

# Repossessions in Scotland

## A guide for advisers

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**Shelter**  
Scotland



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## 1 Introduction

This guide is for advisers trying to prevent repossessions in Scotland. It assumes knowledge of the money advice process when dealing with homeowners. The information focuses on how an adviser can help their client deal with mortgage arrears and procedures which lenders will now use under the Home Owner and Debtor Protection (Scotland) Act 2010 (“the Act”).

## 2 Legislation Covering Repossession

In Scotland, the term 'mortgage' is used to describe forms of loan where a lender requires the borrower to grant a security, which is almost always a standard security, over a house or a flat or other heritable property. 'Heritable property' is the term used in Scots law to describe land, all buildings attached to land, trees and growing crops, mines and quarries, as distinguished from 'moveable property' which covers all other items of value.

The Act came into force on 30 September 2010. Part 1 deals with creditors' rights on default, Part 2 deals with sequestration and trust deeds, and Part 3 has some general notes. For the purposes of this guide the focus will be on Part 1.

This Act amends and repeals parts of the following legislation:

- Conveyancing and Feudal Reform (Scotland) Act 1970 – "the 1970 Act"
- Heritable Securities (Scotland) Act 1894 – "the 1894 Act"
- Mortgage Rights (Scotland) Act 2001 – "the 2001 Act"

The Act requires all repossession cases to be heard in court. It introduces **Pre-Action Requirements** that must be completed before court action can be taken. This forces lenders to prove to the court they have considered reasonable alternatives to repossession. The debtor and any entitled resident can now be represented by an approved **lay representative** in court.

The Act changes the court processes and introduces new forms that need to be served to ensure the lenders' and debtors' action is valid.

### 3 Preventing Repossession – Early Interventions

How quickly the debtor seeks advice will determine the options available to them. The first step when dealing with anyone struggling to pay their mortgage is to do an accurate income and expenditure assessment to identify their ability to pay. Their personal circumstances will also need to be investigated. This will help to identify the reasons behind the debt, whether it will be a short or long-term problem, who else might be affected by the repossession, and what their options are.

The following interventions are not an exhaustive list but introduce some options that should be considered.

#### **Budget**

Assess the household income and ensure this is maximised, taking into account:

- Benefit entitlement.
- Help with mortgage interest.
- Increasing wages.
- Contribution from other family.
- Income from property.
- Payment protection insurance.

Assess expenditure and ensure this is reduced where possible:

- Minimise outgoings with reference to common financial statement for guidance.
- Reduce household insurance.
- Review mortgage terms – investigating reducing payments or other products available.

To get more help with budgeting use the following link:

[http://scotland.shelter.org.uk/getadvice/advice\\_topics/paying\\_for\\_a\\_home/budgeting](http://scotland.shelter.org.uk/getadvice/advice_topics/paying_for_a_home/budgeting)

#### **Negotiate with the Lender**

It may be possible to reduce monthly payments. This could make the mortgage more affordable and help the debtor keep their home. The lender has to agree to any changes to the mortgage terms, so they will need a realistic proposal that will allow the debtor to pay off their mortgage within a reasonable period of time. This requires a budget demonstrating their ability to pay. The lender should also take into account the reasons for arrears.

Lenders have to follow set pre-action requirements which mean they have to make reasonable efforts to agree payment arrangements to clear the debt with the borrower. They must also not apply to the courts for repossession if the debtor is taking steps which will pay off the arrears and any other debts with the lender in a reasonable time. It may also be possible to get a payment holiday for a specific time period, or change their mortgage deal to reduce payments.

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### Debt Arrangement Scheme (DAS)

The Debt Arrangement Scheme (DAS) repays debts over a period of time at an affordable rate. A debtor can apply for a debt payment programme under the DAS if they have two or more debts and are having difficulty keeping up with payments.

A debt payment programme involves making one single payment to a payment distributor, who will then forward payments to each lender. The payment will be split in relation to the size of the debts. If the application for a debt payment programme is successful and payments are maintained, the lenders will not be allowed to take further action (such as arresting wages) to enforce the debt. For more information go to:

<http://www.dasscotland.gov.uk/>

### Mortgage Support Schemes

The **Home Owners' Support Fund** incorporates both the **Mortgage to Rent** and the **Mortgage to Shared Equity** scheme. It aims to help homeowners who have mortgage arrears and face losing their home.

These schemes allow debtors to remain living in their homes, despite becoming unable to meet their financial commitments. Home owners are not eligible for assistance if they can receive help through any other Government support scheme, which includes Support for Mortgage Interest. Debtors who have capital of over £2,000 (or £4,000 if they are over 60) are also excluded from the scheme.

The applicant must have lived in the property for a minimum of 12 months and intend to remain in the property as their only or principal home. The scheme does not require that the lender has begun repossession proceedings; however the owner must have been unable to pay the full payments on a loan secured against their property for at least three months and have at least one month's cumulative arrears.

All applicants must take independent advice from an approved service such as a CAB or Money Advice on their financial situation prior to applying and have been unable to reach an agreement with their lender on how to manage their arrears.

The **Mortgage to Rent** Scheme aims to help households who are in financial difficulty and at risk of becoming homeless by offering them the flexibility to change the tenure of their home, from ownership to a tenancy in the social rented sector. Typically, a local authority or housing association buys the house from the borrower, paying off the mortgage and obtaining a discharge of the lender's security. The home owner then becomes a Scottish secure tenant of a local authority or Registered Social Landlord.

The **Mortgage to Shared Equity** Scheme aims to help households who are in financial difficulty and at risk of becoming homeless. It allows them to retain ownership of their home by reducing the debt held on the property to an affordable level. The Scottish Government purchases a stake in the property and the owner is liable for the remaining debt. The owner retains full responsibility for council tax and any other housing related costs. The scheme is

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only open to owners who have capital and interest repayment mortgages and have more than 25% equity in the property. The property must be above Tolerable Standard.

More details on both schemes eligibility criteria can be found at:

<http://www.scotland.gov.uk/Topics/Built-Environment/Housing/privateowners/Repossession/hosf-1>

### **Selling the Home**

If a lender is threatening to repossess the home, the debtor could be better off selling it themselves in order to pay off the debts, as they are likely to get a much better price. If the lender repossesses, they may not sell it for some time. Meanwhile, the mortgage debt will continue to accumulate. The home could also decrease in value if it is left vacant, waiting to be sold.

There will be other issues you will want to discuss with your client, such as getting a valuation, permission to sell, cost of selling, effects on benefits and finding somewhere else to live. Find more information about your client selling their home voluntarily:

[http://scotland.shelter.org.uk/getadvice/advice\\_topics/paying\\_for\\_a\\_home/mortgage\\_arrears/selling\\_your\\_home\\_voluntarily](http://scotland.shelter.org.uk/getadvice/advice_topics/paying_for_a_home/mortgage_arrears/selling_your_home_voluntarily)

### **Voluntary Repossession**

This option is a last resort. It should only be considered if the arrears are very substantial and the lender will not agree to a repayment arrangement. It may also be worth taking advice on this option if there is no significant negative equity and/or no buyer can be found. This would include the possibility of an application to the Home Owners' Support Fund. The Act now requires that specific information be provided before this can be considered. See Possession Proceedings – before court action, Voluntary Surrender of residential property following calling up notice or notice of default. Find more information about voluntary repossession:

[http://scotland.shelter.org.uk/getadvice/advice\\_topics/paying\\_for\\_a\\_home/mortgage\\_arrears/giving\\_your\\_keys\\_to\\_your\\_lender](http://scotland.shelter.org.uk/getadvice/advice_topics/paying_for_a_home/mortgage_arrears/giving_your_keys_to_your_lender)

## 4 Repossession Proceedings – Before Court Action

If the loan is defaulted, the lender has the right to exercise the power to sell the property in order to pay off the debt. A 'standard arrears letter' will be sent after a missed payment, requesting that the account is brought up to date and that the borrower contacts the lender. This is followed by a more formal letter advising that the account is in serious arrears and that the case will be passed to the lender's solicitors if the debtor does not resolve the matter by paying the balance or by getting in touch to discuss the situation.

Owners who have been unable to make full payments on their loan for three months and have a minimum of one month's arrears could be eligible for the Scottish Government Home Owners' Support Fund. The standard security contains conditions which include provision for the lender to 'call up' the security and/or serve notice of default. If matters are unresolved, the lender will:

- Serve a **Calling-up notice** which must state the exact sum owed at the date of notice and give the debtor two months to pay. In the case *Royal Bank of Scotland v Wilson* 2004 SC 153, 157, It was held that a calling up notice must be served in all cases. It has also been held, in *Santander UK plc v Gallagher* 2011 GWD 25-556, when a calling-up notice is served by sheriff officers it is required to be served personally (i.e. in their hands) on the person to comply with the terms of s 19(6) of the Conveyancing and Feudal Reform (Scotland) Act 1970 regarding "delivery to the person on whom it is desired to be served" . (The Santander case is not binding at a sheriff court level. However, it can be used to build an argument to try to persuade the sheriff hearing the case).  
*AND*
- Serve a **notice of default** (this is in a statutory form) which specifies a failure to pay an instalment and gives the debtor a month to make good the default.  
*AND*
- **Make an application under section 24 of the 1970 Act** by summary application to the local sheriff court, including a certificate specifying the default by the debtor.

The Act introduces '**Restriction in creditors remedies**' in which the lender is restricted in the action they can take. After the debtor has received a calling up notice or notice of default on their repayments, the lender can only repossess the residential property if there is:

- Voluntary surrender by the owner, or
- Warrant of the court after a Section 24 application of the 1970 Act.

### ➤ **Voluntary Surrender of residential property following calling up notice or notice of default**

The property can be voluntarily given back to the lender, so long as the lender obtains written proof from the debtor, or entitled resident that:

- the property is not occupied

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- giving up the property has been agreed
- there has been no coercion of any kind in making this decision.

If the debtor or entitled resident doesn't want to leave their home the mortgage lender has to raise an action for repossession at court, applying under Section 24 of the 1970 Act.

#### ➤ **Court application by creditor for remedies on default**

This is done using the ordinary cause procedure by summary application to the court. There are two ways the lender can apply to court:

- Under the 1970 Act, using a Section 24 application and initial writ. The owner of the property must have received Form E, Notice of Proceedings from Amendment of the Conveyancing and Feudal Reform (Scotland) Act 1970. This informs them of court action being taken to repossess the property. The occupier must be sent Form F of Amendment from the Conveyancing and Feudal Reform (Scotland) Act 1970 addressed to "the occupier". These letters must be sent recorded delivery.
- Under section 5 of the 1894 Act, where the owner of the property must have received Form 1 in Part 2 from the Mortgage Rights (Scotland) Act 2001. This informs them of court action being taken to repossess the house. The occupier of the house must be sent Form 2 in Part 2 from the Mortgage Rights (Scotland) Act 2001 addressed to "the occupier". These letters must be sent recorded delivery.

### **Pre-Action Requirements (PAR)**

The lender must also prove they have followed **Pre-Action Requirements** to show they have considered reasonable alternatives to repossession. These Pre-Action Requirements state your client's mortgage company must:

#### **Have provided clear information about:**

- The terms of loan
- The amount due, clearly showing arrears and any charges from late payments or early repayment of mortgage
- Any other debt owed to this lender.

This needs to be done in a reasonable time after payments to their mortgage have stopped.

In Northern Rock Asset Management and The Royal Bank of Scotland PLC v Helen Louise Miller and Graeme McConnell [2012] ScotSC 28, it was held that default happens at the expiration of the calling-up notice, and that this would be the correct time to start the pre-action requirements. However, this is contrasted in another case, Accord Mortgages Ltd v Thomas Nimmo Rodger Dickson, Sheriffdom of South Strathclyde, Dumfries and Galloway at Hamilton, B1186/11, 6 July 2012, where the judge held that 'default' had a wider meaning; it also covered the failure to make monthly payments due under a mortgage agreement, and the judge thought it unnecessary to wait until a calling-up notice had expired to provide the borrower with this information. Neither of these decisions are binding at a sheriff court level. However, they can be used to build an argument to try to persuade the sheriff who is hearing the case.

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**Make reasonable effort to agree with the offer of future payments to clear the debt by:**

- Trying to contact the debtor to discuss the situation
- Making suggestions for repayment and providing this information clearly to allow the debtor to think about their options
- Allowing reasonable time to consider the suggested options
- Telling the debtor, within a reasonable time, their decision on any suggestions made
- Considering all circumstances that the debtor has informed them about, in deciding if the suggestions are affordable
- Telling the debtor, in writing, the reason why any proposals are rejected. This must be done within 10 working days of the lender informing the debtor they were not accepting the offer
- If a repayment plan is agreed and is then not adhered to, the mortgage lender can start court action to repossess the home. If this is the first time that any part of the agreement has been broken the mortgage lender must:
  - Give notice in writing of their application to the court and the reasons for the application. This can be sent by ordinary post, electronic communication or given to the debtor in person.
  - Wait 15 working days (not including weekends or bank holidays) after the debtor has received the notice before applying to the court
  - Allow the debtor to catch up with any outstanding repayments within these 15 days and then not take them to court.

**Not apply to the courts for repossession if the debtor is taking steps which will pay off the arrears and any other debts with the lender in a reasonable time.**

The debtor must supply evidence of the steps taken to their mortgage lender. These include:

- A claim on payment protection insurance. Proof must be provided that there is a good chance of payment from the policy. This is not valid evidence, by the debtor, of steps to pay off the arrears if the claim has not been made within a reasonable time, is refused, or the debtor is unable to pay the outstanding amount not covered by the policy
- Application to a Government mortgage rescue scheme, which has a reasonable chance of being accepted. The mortgage lender can refuse this as it may not agree with the terms of the scheme. This is not valid evidence of steps to pay off the arrears if the application has not been dealt with in a reasonable time, it has been refused, or the debtor is unable to pay the outstanding amount not covered by the scheme
- Proof that the debtor is trying to sell the property at a reasonable price, with guidance from a professional agency e.g. a solicitor. The debtor must accept reasonable offers and sell the property within a reasonable time. The debtor must also provide the lender with details of the estate agent or solicitor marketing or selling the property so the lender can confirm what is happening with the sale of the house.

**Provide the debtor with information about where to get advice and assistance to help deal with the debts, such as:**

- Official guidance from regulatory bodies such as the Financial Conduct Authority
- Advice agencies such as Citizens Advice Bureau.
- The council's housing department.

**Encourage the debtor to contact their local council to seek help with housing issues.**

**Comply with the guidance issued with the legislation.**

A mortgage lender can only take court action if it has complied with these pre-action requirements.

## 5 Repossession Procedures – Going to Court

A lender can only start court action if it has complied with the Act's pre-action requirements and uses the correct forms, dictated by Part 1 Amendment of the Conveyancing and Feudal Reform (Scotland) Act 1970 and the Sheriff Court Act of Sederunt (Sheriff Court Rules) (Enforcement of Securities over Heritable Property) 2010 have been served. The flow charts identifying the stages Before Court Action and At Court can be found in the resources section.

### Court Forms

When court forms are received, they will have to be checked to make sure what legislation that the action is being raised under.

Examples of forms that can be used:

[Act of Sederunt \(Sheriff Court Rules\) \(Enforcement of Securities over Heritable Property\) 2010/324](#)

[The Home Owner and Debtor Protection \(Scotland\) Act 2010 \(Consequential Provisions\) Order 2010/318](#)

### Representation

When thinking about the different types of representation available to your client it is important to carefully consider a number of issues:

- Complexity/stage of the case
- The different types of cost associated with legal aid/solicitor/lay representation
- Court costs.

#### ➤ Solicitor

Solicitors can provide representation in mortgage repossession proceedings. The vast majority of solicitors work in the private sector and will charge for their services. Your client might be eligible for help in paying the costs of a solicitor through the Scottish legal aid system. If a solicitor is willing to act under legal aid, they must apply to the Scottish Legal Aid Board, who will assess the application.

All firms of solicitors who do legal aid work have to be registered with the Scottish Legal Aid Board (SLAB). Call SLAB's Legal Aid Helpline on 0845 122 8686 or visit their website:

<http://www.slab.org.uk>

For further advice on your client's options including being represented by a solicitor, legal aid eligibility and information on the costs which may be incurred under legal aid, please visit the Scottish Legal Aid Board website:

<http://www.slab.org.uk/public/civil/>

There are also a number of law centres across the country which may be able to provide free representation on mortgage repossession cases. Law centres are not-for profit organisations. A list of law centres and their contact details can be found at:

<http://www.govanlc.com/salc.htm>

<http://scotland.shelter.org.uk>

<http://keepingyourhome.co.uk>

### ➤ **Lay Representation**

The Act gives clients the option of being represented by an HODP approved Lay Representative. Before the 2010 Act it was often difficult for individuals to find legal assistance in mortgage repossession cases due to difficulties with legal aid entitlement and a general shortage of solicitors who would take on this type of work under legal aid. An HODP approved Lay Representative is an individual, other than a solicitor or advocate, approved for purpose by a prescribed body (such as Shelter or CABx).

Only individuals with appropriate skills and knowledge of the court proceedings (in particular the ordinary cause and summary application procedures) can be approved and represent individuals. HODP Lay Representation is part of the Act and allows the debtor, but not the creditor, to get help in court from an approved HODP Lay Representative. It can be very daunting for a client to go to court. An HODP Lay Representative can provide valuable advice and support with the court processes. This service should be free, which will be especially important for clients not eligible for legal aid or who cannot find a solicitor willing to provide a service under legal aid. If a home owner is eligible for legal aid, the HODP Lay Representative should make them aware of this and other agencies that could help. Whilst the representation may be free, there are other costs that the home owner may be liable for (check **Costs associated with going to court**, p18).

HODP Lay Representatives need to be clear to what extent they can and should be acting. HODP approved Lay Representatives can run a mortgage repossession case through all stages, including proofs (a hearing on the evidence). This differs from lay representation in landlord and tenant cases where lay representation is limited to first calling. However, HODP approved Lay Representatives are obliged under the legislation to “throughout the proceedings satisfy the sheriff that the representative is a suitable person to represent the debtor or entitled resident and is authorised by the debtor or entitled resident to do so”. This means that throughout the court process they must satisfy the court that they have the skills to represent the debtor. And just as important, they need to be clear when they are not competent to deal with specific cases or legal processes, and should refer cases where appropriate to another more skilled individual. They must also make sure to procure authorisation from the debtor (a letter for example) that will demonstrate to the court that the HODP approved Lay Representative is authorised to act on their behalf.

As of 2013 Shelter Scotland has two SLAB funded HODP approved Lay Representatives, covering the Sheriffdom of Tayside, Central & Fife (Arbroath, Forfar, Dundee, Perth, Falkirk, Stirling and Alloa) and the Scottish Borders (Duns, Jedburgh, Peebles and Selkirk). Other SLAB funded projects also provide lay representation, for a full list of SLAB funded projects and details of their Civil Legal Assistance Offices see:

<http://www.slab.org.uk/public/civil/Othersourcesofhelp/>

There is guidance on the approval process and how to become an approved Lay Representative in the Statutory Instrument and Scottish Government Guidance on Lay Representation. See the Resources section of this guide.

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### ➤ Entitled Residents

An entitled resident can apply to the court to continue proceedings, or put forward a case, despite not being called as the defender. This means that someone who is part of the household, such as a spouse, civil partner, or partner living in the family home as a couple, can go to court and put forward the case to remain in the home, even if they are not mentioned on the paperwork. The Sheriff should take into account their personal circumstances when deciding what to do.

An entitled resident is a person whose main residence is the house being repossessed and who is also the:

1. Owner not the debtor
2. Non-entitled spouse of the debtor or owner
3. Non-entitled civil partner of debtor or owner
4. Partner living together with the debtor or owner as husband and wife
5. Person living together with the debtor or owner with the characteristics of a civil partnership
6. Person who lived with the debtor or owner in a relationship as in 4 or 5 above if; the home is not the sole or main residence of debtor or proprietor; the person lived with the debtor or owner throughout the 6 months ending with the date the home being repossessed stopped being the debtors or owners sole/main residence; the home is the sole/main residence of a child of both parties under 16.

## Courtroom Structure and Roles

All courtrooms are slightly different but have a similar layout. At the very front of the room there is a single chair facing into the room. This is where the Sheriff sits. **Sheriffs** are senior lawyers who sit at the head of the court (known as the 'bench') and make decisions on the cases brought before them.

The **Sheriff Clerk** sits in front of the Sheriff, facing into the room. Sheriff Clerks are court officials who are in charge of the administration and running of all cases being dealt with in sheriff courts across Scotland. They make sure everything runs smoothly and are responsible for recording all the official documents and evidence for each case. They also make sure that the court is run according to the appropriate court rules and record decisions that are made in each case. Sheriff Clerks usually wear black robes, and because of this it is easy to confuse them with the lawyers. Remember that the Sheriff Clerk sits in front of the Sheriff whereas the lawyers sit at either side.

There is also a **Court Officer** who assists the sheriff clerk. They wear a blue court uniform and usually sit on a chair at the side of the courtroom. Their duties involve bringing the Sheriff into court, calling witnesses, directing the public where to sit and helping maintain order in the court room.

Every court has a Sheriff Clerks' office where all the court papers are processed and all the court timetables are set. All the papers for each case will be held together in a file called a

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“process”. In smaller courts, there may be only one Sheriff Clerk. In larger courts, there may be more than one; usually a principal who is supported by one or more deputies. There may also be some other support staff that help with administration in the Sheriff Clerk’s office. If you’ve have any questions about court procedure or what is happening with the case, you can contact the Sheriff Clerk in your local sheriff court. They cannot give you legal advice but they can tell you what the rules are and give you information about the court.

**Solicitors and other lawyers** appear in court on a regular basis. They sit at opposite sides of the desk in front of the Sheriff and the Sheriff Clerk. They usually wear suits when they are walking around and they wear black gowns when they are appearing in front of the Sheriff in a case.

**Lay Representatives** should be with their client in the public area of the court. They must make themselves known to the Sheriff Clerk, or the Court Officer. Throughout the court process a Lay Representative must satisfy the court that they have the skills to represent and are authorised to act on the debtor’s behalf.

**A Short Hand Writer (generally only required for a full evidential hearing/proof.)** The defender should check whose responsibility it is to organise this and when. It can vary but it is normally the pursuer who organises this.

Everyone else in court sits facing the Sheriff and the Clerk. The people in the courtroom dress formally, and the Sheriff and the solicitors wear black gowns. It is a public court and anyone can sit in the courtroom if they want to watch.

## **Courtroom Practice**

First find out which courtroom the case is being heard in. You should be able to find this out in the civil office. When the defender (or their representative) goes into the courtroom, they should let the Sheriff Clerk or the Court Officer know they are there. Take a seat and wait for the Sheriff Clerk to call the defender’s name. The Court Officials are there to help and should be able to advise clients where to sit, explain the layout of the court and what to expect once the court proceedings begin.

The general rule is that the person who took the case to court, the pursuer, will stand to the left hand side of the Sheriff and the person defending the case will stand to the right. However, this can vary from court to court and the Sheriff Clerk will be able to clarify this. Several cases can be scheduled for the same morning or afternoon so it may take some time until the case is called. It is recommended to arrive before the time stated on the Initial Writ.

There may be a **call over** before the Sheriff arrives (this is where parties can agree cases and the Sheriff Clerk notes the outcomes). When the Sheriff enters the courtroom, this means that official court business is starting.

Everyone in the courtroom should stand up when the Sheriff comes into the courtroom – it is a mark of respect. Court staff will usually let the people in court know when to stand by saying ‘all rise’ or something similar. Everyone in court should also stand up when the Sheriff leaves the court.

The Sheriff is addressed as either “My Lord”, or “My Lady”. The case will be called and the pursuer, their solicitor or Lay Representative will introduce him or herself by using their surname i.e. Ferguson for the Pursuer. The defender or representative will then introduce themselves. The Pursuer usually puts forward their arguments first. If a Lay Representative is speaking on behalf of a client they will have to explain this and provide a letter stating they have been given the authority by the defender.

The defender or their representative will have to stand in front of the Sheriff to let them hear their arguments in the case. Speak directly to the Sheriff, they will indicate when they want to hear the defender’s details of the case. Do not interrupt the Sheriff as there is a formal court procedure and you will be given your chance to be heard.

The Sheriff may ask the pursuer questions but the defender should not ask the pursuer questions. The Sheriff Clerk can be asked to clarify anything before or after the case. Both parties in the case then have to introduce themselves. Again, this will happen whether it is a first hearing or proof. If a Lay Representative is speaking on behalf of a client they will have to explain this and provide a letter stating they have been given the authority by the defender.

➤ **First hearing**

At the first hearing the pursuer will set out their case first. Listen without interrupting. The defender will then be asked if they wish to say anything. If the defender disagrees with what is set out in the Initial Writ the Sheriff can ask that a written defence (known as ‘Answers’) be lodged and fix a hearing for evidence to be led, or for the court to continue consideration of the case.

➤ **Evidential/proof hearing**

Before a proof hearing it is good practice to agree all non-controversial points of the case. These can be submitted before or on the day of the hearing and will reduce the need for witnesses and evidence. This can include details such as the amount of debt, or the procedures followed.

The Sheriff will put all witnesses under oath to tell the truth. Normally evidence will be led by the pursuer’s side, who speak before the defender. Listen to what the pursuer and their witnesses have to say without interrupting. Do not interrupt even if it is wrong. There will be a chance to ask questions when the pursuer has finished and a chance to put across the defence later. Write down any questions for the pursuer or any witness.

Once the pursuer’s witnesses have finished speaking, the Sheriff will direct the defender to ask questions. The Sheriff will also ask any questions they may have at this point. Any new issues raised from this cross examination can be further questioned by the pursuer.

Once all the pursuer’s witnesses have been heard and questioned, the Sheriff will tell the defender to call witnesses. The defender then has the opportunity to put their case and the pursuer must not interrupt. The pursuer will be able to ask their questions at the end of the

witness's evidence, as will the Sheriff. Again any new issues raised can be further questioned by the defence.

Think very carefully about the questions to ask before the court day, as asking the wrong questions could harm the case. It is common and good practice to take a statement from the opponent's witnesses some time before the proof to try to ascertain what they may speak about. When both defender and the pursuer have questioned their witnesses, a final statement (called submissions) about the case will be made to the Sheriff. This should be a summary of the main points made and what conclusion the defender wants the Sheriff to make (for example, give time to pay back arrears). This will happen in a full hearing (or 'proof') but not a first hearing.

## Making a Defence

The Act allows the court, where the debtor appears or is represented, to decide if it is **reasonable to grant the application** for repossession based on the individual circumstances of the case. The following should be taken into account:

- Nature of the debt and reasons for defaulting on the mortgage
- The ability of the debtor to repay the amount due within a reasonable time
- Actions taken by the lender to assist the debtor to pay the amount due
- Participation in Debt Payment Programme through DAS
- The ability of the debtor, and people living in the home, to find reasonable alternative accommodation.

It is important to note that you can seek dismissal of the action from the Sheriff if the Pre-Action Requirements have not been met and the case has been raised under the 2010 Act. You should therefore check that the pre-action requirements have been met, by checking both the papers and with your client. If you notice anything of issue discuss this with the opponent if the client so instructs.

These points should be incorporated into your defence for the debtor or entitled resident. Personal circumstances such as health problems or any other relevant information should also be incorporated into the defence. It is important to ensure the correct paperwork has been served and the pre-action requirements have been met. This should ensure that it is a valid application and that all defensible points are considered.

## Sheriff Decisions

**There is no set procedure in the Act after the first procedural hearing.**

The Sheriff will normally grant decree for repossession, continue the case for consideration, sist (freeze the case for settlement) or fix an evidential hearing.

### ➤ Continue the case

The Sheriff may decide not to make a final decision at the hearing but to arrange another hearing at a future date. This is usually to allow time for:

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- Payment to be made
- The client to sell property or arrange one of the Home Owners' Support Fund options
- More evidence to support the case to be gathered.

The Sheriff Clerk will give you the date of the next hearing there and then.

If the case has been continued (for example, to show that a payment plan to pay off arrears can be kept to), emphasise to your client they must adhere to this. Make sure you know when the next hearing is and inform your client to attend court.

#### ➤ **Dismiss the case**

If the Sheriff dismisses the case it means they have decided that the case is finished and no court order is necessary. This could be because:

- You have proved that the lender has not followed the proper protocol such as lodging the correct forms or adhering to a pre-Action requirement
- The debt has been cleared.

If the Sheriff has dismissed the case then the case is over. If it was dismissed, because the procedures were not properly followed, but the grounds of the case remain, a legal action can be started again, but this time using the correct procedure to bring the case back to court.

#### ➤ **Sist the case**

If the Sheriff sists the case, they are suspending it, but the pursuer or defender can ask for the case to be called back to court at a later date. A case could be sisted to allow time to demonstrate that the debtor can stick to a repayment arrangement. If the case is sisted, emphasise that the arrangement needs to be kept to. If the agreement is not kept, the lender will bring the case back to court. Advise the client that they will need to contact you immediately if they receive papers indicating that the case will be recalled.

#### ➤ **Grant decree**

If the sheriff grants decree it means that they have made a decision granting the order requested. This could be for:

- An eviction order, ending your client's legal right to live in the property
- An order to pay the lender's legal costs.

## **Costs Associated with going to Court**

The basic position is that from the mortgage contract's standard conditions, the client will generally be liable for the Pursuer's reasonable expenses in bringing the case to court. Generally lenders don't ask for the court costs and just add that to the mortgage account.

The defender may also have their own expenses to pay in terms of lodging answers, Minute for Recall, GP's report and so on. If the defender has legal aid in place, this could cover these expenses. A legally aided client (or their solicitor) can also ask for court costs to be reduced to

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nil, but then these expenses are likely to be added to the mortgage account, as this will be in the standard mortgage contract's conditions.

## 6 Post Decree

### Appeal

You can only appeal against the Sheriff's decision if they did not follow the proper court procedures, or they did not use the law properly to make their decision. This kind of appeal is quite difficult so you should always seek specialist legal advice. There are strict time limits for lodging appeals, so get advice straight away if you think your client can appeal.

### Recall of Decree

The decree can be recalled. This brings the court action back to the start. The lender, debtor (if they did not appear and were not represented at any point during the case) or an entitled resident (if they did not appear) can recall the decree.

A recall can happen up until ejection from the property, but it can only be done once by each party. The lender, debtor and entitled resident must be given notice of this procedure. This could allow the debtor or entitled resident to defend the repossession action in court.

If the case was initially raised prior to 30 September 2010 and a court order for repossession has been granted it may be possible to proceed by way of a Reponing Note where decree in absence was granted, then apply for a section 2 order under the Mortgage Rights (Scotland) Act 2001.

### Eviction Procedures

If the decree granted was for repossession, the lender can legally evict, normally 14 days after decree has been granted. If there is no way of preventing the eviction i.e. via a Minute of Recall, your client must find alternative accommodation. They can make a homeless application to their council.

If your client does not move out, they will receive a letter telling them that the Sheriff Officers will eject them. If the decree was granted, your client will be told how much they owe and how they can pay. If your client and their family do not leave by the last date allowed, Sheriff Officers will remove them and change the locks. Sheriff Officers have the power to open 'shut and lockfast places' and will proceed even if the debtor is absent when they call.

If an order for eviction is made, or your client leaves the property after the lender starts the court case but before the order is made, your client may be ordered to pay the legal costs.

If the court order decree for ejection is granted, Sheriff Officers will write to the debtor with a date to vacate. If the debtor does not comply, Sheriff Officers will remove them, their family and possessions.

### After Repossession

The debtor ceases to be liable for future mortgage payments once the loan has been called up under the 1970 Act. After that date the loan agreement is considered terminated. The

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debtor will remain responsible for the interest on the outstanding balance of the loan until the loan is discharged. The lender will deduct the amount due in respect of the loan from the proceeds of the sale. Until a new purchaser is found, the debtor remains responsible for repairs and maintenance. Debtors should check the conditions of their insurance policy. They will remain liable until the sale of the house is completed. If the home is uninhabited, the cost of insurance may rise significantly.

Liability for council tax ends when the lender has repossessed the property and the debtor no longer lives there.

The lender must get the best price for the property if they gain possession. On completion of the sale the debtor will be paid any money which is left over after settling the mortgage debt, including legal costs, estate agent's fees and the redemption of all other securities registered on the property. If the sale proceeds are not sufficient to pay off the mortgage in full the lender will have the option of pursuing the debtor for the shortfall, as will the insurance company if it has had to pay out on a mortgage indemnity policy. The lender must have reasonably incurred the expenses. In one case where the debtor had agreed to a voluntary sale to pay off the mortgage and arrears before the commencement of repossession action, the lender was held responsible for the legal costs of both parties (Royal Bank of Scotland Plc. v Kinnear 2005 HLR 2; 2001 GWD 3-124).

## Housing Options

### ➤ Homeless Application

Section 11 of the Homelessness etc Scotland Act 2003 requires lenders to notify the local authority when they serve notices seeking to repossess a property. This provision is intended to give the authority time to respond so it can fulfil its homelessness duties. If the debtor is likely to subsequently apply to the local authority as homeless, it should be made clear to the authority that the debtor could not possibly have met the payments required by the lender. This ensures that the debtor is not considered to be intentionally homeless.

Households who are deemed intentionally homeless following mortgage repossession should be advised of their right to a review of this decision, and be referred to the appropriate agency for independent advice. There may be other circumstances such as mental or physical health problems, or relationship breakdown, which may have contributed to the arrears which would make it possible to challenge a finding of intentionality. Use the following link to find out more about what local authorities might ask:  
[http://scotland.shelter.org.uk/getadvice/advice\\_topics/homelessness](http://scotland.shelter.org.uk/getadvice/advice_topics/homelessness)

### ➤ Housing associations

Housing association rents are generally cheaper than renting from a private landlord, although they can be a little higher than council rents. Rent is usually paid weekly, in advance, and your client is unlikely to be asked to pay a deposit upfront.

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If your client rents from a housing association they will have a Scottish Secure Tenancy or, in certain circumstances, a Short Scottish Secure Tenancy. This offers your client strong occupancy rights, as well as rights to repair and to pass the tenancy on to other members of their household. Short Scottish secure tenants do not have such strong rights, and can be evicted more easily.

Housing association tenants have more say in the management of their homes than council or private tenants. Tenants elect the management committee responsible for the running of a housing association and are usually eligible to become members themselves.

Most housing associations have specialist staff who offer a variety of advice and support services to tenants. These services can include:

- Advice and help for claiming benefits
- Help to settle into a new tenancy
- Ongoing support to help tenants manage their day-to-day affairs.

Use the following link to find out more about housing associations:

[http://scotland.shelter.org.uk/getadvice/advice\\_topics/finding\\_a\\_place\\_to\\_live/housing\\_associations](http://scotland.shelter.org.uk/getadvice/advice_topics/finding_a_place_to_live/housing_associations)

➤ **Private rented sector**

This is normally the most expensive option, with limited security of tenure. Any income generated from the sale of the property may impact on benefit entitlement and therefore available help with housing costs. A deposit is normally required, although there may be some local rent deposit schemes available that will provide a written guarantee if your client meets certain criteria. Find more information about renting privately:

[http://scotland.shelter.org.uk/get\\_advice/advice\\_topics/finding\\_a\\_place\\_to\\_live/renting\\_privately](http://scotland.shelter.org.uk/get_advice/advice_topics/finding_a_place_to_live/renting_privately)

➤ **Buying another property**

Obtaining another mortgage may be difficult for the debtor after decree has been awarded. If there is money left over from the sale of the property this could be used as a deposit. The debtor may need to rely on other family members to apply for the mortgage. Your client should seek independent financial advice to find out their options.

## 7 Resources

### Legislation

Conveyancing and Feudal Reform (Scotland) Act 1970:

<http://www.legislation.gov.uk/ukpga/1970/35/contents>

Heritable Securities (Scotland) Act 1894:

<http://www.legislation.gov.uk/ukpga/Vict/57-58/44/contents>

Mortgage Rights (Scotland) Act 2001:

<http://www.legislation.gov.uk/asp/2001/11/contents1>

Home Owner and Debtor Protection (Scotland) Act 2001:

<http://www.legislation.gov.uk/asp/2010/6/contents>

The Home Owner and Debtor Protection (Scotland) Act 2010 (Consequential Provisions) Order 2010

<http://www.legislation.gov.uk/ssi/2010/318/contents/made>

The Lay Representation in Proceedings relating to Residential Property (Scotland) Order 2010:

<http://www.legislation.gov.uk/ssi/2010/264/contents/made>

The Applications by Creditors (Pre-Action Requirements) (Scotland) Order 2010

<http://www.legislation.gov.uk/ssi/2010/317/contents/made>

Act of Sederunt (Sheriff Court Rules) (Enforcement of Securities over Heritable Property) 2010

<http://www.legislation.gov.uk/ssi/2010/324/contents/made>

Act of Seredunt (Sheriff Ordinary Cause Rules) 1993 No.1956 (S.223):

<http://www.legislation.gov.uk/uksi/1993/1956/contents/made>

Act of Sederunt (Summary Cause Rules) 2002 No. 132

<http://www.legislation.gov.uk/ssi/2002/132/contents/made>

### Case Law

Santander UK Plc v. Gallagher [2011] ScotSC 3:

<http://www.bailii.org/scot/cases/ScotSC/2011/31.html>

Northern Rock Asset Management and the Royal Bank of Scotland plc v. Helen Louise Miller and Graeme McConnell [2012] ScotSC 28:

<http://www.bailii.org/scot/cases/ScotSC/2012/28.html>

Royal Bank of Scotland plc v Wilson & Anor (Scotland) [2010] UKSC 50:

<http://www.bailii.org/uk/cases/UKSC/2010/50.html>

Accord Mortgages Ltd v Thomas Nimmo Rodger Dickson, Sheriffdom of South Strathclyde, Dumfries and Galloway at Hamilton, B1186/11, 6 July 2012:

<http://www.acandco.com/includes/misc/accord%20mortgages%20v%20thomas%20dickson.pdf>

### Other Resources

Shelter Scotland

<http://scotland.shelter.org.uk/>

Scottish Government Guidance on Lay Representation:

<http://www.scotland.gov.uk/Publications/2010/08/03135201/0>

Scottish Government Guidance on Pre-Action Requirements for Creditors:

<http://www.scotland.gov.uk/Resource/Doc/320428/0102510.pdf>

Scottish Government Guidance on the Mortgage Rights (Scotland) Act 2001:

<http://scotland.shelter.org.uk>

<http://keepingyourhome.co.uk>

<http://www.scotland.gov.uk/Resource/Doc/46729/0031352.pdf>

The Scottish Government's Home Owners' Support Fund – Guidance on the Mortgage to Rent and Mortgage to Shared Equity Schemes:

<http://www.scotland.gov.uk/Topics/Built-Environment/Housing/privateowners/Repossession/hosf-1>

Scottish Legal Aid Board:

<http://www.slab.org.uk/>

Scottish Courts Website, Sheriff Courts:

<http://www.scotcourts.gov.uk/the-courts/sheriff-court/find-a-court>

National Debt Line:

<http://www.nationaldebtline.co.uk/scotland/>

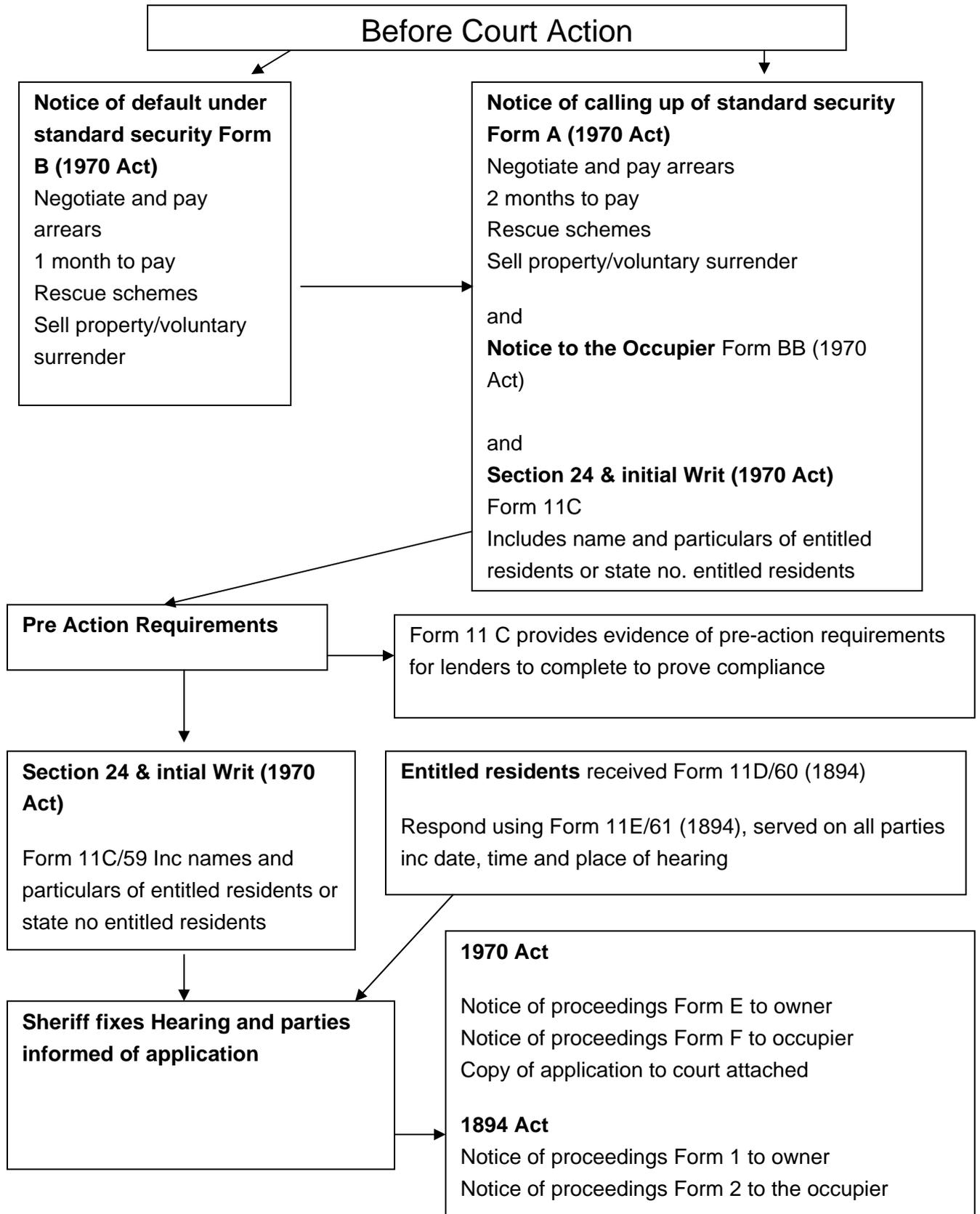
Financial Conduct Authority

<http://www.fca.org.uk/>

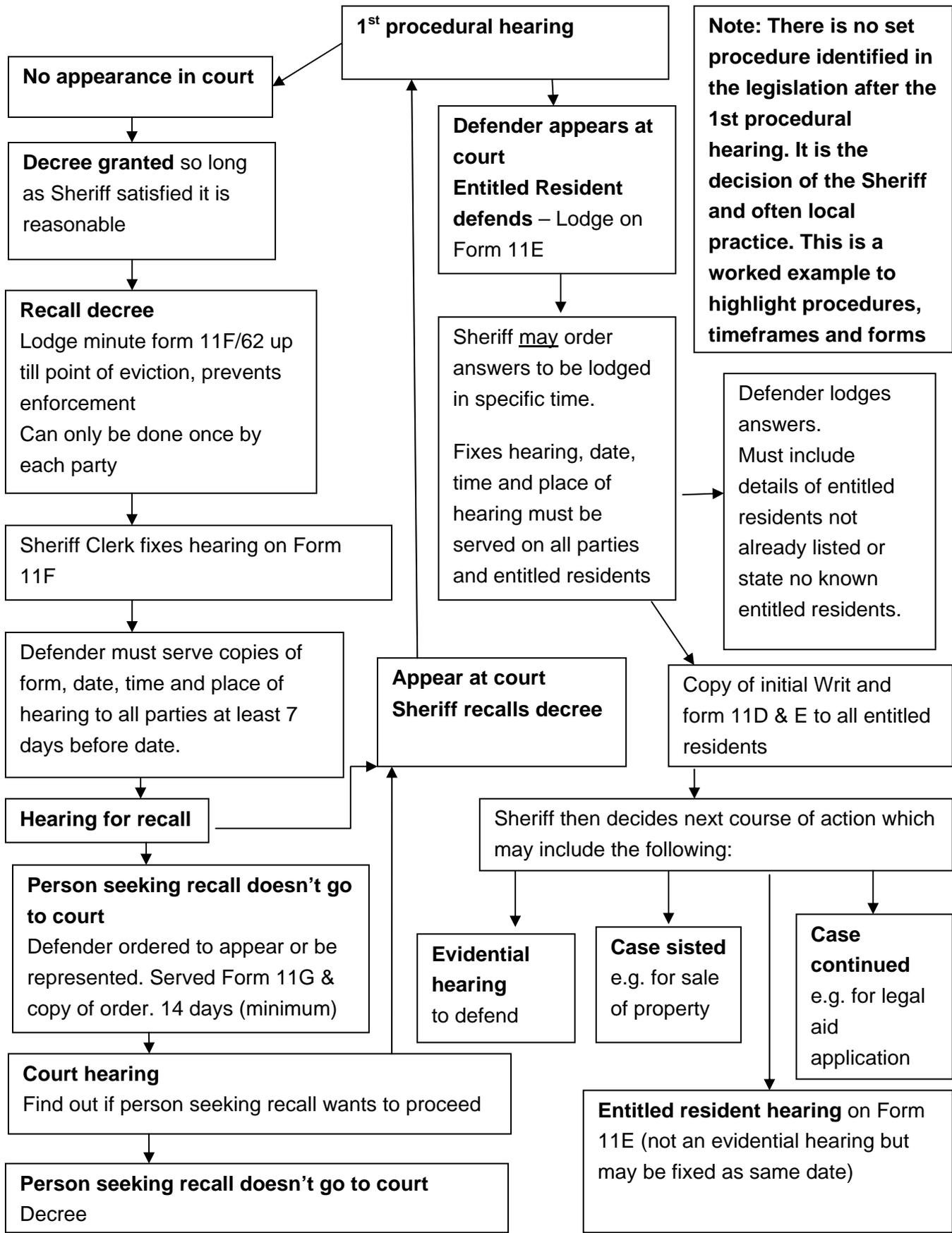
<http://scotland.shelter.org.uk>

<http://keepingyourhome.co.uk>

## Flowcharts



# At Court



**Note: There is no set procedure identified in the legislation after the 1st procedural hearing. It is the decision of the Sheriff and often local practice. This is a worked example to highlight procedures, timeframes and forms**