

# **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 206 – Arrestment in execution***

669. **Section 206** inserts new Part 3A into the 1987 Act (after section 73). This new Part contains 18 new sections dealing with the diligence of arrestment in execution and the related action of furthcoming.
670. Arrestment is a diligence which allows a creditor to attach a debtor’s moveable property, such as goods or funds (for example, funds held in bank accounts). Arrestment can be used only where these assets are owned by the debtor but are in the possession of a third party. The third party is known as the “arrestee” and is often, in the case of funds, a bank or financial institution. If the assets are in the possession of the debtor rather than a third party then the diligence of attachment (or, in the case of money, money attachment) may be available.
671. Arrestment simply attaches the assets held by an arrestee; it does not transfer ownership of the assets to the creditor. To complete the diligence and have the assets handed over or sold, the creditor must raise an action of furthcoming. In many cases, the formal action of furthcoming is not necessary as the debtor completes a voluntary mandate permitting the arrestee to hand over the assets to the creditor in satisfaction of the debt.
672. The following sections make modifications to certain aspects of the law of arrestment. Those aspects of the law which are unchanged by this Act remain subject to the rules of common law.

##### **New section 73A – Arrestment and action of furthcoming to proceed only on decree or document of debt**

673. Section 73A(1) provides that arrestment is permitted only to enforce a court decree (including a summary warrant) or a registered document of debt where the warrant or extract of the decree or document authorises arrestment. “Decree” and “document of debt” are defined in subsection (4). The Scottish Ministers have the power to add, remove or vary these definitions by order made by statutory instrument (subsection (5)). The exercise of this power is subject to negative resolution procedure.
674. Where, however, the decree is a summary warrant, arrestment can be executed only if the debtor has been charged to pay the debt and the period of the charge (14 days, or 28 days if the debtor is outside the UK or the debtor’s whereabouts are unknown) expires without the debt being paid (subsection (2)). In any other case, no prior charge is required before arrestment may be executed. Any existing rule of law relating to the

types of decrees or documents on which arrestment can proceed is abolished if the rule is inconsistent with these provisions (subsection (3)).

### **New section 73B – Schedule of arrestment to be in prescribed form**

675. This section enables the Scottish Ministers to prescribe the form of schedule of arrestment to be used. This is only required in an arrestment which has not started out as an arrestment on the dependence of a court action. This power is exercisable by regulations subject to negative resolution procedure.

### **New section 73C – Arrestment on the dependence followed by decree**

676. Where a creditor obtains a final decree in the creditor's favour at the conclusion of a court case and the creditor had arrested property of the debtor on the dependence of the action then, under common law, the arrestment on the dependence automatically becomes an arrestment in execution of the final decree. In these circumstances, section 73C provides that the creditor will be required to serve a copy of the final decree, in the form prescribed in rules of court, on the arrestee. This gives the arrestee notice that the arrestment on the dependence has become an arrestment in execution and may be followed by an action of furthcoming, a voluntary mandate to release the assets held or by the automatic release of funds under new section 73J (see paragraphs 696 to 699 below).

### **New section 73D – Debt advice and information**

677. Section 73D imposes a duty on a creditor to provide a debtor who is an individual with a copy of the debt advice and information package during a 48-hour period beginning with the service of either a copy of the final decree in favour of the creditor, following an action on the dependence of which the creditor has executed an arrestment, or a schedule of arrestment in a standard arrestment in execution. If the creditor fails to provide the debt advice and information package, the arrestment shall be invalid. The meaning of "debt advice and information package" in the 1987 Act is set out in section 47(4) (inserted by section 201(1) of this Act), as read with section 106 (as amended by paragraph 16(14) of schedule 5 of this Act).

### **New section 73E – Funds attached**

678. New section 73E provides rules to limit the sums that may be attached by an arrestment in execution which secures sums held by the arrestee (for example, a credit balance in a bank account in the debtor's name).
679. This section changes the common law for most arrestments under which the words "more or less" in the arrestment schedule of a validly executed arrestment in execution attach the whole of the debtor's moveable property in the possession of the arrestee rather than merely enough property to cover the value of the debt due by the debtor to the arresting creditor. That rule operates regardless of the size of the actual debt due.
680. Subsection (1) sets out the circumstances in which the rules in this section apply. For this section to apply to arrestment in execution of a decree there must not have been an arrestment on the dependence of the action in which the decree is granted. The sum attached in those cases is determined at the point at which the arrestment on the dependence is granted (see section 15H of the 1987 Act inserted by section 169 of this Act). Paragraph (b) clarifies that this section applies to an arrestment only to the extent that the arrestee holds funds due to the debtor which are of an ascertainable amount at the time the arrestment is executed. Also, it applies where the arrestee holds the debtor's funds, even where the arrestee also holds other moveable property belonging to the debtor.
681. Debts can be classified as "pure", "future" or "contingent". A pure debt is one which is currently due and can be demanded immediately. For example, the obligation of a bank

to an account holder in respect of sums due on a current account. Future debts are an obligation to pay a debt on a certain future date or on the occurrence of an event which must occur. For instance, an obligation to pay a building contractor on completion of a 12 month contract. A contingent debt is a debt which depends on the occurrence of an uncertain future event. For example, the right of an insured car owner to be indemnified by an insurer against a third party claim for damage to a vehicle in a car accident, caused by the insured where the third party has not yet raised a court action for damages, is a contingent debt.

682. Under common law, all of these types of debt are arrestable. However, contingent debts are arrestable only where the right to the debt has vested in the common debtor. It is arrestable for what it may ultimately prove to be worth. Accordingly, pure debts are of an ascertainable amount, future debts may be of an ascertainable amount (although some may not be if they increase, say, in accordance with rising interest rates). Contingent debts, on the other hand, are unascertainable as there is no guarantee that the contingency will be purified.
683. This section, in dealing only with debts to the extent that they are ascertainable, deals only with pure debts and any future debts of an ascertainable amount. For future debts which are not of an ascertainable amount and all contingent debts, the common law applies. That means, rather than the formula set out in subsection (2) applying, because the debt is unascertainable, a sum will be arrested under common law “more or less” for the amount of the debt owed, plus any expenses.
684. For ascertainable debts, subsection (2) provides that the funds attached by the arrestment will be the lesser of—
- the sum held by the arrestee on the debtor’s behalf (referred to as the debt due to the debtor by the arrestee because a sum of money held, for example, by a bank in a person’s account is in fact a debt owed by the bank to the person for the balance in the account); or
  - the sum arrived at by the formula set out in paragraph (b). The formula requires adding up the amount of the principal sum claimed in the decree or document, any expenses chargeable against the debtor under the decree or document, the expenses of carrying out the arrestment, interest on the principal sum up to and including the date of the arrestment plus interest that may accrue in the year following that and interest on the expenses of the arrestment itself plus an amount to be specified by the Scottish Ministers in regulations which approximates to the average expenses chargeable against a debtor in an action of forthcoming.
685. If the amount held by the arrestee is not enough to cover the sum arrived at under the subsection (2)(b) formula and the arrestee also holds other moveable property belonging to the debtor, subsection (4) provides that the arrestment will attach all the moveable property of the debtor held by the arrestee in addition to any funds due to the debtor and held by the arrestee. Subsection (5) provides that in any other case (in other words, where the amount of money held by the arrestee is enough to cover the amount arrived at in the subsection (2)(b) formula) the arrestment will not attach any other moveable property and attaches only the amount of money arrived at under subsection (2).
686. Subsection (6) ensures that the sum attached under section 73E(2) will only include ascertainable debts and that, in this situation, the creditor cannot unnecessarily attach additional funds relating to unascertainable debts under common law. Where the sum attached in the hands of the arrestee is the amount due in respect of the debt, there is no need to allow attachment of additional funds, otherwise the creditor would attach funds unnecessarily to the detriment of the debtor. There may, however, be circumstances where the arrestee owes unascertainable debts to the common debtor which the creditor ought to have the right to arrest in addition to ascertainable debts to make up the amount of the debt, interest and expenses owed to the creditor. Subsection (6) does not prevent

an additional amount of unascertainable debts being attached under common law in those circumstances.

687. Note that any amount of money attached by this section may be reduced by the provisions of new section 73F.

### **New section 73F – Protection of minimum balance in certain bank accounts**

688. New section 73F protects debtors by providing that a minimum level of funds within bank and other accounts cannot be attached by an arrestment.
689. Section 73F applies to both arrestments in execution and arrestments on the dependence providing the arrestment attaches funds of a debtor held by a bank or similar financial institution. It applies only if the debtor is an individual (not a company, partnership or other body or organisation) and the account in question is not a trading account and is not in the name of a company, partnership or other association (subsections (1) and (2)).
690. Subsections (3) and (4) have the effect of preventing the attachment of an amount below the amount which, in an earnings arrestment, cannot be arrested when a person is paid monthly. At the time of the passing of this Act, this amount was set at £370 by the [Diligence Against Earnings \(Variation\) \(Scotland\) Regulations 2006 \(S.S.I. 2006/116\)](#). This amount can, however, be varied by the Scottish Ministers under the power conferred upon them in section 49(7)(a) of the 1987 Act (the functions of the Lord Advocate were transferred to the Secretary of State (by virtue of the [Transfer of Functions \(Lord Advocate and Secretary of State\) Order 1999 \(S.I. 1999/678\)](#) and to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998). So, where the sum held by the arrestee is more than that amount, only the funds over that amount can be attached by an arrestment. If the sum in the debtor's account is less than that amount, no funds are attached.
691. Subsection (5) defines what is meant by "bank or other financial institution".
692. Under subsection (6), the Scottish Ministers may modify the types of account or vary any descriptions of the types of account that section 73F applies to. Also the definition of "bank or other financial institution" may be modified by the Scottish Ministers to add or remove types of financial institution or vary any of the descriptions of the types of institution. These powers are exercisable by regulations subject to the negative resolution procedure.

### **New section 73G – Arrestee's duty of disclosure**

693. New section 73G places a duty on arrestees to disclose to an arresting creditor the existence of and the value of assets attached by an arrestment. Where nothing is arrested, there is no requirement for the arrestee to provide a "nil" return. The disclosure has to be submitted in the prescribed form within 3 weeks of the date on which the schedule of arrestment is served on the arrestee. A copy of the disclosure must be sent to the debtor and to any person known to the arrestee who owns or claims to own (in common or wholly) the attached property, or to whom attached funds are, or are claimed to be, due (in common or wholly).

### **New section 73H – Failure to disclose information**

694. Section 73H(1) provides that, where an arrestee fails to make a disclosure under section 73G, the sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of either the sum due by the debtor to the creditor or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (at the time of the passing of this Act, £370).
695. Subsection (2) provides that in the case of an arrestment on the dependence of an action, the sanction in subsection (1) cannot be applied until the creditor has served a copy of the final decree in the action (see section 73C). The failure to disclose information can

be treated as a contempt of court in arrestment on the dependence cases. Contempt of court is punishable by any of, or a combination of, admonition, fine and (in extreme cases) imprisonment or detention.

696. Where the arrestee pays over a sum ordered under subsection (1) following a failure to disclose information, subsection (3) provides that the amount paid reduces the debt owed by the debtor to the creditor by that amount and the arrestee is not allowed to recover that amount from the debtor.
697. Subsection (4) gives an arrestee a right of appeal against an order to pay money to the creditor following a failure to disclose information. The appeal must be made to the sheriff principal within 2 weeks of the date of the order and can only be on a point of law. There is no further right of appeal.

### **New section 73J – Automatic release of arrested funds**

698. New section 73J provides for a procedure by which a creditor can obtain arrested funds automatically after the expiry of defined period. Where funds are released under this procedure there is no need for an action of furthcoming or for the debtor to grant a mandate to release funds.
699. Subsection (1) states that the automatic release of funds can apply only when the arrestment is an arrestment in execution (even if it originally was an arrestment on the dependence) and it attaches funds held by the arrestee and owing to the debtor.
700. The automatic release of funds under this section is to take place at the end of the period of 14 weeks starting on the date of the service of the schedule of arrestment or (if the arrestment was originally executed on the dependence) the date of service of the copy of the final decree. The arrestee can release the funds before the automatic release period has expired if those with an interest in the attached funds authorise the arrestee to do so, by way of a mandate. Automatic release may be prevented by any of the events mentioned in new section 73L(1).
701. Subsection (4) makes it clear that any references in this section and in sections 73K to 73P (which make provision related to automatic release of funds) to funds or sums due do not include references to funds or sums due in respect of future or contingent debts. As mentioned above at paragraphs 681681 and 682682, future and contingent debts are arrestable. (Ascertainable future debts being arrestable according to the formula set out in section 73E and unascertainable future and contingent debts being arrestable at common law). Accordingly, any arrestment of funds or sums due in respect of future or contingent debts cannot be completed by automatic release. Instead an alternative means of realising the arrestment such as a voluntary mandate or action of furthcoming must be pursued.

### **New section 73K – Sum released under section 73J(2)**

702. New section 73K states how to calculate the amount which is to be released under the automatic release procedure. The sum to be released must be the lowest of—
- the sum attached by the arrestment (which is calculated under section 73E and may be limited by the protected minimum balance provisions in section 73F);
  - the amount the arrestee holds on behalf of the debtor (excluding any funds or sums relating to future or contingent debts); or
  - the sum calculated under a formula similar to that set out in section 73E(2)(b) but without any amount representing the average costs of an action of furthcoming (which is not needed if the funds are released) and limiting the interest charged to interest up to the date of release (rather than 1 year's interest as under section 73E(2)(b)).

### **New section 73L – Circumstances preventing automatic release**

703. Section 73L(1) sets out the circumstances which prevent an arrestee automatically releasing funds under section 73J. The circumstances are—
- that the arrestee or debtor or any other person to whom funds are due solely or in common with the debtor applies, by notice of objection under section 73M, to the sheriff;
  - the debtor makes a hardship application for release of funds or property under section 73Q(2);
  - an action of multiplepointing is raised (which is an action where there are competing claims as to ownership of attached property held by an arrestee, for example more than one creditor of the debtor attempts to arrest the funds); or
  - the arrestment is recalled or restricted or otherwise ceases to have effect. An arrestment may be recalled where, for example, the debt in relation to which it has been effected is paid. Recall or restriction can also occur by order of the sheriff where a time to pay order is applied for under Part I of the 1987 Act.

### **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 multiplepointing 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 multiplepointing 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 multiplepointing. An objecting party can also enter into an action of multiplepointing 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 multiplepointing 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 multiplepointing or other proceedings. The sheriff must also sist the objection proceedings if any multiplepointing 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).