

# PERSONAL INSOLVENCY LAW UNIT



Interim Report

**LG**OVAN  
**LAW**  
CENTRE

# INDEX

|   | <b>Page</b>  |
|---|--------------|
| 1. <a href="#">Foreword</a>                             | <b>3</b>     |
| 2. <a href="#">Introduction</a>                         | <b>4-5</b>   |
| 3. <a href="#">Key Findings</a>                         | <b>8-11</b>  |
| 4. <a href="#">Protecting the Home</a>                  | <b>11-13</b> |
| 5. <a href="#">Failed Protected Trust Deeds</a>         | <b>12-14</b> |
| 6. <a href="#">Billing in Personal Insolvency</a>       | <b>15</b>    |
| 7. <a href="#">PPI Claims and Protected Trust Deeds</a> | <b>16</b>    |
| 8. <a href="#">Statutory Interest</a>                   | <b>17-18</b> |
| 9. <a href="#">Summary Diligence</a>                    | <b>19</b>    |
| 10. <a href="#">Council Tax Debt</a>                    | <b>20</b>    |
| 11. <a href="#">EU Citizens</a>                         | <b>21</b>    |
| 12. <a href="#">Composition</a>                         | <b>22</b>    |
| 13. <a href="#">Regulatory Framework</a>                | <b>23</b>    |

## FOREWORD

---

**The Management Committee of Govan Law Centre** established the Personal Insolvency Law Unit as it believed there was a need for specialised advice for consumers on bankruptcies and protected trust deeds.

With over 150,000 Scots having being made insolvent since 2008, the Law Centre has seen many cases concerning home owners facing the loss of their home and consumers being mis-sold insolvency solutions.

Although existing services advise on how to access such processes, they are less able to advise debtors once they are in the solution, due to the complex and specialised nature of this area of law.

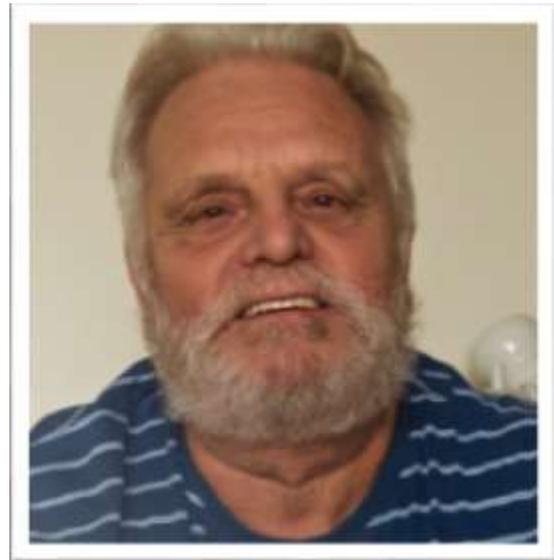
We have come across cases where vulnerable debtors have faced loss of their homes, but with specialised advice have been able to keep them.

We have found cases where it's clear debtors have been mis-sold protected trust deeds and which then fail, making the position of those who sought help worse.

In the worst examples of this that we have found some firms have been refusing over 88% of their clients a discharge from their debts.

We have raised these issues with the Accountant in Bankruptcy and the Institute of Chartered Accountants, who we understand share our concerns.

We have also worked with other front line advice agencies and assisted them by providing second tier advice to assist them and their clients.



It is clear to us in the short time the project has been running, and with the limited resources available, our initial suspicions and concerns were well founded.

We believe personal insolvency has a role in enabling financially excluded and over indebted consumers to obtain a fresh start, but we also believe there is a significant unmet need for those in so-called solutions to obtain independent and specialised advice.

**Thomas McMahon**  
**Chairman**  
**Govan Law Centre**

## INTRODUCTION

---

**Many consumers in Scotland enter** into personal insolvency solutions believing that they will resolve their financial difficulties and secure much needed light at the end of a dark tunnel of unmanageable debt.

The aim is to take back control, repay debts as best as possible, and provide financial rehabilitation and a fresh start for those who have generally been through life crises. In many cases insolvency solutions work reasonably well, but there are far too many cases where things go horribly wrong. In our experience, both consumers and creditors lose out.

Govan Law Centre (GLC) was concerned with the high incidence of poor outcomes for extremely vulnerable consumers, which is why we appointed Alan McIntosh to head up the first ever pilot Personal Insolvency Law Unit in Scotland. The project has so far been self-funded by GLC on a pilot basis in order to properly assess the scope, and need, for a dedicated and free specialist service in Scotland.

This report, written by the Unit's Project Manager, provides compelling evidence that there is an overwhelming need for a dedicated specialist service; a service that can both provide second tier support to front line advice agencies but also undertake complex and contentious casework for consumers. The report evidences a number of important market and systemic failures, including a high level of failed protected trust deeds and the failure to protect a consumer's home from repossession.



All too often a few thousand pounds of council debt results in a homeowner being sequestrated and losing a home for their family. The cost of this process is massively more expensive than the council tax debt, and the local authority may still have a legal obligation to provide accommodation to the family. This isn't in the public interest – nor indeed the interest of creditors and consumers. Our one-sized fits all system is frequently a sledgehammer trying to crack a nut.

From my experience as a member of the Financial Conduct Authority's (FCA) Consumer Panel for six years, I can see some parallels with failures in the Debt Management Company (DMC) sector and the personal insolvency market. Until the FCA took over the regulation of consumer credit no-one was aware that many DMCs were taking 90% of a client's payment to creditors in their fees. Indeed, this year 100 DMCs left the market as they were unable to comply with the new regulatory regime

and meet the standards required for full FCA authorisation.

The Accountant in Bankruptcy's 2015/16 Annual Report reveals a variance between insolvency firms of 0% and 88% in relation to failed protected trust deeds. For those firms with a high failure rate what is happening is the consumer thinks they are making payments to creditors, but no dividend is ever paid to creditors, with thousands of pounds in each case being charged by the firm as a fee.

Shockingly, the consumer ends up back in the same perilous position they started with, despite paying thousands of pounds to an insolvency firm. Govan Law Centre doesn't think this is the interest of consumers or creditors. The market isn't working properly. A dedicated specialist service could help prevent consumers being charged for failed solutions; and provide vital evidence for the need for systemic change and more effective regulation in Scotland.

**Mike Dailly**  
**Principal Solicitor**  
**& Solicitor Advocate**

## KEY POINTS

---

### 1. Personal Insolvency Advice

- We believe there is a significant unmet need in for independent, personal insolvency advisers, who are not working for private sector firms to advise clients who are in protected trust deeds and sequestrations.

### 2. Protecting the Home

- The most common issue we are dealing with is assisting debtor's facing the sale of their home in protected trust deeds and sequestrations. We would support the Scottish Government revisiting this issues as a matter of urgency and believe a few solutions should be considered, including:
  - A set amount of equity being prescribed, under which the principal home will not vest with the trustee;
  - A robust pre-action protocol to be introduced that must be complied with before an action for ejection is raised;
  - The re-introduction of a simpler process of statutory composition that allows homes to be re-invested back to the debtor upon acceptance by two-thirds in value of creditors.

### 3. Failed Protected Trust Deeds

- We are increasingly concerned with the number of Protected Trust Deeds where debtors are being refused a discharge, which for some firms' accounts for 88% of all their cases.
- We support a requirement for trustees to give 28-day notice to the Accountant in Bankruptcy that a debtor is at risk of being refused a discharge so they can be referred for advice.
- We feel the Accountant in Bankruptcy and the Regulatory Professional Bodies need to ensure where Protected Trust Deeds are failing, where possible action is taken to avoid debtors' being refused a discharge.

### 4. PPI Claims and Protected Trust Deeds

- With the ongoing cases in front of the Scottish Sheriff Appeals Court and the Court of Session, the issue of PPI being recovered in Protected Trust Deed remains controversial.
- We have been advising clients on this and may raise actions for payment of money to secure client's claims until the matter is resolved by the courts.

## 5. Statutory Interest Rates

- We are seeing many cases where it is clear the current statutory rate of interest in sequestrations and protected trust deeds is having a punitive effect and call for the Scottish Government to use its existing powers to reduce the current level of statutory interest from 8% to a fairer rate.

## 6. Summary Diligence

- In several cases, debtors, sometime consumer debtors are being sequestrated because of apparent insolvency constituted using the summary diligence procedure.
- We would support the Scottish Government abolishing this process and ensure creditors must constitute their debts using actions for payment of money.

## 7. Council Tax Debt

- Much of the creditor petitions we are seeing, resulting in debtors' being made bankrupt and homes being placed at risk, are for council tax arrears.
- We would support the Scottish Government considering whether the land diligence of Inhibition should be available to local authorities when they obtain a summary warrant.
- We would also support bankruptcy only being available when actions for payment of money have been raised.

## 8. EU Citizens

- We have dealt with several insolvency cases that involve cross border issues, particularly, but not exclusively in relation to Irish citizens.
- We call for more to be done to highlight to EU Citizens working and residing in Scotland, that Scots Law can help address the liabilities they have in other EU member states.

## 9. Composition

- We have helped clients with and assisted other agencies in recalling sequestrations.
- We would support the Scottish Government reconsidering the decision to abolish statutory composition. We believe statutory composition can still have a role as an equitable remedy where recall is not possible, using a modernised procedure.

## 10. Regulatory Framework

- We believe the regulatory framework for personal insolvency in Scotland requires to be fully reviewed to address gaps.

# PROTECTING THE HOME



**Most cases which the Personal Insolvency Law Unit** have been doing concern people facing the sale of their home by trustees in bankruptcy and protected trust deeds.

In approaching these cases we have taken a joined-up approach, working alongside the clients, their trustees and the creditors.

This approach compliments the work of the Govan Law Centre solicitors who

represent and defend such actions in court.

In several cases, where we have shown home owners are vulnerable, some creditors have been prepared to show forbearance, supporting our efforts to prevent the loss of the client's home.

In other cases, it has been possible to obtain agreement from Trustees that an offer of composition be made to creditors

## CASE STUDY 1

In a case that concerned an elderly couple in a protected trust deed, the Unit, working with another Law Centre, assisted in making an offer of composition to creditors via the Trustee, that was accepted.

The application to eject the elderly couple from their home, had been in front of the Sheriff for over a year.

The protected trust deed had been granted over ten years earlier and despite initially only being for three years, was still open.

The difficulty was when the Trust Deed was granted the hope was at the end of the arrangement the clients could re-mortgage.

However, in that time the credit crunch occurred and the clients were not able to re-mortgage, meaning despite continuing to pay their mortgage, they lived with the fear of losing their home for more than ten years.

and for the insolvency process to be finalised without the loss of the debtor's home.

We believe there is strong evidence to suggest many homes are being sold unnecessarily, particularly when vulnerable people are involved and debtors are struggling to source independent advice in this area.

We have heard repeatedly debtors do not engage and actions, therefore, must be raised to sell homes.

In our experience, however, the insolvency process is one that alienates debtors.

Where debtors can source independent advice, provided by experienced personal insolvency advisers, we find they do engage and solutions can be found.

## **THE MAIN RESIDENCE**

The issue of how the main residence of debtors is dealt with in personal insolvency is one that has arisen before, most recently with the Home Owner and Debtor Protection (Scotland) Act 2010.

With that legislation, The Scottish Government acknowledged more had to be done to protect both the principal and family homes in Personal Insolvency.

To this extent a new type of Protected Trust Deed was introduced that allowed the main residence of a debtor to be excluded from the Arrangement.

In addition, s40 of the Bankruptcy (Scotland) Act 1985 was amended to allow the sheriff, in relation to a family home, to consider delaying an application to sell the home for a period of three years, as opposed to the previous position of one year.

## **CASE STUDY 2**

**Mrs. B was a single woman who lived with her severely autistic son in a home that had been adapted for his needs.**

**She was sequestered for a relatively low amount of council tax arrears.**

**Mrs. B sought advice from another solicitor and was advised to offer £20 per month towards the Trustee's interest in her home, which was never realistic.**

**When Govan Law Centre began representing Mrs. B, we reduced the extent of the liability for council tax by applying for council tax reduction.**

**We also established that her gas provider had continued to recover the debt owed to them during the sequestration by way of a pre-payment meter and the debt had substantially reduced.**

**When further information was provided to the Local Authority they withdrew their claim from the sequestration and supported our efforts to save Mrs. B's home.**

**The action against Mrs. B by the Trustee to sell her home has now been dropped, although £7,000 had to be paid for the Trustee's fees.**

A new requirement was also introduced to require Trustees to inform local authorities where they intended to raise an action to sell a home, bringing this area of law into line with that for repossessions and evictions.

However, the new type of Protected Trust Deed is almost never used by Trustees and the difficulty with s40 defences in bankruptcy, is they rarely result in avoiding the sale of the debtor's home or even sheriff's deferring the sale for one year (never mind the possible three years).

Another issue with s40 defences is they can only be used where the home is a family home and, therefore, provide no protection for single persons, even when there are compelling reasons and circumstances for sheriffs to consider refusing or delaying a sale.

In relation to the requirement to report potential homelessness to local authorities, we find this helps, but often comes just before the action to force the sale of the home is raised. We also have concerns whether these clients are then receiving specialised advice.

### **EQUITY RICH PROTECTED TRUST DEEDS**

The recent introduction into the Scottish market by some firms of what are now being called Equity Rich Protected Trust Deeds is, we believe, a direct result of the failure of the 2010 legislation.

This practice has borrowed from the English IVA (Individual Voluntary Arrangements) market and is where trustees propose dealing with equity in Protected Trust Deeds with an additional 12-24 monthly payments, often only realising a percentage of the equity.

Concerns have been raised that these practices legally could be challenged and we share these concerns.

It's important to note that in the IVA market these practices were developed using industry wide protocols, whereas in Scotland they have been introduced by a number of firms, many very active in the IVA market unilaterally introducing them into Scotland, ignoring the legal differences between IVAs and Protected Trust Deeds.

We also note that none of the Regulatory Professional Bodies for Insolvency Practitioners in Scotland have recommended their use in Scotland.

As this is a relatively new practice, our concern is they may not function as intended over time in Scotland, may be legally challenged and could leave many thousands of Scottish debtors in a perilous position in relation to their homes.

### **RECOMMENDATIONS**

It is our recommendations that the issue of the main residence in personal insolvency should be revisited.

We believe there are several solutions that should be considered, including:

- Adopting a minimum amount of equity under which the home should not vest with the Trustee;
- A robust pre-action protocol, like that already in existence for social landlord rent arrears and mortgage arrears that must be complied with prior to action being raised;
- A simple statutory composition procedure being introduced that allows lenders to formally instruct a trustee to abandon their interest in

the property, where it is believed the home should not be sold;

- A review of the circumstances under which a sheriff may delay the sale of a home or refuse its sale under s40 of the Bankruptcy (Scotland) Act 1985 and for these protections to be extended to not only family homes, but to the main residence of a debtor.

## FAILED PROTECTED TRUST DEEDS

Since 2008 Trustees can refuse a debtor a discharge from their Protected Trust Deed (PTD).

The effect of this is the debtor loses the protections of their PTD; remain liable for their debts (with contractual interest added from the date of the trust deed being granted); and lose the funds that have been paid into the PTD, which go to paying the Trustee's fees and outlays.

Statistics provided from the Accountant in Bankruptcy show that in 2015/16, 1,020 debtors were refused a discharge in the 6,941 cases where the Trustee received a discharge, representing an average failure rate of approximately 15%. However, for some firms that number has been as high as in 88% of all their cases (pg. 96 of the Accountant in Bankruptcy Annual Report 2015-16).



There is a clear correlation between cases where debtors are refused discharges and creditors not receiving dividend payments.

When debtors are refused a discharge, they normally must apply for their sequestration, meaning the time they have spent in the Protected Trust Deed has been wasted and of no benefit to the debtor or the creditors.

Anecdotal evidence from Citizen Advice Bureaux and other money advice agencies is that the number of cases where this is occurring, is inclining them to advise clients against granting Trust Deeds.

### *Trustees Discharged in 2015/16 by Trustee Organisation (Cases protected after 1 April 2008)*

### *Debtor Discharge Not Granted (Failed PTDs)\**

|  |     |
|--|-----|
| Knightsbridge Insolvency Services Limited        | 345 |
| KPMG   | 120 |
| Wilson Andrews Limited                           | 100 |
| MacGregors The Counting House (Scotland) Limited | 80  |
| Begbies Traynor                                  | 65  |
| Campbell Wallace Fraser                          | 55  |
| Carrington Dean                                  | 50  |
| Apex Debt Solutions                              | 50  |
| Creditfix Ltd.                                   | 45  |
| Wylie & Bisset LLP                               | 20  |
| WRI Associates Limited                           | 15  |
| HJS Recovery                                     | 10  |
| Payplan Scotland                                 | 10  |
| Grant Thornton UK LLP                            | 10  |

\*The examples provided are based on a minimum qualifying number of 10 PTDs and rounded to the nearest 5.

\*\*It should be noted the above number of cases does not in itself provide a true representation of how each firm is performing. Different firms will have different number of cases, so it may be expected firms with more cases may refuse a debtor a discharge in more cases. To illustrate the table below shows the number of cases each firm has open.

We believe more research must be carried out into this area. A failure rate of 15% is alarming, but one of 88% is appalling and if related to any other consumer financial product would be a cause for serious concern and potential evidence of mis-selling.

| Trustee Organisation                             | Post 2008 Cases* | Pre 2008 Cases* |
|--|------------------|-----------------|
| Knightsbridge Insolvency Services Limited        | 8,005            |                 |
| Creditfix Ltd.                                   | 4,775            |                 |
| KPMG   | 3,660            | 135             |
| Wilson Andrews Limited                           | 3,710            | 20              |
| Apex Debt Solutions                              | 3,010            | 5               |
| Carrington Dean                                  | 2,925            |                 |
| Campbell Wallace Fraser                          | 1,865            |                 |
| Invocas Financial Limited                        | 1,410            | 155             |
| Begbies Traynor                                  | 1,140            | 140             |
| Wylie & Bisset LLP                               | 1,090            | 15              |
| MacGregors The Counting House (Scotland) Limited | 805              |                 |
| A.G. Taggart & Co. Ltd.                          | 670              | 45              |
| Payplan Scotland                                 | 615              |                 |
| Mazars LLP                                       | 375              |                 |
| Grant Thornton UK LLP                            | 315              | 15              |
| WRI Associates Limited                           | 320              |                 |
| Varden Nuttall Limited                           | 310              |                 |
| HJS Recovery                                     | 270              |                 |
| Campbell Dallas LLP                              | 270              |                 |
| Findlay Hamilton                                 | 180              | 55              |
| AMI Financial Solutions Ltd.                     | 205              |                 |
| AFS/Cleardebt                                    |                  | 195             |
| 180 Advisory Solutions Limited                   | 190              |                 |
| MLM CPS Limited                                  | 155              |                 |

\* The above statistics are based on an overall minimum qualifying number of 150 PTDs. Figures are rounded to the nearest 5.

### CASE STUDY 3

Mr K was referred by a money advice agency after being referred to them by his MSP.

He had granted a Trust Deed after obtaining advice via a website advertising debt solutions.

He had £25,000 in debt, but despite this it was proposed he grant the trust deed and make 48 monthly contributions of £500, paying back £24,000. This would only provide a 59p in the £ return for creditors, whereas if he had applied for a Debt Payment Programme under the Debt Arrangement Scheme, this could have been completed in 52 months and returned at least 92p in the £ to creditors.

After a short period Mr K was not able to maintain the £500 per month contributions and soon accrued more debts. His contribution was reduced to £100 per month for approximately 18 months and at the end of that period he was told his contribution had to increase to £500 per month again. He was also told he would need to pay for an additional 12 months. He was also told his Trust Deed may still fail.

Our investigations have shown the original contribution was never realistic and also it is still not affordable.

We also don't accept the Trust Deed should be extended if he genuinely has been paying what he could afford.

On the basis we fear Mr K's PTD is at a high risk of failing and he may lose the money he has paid in and be given his debts back, we have invited the Accountant in Bankruptcy to investigate the case and consider whether a direction to the Trustee is warranted as to how the PTD should be administered.

### AIB DIRECTIONS RECOMMENDATION

In additions to the Regulated Professional Bodies (RPBs) taking more steps to ensure that debtors are only included into PTDs where it is appropriate, we support during monitoring visits that RPBs pay more attention to cases where debtors have been refused a discharge.

We also support the Accountant in Bankruptcy using their existing powers under the Protected Trust Deed (Scotland) Regulations and the new Bankruptcy (Scotland) Act 2016 to be more proactive and give directions where PTDs are at risk of failing.

This may include revising contribution levels where it can be shown the debtor is not able to maintain existing contributions, either because the debtor's circumstances have changed or, as we have found, they were never realistic from the outset.

It may also include where it can be shown the trustee was at fault at the outset in proposing the PTD or in its administration, making directions where the funds paid into the PTD are refunded back to the debtor.

Our fear is many debtors are entering Protected Trust Deeds from the outset that were never realistic and high risk. This can occur for several reasons, but one area of significant concern is the payment of referral fees to lead generation firms ranging from £1,500-£2,000 per case.

We would finally recommend a requirement is imposed on trustees to give 28 days' notification to the AIB that a debtor is at risk of being refused a discharge so they can be referred for independent, specialist advice.

## BILLING IN PERSONAL INSOLVENCY

**Concerns about the level of fees of insolvency practitioners in Protected Trust Deeds and Sequestration** has been an area of concern for some time.

The Scottish Government, in response to these concerns, introduced a new fee structure for Protected Trust Deeds in 2013.

Despite this, however, we remain concerned there is not enough transparency in relation to how fees are calculated, increasingly in relation to

sequestrations, which are still calculated on a time basis.

We have seen comparable cases in relation to the age of the case and the complexity of the case, where there are huge disparities in relation to the time that has been charged against them.

It appears trustees may only charge to a case the fees that the funds in the case allow for, but when further funds are ingathered their fees dramatically increase.

This may be as the true level of work is being more realistically shown, but it is difficult to discern whether this is the case or whether the time on the case has been inflated as there are more funds to fee against.

### CASE STUDY 4

We were contacted by Mrs P who was the Executor of her sister's estate.

She had only become aware her sister had been made bankrupt when she passed away.

She contacted the trustee through her solicitor and was advised if she could pay £20,000, this would be sufficient to finalise her sister's sequestration.

She was unable to pay this, but was advised if her solicitor arranged the sale of her sister's home, the cost would only increase by a few thousand pounds at most.

Approximately six months later, the sale was completed and Mrs P was advised the total sum required, including fund due to creditors, was approximately £30,000 plus another £10,000 as a contingency.

She was advised the fees charged on the case amounted to approximately 68 hours, despite her solicitor primarily

handling the sale of the property. No legal action had been raised in the case.

Her solicitor felt unable to assist Mrs P in challenging the fees, due to the specialised nature of the area and a second solicitor he referred her onto was also unable to help.

When the lady contacted the Personal Insolvency Law Unit, the deadline for appealing against the fees had expired.

We have applied to the Sheriff for an extension on the time limit within which an appeal can be granted and this has been granted.

## PPI CLAIMS AND PROTECTED TRUST DEEDS

**A reoccurring issue that has arisen** has been in relation to claims for Payment Protection Insurance by clients that have previously been in Protected Trust Deeds.

We have seen a few variations of this issue, namely:

- Where the client's former trustee has reopened the Protected Trust Deed after it has been closed, to claim the PPI refund;
- Where the bank has set off the PPI claim against debts that were included in the Protected Trust Deed, after the PTD has been closed; and
- Where the bank or finance organisation have withheld the payment to the debtor after a PTD has been closed.

This issue has been complicated recently by case law, with the most significant being the Court of Session Inner House decision in Doneen v Mond that held, depending on the wording of the PTD, the final distribution in an arrangement acts like a composition in bankruptcy, with not only the debtor's personal liability for the debt, but the debt itself being extinguished by the termination of the PTD, meaning the Trustee cannot claim the funds after the case has been closed.

We believe, despite all the Regulatory Professional Bodies of Insolvency Practitioners advising that Trustees don't take any funds until the legal issues were resolved, several Trustees have taken the PPI refunds of clients whose PTD had been closed.

In the case of Doneen our understanding is the Court of Session has refused the Trustee in that case the right to appeal to the UK Supreme Court, but an appeal may still be applied for directly to the Court.

In the second case scenario where the bank sets off the PPI Claim against a debt that had been included in the PTD, the issue was dealt with by Sheriff Reid at Glasgow in the case of Allison Donnelly v Royal Bank of Scotland, which we understand is currently waiting to be heard by the Sheriff Appeal Court, but may not be decided until the Doneen case has been finalised.

We are concerned there are possibly thousands of cases involving significant sums of money which may have to be resolved when the issue is finally resolved.

### CASE STUDY 5

Mr B, a pensioner contacted us 10 months after a finance company had told him his PPI Refund had been paid to his Trustee.

When we wrote to both the trustee and the finance company, we discovered the trustee had declined to take the funds in line with the guidance issued by his RPB.

Our client received within a week a payment for £6,300 and did not have to pay a claims management fee of 25%.

## STATUTORY INTEREST

A common misconception is on the date of sequestration, or the date a trust deed is granted, the amount owed to creditors is frozen.

This is not the case.

The debt continues to increase daily in line with the level of statutory interest that applies at the time.

Since 1993, the level of statutory interest in personal insolvency has been 8% per annum (prior to then it was 15%).

Another misconception is this has no effect on the debtor; however, it does increase the debt owed by the debtor and ultimately may reduce the amount a debtor must pay to recall a bankruptcy; or where an asset is sold, the amount that is repaid, to the debtor.

This can have a detrimental effect on debtors where cases are kept open to allow an asset to be realised, such as a home or a PPI claim.

A large, bold, red graphic of the number '8' followed by a percentage sign '%'. The graphic has a slight shadow effect, making it stand out against the white background.

With the historically low interest rates we have been experiencing, we now believe the current level of statutory interest is having a punitive effect on some debtors and providing some creditors with an unjustified windfall.

The powers to set the statutory level of interest is wholly devolved to the Scottish Parliament. We understand the Scottish Government is currently awaiting the outcome of a DTI consultation into this issue, but we believe this delay is completely unnecessary and a decision to

### CASE STUDY 6

In one case, granted over a decade ago, the £27,321 of debt the client had grew to £52,507, due to statutory interest of 8% per annum being added.

The case is still ongoing, however, when the client signed the Trust Deed it was hoped he could re-mortgage at the end of the three years, but was not able to due to the credit crunch.

Since then, with three children still living in the home, the mother of the family has passed away.

Although it is now hoped the sale of the property can be avoided, as the trustee has agreed to circulate an offer of composition to creditors, if the home did have to be sold it would mean the debtor would almost certainly receive nothing back from the sale.

reduce the level of statutory interest is possible now.

The delay is a particular cause for concern as we believe there are a significant number of protected trust deeds that have remained open beyond the normal 3-5

years where the debtor has not received a discharge (many we suspect because of issues relating to the main residence).

| Years   | Current Cases<br>2008 -                     |   | Legacy Cases **<br>Pre 2008          | Total                                       |
|---------|---|---|--------------------------------------|---|
|         | Cases where the debtor has been discharged* | Cases where the debtor has not been discharged* | Debtor discharge data not available* | All cases where trustee is still in office* |
| 4 to 5  | 1,965                                       | 3,010   | -                                    | 4,975                                       |
| 5 to 6  | 1,245                                       | 1,085   | -                                    | 2,330                                       |
| 6 to 7  | 995   | 455   | -                                    | 1,450                                       |
| 7 to 8  | 490   | 270   | -                                    | 760   |
| 8 to 9  | 5   | 5   | 210                                  | 220   |
| 9 to 10 | -   | -   | 105                                  | 105   |
| 10 +    | -   | -   | 100                                  | 100   |

\*Figures are rounded to the nearest 5.

\*\*Debtor discharge information for cases recorded in MIDAS. The requirement to record debtor discharge information was introduced with the Protected Trust Deed (Scotland 2008) regulation.

| Trustee Organisation**                           | 4 to 5 | 5 to 6 | 6 to 7 | 7 to 8 | 8 to 9 | 9 to 10 | 10 + |
|--|--------|--------|--------|--------|--------|---------|------|
| Apex Debt Solutions                              | 895    | 580    | 515    | 170    | 5      |         |      |
| KPMG   | 760    | 455    | 145    | 45     | 5      | 10      | 5    |
| Wilson Andrews Limited                           | 515    | 285    | 135    | 90     | 5      |         |      |
| Invocas  | 335    | 175    | 90     | 85     | 25     | 15      | 20   |
| Creditfix Ltd.                                   | 480    | 95     | 55     | 10     |        |         |      |
| Knightsbridge Insolvency Services Limited        | 615    |        |        |        |        |         |      |
| Begbies Traynor                                  | 200    | 115    | 70     | 45     | 55     | 15      | 20   |
| Wylie & Bisset LLP                               | 155    | 130    | 100    | 75     | 10     | 5       |      |
| Campbell Wallace Fraser                          | 335    | 25     |        |        |        |         |      |
| MacGregors The Counting House (Scotland) Limited |        | 45     | 170    | 135    |        |         |      |
| Carrington Dean                                  | 245    | 60     | 5      |        |        |         |      |
| A G Taggart & Co Limited                         | 85     | 40     | 15     | 5      | 15     |         |      |
| HJS Recovery                                     | 85     | 40     |        |        |        |         |      |
| William Duncan (Business Recovery) Limited       | 30     | 55     | 25     | 5      |        |         |      |
| AFS  |        |        |        |        | 45     | 40      | 30   |
| Mazars LLP                                       | 20     | 85     |        |        |        |         |      |
| Findlay Hamilton                                 | 15     | 20     | 25     | 25     | 5      | 5       |      |
| Grant Thornton                                   | 35     | 20     | 10     | 5      | 10     |         |      |
| BDO LLP  |        | 10     | 20     | 10     | 20     | 10      | 15   |
| 180 Advisory Solutions Limited                   | 35     | 20     | 15     | 5      |        |         |      |
| WRI Associates Limited                           | 40     | 25     | 5      |        |        |         |      |
| ClearDebt Limited                                |        |        | 5      | 35     |        |         |      |
| MLM CPS Limited                                  | 5      | 5      | 15     | 5      |        |         |      |
| French Duncan LLP                                | 15     | 10     | 5      |        |        |         |      |

## SUMMARY DILIGENCE

**With the Scottish Government's** review of the law of diligence due to end on the 30<sup>th</sup> of November 2016 another area of concern we have come across is creditors using the summary diligence procedure to sequester debtors.

Summary diligence is the process where creditors register debts for preservation and execution in the Books of Council and Session or the Sheriff Court Roll Book.

When the debtor defaults on their debt, the warrant to execute diligence is then extracted, without an action for payment being raised in court.

The result of this is debts, often disputed, can be used to serve a charge for payment to constitute apparent insolvency and then raise a bankruptcy petition.

Summary diligence is a procedure that has been abolished for over 40 years in relation to Consumer Credit Agreements, abolished under s93A of the Consumer Credit Act 1974.

It is still, however, used frequently in relation to credit union loans, personal guarantees in relation to business debts and tenancy and lease agreements, many of which are not entered by individuals acting in the course of a business.

Considering how this process is often used to go after individuals personally and in our belief, is open to abuse, we believe it should be abolished.

The process presents many difficulties, as not only can it be used to sequester individuals quickly, without allowing them the opportunity to challenge whether the debt is owed, the only process available to

### CASE STUDY 7

Miss A provided her daughter with a personal guarantee for a tenancy agreement she entered. As part of the agreement, Miss A permitted the debt to be registered for preservation and execution without understanding what the implications were.

When Miss A's daughter left the property, a Charge for Payment was served on Miss A for £4,283.15 by the landlord, who made it clear his intentions were to sequester Miss A.

We believed the sum due included amounts for illegal charges.

The Principal Solicitor of Govan Law Centre obtained an interim interdict from the Court of Session to stop the charge being used to sequester Miss A, whose own home may be at risk if she is sequestered.

debtors to prevent a charge for payment being used is to raise an action for interdict, suspension and reduction through the Court of Session.

As can be seen in the above case study, the amounts owed are often small.

## COUNCIL TAX DEBT

**Many of the creditor petitions we** have seen, which often place debtor's homes most at risk, are for council tax arrears.

We understand local authorities, like HMRC are in a unique position in that they are involuntary creditors, but equally they have an advantage over other creditors in that they can use the summary warrant procedure.

We also, however, find in relation to these types of bankruptcies there is an increased risk the debtor has low income and is vulnerable in other ways.

In two cases, where we were able to bring further information of this vulnerability to the attention of local authorities, they have worked with us successfully to prevent the sale of the debtor's home in sequestration.

Considering this, it is our recommendation that the Scottish Government in its review of the law of diligence, considers allowing these statutory creditors to use the diligence of inhibitions when they have used the summary warrant procedure, something that currently they are not able to.

We believe this may allow these types of creditors to use another method of enforcement, not only to secure their debts, but as an additional step before deciding whether to sequester a debtor.

We would also recommend that consideration be given to preventing any summary procedure, whether the summary warrant or summary diligence procedure being used as part of the process of sequestering a debtor.

This would not prevent them raising an action for payment of money, but we believe this would introduce a further step that may allow a debtor to seek advice and assistance before a petition is granted and place these creditors on an equal footing with other creditors.

### CASE STUDY 8

Mr K was referred to as someone who was at risk of homelessness.

A local authority had petitioned for the debtor's sequestration and after four years, with no offer being made to address the debts the trustee reluctantly raised an action for the sale of Mr K's home.

As he lived on his own, there were no defences under s40 of the Bankruptcy (Scotland) Act 1985, but a Govan Law Centre solicitor did get the case sisted as it was suspected Mr K had learning difficulties.

Mr K had no mortgage on his home, which had been left to him by his late mother. After it was shown to the local authority and to trustee that Mr K had no means of raising the funds to prevent the sale of his home, both parties agreed to work to prevent the sale.

The sale was avoided and the action was dismissed with the assistance of the local authority and the trustee.

## EU CITIZENS

**Under the European Cross Border Insolvency Rules,** Scottish personal insolvency remedies are recognised across the other 27 member states.

Equally, Scots Law recognises the insolvency solutions of other EU Member states.

The effect of this is European Citizens living and working in Scotland, where they can show their Centre of Main Interest (COMI) is here, can avail themselves of Scottish personal insolvency remedies, even to address debts from their home countries.

They can do this secure in the knowledge that their home legal system will recognise their discharge.

We have had several cases involving EU citizens and have been able to advise them that they are able to include their debts from other EU Member States into their sequestration.

We have also had cases, involving Irish Citizens, where we have been able to advise those clients on remedies available in Ireland and how these are more appropriate for their types of debts than Scots Law is and can help protect their homes in Ireland.

This has been aided as the Project Manager of the Personal Insolvency Law Unit is also an Irish Licenced Personal Insolvency Practitioner.

We have found there are many Irish debtors travelling back and forward to Scotland for work, but who have homes in Ireland.



We have also found many EU Citizens come to Scotland to work so they can address their debts, but still struggle to do so, unaware that Scottish Personal Insolvency remedies can assist.

### CASE STUDY 9

Mr M who was Scottish was referred onto us by another advice agency. They were considering assisting him to apply for his own bankruptcy in Scotland. We were able to establish Mr M's Centre of Main Interest was in Ireland, as the family home his estranged wife lived in with his children was in Ireland, he rented a home in Ireland, his solicitors were in Ireland and he had an Irish PPS number. Mr M had always travelled back and forward to Scotland to work, but only boarded with relatives when here.

We were able to advise on Irish debt solutions which did not necessarily mean he would lose his home if he became insolvent.

We were also able to eventually refer him onto an Irish Insolvency Practitioner and were able to advise how Irish laws could protect him from his UK creditors

## COMPOSITION

---

**Composition is a concept in Scottish personal insolvency law** which has a long history.

It historically could be extra-judicial (meaning not involving the courts) or statutory and was previously provided for in Schedule 4 of the Bankruptcy (Scotland) Act 1985 (the 1985 Act).

Statutory composition was abolished by the Bankruptcy and Debt Advice (Scotland) Act 2014, but extra judicial composition remains.

Composition allows a sequestration of a Protected Trust Deed to be finalised and assets to be reinvested back to the debtor, with the consent of creditors, without it being necessary to realise all the debtor's assets.

We have found this equitable process in Scotland to have been of invaluable use in the cases we have been dealing with, as often the problem trustees have is they must realise a debtor's assets if it is for the benefit of the creditors and it can be shown it is commercial to do so.

However, as we have shown in several our cases studies, there can be circumstances that justify creditors showing forbearance towards debtors, where vulnerable people or children are involved.

The trustee's fees and outlays usually have to be paid, although in one case the trustee was prepared to reduce these as they shared our hopes to avoid a sale, but where they can and it can be shown the offer being made is a reasonable one, we are strongly of the opinion that Trustee's

should circulate an offer of composition to the creditors.

Usually a reasonable offer will mean the best offer, possible given the circumstances of the cases.

It is normally necessary in compositions to require the full consent of all creditors, although in certain cases, creditors not objecting may be sufficient.

Considering this, it is our opinion the abolition of statutory composition was unfortunate. Statutory composition was different in that only two thirds of creditors had to agree to the offer for it to be binding, so therefore, had advantages over extra judicial composition.

Statutory composition, however, was a rarely used procedure, possibly as it had not been modernised since the 1985 Act.

In retrospect, we believe it is a process, that could be modernised and streamlined and used to protect more debtor's homes. It could also provide solutions to debtors where recall is not possible, possibly because the level of statutory interest being applied means debts cannot be repaid in full.

In not all cases, however, have trustees agreed to make offers of composition.

Where this is the case we have continued to negotiate with the trustee, but in future may request the Accountant in Bankruptcy make a direction such offers should be circulated, failing which we may request the Sheriff makes such a direction.

## REGULATORY FRAMEWORK

---

**We believe there are serious gaps in** the regulatory system for personal insolvency in Scotland that allow abusive practices in the market to develop and continue.

For instance, the Accountant in Bankruptcy have a supervisory role over protected trust deeds and sequestration, which are matters wholly devolved to the Scottish Parliament.

They, therefore, award debtor sequestrations and protect trust deeds.

They can also give directions to trustees in how protected trust deeds and sequestrations are administered.

The Accountant in Bankruptcy, however, cannot sanction or remove the licences of insolvency practitioners, who are regulated with one of three bodies, the Institute of Chartered Accountants for Scotland, the Institute of Chartered Accountants for England and Wales and the Insolvency Practitioners Association.

These organisations can also issue guidance to their practitioners, but we have found in relation to Equity Rich Protected Trust Deeds, Refunds of VAT, and PPI claims in Protected Trust Deeds, they are not always followed.

We have also found the Regulatory Bodies have no powers to act against the employers of insolvency practitioners, so even if an insolvency practitioner is sanctioned for their conduct, there is no sanction against the firm that employs them and may continue the practice with another insolvency practitioner.

We have also found that these firms may not be regulated by the Financial Conduct Authority, as there is an exemption under their licencing scheme for personal insolvency.

We find this regulatory framework hugely unsatisfactory and although we acknowledge both the Accountant in Bankruptcy and the Regulatory Bodies share many of our concern, fear regulation is not as effective as it could be.

We believe there must be a full review of how this industry in relation to personal insolvency in Scotland is regulated to protect consumers, creditors and most practitioners who are not involved in bad practice.

