Proposals for a

Cost of Living (Debt) (Scotland) Bill

Contents

DEBT ARRANGEMENT SCHEME

Payment Breaks

Currently under Regulation 37 (1) (h) of the Debt Arrangement Scheme (Scotland) Regulations 2011, a debtor can apply to defer payments due under a Debt Payment Programme for 6 months if the following circumstances are satisfied.

If their disposable income has reduced by 50% due to any of the following reason:

1. A period of unemployment or change in employment;
2. A period of leave from employment for maternity, paternity, adoption or to care for a dependant;
3. A period of illness of the debtor;
4. divorce, dissolution of civil partnership or separation from a person to whom the debtor is married or the civil partner;
5. death of a person with whom the debtor shared care (financial responsibilities or otherwise

There is nothing in the current regulations that would allow a payment break to be applied for due to the rise in the cost of living.

Proposal:

To include in Regulation 37 (3) a payment break that can be applied for due to a rise in the debtor's expenditure.

Composition

Currently under Regulation 46A of the 2011 Regulations (as amended by the 2013 Regulations), a debtor in a Debt Payment Programme can apply for composition of their debts and have them written off after 12 years, where 70% of the debt due under the programme has been repaid.

An application for Composition can only be applied for after the debtor has been in the Debt Payment Programme for 12 years.

Creditors must be notified when composition has been applied for and they have 21 days to respond. If they fail to respond within 21 days, they are deemed to consent.

Proposal:

Part 9A of the 2011 Regulations should be deleted and in Regulation 28 of the 2011 Regulations (Discretionary Conditions) it should be possible for a Debt Payment Programme to be made subject to a Discretionary Condition that there will be composition of the debts after at least 6 years and where 70% of the debts have been repaid. This could be in conjunction with increasing the minimum debt level for Protected Trust Deeds.

This would have several benefits:

- It would introduce an element of debt relief into a Debt Payment Programme, that would allow consumers to avoid having to use a personal insolvency solution (such as a Protected Trust Deed or Bankruptcy), as they cannot repay all their debts within a fair and reasonable period.
- It would increase the returns to creditor, over what they would receive if the debtor was to apply for Sequestration or Protected Trust Deed, as even allowing for the statutory charges that creditors must paid in the Debt Arrangement Scheme (22%),

it would still ensure they received 48%, which is still greater than they would receive in a Protected Trust Deed or Sequestration.

- It would allow debtors to seek this type of Debt Relief without having to use an insolvency practitioner and would allow such programmes to be applied for via Not-for-Profit Money Advice Services provided by Citizen Advice Bureaux, Stepchange, Local Authority Money Advice Services and other independent advice providers.
- It would reduce the dangers of debtors being mis-sold Protected Trust Deeds and the risk of a debtor's situation being made worse if their Trust Deed fails, and they have all their debts returned to them (as with DAS the debt is reducing monthly).
- Composition would still be subject to creditor agreeing expressly or via deemed consent and if they objected, their grounds for objection could be considered by the Debt Arrangement Scheme Administrator by applying a fair and reasonable test.

Interest and Charges

Under Regulation 4 of The Debt Arrangement Scheme (Interest, Fees, Penalties and Other Charges) (Scotland) Regulations 2011, all interest, fees, charges, and other penalties are frozen once a Debt Payment Programme is applied for, and this continues once it is approved. However, these fees and charges can be reapplied if the Debt Payment Programme is revoked.

Proposal:

Regulation 4 should be amended, so even if a Debt Payment Programme is revoked, interest, fees, charges, and penalties cannot be reapplied for the period during which the Debt Arrangement Scheme was operating.

Single Debts

Currently it is possible for people to apply for a Debt Payment Programme for a Single Debt, however, unlike with multiple debt Programmes, where the creditor fails to respond within 21 days, there is no deemed consent. Instead, it is for the Debt Arrangement Scheme Administrator to decide whether the Programme should be approved using a Fair and Reasonable Test.

Proposal:

Deemed consent should be introduced for single debt Programmes. Creditors will be notified, as they are in multiple debt Programmes. If they fail to respond with the notification period, there is no reason they should not be deemed to consent. There is no requirement for Government to intervene and decide if a Programme is Fair and Reasonable.

TIME TO PAYS

Maximum Amounts and Preconditions

Currently under the Debtor (Scotland) Act 1987, a debtor can apply for a Time to Pay Direction when their case is raised in Court. Once a Court Order has been granted, then

providing the debtor has not previously applied for a Time to Pay Direction, they can apply for a Time to Pay Order, but only after a Charge for Payment has been served by Sheriff Officers. Currently the maximum debt level that a Time to Pay Direction/Order can be applied for is £25,000.

Proposal:

The maximum debt amount a Time to Pay direction can be applied for should be increased to £50,000. It should also be possible for a Debtor to apply for a Time to Pay Direction earlier, when a default or arrears notice under the Consumer Credit Act 1974 has been served, or a Summary Warrant has been issued for Council Tax Arrears; or with regards the proposal below for Court Monitored Repayment Plans, a Notice of Proceedings is served by a landlord. The requirement to have to wait for a Charge for Payment to be served before applying for a Time to Pay Order should be removed.

All these changes will allow people in debt to act sooner to get a court approved arrangement, where an agreement is not possible with the creditor.

Rent and Mortgage Arrears - Court Monitored Repayment Plans

Current practice is when a Time to Pay Direction is granted this results in a court order being granted, so effectively the Time to Pay is an Instalment Decree. This has several negative effects for those in debt and makes Time to Pay Directions undesirable in several situations.

First, in relation to rent arrear cases this means where the debtor agrees a repayment plan for instalments, where the debtor has arrears of the equivalent of two instalments and a third instalment is not paid, the creditor can enforce the court order without returning to court. In addition to that, Time to Pay Orders only relate to the recovery of debt and don't prevent evictions or repossessions.

For this reason, good practice has always been for advisers and solicitors representing in eviction and repossession cases to request a continuation of the action to monitor repayments; or for the case to be sisted, which effectively suspends the action, without a court decree being granted.

However, recent guidance that has been issued by Sheriff Principals in Scotland, has now instructed Sheriffs not to allow continuations or sists in rent arrear cases (and presumably this practice may also be applied eventually to mortgage arrear cases) unless there are exceptional circumstances. This means advisers and solicitors may be forced, into applying for Time to Pay Directions, which is likely to result in more evictions, as when tenants miss payments, landlords will not have to bring the cases back in front of the court before commencing recovery action.

Proposal:

The Debtors (Scotland) Act 1987 should be amended to require the court in rent and mortgage arrear cases to continue or sist the case for monitoring, where a repayment plan is agreed for the payment of arrears. This would mean, where payments are missed, eviction or repossession action cannot take place without the case calling again in front of the court.

Car Finance Agreements

The last ten years has seen a massive growth in car finance agreements, such as hire purchase, conditional sale and PCP Agreements being used to finance the purchase of cars. It is now believed that over 90% of all new cars in the UK are purchased using these agreements.

The effect of this is that as ownership of the vehicle is not passed to the driver until all payments have been made, the vehicle can be repossessed if the consumer falls into arrears. Under the Consumer Credit Act 1974 (UK reserved legislation), a consumer can apply for a Time Order, however, there are several problems with this.

First, despite consumers being able to apply for a Time Order when a notice of arrears or default notice is served, they must use the Summary Application procedure to do so, which although free, does require the lender to have the application served on them by Sheriff Officers, which does involve a cost of the consumer.

Alternatively, they need to wait for an action for the repossession of the car to be raised in the Sheriff Court, but that can take up to 12 months and often creditors will refuse to accept any payments in that time, meaning the arrears will be significant and, therefore, it will be less likely a repayment plan can be agreed.

Also, Time to Pay Directions, under the Debtors (Scotland) Act 1987 are ineffective as they result in an Instalment decree and only relate to the payment of the money, and don't prevent the vehicle being repossessed.

Proposal:

The Debtors (Scotland) Act 1987 should be amended so when a reasonable repayment plan is agreed in relation to a Hire Purchase or Conditional Sale agreements, the cases should be continued or sisted to monitor repayments, so that the goods cannot be repossessed without the case calling back in front of the Court.

ILLEGAL DEBT RECOVERY ACTIVITY

Repossession of Goods by people other than Sheriff Officers and Messenger at Arms

Under the Consumer Credit Act 1974, in relation to Conditional Sale and Hire Purchase Agreements, goods can be repossessed without a court order, where less than a third of the total amount owed has been paid.

However, it has always been accepted in Scots Law, a court order may be required in all circumstances, due to the common law dislike for the use of self-help remedies. Most Scottish solicitors will always advise their consumer credit clients they are always required to obtain a Court Order in Scotland.

Despite this, there is a rise in firms, particularly English firms, who regularly try to repossess cars subject to hire purchase and conditional sale agreements before a court order has been obtained.

Proposal:

A new offence should be created in the Debtors (Scotland) Act 1987 where a person is guilty of the offence of repossessing goods subject to a hire purchase or conditional sale agreement, without a court order, is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

A further civil remedy should be made available to the consumer against the lender, where their goods are repossessed without a court order, entitling them to compensation up to the full amount they have paid under the agreement and for any further liability that may still exist, to be reduced to nil by the Sheriff.

STATUTORY MORATORIUM

Vulnerable Client Extensions

Currently, under the Bankruptcy (Scotland) Act 2016, a debtor can apply for a Statutory Moratorium to ensure they are protected from Diligence (legal debt recovery action) and petitions being raised for their Sequestration for up to 6 months. These provisions are currently temporary until the 30th of September 2022, but will be made permanent after that date, due to amendments made by the Coronavirus (Recovery and Reform) Scotland Act 2022.

Under the Amendments introduced by the 2022 Act, Scottish Government Ministers can amend the period a Statutory Moratorium applies for with Regulations.

Statutory Moratoriums can only be applied for once in any 12-month period.

However, this does not address the situation where someone's circumstances justify someone being allowed a greater period of protection.

Proposal:

The Bankruptcy (Scotland) Act 2016 should allow for more than one Moratorium being allowed in a 12-month rolling period, subject to a Fair and Reasonable test being applied by the Accountant in Bankruptcy.

Grounds that should allow for a second Moratorium being allowed, could include:

- Ongoing mental or physical health problems, where there is a reasonable prospect the debtor's health will improve sufficiently to allow them to enter an agreement with their creditors or be able to make an informed decision about entering a formal debt solution
- Bereavement
- Ongoing unemployment, where there is a reasonable prospect the debtor will be able to return to remunerative employment within a reasonable period
- Pregnancy or birth of a new child
- Temporary increases to the cost of living where there is a prospect the debtors circumstances will improve within a reasonable period and there is evidence the debtor is receiving budgeting and income maximisation advice from an Approved Money Advice Service

CALCULATION OF DEBTOR CONTRIBUTIONS IN INSOLVENCY

Child Maintenance

Under the S1 of the Family Law (Scotland) Act 1985 and S1 of the Child Support Act 1991, both provisions are clear that a parent's obligation to pay aliment or maintenance to support a child is owed to the child and not the other parent.

Currently Scottish Government legal advice is that when they or an insolvency practitioner is calculating the contribution that a debtor can make towards their Bankruptcy or Protected Trust Deed, any child maintenance money that is paid by a non-resident parent to the debtor can be used in that calculation.

Proposal:

Section 89 of the Bankruptcy (Scotland) Act 2016 should be amended to state that when the Common Financial Tool is being used to calculate a contribution for a Sequestration or a Protected Trust Deed, no regard should be had to Child Maintenance money that is paid to the parent.

This would bring the law for Bankruptcies and Protected Trust Deeds into line with law relating to income-based benefits such as Universal Credit, that disregard any child maintenance money that is paid to the resident parent.

Bursaries

Student bursaries are also paid to meet the essential alimentary needs of students. Currently, unlike Social Security benefits, when calculating contributions for Sequestrations and Protected Trust Deeds, Student bursaries can be used when assessing how much a debtor can pay.

Proposal:

S89 of the Bankruptcy (Scotland) Act 2016 should be amended to provide Student bursaries with the same inalienability status that Social Security Benefits have in Bankruptcy and Protected Trust Deeds.

BANKRUPTCY

Minimum Asset Bankruptcy

Currently under the Bankruptcy (Scotland) Act 2016, debtors can apply for a Minimum Asset Procedure Bankruptcy. The minimum debt level that the debtor must have to apply for a MAP is £1,500.

A Debtor can only apply for a Minimum Asset Procedure Bankruptcy once every ten years, this is despite the fact in relation to Full Administration Bankruptcies (where the debt level may be more), the debtor has only to wait 5 years before making another application.

Proposal:

The minimum debt level for Minimum Asset Bankruptcies should be removed, as for some low-income debtors, bankruptcy may be the only formal debt solution suitable for them and people should not be denied a solution. Debtors cannot apply for bankruptcy without obtaining advice from an Approved Money Adviser, so this would negate the risk of people unnecessarily becoming bankrupt.

The period people need to wait before they can reapply for a Minimum Asset Bankruptcy should be brought into line with Full Administration Bankruptcies and reduced to five years.

Bankruptcy Application Fees

Currently, over 70% of all people who go bankrupt, don't pay a fee, as they are in receipt of certain benefits and are entitled to an application fee waiver.

However, despite this 20-30% of applicant still must pay an application fee (£50 for Minimum Asset Bankruptcy; £150 for Full Administration Bankruptcy). Many of these people, however, cannot afford to make any contribution to their bankruptcy.

Proposal:

Fee waivers should be introduced for anyone who qualifies for bankruptcy, and who at the date they make their application, are deemed unable to contribute to their bankruptcy.

Bankruptcy Payment Period

In 1985, in the Bankruptcy (Scotland) Act 1985, the length of time someone who was bankrupt had to make payments to their bankruptcy was fixed at 3 years. In 1986, in England, Wales and Northern Ireland it was also set at 3 years with the Insolvency Act 1986. In 2015, in the Republic of Ireland, with the Personal Insolvency Act, the payment period was also reduced to 3 years.

In 2015, with the Bankruptcy and Debt Advice (Scotland) Act 2014, Scotland increased the length of time that someone had to make a payment in their bankruptcy to 4 years.

Despite, Scots having now been paying for longer than anyone else in these islands, for the last 7 years, there is no evidence that the longer payment period has resulted in increased returns for creditors. It is believed most of the increased payments have been swallowed up with the increased costs of administering the bankruptcy for the longer period.

Proposal:

Reduce the payment period back to 3 years and bring it into line with other bankruptcy systems in these islands.

EARNING ARRESTMENTS

Protected Minimum Amount

Under the S49 (1) of the Debtors (Scotland) Act 1987 debts can recovered from earnings using an Earning Arrestment. The amount that can be arrested is contained in The Diligence against Earnings (Variation) (Scotland) Regulations 2021, which provides that no deduction can be made below a Protected Minimum amount, which is currently £18.63 per day/£130.73 per week/£566.51 per month.

The Protected Minimum Amount also applied to Bank Account Arrestments, but for Bank Account Arrestments was increased to £1,000 in the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (with the provision commencing in November 2022). This £1,000 is the same amount that a debtor is allowed to retain in their bank account when made bankrupt as a cost-of-living provision.

Proposal:

The Protected Minimum Amount in Earning Arrestments should be harmonised with Bank Account Arrestments, so no deduction can be taken from earnings of less than £1,000 per month/£32.88 per day/£230.70 per week.

This will have an immediate effect for tens of thousands, who are currently struggling with Earning Arrestments in that it could mean they are up to £82.36 better off each month.

Variations

Currently in Scotland there is no provisions that allow an Earning Arrestment amount to be varied. The amount that is taken is based on a fixed percentage amount over the Protected Minimum Amount. This can result in Debtors suffering hardship and having to apply for a formal debt solution to have the Earning Arrestment lifted. In the case of Council Tax debt, it can also mean that the consumer cannot repay their current council tax liability, and this means they get caught in a vicious circle of their council tax debt each year being passed to Sheriff Officers.

It can also be problematic where the consumer has other UK arrestments in place that take priority over Scottish Earning arrestments, such as Deduction from Earning orders under the Child Support Act 1991.

A formal debt solution may not always be the preferred option for the Consumer or even the creditor who is using the Scottish Earning Arrestment.

Proposals:

Earning Arrestments in Scotland should be amended to allow a variation to be applied for with the agreement of both the Creditor and the Consumer. This could mean replacing the specified amount in The Diligence against Earnings (Variation) (Scotland) Regulations 2021 with a fixed amount or a lower percentage. This would work like how Direct Earning Arrestments for benefit overpayments currently operate and should not present any additional problems for creditors. The variation could also be subject to an ongoing discretionary condition, such as an ongoing liability must be paid.

Creditors would also be allowed to revoke the variation where the Debtor fails to comply with a discretionary condition and revert to the amount stipulated in the Diligence Against Earning Regulations.

ACTIONS OF ARRESTMENT AND FUTHCOMING

Charge for Payments

Currently Charge for Payments giving a debtor 14 days to pay a debt in full need to be served by a Sheriff Officer before most diligences (legal debt recovery) are executed. This applies to Bank Account Arrestments where the debt has been constituted by a Summary Warrant (Council Tax and HMRC Debts).

There is no such requirement to serve a Charge for Payment before a Bank Account Arrestment is executed for ordinary debts constituted by a Court Order. This can result in the unacceptable situation where someone can have one of the harsher forms of diligence executed against them, without any previous, more proportionate recovery action being attempted first.

Proposal:

The Debtors (Scotland) Act 1987 should be amended so a Charge for Payment must be served before any Action for Arrestment and Futhcoming is executed.

SUMMARY DILIGENCE

Summary Diligence is a debt enforcement procedure where debts can be recovered legally using diligence (legal debt recovery) using Sheriff Officers, without the need to obtain a court order. Since 1974, it has been abolished in relation to consumer credit debt but is still legal for non-consumer credit regulated debts and can be used to enforce credit union debts and landlord guarantees. The Summary Diligence process means consumers can be denied their chance to attend court and defend themselves.

Proposal:

Amend the Debtors (Scotland) Act 1987, to abolish the use of Summary Diligence where someone acquires the debt for un-business-related purposes.

COUNCIL TAX LIABILITY

Power to write off Council Tax Debts

The Local Government Finance Act 1992, which applies to the whole of the UK, contains in Part One (which only applies to England and Wales) a Section13A(1)(c) which is used by billing authorities to reduce Council Tax bill, where they see fit. This could be because there has been a fire or flooding in a home or some other extenuating circumstances, which is causing hardship for the household. It could also be because the Council doesn't believe the debt is recoverable.

Other situations may be when someone must leave their own home to care for elderly relatives but intend to return eventually and don't want to, or can't sell it, and are no longer entitled to an unoccupied exemption from Council Tax.

Part Two of the Act which relates to Scotland has no similar provision, meaning Scottish Local Authorities don't believe they have the power to reduce or write off someone's council tax liability, other than through using the Council Tax Reduction, Discount and Exemption Schemes.

Proposal:

The Local Government Finance Act 1992 should be amended to introduce a S80B to allow Scottish Councils to reduce someone's council tax liability, to nil if necessary, if they feel it is appropriate having regard to the household circumstance and the recoverability of the debt.

Power to Reduce Council Tax Liability to Encourage Energy Efficiency

Section 80A of the Local Government Finance Act 1992, requires Local Authorities in Scotland to operate Scheme that allows for the reduction of Council Tax liability, where the liable person has made energy efficiency improvements to their home.

Each Local Authority operates their own Scheme. However, most are poorly publicised and primarily only relate to loft and wall cavity insulation.

Proposal:

Section 80A, in the current climate, should be redrafted to create a national discount scheme that offers discounts in Council Tax for households that invest in more energy efficient windows, doors, boilers and energy generating technology, such as windmill and solar panels. This will encourage increased energy efficiency and a reduction in energy usage.

SCHOOL MEALS

School Meal Debt

Scotland has seen in recent years a significant increase in school meal debts owed to local authorities. This is only likely to increase with the cost of living.

Proposal:

School meal debt should not be recoverable after the end of the school term. Local authorities should be provided with the discretion to write off school meal debt sooner, where the family circumstances warrant it.

PENALTY CHARGE NOTICES

Capped Parking Charges

In recent years there has been a significant increase in the number of firms specialising in issuing private Penalty Charge Notices (PCN) for breaches of parking rules on private land. These firms, providing they are member of several registered bodies, can apply to the DVLA for the details of a Registered Keeper of a car which it believes has committed a contravention, so they can issue them with a PCN. These notices can demand payments of sums as much as £100 for even the slightest of contraventions.

Although Firms routinely offer drivers a discount, so they only have to pay £60, if they pay within 14 days, they also routinely add £50-70 administration charges to PCNs that are not paid in time, resulting in drivers being pursued for £150-170 per charge.

This sector across the UK is only subject to voluntary regulation. However, as the legal basis for these charges is contract law, courts will enforce PCNs. It is also not unknown for Firms to hold off and issue drivers with multiple fines at once and it is not unusual for drivers to be pursued for hundreds and sometimes thousands of pounds in charges.

Part 8 (Recovery of unpaid parking charges) of the Traffic (Scotland) Act 2019 was introduced to regulate the recovery of these charges and S95 introduced the concept of registered keepers' liability, where the registered keeper of a car could be held liable, where the identify of a driver was unknown. These provisions have not yet commenced.

Proposal:

Scotland should aim to further regulate this industry, particularly as many of the debt recovery firms, that Parking Companies use, are not regulated by the Financial Conduct Authority, which regulates most debt recovery firms in the UK.

Proposed amendments that should be included in Part 8 of the Traffic (Scotland) Act 2019 should include:

- A requirement that a PCN is not legally recoverable or enforceable unless the driver is notified within 3 months of the contravention.
- That the amount a Parking Firm can charge should be capped at £50 and no additional service charges should be possible.
- Courts when hearing cases, should have the discretion to vary the amount that is recoverable, including reducing the amount to nil, once they have had regard to the

conduct of the Parking firm or its agents in how they attempted to recover the debt prior to raising the court action.