



Bankruptcy and Diligence etc. (Scotland) Act 2007

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PART 4

LAND ATTACHMENT AND RESIDUAL ATTACHMENT

CHAPTER 3

RESIDUAL ATTACHMENT

Residual attachment

129 Residual attachment

- (1) There is to be a form of diligence over property of a debtor to be known as residual attachment.
- (2) Residual attachment may be used to attach property (heritable or moveable) only of such description or class as may be specified by the Scottish Ministers by regulations.
- (3) The Scottish Ministers may specify any property but only if—
 - (a) it is transferable; and
 - (b) it is not—
 - (i) attachable by; or
 - (ii) exempt from,
any other diligence.
- (4) The Scottish Ministers may not specify—
 - (a) a right of a debtor as tenant of a dwellinghouse which is the debtor's sole or main residence; or
 - (b) a right of a debtor as tenant of a croft.
- (5) Property which is owned in common by a debtor and a third party may be attached by residual attachment in satisfaction of the debts of the debtor.

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- (6) Regulations under subsection (2) above may—
 - (a) vary the description of; or
 - (b) remove property of such description or class from, the property which may be attached by residual attachment.
- (7) Regulations under subsection (2) above may make further provision, in the case of property of a particular description or class, about—
 - (a) the content and effect of an application for an order under section 132(2) of this Act (in this Chapter, a “residual attachment order”);
 - (b) the effect of such an order;
 - (c) the content and effect of an application for an order under section 136(2) of this Act (in this Chapter, a “satisfaction order”);
 - (d) the effect of such an order and, in particular—
 - (i) the methods for and procedures involved in satisfying the sum recoverable by the residual attachment out of the attached property which such an order may authorise;
 - (ii) the duration of such an order; and
 - (iii) the disbursement of any sums recovered by such an order;
 - (e) the powers of the court in relation to residual attachment orders, satisfaction orders and other orders made by virtue of this Chapter; and
 - (f) the termination of residual attachment.
- (8) Regulations under subsection (2) above may make further provision—
 - (a) about the effect of the making of time to pay directions and time to pay orders on residual attachment; and
 - (b) about the effect of sequestration on residual attachment including, without prejudice to that generality, provision—
 - (i) that a residual attachment created during such period before the date of sequestration as may be prescribed is not to be effectual to create a preference for the creditor;
 - (ii) about the effect of sequestration on the rights of a creditor to insist in a residual attachment created before any such period; and
 - (iii) about the effect of sequestration on the rights of a creditor to create a residual attachment on or after the date of sequestration.

Application for residual attachment order

130 Application for residual attachment order

- (1) A creditor may apply to the court for a residual attachment order but only if—
 - (a) the debt is constituted by a decree or document of debt;
 - (b) the debtor has been charged to pay the debt;
 - (c) the period for payment specified in the charge has expired without payment being made; and
 - (d) where the debtor is an individual, the creditor has, no earlier than 12 weeks before applying for the residual attachment order, provided the debtor with a debt advice and information package.
- (2) An application for a residual attachment order, must—

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- (a) be in (or nearly as may be in) the form prescribed by Act of Sederunt;
 - (b) specify the property which it is sought to attach;
 - (c) state—
 - (i) how, were a satisfaction order made, the value of that property would be realised; and
 - (ii) that doing so would result in the sum mentioned in section 134(3) of this Act being paid off or reduced; and
 - (d) be intimated to—
 - (i) the debtor; and
 - (ii) any other person having an interest.
- (3) A person who receives intimation of the application may, before the expiry of the period of 14 days beginning with the day on which that intimation is made, lodge objections to the application.

131 Effect of application for residual attachment order

- (1) Where an application for a residual attachment order is intimated to a debtor, the debtor must not, during the period mentioned in subsection (2) below, take any of the steps mentioned in subsection (3) below in relation to the property specified in the application.
- (2) The period referred to in subsection (1) above is the period—
 - (a) beginning with the day on which the application is intimated to the debtor; and
 - (b) ending with the day on which the court—
 - (i) makes a residual attachment order; or
 - (ii) dismisses the application.
- (3) The steps referred to in subsection (1) above are—
 - (a) transferring or otherwise disposing of the property;
 - (b) burdening the property;
 - (c) granting any licence or sub-licence in relation to the property; or
 - (d) entering into any agreement to do anything mentioned in paragraph (a), (b) or (c) above in relation to the property.
- (4) Any step mentioned in subsection (3) above which is taken in breach of subsection (1) above is void.
- (5) Breach by the debtor or any other person of subsection (1) above may be dealt with as a contempt of court.

Residual attachment order

132 Residual attachment order

- (1) At the hearing on an application under section 130(1) of this Act, the court must not make any order without first giving any person who has lodged objections under subsection (3) of that section an opportunity to be heard.
- (2) Subject to subsection (4) below, the court may, if satisfied that the application is in order, make—

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- (a) a residual attachment order; and
 - (b) any other order which the court thinks fit in consequence of the residual attachment order.
- (3) A residual attachment order must—
- (a) specify the property to be attached;
 - (b) require the creditor to intimate the order to—
 - (i) the debtor; and
 - (ii) any other person the court specifies; and
 - (c) state on whom the schedule of residual attachment must be served.
- (4) The court must make an order refusing the application for a residual attachment order if satisfied—
- (a) that the property specified in the application (or any part of it) is not capable of being attached by residual attachment; or
 - (b) that—
 - (i) were the satisfaction order proposed in the application made, it would not result in the value of that property being realised; or
 - (ii) were that order made and the value of that property realised, it would not result in the sum recoverable by the residual attachment being paid off or reduced.
- (5) Without prejudice to the generality of subsection (2)(b) above, an order under that paragraph may—
- (a) prohibit a specified person from acting so as to defeat the residual attachment in whole or in part;
 - (b) prohibit a specified person from making payments due to the debtor in respect of the property to be attached;
 - (c) appoint a judicial factor to ingather and manage that property;
 - (d) require a specified person to produce to the court documents relating to the debtor's right to that property;
 - (e) authorise the creditor to complete title in the name of the debtor to that property; and
 - (f) authorise the creditor to take specified action to preserve the value of that property.

133 Schedule of residual attachment

- (1) Where the court grants a residual attachment order, the creditor may serve a schedule of residual attachment.
- (2) A schedule of residual attachment must—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
 - (b) be served on—
 - (i) the debtor; and
 - (ii) any person specified in the residual attachment order; and
 - (c) specify the property which is being attached.

134 Creation and effect of residual attachment

- (1) A residual attachment is, subject to section 142(1) of this Act, created over the property specified in the schedule of residual attachment (in this Chapter, the “attached property”) at the beginning of the day after the day on which that schedule is served on the debtor.
- (2) A residual attachment—
 - (a) confers on the creditor a right in security over the attached property; and
 - (b) secures the sum mentioned in subsection (3) below (in this Chapter, the “sum recoverable by the residual attachment”).
- (3) That sum is—
 - (a) the sum for the payment of which the charge was served, together with any interest accruing after such service and before the residual attachment ceases to have effect; and
 - (b) all expenses which are chargeable against the debtor by virtue of the attachment.

Satisfaction order

135 Application for satisfaction order

- (1) The creditor may, where a residual attachment is in effect, apply to the court for a satisfaction order authorising the satisfaction of the sum recoverable by the residual attachment out of the attached property.
- (2) An application under subsection (1) above must—
 - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
 - (b) specify the attached property (or part of it) in relation to which the application is made;
 - (c) state—
 - (i) how, were a satisfaction order made, the value of that property would be realised; and
 - (ii) that doing so would result in the sum recoverable by the residual attachment being paid off or reduced; and
 - (d) be accompanied by—
 - (i) a copy of the schedule of residual attachment; and
 - (ii) any other document prescribed by Act of Sederunt.
- (3) An application under subsection (1) above must be intimated to—
 - (a) the debtor;
 - (b) any person to whom the residual attachment order was intimated; and
 - (c) any other person having an interest.
- (4) A person who receives intimation under subsection (3) above may, before the expiry of the period of 14 days beginning with the day on which intimation is made, lodge objections to the application.
- (5) Where provision is made by virtue of this Chapter or by any other enactment permitting the application under subsection (1) above to be an electronic communication, the requirement in paragraph (d) of subsection (2) above that the

application be accompanied by the documents mentioned in that paragraph is satisfied by the provision of electronic communications.

136 Satisfaction order

- (1) At the hearing on an application under section 135(1) of this Act, the court must not make any order without first giving any person who has lodged objections under subsection (4) of that section an opportunity to be heard.
- (2) Subject to subsection (6) below, the court may, if satisfied that the application is in order, make—
 - (a) a satisfaction order authorising the satisfaction of the sum recoverable by the residual attachment out of the attached property (or part of it) specified in the order; and
 - (b) any other order which the court thinks fit in consequence of the satisfaction order.
- (3) A satisfaction order must—
 - (a) specify the attached property to which it applies; and
 - (b) require the creditor to intimate the order to—
 - (i) the debtor; and
 - (ii) any other person the court specifies.
- (4) Without prejudice to the generality of subsection (2) above, a satisfaction order may authorise—
 - (a) the creditor to sell the attached property;
 - (b) the transfer of ownership of the property to the creditor;
 - (c) the transfer of income derived from the property to the creditor; or
 - (d) the creditor to lease or licence the property.
- (5) Where the court makes a satisfaction order—
 - (a) authorising the sale of attached property, it must—
 - (i) appoint a suitably qualified person (in this Chapter, the “appointed person”) who is willing to execute the order; and
 - (ii) specify in the order the period within which the attached property is to be sold;
 - (b) it may appoint a suitably qualified person to report on the market value of the attached property.
- (6) The court must make an order refusing the application for a satisfaction order if satisfied that any of the grounds mentioned in subsection (7) below apply.
- (7) The grounds referred to in subsection (6) above are—
 - (a) the residual attachment is invalid;
 - (b) the residual attachment has ceased to have effect; or
 - (c) that—
 - (i) were the satisfaction order proposed in the application made, it would not result in the value of that property being realised; or
 - (ii) were that order made and the value of that property realised, it would not result in the sum recoverable by the residual attachment being paid off or reduced.

- (8) The court may, if satisfied that making a satisfaction order would be unduly harsh to the debtor or any other person having an interest—
- (a) make a satisfaction order but suspend its effect for a period not exceeding 1 year beginning with the day on which the order is made; or
 - (b) make an order refusing the application.

137 Intimation of court's decision

- (1) Where a satisfaction order is made, the creditor must, as soon as is reasonably practicable, send a copy of the order to—
- (a) the debtor;
 - (b) where the satisfaction order authorises the sale of the attached property, the appointed person; and
 - (c) any other person the court specifies in the order.
- (2) Where the court refuses to make a satisfaction order, the court must, as soon as is reasonably practicable, send a copy of the order to the debtor and to any other person appearing to the court to have an interest.

138 Effect of certain refusals of application for satisfaction order

Where, under section 136(6) of this Act, an order is made refusing an application for a satisfaction order by virtue of the ground mentioned in paragraph (c) of subsection (7) of that section—

- (a) the residual attachment does not, by reason only of that refusal, cease to have effect; and
- (b) it is competent for the creditor to make a further application under section 135(1) of this Act.

Termination, discharge etc. of residual attachment

139 Termination by payment etc.

- (1) Subject to subsection (2) below, if the full sum recoverable by the residual attachment is either paid or tendered to—
- (a) the creditor;
 - (b) where one has been appointed, the appointed person; or
 - (c) a judicial officer or any other person who has authority to receive payment on behalf of the creditor,
- the residual attachment ceases to have effect.
- (2) Subsection (1) above does not apply unless the sum is paid or tendered before—
- (a) where a satisfaction order authorising sale of the attached property is made, a contract of sale of the attached property is concluded; or
 - (b) in any other case, the attached property is otherwise disposed of.

140 Recall

- (1) The debtor or any other person having an interest may apply to the court for an order—

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- (a) recalling a residual attachment; or
 - (b) restricting such an attachment.
- (2) An application under subsection (1) above must—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
 - (b) be intimated to the creditor.
- (3) The court must, if satisfied that the residual attachment—
- (a) is invalid;
 - (b) has been executed incompetently or irregularly; or
 - (c) has ceased to have effect,
- make an order declaring that to be the case and recalling the residual attachment.
- (4) The court may, if satisfied that the residual attachment is valid but—
- (a) having regard to the sum recoverable by the residual attachment, that significantly more property is attached than need be; and
 - (b) that it is reasonable to do so,
- make an order restricting the effect of a residual attachment to part only of the property to which it relates.
- (5) An order of recall or restriction must be in (or as nearly as may be in) the form prescribed by Act of Sederunt.

141 Duration of residual attachment

- (1) Subject to sections 139 and 140 of this Act and to subsection (2) below, a residual attachment ceases to have effect on the expiry of the period of 5 years beginning with the day on which the schedule of residual attachment is served on the debtor.
- (2) The court may, on the application of the creditor during the period of 2 months ending with the day on which the period mentioned in subsection (1) above ends, extend the period during which a residual attachment has effect.
- (3) The court may extend the period for which a residual attachment has effect on more than one occasion and subsections (1) and (2) above apply as if for the reference in subsection (1) above to the day on which the schedule of residual attachment is served on the debtor there were substituted a reference to the day on which the court last extended that period.

142 Effect of death of debtor

- (1) Where, in relation to a debt—
- (a) the creditor has taken any steps towards obtaining a residual attachment order against the debtor; but
 - (b) has not, before the date of death of the debtor, served a schedule of residual attachment on the debtor,
- any such steps cease to have effect; and accordingly any residual attachment order relating to that debt becomes, on that date, void.
- (2) Where a residual attachment is created before the death of the debtor, it continues to have effect in relation to the attached property after that death.

- (3) The Court of Session may, by Act of Sederunt, provide for the operation of this Chapter in a case to which this section applies and may, in particular—
- (a) modify the provisions about intimation of applications for satisfaction orders; and
 - (b) confer power on the sheriff to dispense with or modify procedures under this Chapter.

General and miscellaneous

143 Expenses of residual attachment

- (1) The expenses incurred by the creditor in executing a residual attachment are chargeable against the debtor.
- (2) Expenses which, in accordance with subsection (1) above, are chargeable against the debtor are recoverable from the debtor by the residual attachment but not by any other legal process.
- (3) Where any expenses such as are referred to in subsection (2) above have not been recovered by the time the residual attachment is completed, or otherwise ceases to have effect, they cease to be so recoverable.
- (4) In subsection (2) above, the reference to expenses does not include a reference to expenses of service of a charge.
- (5) The court may, if satisfied that the debtor has objected to an application for a satisfaction order on frivolous grounds, award expenses, not exceeding such amount as may be prescribed by the Scottish Ministers by regulations, against the debtor.

144 Ascription

- (1) This section applies where any sums are—
- (a) recovered by a residual attachment; or
 - (b) paid to account of the sum recoverable by the residual attachment while it is in effect.
- (2) Such sums must be ascribed to the following in the order in which they are mentioned—
- (a) the expenses which are chargeable against the debtor incurred in the residual attachment;
 - (b) any interest which has accrued, at the date of the making of the residual attachment order, on the sum for payment for which the charge was served;
 - (c) any sum for payment of which that charge was served together with such interest as has accrued after the day mentioned in paragraph (b) above.

145 Interpretation

- (1) In this Chapter—
- “appointed person” has the meaning given by section 136(5)(a)(i) of this Act;
 - “attached property” has the meaning given by section 134(1) of this Act;
 - “court” means—

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- (a) the Court of Session; or
- (b) the sheriff,

and references to applying to the court are references to applying by petition or, as the case may be, by summary application;

“croft” has the meaning given by section 3 of the Crofters (Scotland) Act 1993 (c. 44);

“decree” has the meaning given in section 221 of this Act (except that paragraphs (c), (g) and (h) of the definition of “decree” in that section do not apply) being a decree which, or an extract of which, authorises residual attachment;

“document of debt” has the meaning given in section 221 of this Act, being a document which, or an extract of which, authorises residual attachment;

“dwellinghouse” includes any yard, garden, outbuilding or other pertinents;

“judicial officer” means the judicial officer appointed by the creditor;

“residual attachment order” means an order under section 132(2) of this Act;

“satisfaction order” means an order under section 136(2) of this Act; and

“sum recoverable by the residual attachment” has the meaning given by section 134(2)(b) of this Act.

- (2) The Scottish Ministers may by order modify the definitions of “decree” and “document of debt” in subsection (1) above by—
- (a) adding types of decree or document to;
 - (b) removing types of decree or document from; or
 - (c) varying the description of,
- the types of decree or document to which those definitions apply.