**24 November 2010**

**PRESS SUMMARY**

**Royal Bank of Scotland (Respondent) v John Patrick McCormack Wilson and another (Appellants) (Scotland)**
**Royal Bank of Scotland (Respondent) v Francis John Wilson and another (Appellants) (Scotland)**
**[2010] UKSC 50**
***On appeal from an Extra Division of the Court of Session [2009] CSIH 36***

**JUSTICES**: Lord Hope (Deputy President), Lord Rodger, Lord Walker, Lady Hale and Lord Clarke

## BACKGROUND TO THE APPEAL

This appeal raises questions as to the proper construction of provisions of the Conveyancing and Feudal Reform (Scotland) Act 1970 (the "**1970 Act**") which establish and regulate the form of security over heritable property known as a "standard security". In particular, the appeal addresses the circumstances in which a creditor is entitled to eject the debtor from the property over which the security was granted.

The Appellants, two married couples, are proprietors and occupiers of their homes, which are subject to a standard security granted by each couple to the respondent bank in 1991. In each case the amount secured was any sum which the husband and wife owed or might owe to the bank, whether jointly or as individuals. In 1992 and 1993, the husbands, who are brothers, undertook to repay to the bank any indebtedness of the two firms in which they were involved. In 1995 the bank wrote to each of the brothers demanding repayment of the amounts which were then overdrawn on current accounts of the firms. When the sums were not paid, the bank took steps which were intended to allow it to sell the couples' homes. In particular, in 1998 the bank treated the debtors as being in default and applied for, and was granted, warrant to exercise the powers available to creditors under standard condition 10 in Schedule 3 to the 1970 Act. This was the first time that the wives knew that their homes were at risk of repossession by the bank.

The bank then applied to Edinburgh Sheriff Court for an order to eject the couples from their homes. Under section 5 of the Heritable Securities (Scotland) Act 1894 (**section 5**), however, a creditor can only do so if the proprietor has failed to repay the sum in question "after formal requisition". The sheriff declined to grant an order for ejection, on the basis that the bank had not made a formal requisition for payment. The bank appealed to the Court of Session. An Extra Division held that a certificate of default which the bank had lodged in court, in accordance with section 24(2), constituted such formal requisition. The couples appealed to the Supreme Court.

## JUDGMENT

The Supreme Court unanimously allowed the appeal and held that the bank is not entitled to the remedies sought.

## REASONS FOR THE JUDGMENT

Lord Rodger held that a certificate of default is simply a piece of evidence created for use in proceedings and, contrary to the opinion of the Extra Division, cannot constitute a "formal requisition" for the purposes of section 5, since that requisition has to be made before any proceedings are begun: **[31]**. Having observed that service of a calling-up notice would satisfy section 5 (**[30])**, Lord Rodger also rejected the bank's argument that,

on a proper interpretation of section 24(1) of the 1970 Act, the bank should be treated as if it had served a calling-up notice. In Lord Rodger's opinion such an interpretation of section 24(1) would water down an important precondition to the ejection procedure, which was intended as a protection for debtors: **[32]-[33]**. Lord Rodger further held that the language of section 19(1) of the 1970 Act is mandatory, not permissive: **[46]-[47]**. Therefore a creditor, like the bank in this case, who seeks repayment of the debt and, failing repayment, to sell the security subjects must serve a calling-up notice: **[51]**. The bank had not done so and, for that reason also, Lord Rodger would have allowed the appeal. Lord Clarke agreed with Lord Rodger on this point: **[85]**.

Lord Hope said that he agreed with Lord Rodger, but that the decision that the bank had pursued the wrong course when they decided to enforce these securities ran counter to the way the provisions of the Act had been understood and applied for decades: **[54]**. A certificate of default lodged eight years after raising the action cannot satisfy section 5 because, logically, a formal requisition must occur before any default by the debtor: **[63]-[64]**. Where a creditor seeks discharge of the debt (in whole or in part), the section 19(1) procedure has to be followed and a calling -up notice must be served: **[73]-[74]**, so that even if the bank had met the requirements of section 5, it would not have been entitled to the remedies sought as it had not served the calling-up notice: **[75**]. Both Lord Rodger and Lord Hope held that a calling-up notice and a notice of default are not mutually exclusive and that in certain circumstances a creditor can serve both: **[48], [71]**.

Lord Walker agreed with Lord Rodger and Lord Hope: **[76]**.

Lady Hale held that section 19(1) procedure is mandatory, observing that the policy of requiring a creditor to give notice of its intention to call in the security to all proprietors makes good sense: **[80]**. Lady Hale also held that the formal requisition requirement under section 5 had not been complied with as the wives did not have notice of the bank's repayment demand until the proceedings began and thus were not given an opportunity to remedy their husbands' default until it was too late: **[81]**.

*References in square brackets are to paragraph numbers in the judgment.*