



## **GLC proposed amendments to the Bankruptcy & Diligence etc., (Scotland) Bill – introduction of the ‘reasonable’ test.**

### **What would the proposed amendments mean in practice?**

Debtors should be able to oppose creditor driven bankruptcy and applications for the sale of their home (under the Bill’s new ‘land attachment’ provisions) where they are in a position to offer repayment of the debt due, or, for example, re-mortgage or raise finance to repay the debt due within a number of weeks, or enter into a repayment plan via the Debt Arrangement Scheme (DAS) etc.,

### **Bankruptcy**

At present, many sheriffs take the view they have no discretion to continue bankruptcy proceedings (standing the mandatory terms of section 12 of the Bankruptcy (Scotland) Act 1985, which provides that the court ‘*shall award sequestration forthwith*’ unless certain limited conditions apply: there are arguments for and against this view, and ultimately the debtor needs to take urgent pro-active legal steps to avoid sequestration at the first calling date: see further [www.govanlc.com/sequestration](http://www.govanlc.com/sequestration)).

However, the proposed amendment would remove the anomaly of debtors being forced into sequestration when they simply need a one-off final opportunity to repay their debt. Typically, such debtors are often homeowners with substantial equity and it is not uncommon in Scotland to see local authorities and factoring companies (factors of tenements) sequestrating homeowners for as little as £2,000 in practice.

Once bankrupt, homeowners cannot raise funds on their property – even where they have substantial equity. The current system is therefore apt to create homelessness which could be very easily avoided.

Just like in the thousands of cases where tenants or homeowners oppose eviction or mortgage proceedings, the court could have the power to allow debtors to repay their debts without awarding sequestration. A debtor could obtain one final chance and homelessness could be avoided, while ensuring that creditors were repaid in full.

The effect of the proposed minor amendment to the Bankruptcy (Scotland) Act 1985 is produced below as paragraphs [1] and [2] (the amendment is introduced as ‘tracked changes’).

### **Land attachment**

Part 4 of the Bill introduces a new land attachment procedure whereby any creditor who is owed at least £1,500 can register a ‘land attachment’ for a period of 6 months and thereafter apply to the court for warrant to sell a debtor’s home. Proposed amendments [3] and [4] would introduce a ‘reasonableness’ requirement to applications for warrant for sale. This would mean that where a debtor entered into a

repayment plan the court would be empowered to continue the application to monitor payments made – which is what happens in practice in most eviction and mortgage repossession cases, with cases ultimately being dismissed once debts are cleared. A more proportionate and flexible approach would avoid creating homelessness for modest debts which could be repaid by debtors.

**[1] At the end of paragraph 10(c) to schedule 1 [of the bill] add the following -**

**(iii) delete the word ‘and’ where it appears in paragraph (d).**

**(iv) delete ‘,’ where it appears at the end of paragraph (e) and insert the following ‘; and (f) that it is reasonable to award sequestration, ’.**

**[2] After paragraph 10(c) insert the following –**

**‘< > after subsection (3A) insert the following –**

**‘(3AA) The court may, as it thinks fit, adjourn proceedings under this Act for a period or periods, with or without imposing conditions’.**

**[3] In section 86, insert the following paragraph after subsection (6)(f) –**

**‘< > it is not reasonable to grant a warrant for sale; ’**

**[4] After section 86(6), insert the following new subsection –**

**‘< > Where the sheriff is satisfied that it is not reasonable to grant a warrant for sale, the application for warrant for sale may be dismissed or adjourned for a period or periods, with or without imposing conditions’.**

## **BANKRUPTCY (SCOTLAND) ACT 1985 as amended**

**12. (1) Where a petition for the sequestration of his estate is presented by the debtor, unless cause is shown why sequestration cannot competently be awarded, the court shall award sequestration forthwith if it is satisfied -**

**(a) that the petition has been presented in accordance with the pro-visions of this Act;**

**(b) that either subsection (2A) or (2B) of section 5 of this Act applies to the debtor; and**

**(c) that the provisions of subsections (6) and (6A) of that section have been complied with.**

**(1A) Where a petition is presented as mentioned in subsection (1) above, the Accountant in Bankruptcy may, not later than seven days after the date on which sequestration is awarded, apply to the court for the grant of a certificate for the summary administration of the sequestration of the debtor’s estate.**

(2) Where a petition for sequestration of a debtor's estate is presented by a creditor or a trustee acting under a trust deed, the court to which the petition is presented shall grant warrant to cite the debtor to appear before it on such date as shall be specified in the warrant, being a date not less than six nor more than 14 days after the date of citation, to show cause why sequestration should not be awarded.

(3) Where, on a petition for sequestration presented by a creditor or a trustee acting under a trust deed, the court is satisfied.

(a) that, if the debtor has not appeared, proper citation has been made of the debtor;

(b) that the petition has been presented in accordance with the provisions of this Act;

(c) that the provisions of subsection (6) of section 5 of this Act have been complied with;

(d) that, in the case of a petition by a creditor, the requirements of this Act relating to apparent insolvency have been fulfilled; ~~and~~

(e) that, in the case of a petition by a trustee, the averments in his petition as to any of the conditions in subsection (2C) of the said section 5 are true; ~~and~~

~~(f) that it is reasonable to award sequestration.~~

it shall, subject to subsection (3A) below, award sequestration forthwith.

(3A) Sequestration shall not be awarded in pursuance of subsection (3) above if.

(a) cause is shown why sequestration cannot competently be awarded; or

(b) the debtor forthwith pays or satisfies, or produces written evidence of the payment or satisfaction of, or gives or shows that there is sufficient security for the payment of.

(i) the debt in respect of which he became apparently insolvent; and

(ii) any other debt due by him to the petitioner and any creditor concurring in the petition.

[\(3AA\) The court may, as it thinks fit, adjourn proceedings under this Act for a period or periods, with or without imposing conditions.](#)

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