

Protections against land attachment?

The Deputy Minister for Enterprise & Life Long Learning, Allan Wilson MSP, gave evidence to the Enterprise Committee on 26 September 2006 that:

‘We have built a number of strong debtor protections into the attachment process ... Depending on how you count them, there are about 21’. (Official Report, col 3287, <http://www.scottish.parliament.uk/business/committees/enterprise/or-06/ec06-2202.htm#Col3281>).

Below is the Scottish Executive’s list of 21 ‘debtor protections’ against land attachment. What protection will they offer to citizens in practice? Govan Law Centre’s Principal Solicitor, Mike Dailly, provides a brief analysis.

- **Lower debt limit of £3000** *Citizens Advice Scotland reports that the average unsecured debt of individual CABx clients was £13,380 in 2006 (www.cas.org.uk/FileAccess.aspx?id=3124) Most people in Scotland have unsecured debts in excess of £3,000. A limit of £3,000 means that homeowners can face homelessness for not paying consumer debts on a store card, credit card, defaulting on an unsecured personal loan or for council tax arrears.*
- **6 month gap between attachment and sale** *A six month gap is not a protection against homelessness – it is a delay. The Executive’s aim is for debtors to set up a Debt Arrangement Scheme (DAS) repayment plan during this six month period. However, DAS has been an unsuccessful policy to date with a very low take up. Debtors can only access DAS through an accredited advisor – as at November 2006 there were 77 in Scotland, with only 3 for the whole of Glasgow. DAS has proven to be overly bureaucratic and of minor impact in practice.*
- **Not worth it test limit of £1000 plus costs of attachment** *It is only necessary for a homeowner to have at least just over £1,000 of equity in their home in order for land attachment to be competent. Most homeowners will have some equity in their homes – particularly with property values in Scotland increasing by 14% on average each year (<http://news.bbc.co.uk/1/hi/scotland/6068316.stm>)*
- **Court has discretion to make or refuse a sale order** *This is highly misleading. Under section 86(2) of the Bill the sheriff will not make an order if the application is procedurally invalid or not in order. The sheriff has no general power to refuse an order.*
- **Court can refuse any sale on ground of undue harshness** *This is correct. However, the ‘defence’ of ‘unduly harsh’ has proven to be weak for other forms of diligence. For example, the unduly harsh test was available under the former diligence of poindings*

and warrant sales, yet over 23,000 poindings took place each year. Losing your home is by definition 'harsh', so this debtor protection will be difficult to rely on.

- **Court can delay any sale for up to a year on ground of undue harshness** *This is not a separate debtor protection, rather it is an alternative disposal flowing from the unduly harsh test. The weakness of that protection is discussed above.*
- **Court can refuse the sale of a home having regard to the nature of and reasons for the debt** *This is untrue. This purported protection arises from section 87, the relevant part of which is as follows:*
 - (4) Before making, under section 86(2) of this Act, an order granting a warrant for sale, the sheriff must have regard to the matters mentioned in subsection (5) below.
 - (5) Those matters are—
 - (a) the nature of and reasons for the debt secured by the land attachment;
 - (b) the debtor's ability to pay, if the effect of the warrant for sale were suspended by an order under subsection (6) below, the debt outstanding (including any interest and expenses chargeable against the debtor);
 - (c) any action taken by the creditor to assist the debtor in paying that debt;
 - (d) the ability of those occupying the dwellinghouse as their sole or main residence to secure reasonable alternative accommodation.

Section 87(4) requires the court before making an order under section 86(2) to have regard to the four factors set out in subsection (5). However, section 87 does not give the sheriff any power to refuse an order based upon consideration of those factors – the requirement is to have 'regard'. Instead, we are referred back to section 86(2). Nowhere in section 86 is there a general power to refuse a warrant for sale.

- **Court can delay any sale of a home for up to a year having regard to the nature of and reasons for the debt** *Section 87(6) does provide a general power to defer a sale for up to one year. But after the delay the debtor still becomes homeless.*
- **Court can delay the sale of a home for up to a year having regard to the debtors ability to pay** *This is duplication of the deferment power arising from 87(6) – there is only one power.*
- **Court can refuse the sale of a home having regard to any action taken to assist the debtor in paying the debt** *This is untrue, and is based upon a misunderstanding (or flawed drafting) of section 87 (discussed above).*

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- **Court can refuse the sale of a home having regard to the ability of those living in it to find reasonable alternative accommodation.** *This is untrue, and is based upon a misunderstanding (or flawed drafting) of section 87 (discussed above).*
- **Court can delay the sale of a home for up to a year having regard to the ability of those living in it to find reasonable alternative accommodation** *This is duplication of the deferment power arising from 87(6) – there is only one power.*
- **Court can suspend an application for a sale order to allow land to be sold by the debtor** *Forcing a debtor to voluntarily sell their home and become homeless to repay in full unsecured debts as low as £3,000 is not a ‘protection’.*
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- **Independent person appointed by the court acts in any sale and ensure best price is achieved** *Rather than being a debtor protection, this is a device to ensure a fair price is obtained for the sale of a debtor’s home.*
- **Land attachment can be restricted to part of land attached** *Does not apply to an ordinary homeowner – you cannot sell half a house.*
- **Expenses of attachment only recoverable through attachment** *Does not protect a homeowner from being made homeless; rather ensures that legal expenses are deducted from the proceeds of sale.*
- **If for a single debt, the attachment can be stopped by time to pay under the Debtors (S) Act 1987** *This is correct, but the creditor can object to the time to pay application. If so it would call before a sheriff. In practice many sheriffs will only allow debts to be repaid at the monthly contractual rate + the ability to clear all arrears within 12 to 24 months. Contrast, the position for eviction and mortgage repossession cases where a ‘reasonableness’ legal test applies and homeowners have many more options. For homeowners who have no prospects of being able to pay their mortgage they can always apply under the Mortgage to Rent*

Scheme, and become a tenant. Land attachment will undermine the Mortgage to Rent Scheme. Finally, if a debtor misses three payments, time to pay protection falls, and cannot be re-instated.

- **If for a single debt, which is a consumer debt, the attachment can be stopped by a time order under the Consumer Credit Act 1974** *This is correct, but subject to the caveats above.*
- **If for one of multiple debts, the attachment can be stopped by approve of debt payment programme under the Debt Arrangement Scheme** *This is correct, but in practice is unlikely to provide significant protection for the reasons discussed under 'debtor protection 2'.*

In conclusion, there are essentially four 'debtor protections' against land attachment in the Bankruptcy & Diligence (Scotland) Bill and not 21 as claimed by the Scottish Executive. They are:

1. Power of sheriff to refuse or defer sale (for up to 1 year) if '**unduly harsh**' under s.86(3)
2. Power of sheriff to refuse if application **not valid or in order** under s.85(5) and (6)
3. Where debtor occupies property as his or her sole or main residence, power of sheriff to **defer sale** for up to 1 year.
4. Ability of debtor to prevent land attachment by applying for either a **time to pay** order (Debtors (Scotland) Act 1987) or time to pay order (Consumer Credit Act 1974) or DAS (Debt Arrangement & Attachment (Scotland) Act 2002).

A debtor has only one defence on the merits in practice (i.e. capable of resulting in an application for sale being dismissed): the 'unduly harsh' defence. As discussed, accessing that defence will be extremely difficult – as the experience of poindings and warrant sales has demonstrated.

It would appear the Deputy Minister has obtained poor legal advice. The Minister suggests that a sheriff can refuse a warrant for sale having regard to a homeowner's personal circumstances. **However, no power to do so has been provided for in either s.86 or 87 of the Bill.**

Instead the court is only directed to 'have regard' to such circumstances and can only defer a sale under s.87. The only power to reject a sale is contained within s.86 – and arises on two grounds only (a) unduly harsh, s.86(3) or (b) where an application is invalid or not in order, s.85(5) and (6).

Unless the Minister brings forward an amendment to correct this drafting flaw, homeowners will be vulnerable to homelessness on land attachment. The Sheriff Court in Scotland will have very little power to prevent homelessness in Scotland on a warrant for sale; in contrast to the County Court in England & Wales. Homeowners in Scotland will be much more vulnerable to homeless on land attachment than homeowners in England are from charging orders.

In conclusion, while the principles of the English charging order have been imported into Scotland, they have been done so badly, and without the very basic protection that exists in England from the **Charging Orders Act 1979** and **Trust of Lands and Appointment of Trustees Act 1996**.