

# **BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 10 – Arrestment in Execution and Action of Furthcoming**

##### ***Section 73M – Notice of objection***

704. This section provides for the way in which notices of objection to automatic release are dealt with. Debtors, arrestees and third parties may apply to the sheriff by notice of objection for an order recalling or restricting the arrestment of funds.
705. Any objection to automatic release must be on the grounds that the warrant in execution of which the arrestment was executed is invalid, or that the arrestment has been executed improperly or irregularly, or that the funds are due to a third party wholly or in common with the debtor (subsection (4)). Any objection must be made in the form to be prescribed in court rules and must be made within 4 weeks of the schedule of arrestment (or, in the case of an arrestment which was originally on the dependence, the copy of the final decree) being served. The notice must also be given to the creditor, the debtor, the arrestee and any other third party with an interest, known to the person objecting.
706. Subsection (5) prevents any debtor, arrestee or third party, who has raised a notice of objection to the automatic release of attached funds, from raising an action of multiplepoinding or other court action in respect of those funds (for example, an action of furthcoming). There are three exceptions to this which are detailed in subsections (6) and (7). A party who has objected to the automatic release may raise a multiplepoinding or other proceedings where the sheriff makes an order under section 73N(5) sisting the proceedings on the objection. The sheriff might do this where there are complex competing claims to the ownership of the property which would be more appropriately resolved in a multiplepoinding. An objecting party can also enter into an action of multiplepoinding or other proceedings raised by another party.
707. A debtor who has objected to automatic release may, under subsection (7), also apply to the sheriff for release of funds or property because of undue hardship. Where this happens, the sheriff can hear both cases at the same time to ensure the effective use of court time.

##### **New section 73N – Hearings following notice of objection**

708. Section 73N(1) provides that the sheriff shall, subject to the circumstances set out in subsection (5), hold a hearing where the automatic release of attached funds is objected to by the debtor, the arrestee or a third party claiming to be due the attached funds (whether solely or in common with the debtor). The hearing must be held within 8 weeks of the day the notice of objection was given to the interested parties. Subsection

(2) provides that, before the sheriff can make an order, the creditor, the arrestee, the debtor and any interested third party have the right to be heard at the hearing.

709. Under subsection (3), the sheriff can make an order recalling or restricting the arrestment where the sheriff is satisfied that the objection is upheld.
710. The sheriff can reject the application and order the release of funds to the creditor on the expiry of the 14 week period or, where it has already expired, the release as soon as is reasonably practicable after the date on which the order is made (subsection (4)). Even although the court requires to hold a hearing within 8 weeks of the day on which an objection is made, it is possible that the hearing may not conclude prior to the 14 week time limit for automatic release expiring. The court can still deal with the merits of the case if for any reason it is not possible to determine an application within the 14-week period.
711. Subsection (5) provides that where the sheriff is satisfied that it is more appropriate for the matters raised at the objection hearing to be dealt with by an action of multiplepoinding or other proceedings, the sheriff may make an order sisting the proceedings on the objection. That means effectively putting the objection hearing proceedings “on hold” pending the outcome of the multiplepoinding or other proceedings. The sheriff must also sist the objection proceedings if any multiplepoinding or other proceedings are raised, provided they are raised before a decision is made in respect of the objection application.
712. In addition to making an order recalling or restricting the arrestment, an order for release of funds or an order to sist the proceedings, the sheriff is able to make any other order which the sheriff considers appropriate under subsection (6).
713. Subsection (7) provides that the objector (on order of the sheriff) must inform the creditor, arrestee, debtor and any interested third party of the sheriff’s decision on the application. Subsection (8) provides that any party who objects to the decision of the sheriff is able to appeal to the sheriff principal within 14 days of the decision. The appeal may be on a point of law only and the decision of the sheriff principal is final.
714. Further procedure on hearing objections will be set out in rules of court.

### **New section 73P – Arrestee not liable for funds released in good faith**

715. Section 73P makes it clear that arrestees are not liable to the debtor or any other interested party where they release funds in good faith to a creditor because the arrestee was unaware that the warrant in execution of which the arrestment was executed was invalid or the arrestment was incompetently or irregularly carried out.

### **New section 73Q – Application for release of property where arrestment unduly harsh**

716. Section 73Q gives a debtor upon whom an arrestment in execution has been effected (including an arrestment in execution which has started life as an arrestment on the dependence of an action in which the creditor has been successful) and has attached moveable property or funds, the right to apply to the sheriff for an order to be made on the grounds of hardship. This right can be exercised at any time during which the arrestment has effect. For an arrestment of funds to which the automatic release process applies, such an application would require to be made prior to the expiry of the 14 week period for automatic release set out at section 73J(3) or the funds would be automatically released to the creditor.
717. The debtor is able to apply for an order which stops the effect of the arrestment in relation to some or all of the funds and/or property attached and requiring the arrestee to release some or all of the funds and/or property.

718. The application must be in the form prescribed by rules of court and must be copied to persons with an interest, in particular, the creditor and the arrestee.

**New section 73R – Hearing on application under section 73Q for release of property**

719. Following an application by a debtor under section 73Q, the sheriff may, if satisfied that the arrestment is unduly harsh to the debtor or any other person listed in this section (certain family members), and taking into account the circumstances of the case, make an order for the release of some or all of the arrested funds or moveable property. A sheriff could, for example, take into account whether the arrested funds or some of them were needed by the debtor for what might be termed “essential services” such as to pay a carer or to pay rent.
720. Where funds are attached, the sheriff must, in particular, consider the source of the funds (for example, whether any funds to the credit of a debtor in a bank account derive from state benefits or tax credits) and whether there is already a diligence in effect in relation to those funds, such as an earnings arrestment.
721. Where the sheriff refuses to make a hardship order the sheriff may, where funds are attached, order the automatic release of funds on the expiry of the 14 week period set out in section 73J(3) or, where that period has already passed, as soon as reasonably practicable after the date on which the order to release is made.
722. Where someone wishes to appeal against the decision of the sheriff (for example an aggrieved debtor or creditor), they have 14 days to do so after the decision is made. An appeal may be made to the sheriff principal on a point of law only and the decision of the sheriff principal is final.

**New section 73S – Mandate to be in prescribed form**

723. Section 73S formalises the voluntary mandate which will enable the arrestee to release arrested funds or other property to creditors without having to proceed to an action of furthcoming. The mandate must now be in a form prescribed by the Scottish Ministers by regulations. If a mandate is not in the prescribed form it is invalid. Subsection (3) provides that where a mandate is invalid but the arrestee pays over funds or hands over property, the arrestee is not liable to the debtor or any other interested party for financial loss caused by releasing the funds or property provided the arrestee acted in good faith (for example, the arrestee did not know and could not reasonably have known that the mandate was not in the proper form).

**New section 73T – Arrestment of ships etc.**

724. This section makes clear that the provisions of this Part of the Act do not apply to the arrestment of ships, cargo or other maritime property which are subject to special rules (see, in particular, Part V of the Administration of Justice Act 1956 which is amended by Part 14 of and schedule 4 to this Act).