

Expenses in mortgage repossession cases

A standard contractual requirement in secured loans is for the debtor to indemnify the lender in the event the standard security requires to be enforced, for example by calling-up the loan or raising repossession proceedings. The question of expenses has become more controversial since the enactment of the Mortgage Rights (Scotland) Act 2001 (MRA). In practice it is not uncommon for lenders to charge the debtor its full agent/client expenses which can often come in at around £2,000. Many lenders simply debit these expenses from the debtor's mortgage account.

This position can appear unfair where the debtor has pursued a section 2 application under the MRA and is successful in having the proceedings dismissed with undefended judicial scale expenses only. Instead of the defender being liable for the sum of £209.80¹ (the pursuer's costs in raising the initial writ), he or she can be required to pay ten times this sum.² In many cases the borrower's mortgage arrears will be less than this sum; creating the anomaly whereby a debtor is placed in a cycle of debt. For example, a debtor works hard to clear his or her arrears, gets the action dismissed and then find he or she owes more than when the action was first raised. Is there anything the debtor can do to challenge the application of full agent/client expenses?

The mortgage indemnity clause is not a straight-forward contractual provision. It arises from Standard Condition 12, schedule 3 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (the 1970 Act), which provides:

'12. The debtor shall be personally liable to the creditor for the whole expenses of the preparation and execution of the standard security and any variation, restriction and discharge thereof and, where any of those deeds are recorded, the recording thereof, and all expenses reasonably incurred by the creditor in calling-up the security and realising or attempting to realise the security subjects, or any part thereof, and exercising any other powers conferred upon him by the security'.

Section 10 of the 1970 Act imports into the standard security an obligation for the debtor to pay *inter alia* 'all expenses for which the debtor is liable by virtue of the deed or this Part of this Act'. Thus, creditors are on the face of it entitled to debit expenses under Standard Condition 12 from the debtor's mortgage account.

The courts have yet to determine whether a creditor who initiates mortgage repossession proceedings should be restricted to expenses on the judicial scale. In *Clydesdale Bank plc v. Mowbray* 2000 SC 151 the defender sought to argue that the pursuers' expenses should be restricted to previous awards of judicial expenses. The

¹ Act of Sederunt (Fees of Solicitors and Witnesses in the Sheriff Court) (Amendment) 2004 (S.S.I. 2004 No. 152), which amends the Table of Fees in the Schedule to the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (S.I. 1993/3080).

² The disparity of this position is further exacerbated where a defender is in receipt of civil legal aid and the court agrees to modify expenses to nil in terms of section 18 of the Legal Aid (Scotland) Act 1986, yet the creditor nevertheless debits full agent/client expenses to the defender's mortgage account in terms of Standard Condition 12.

court at first instance rejected this argument under reference to Standard Condition 12 and noted that the court must determine ‘what expenses the pursuers have reasonably incurred in calling-up the securities and realising or attempting to realise the security subjects. These expenses, in my opinion, are not restricted in any way which the defender maintained before me’.

On a reclaiming application, the Extra Division held that the competency of the bank seeking full agent/client expenses had not been properly examined and reserved its opinion on this question. Giving the opinion of the court Lord Kirkwood said: ‘there was no information before the court to determine what sums were additional to their judicial expenses being claimed by [the Clydesdale Bank plc] to make their claim equivalent to expenses on an agent and client basis; proof before answer would be necessary on that matter also. The issue of competency should be reserved until the facts were established’. Thus the matter remains unsettled.

At least three strategies to challenging the imposition of full agent/client expenses can be suggested in mortgage repossession cases.

[1] *Human Rights Act argument*

Where there is agreement between the parties to dismiss proceedings, the debtor’s agent should seek to do so either on the undefended ordinary cause scale³ or where the client is legally aided for no expenses due to or by, failing which a motion should be made to modify expenses to nil.⁴ Where the lender then debits its full agent/client expenses the debtor should consider whether to raise an action of declarator and payment for the debited sum. The debtor’s argument could be that the court has already determined the question of ‘reasonable’ expenses in the proceedings, and that the words ‘reasonably incurred’ in Standard Condition 12 should be interpreted to include ‘as determined by the court’. Support for this position may come from section 3 of the Human Rights Act 1998 (the 1998 Act) which provides that: ‘So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. It might be argued that to interpret Standard Condition 12 in a manner that permits a lender to recover its full agent/client expenses in court proceedings, when the court has already determined that either no expenses or a fixed sum is due, interferes with the debtors Convention rights under Article 8 (right to respect for private and family life) and Article 1 of the First Protocol (protection of property). This argument could contend that a wider interpretation would be disproportionate in its effect and would be unnecessary to protect the rights of the lender, particularly where the debtors level of mortgage arrears were lower than the agent/client legal expenses. Furthermore, a wider interpretation would result in an usurping of the court’s ability to determine the question of expenses, which is a part of the debtor’s civil rights, as guaranteed by Article 6 of schedule 1 to the 1998 Act.

³ It will be noted that there is no need to lodge a Notice of Intention to Defend in MRA applications; and indeed good practice would suggest that it may be unwise to do so.

⁴ In terms of section 18 of the Legal Aid (Scotland) Act 1986, which refers to an award which is ‘a reasonable one’ to pay having regard to all the circumstances including the means of the parties and their conduct in connection with the dispute.

[2] *Unfair term of contract argument*

Debtors have protection against unfair or unreasonable terms in consumer contracts. Section 4 of the Unfair Contract Terms Act 1977 prohibits the imposition of indemnity clauses unless that term is 'reasonable', as defined by section 11 and schedule 2 to the 1977 Act. An indemnity clause which is not reasonable will be of no contractual effect. Protection is also afforded to debtors by the Unfair Terms in Consumer Contract Regulations 1999 (SI 1999/2083) (the UTCCR). The first hurdle that presents to this line of argument is whether Standard Condition 12 is a term of contract or a statutory provision directly regulating the relationship between creditor and debtor? Standard Condition 12 is one of many standard conditions which the parties to a secured loan agree to by default. Section 11(2) of the 1970 Act provides that these conditions 'either as so set out or with such variations as have been agreed by the parties in the exercise of the powers conferred by the said Part (which conditions are hereinafter in this Act referred to as the "standard conditions"), shall regulate every standard security'. Importantly all of these conditions, other than standard condition 11, can be varied between the parties. The fact the conditions can be varied would tend to suggest that they are not mandatory or directive in the way that other implied statutory conditions are. For example, the implied repair obligations to domestic leases from s.113 and schedule 10 to the Housing (Scotland) Act 1987 cannot be contractually varied. Accordingly, it is arguable that there is no reason why the standard conditions once incorporated into the contract between the parties should not come under the auspices of the 1977 Act and the UTCCR; after all they are contractual terms between the parties. Assuming this hurdle was overcome, a debtor would then have to make out a case that the indemnity clause was unfair, and similar arguments to those mooted in the above noted HRA argument could be utilised.

[3] *Expenses 'not reasonably incurred' argument*

The final suggested argument is perhaps more straight-forward and relies upon the requirement in Standard Condition 12 for the creditor's expenses to have been 'reasonably incurred'. In *Royal Bank of Scotland v. Kinnear* GWD 3-124⁵, the creditor raised repossession proceedings notwithstanding that the debtor had voluntarily agreed to sell the security subjects. The court awarded expenses against the creditor. This decision was upheld by Sheriff Principal Kerr Q.C. who found that it had not been reasonable for the creditor to proceed with proceedings in the particular circumstances of the case. Since the enactment of the MRA it is now possible for debtors to resist decree for repossession if they can present and adhere to a reasonable repayment plan. What happens if the creditor rejects a repayment plan prior to raising proceedings which the court later accepts as reasonable? Arguably the creditor has acted unreasonably in refusing the repayment plan and raising proceedings, and if so, the debtor can insist that expenses under Standard Condition 12 are not 'reasonably incurred'. The MRA would seem to lend support to this line of argument as creditors are now aware that the courts, in deciding whether or not to suspend their right to seek decree, will have regard to 'any action taken by the creditor to assist the debtor to fulfil those obligations [under the mortgage]' (section 2(2)(c)).

⁵ The author is grateful to Mark Higgins, Partner, Golds Solicitors for highlighting this case in a paper presented to a joint MRA conference organised by LSA and Govan Law Centre on 27 October 2004.

Perhaps the one thing certain on this subject is that the law on legal expenses in repossession cases requires clarification in light of the MRA. Whether that can be provided by the courts or whether law reform is needed to do justice between the parties in light of the MRA we shall need to wait and see.

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