

# **DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) ACT 2002**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 2 – Attachment**

##### **Attachment**

29. This part of the Act introduces a new method of enforcement, or diligence, for the attachment of corporeal moveable property. The law of diligence provides procedures by which legal obligations, usually imposed by an order of the civil courts, can be enforced. Different procedures for the enforcement of obligations concerning legally constituted debt apply to different types of property. Corporeal moveable property is property which is tangible (corporeal), is not fixed like land or buildings and can be handled and moved (moveable).
30. Rules of court will make supplementary provision for the manner in which the procedural requirements under this Part of the Act are to be undertaken within the court process – for example, regarding intimation of documents and steps in procedure, the conduct of hearings and the manner in which applications to the sheriff or appeals against decisions may be made (including provision of forms to be used). The Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002, which came into force on 30 December 2002, makes provision for the rules to be applied under the Act.

##### **Section 10 – Attachment**

31. This section creates a new diligence over corporeal moveable property for recovery of legally constituted debt, to be known as attachment.
32. [Section 10\(3\)](#) and [\(4\)](#) provide that attachment is only competent where the debtor has been charged to pay the sum owed together with interest accrued and the creditor has provided the debtor with a debt advice and information package. In the absence of a charge to pay in summary warrant cases, the creditor must provide the debtor with a debt advice and information package before taking any steps to carry out an attachment.
33. [Section 10\(5\)](#) defines terms used in this section. It specifies that the debt advice and information package is to contain such information as may be determined by the Scottish Ministers. It also specifies the meaning of decree and document of debt.

##### **Section 11 – Articles exempt from attachment**

34. This section specifies property which is to be exempt from attachment.
35. [Section 11\(1\)](#) provides that it will not be competent to attach articles which are reasonably required for the debtor's profession, trade or business, and which do not exceed an aggregate value of £1,000. In particular, tools of trade, books other equipment

may not be attached. This will enable valuable property to be attached whilst permitting the debtor to retain items which will allow him to continue his business and generate income. This is in line with recommendations 7 and 11 of the Scottish Law Commission in its *Report on Pounding and Warrant Sale* (Scot Law Com No177). Specific provision is also made to exempt a vehicle reasonably required by the debtor and not exceeding £1000, and a mobile home which is the debtor's only or principal residence. Gardening equipment necessary for keeping a debtor's garden or yard adjacent to where the debtor lives is also exempted.

36. **Section 11(2)** allows the Scottish Ministers to add or remove and vary the items exempted by regulations. This will provide flexibility in order to meet changing circumstances or where it is considered that further debtor protection may be needed.

### ***Section 12 – Times when articles may not be attached***

37. **Section 12** specifies days on which attachment may not take place, namely on a Sunday, a day which is a public holiday in the area in which the attachment is to be executed or any other day prescribed by rules of court. It also specifies times during which attachment may not take place, restricting it to between 8am and 8pm unless prior authority has been obtained from the sheriff.

### ***Section 13 – Presumption of ownership***

38. **Section 13** provides a presumption that articles in the possession of a debtor are owned by the debtor, either solely or in common with a third party.

### ***Attachment of articles kept outwith dwellinghouses***

#### ***Section 14 – Procedure for attachment of articles kept outwith dwellinghouses etc.***

39. **Section 14** provides that sections 15 to 19 apply only to the attachment of articles which are kept outwith a dwellinghouse and that they do not apply to a mobile home which is the debtor's only or principal residence.

### ***Section 15 – Power of entry and valuation***

40. **Section 15(1)** provides for entry into premises which are not a home (dwellinghouse) for the purpose of executing an attachment and permits locked premises to be opened if necessary. Sections 15(2) and (3) provide that the valuation of an article is to be based on the amount the article would be likely to fetch if sold on the open market, and is to be carried out, where appropriate, by a professional valuer or other suitably skilled person. This will be applicable in cases where, for example, the article concerned is antique or unusual.

### ***Section 16 – Attachment of mobile homes***

41. This permits a caravan, houseboat or other moveable structure used as a dwellinghouse, which is the only or principal residence of a third party, to be released from an attachment. The third party must be given notice of the attachment. The debtor or the third party may then, within 14 days of the attachment, apply to the sheriff for its release. If, however, there is good reason for the application being made late the sheriff can consider an application made after that period but before the mobile home is auctioned.

### ***Section 17 – Report of attachment***

42. This section provides for judicial supervision of the attachment by requiring that a report of the attachment be made to the sheriff within 14 days of its execution. The sheriff may allow a longer period on cause shown. If there is some irregularity in the format of, or procedure by which the report was made, the sheriff may refuse to accept the report and the attachment will cease to have effect.

43. **Section 17(2)** provides that the report must be in the form prescribed in rules of court and that it must be signed by the officer. **Section 17(3)** stipulates what the report should specify. Under **section 17(4)** the report need not specify articles which have been sold following specific orders made by the court regarding the sale of perishables nor a vehicle that has been sold.

### ***Section 18 – Redemption***

44. **Section 18** enables attached articles to be redeemed by the debtor within 14 days of the date on which the article was attached. This provides for circumstances where an article has been attached but the debtor wants to buy it back before auction.
45. **Section 18(2)** specifies that the article must be redeemed at the attached value. **Section 18(3)** and (4) provide for a receipt to be given when payment is made upon which the attachment will cease to have effect. The receipt will be in a form prescribed by rules of court.
46. **Section 18(5)** provides for a supplementary report to be made as soon as reasonably practicable to the sheriff in respect of a redemption made after the original report of attachment has been made.

### ***Section 19 – Removal and auction of attached articles***

47. **Section 19** requires arrangements for the auction of attached articles to be made and, after notice of the date on which the auction is to take place has been given, permits the removal of articles from the place where they are kept to the place where the auction is to take place. **Section 19(4)** and (5) permit only sufficient articles as would, if sold at their attached values cover the debt due, to be removed for auction. Any remaining attached articles will cease to be subject to attachment.

### ***Section 20 – Order for security of articles or sale of articles which are perishable etc.***

48. **Section 20** allows the sheriff to make an order for the security of attached articles and for the immediate sale of perishable articles so that they will not deteriorate and lose value. The proceeds of sale are then consigned in court.
49. **Section 20(2)** provides that an application for such an order must be intimated to the debtor or creditor and the officer depending on which party makes the application.
50. **Section 20(4)** provides that where an attachment ceases to have effect before an auction takes place the sum consigned in court will be paid to the creditor to meet the debt and any surplus will be paid to the debtor.

### ***Section 21 – Unlawful acts after attachment***

51. This section prohibits the removal, sale, gifting or other disposal of attached articles and their wilful destruction or damage. To do so will be in breach of the attachment and may be dealt with as a contempt of court.
52. **Section 21(7)** requires the debtor to give notification to the creditor and officer if an attached article is stolen and of any insurance claim which the debtor intends to make. **Section 21(10)** provides that, where attached articles have been damaged, destroyed or stolen, the sheriff may order that others be attached. Damaged articles may, on the authority of the sheriff, be revalued.
53. **Section 21(11) to (15)** makes provision for a sum of money to be consigned in court in circumstances where an article is made unavailable by the debtor or any third party who knows the article is attached. These include where the debtor or third party moves an attached article and it is subsequently damaged, destroyed, lost or stolen or is acquired by another person who is unaware of the attachment, and where the debtor or third party

wilfully damages or destroys the article. The sum to be consigned will be equal to the difference between the value of the article when attached and the value of the damaged article or, in any other case, a sum equal to the attached value. Where the attachment of a damaged article ceases to have effect before its auction, any sum which has been consigned in court will be paid to the creditor to the extent necessary to meet the debt with any surplus left over being paid to the debtor.

### ***Section 22 – Release of vehicle from attachment***

54. This section provides for the protection of vehicles where auction would be unduly harsh in the circumstances, for example, vehicles used for travel to work or for regular medical treatment in a rural area not serviced by public transport. Circumstances which would constitute undue harshness are not specified, thus allowing the sheriff to make a decision based on the debtor's individual circumstances. This section implements recommendation 11 of the Scottish Law Commission in Scot Law Com No 177.
55. [Section 22\(1\)](#) entitles the sheriff, on an application by the debtor, to make an order for release of the vehicle. [Section 22\(2\)](#) restricts the release to vehicles whose value does not exceed £1,000. This monetary limit may be varied by the Scottish Ministers in regulations. [Section 22\(3\)](#) provides that, where the value of the vehicle is over £1,000, the sheriff may order the sale of the vehicle and for the proceeds of sale up to £1,000 to be paid to the debtor to enable a replacement vehicle to be obtained and for any surplus to remain in court. [Section 22\(5\)](#) provides that if the vehicle cannot be sold within 14 days of the date of the order the attachment will cease to have effect.

### ***Section 23 - Appeals against valuation***

56. [Section 23](#) provides that, where a sheriff is satisfied that the aggregate value of the attached articles is substantially below market value, the sheriff may, up until the date of their auction, order the attachment to cease.. [Section 23\(2\)](#) provides that this can be done either on the sheriff's own accord or on an application by the debtor. [Section 23\(3\)](#) ensures that such an order cannot be made without the debtor and creditor having been given an opportunity to make representations and, if they so wish, be heard.

### ***Section 24 – Duration of attachment***

57. This section provides that an attachment will cease to have effect if no further action is taken within six months of the attachment or 28 days of the removal of the attached article from the place at which it was attached, whichever is the earlier. An extension of the period may be permitted only by order of the sheriff in circumstances where the debtor is likely to comply with an agreement with the creditor to pay the debt due by instalments or where the auction cannot take place before the date on which the attachment ceases through no fault of the creditor and that will prejudice the creditor.

### ***Section 25 – Second attachment at same place***

58. [Section 25](#) provides that a second attachment may not be undertaken at the same premises to enforce the same debt unless other articles were brought onto the premises after the first attachment took place.

### ***Section 26 – Invalidity and cessation of attachment***

59. [Section 26](#) provides that, at any time before the auction of attached articles, the sheriff may, on his own initiative or on an application by the debtor, make an order declaring the attachment to be invalid or having ceased to have effect. The sheriff may also make such other order as is considered necessary in the circumstances. This enables enforcement action to be halted in the event of an irregularity in procedure or if an attachment should have ceased to have had effect.

60. [Section 26\(4\)](#) gives the debtor and the creditor an opportunity to make representations and, if either so wishes, to be heard. [Section 26\(5\)](#) provides for any articles removed to be returned in the event of an order being made. [Section 26\(6\)](#) provides for the sheriff to give reasons for a refusal to grant such an order.

### **Auction of attached articles**

#### ***Section 27 – Notice of public auction.***

61. [Section 27](#) provides that an auction of attached articles must be held by public auction in an auction room unless it is impractical to do so in which event the auction may be held in an alternative location that the officer considers appropriate other than in a debtor's dwellinghouse. [Section 27\(3\)](#) allows other articles, attached along with those which it is impractical to auction in an auction house, to also be auctioned at the alternative location in order to prevent the cost of having two auctions.
62. Intimation of the date and place of the auction, and the date of removal of attached articles kept outside dwellinghouses, must be given to the debtor and to any third party in possession of the attached articles, and details advertised by public notice.

#### ***Section 28 – Alteration of arrangements for removal or auction***

63. [Section 28\(1\)](#) prohibits the date of auction or removal from being varied, unless due to circumstances beyond the creditor's or officer's control. Any new date must be intimated to the debtor and to any other person in possession of the attached articles. [Section 28\(3\)](#) requires the new date to be at least seven days after intimation.

#### ***Section 29– Cancellation of auctions***

64. This section allows an auction to be cancelled to enable the debtor to repay the debt in the event of an agreement having been reached with the creditor but restricts the cancellation to no more than two occasions. [Section 29\(4\)](#) allows for any necessary subsequent resumption of the auction should the debtor default on an agreement made with the creditor, provided that the sheriff, on an application by the creditor, is satisfied that the debtor has defaulted. [Section 29\(5\)](#) makes provision for the debtor to be given an opportunity to respond to an allegation that he/she has breached the agreement, including a right to be heard, before the sheriff makes an order allowing the resumption of the auction.

#### ***Section 30 – Auction***

65. [Section 30\(1\) to \(3\)](#) provides for the auction to be attended by the officer and a witness and for a record to be made of the articles sold specifying the amount which each achieved.
66. [Section 30\(4\)](#) permits any article to be bought by any creditor or by a third party who owns the article in common with the debtor.

#### ***Section 31 – Disposal of proceeds of auction***

67. [Section 31\(1\)](#) provides for the proceeds of the auction to be applied firstly to meet the expenses of the procedure and then to the creditor to meet the debt with any surplus payable to the debtor. [Section 31\(2\)](#) provides that, where the sum due is not realised, ownership of any unsold articles will pass to the creditor, in which case their value will be credited against the debt due.
68. [Section 31\(6\)](#) specifies that the proceeds of auction are to include any sum consigned in court and any sum received from a third party for purchase of the debtor's share in joint property.

### ***Section 32 – Report of auction***

- 69. **Section 32(1)** requires a report to be made to the sheriff within 14 days of the date of auction.
- 70. **Section 32(2)** specifies the content of the report of auction, including details of articles sold and remaining unsold, price achieved, expenses, any surplus paid to the debtor and any balance due to or by the debtor.
- 71. **Section 32(3)** provides for the sheriff to order that the chargeable expenses, in whole or in part, be charged against the officer responsible for the report in the event of the report being made late without reasonable excuse or the officer's refusal or delay in making the report. Section 31(4) allows the sheriff to treat any such failure as misconduct.

### ***Section 33 – Audit of report of auction***

- 72. **Section 33** requires the sheriff to remit the report of the auction to the auditor of court for him to tax the expenses charged, certify the balance due to or by the debtor and make a report to the sheriff.
- 73. **Section 33(4)** requires the sheriff to make an order declaring what sum remains due to or by the debtor. In the event of an irregularity in the procedure, the sheriff may declare the auction void and make any other provision considered necessary as a result. However, any such order will not affect a purchaser's title to property bought in good faith.

### **General and miscellaneous provisions**

#### ***Section 34– Articles belonging to a third party***

- 74. **Section 34(1)** enables articles, prior to auction, to be released from attachment where a third party claims ownership and either the officer is satisfied as to the validity of the claim or the sheriff grants an order.
- 75. **Section 34(3)** provides for other articles owned by the debtor and kept at the same place as where the original attachment took place to be attached instead of the released articles.

#### ***Section 35 – Articles in common ownership***

- 76. **Section 35(1)** allows articles commonly owned by a debtor and a third party to be attached and sold in satisfaction of the debtor's debt.
- 77. **Section 35(2)** allows the common owner to redeem such articles on payment of an amount equal to the debtor's interest in the article.
- 78. **Section 35(3)** enables the sheriff to order that the article be released from attachment where its sale would be unduly harsh to the common owner.
- 79. **Section 35(4)** provides for other articles owned by the debtor to be attached in replacement.

#### ***Section 36 – Procedure where articles in common ownership are sold at auction.***

- 80. **Section 36** covers circumstances where assets in common ownership are sold at auction. Section 36(1) and (2) entitles the third party to a proportion of the proceeds of sale corresponding to his/her interest in them.

#### ***Section 37 – Attachment terminated by payment or tender of full amount owing***

- 81. **Section 37** provides that an attachment will cease to be effective where the full amount owing to the creditor is paid.



***Section 38 – Assistance to debtor***

82. Section 38 allows the sheriff clerk to provide debtors with assistance in explaining the procedure involved or completing any forms which may be necessary in connection with any of the procedures in the Act.

***Section 39 – Expenses chargeable in relation to attachment etc.***

83. This section makes provision for determining liability as between debtor and creditor for the expenses of the procedures in the Act.

***Section 40 – Recovery from debtor of expenses of attachment***

84. This section specifies when the expenses of an attachment chargeable against the debtor may be recovered otherwise than from the proceeds of auction.

***Section 41 – Ascription of sums recovered by attachment or while attachment is in effect***

85. This section provides for the order in which amounts recovered by attachment are to be applied, namely towards the cost of attachment, then to interest payable which had accrued by the date of the attachment, then to the debt due including expenses.

***Section 42 – Restriction on fees payable by debtor***

86. This section prohibits the charging of fees to the debtor for any application made by the debtor under the Act, any objections made by the debtor to an application made by another party or in relation to any hearing.

***Section 43 – Power to provide for lay representation***

87. This section confers power to make provision in rules of court for lay representation to be permitted in proceedings concerning attachment.

***Section 44 – Legal aid***

88. This section provides that legal aid is not available for proceedings under Parts 2 and 3 of the Act. Third parties are not prevented from obtaining legal aid in connection with those proceedings.

***Section 45 – Interpretation of this Part and Parts 3 and 4***

89. This section defines terms used in Parts 2, 3 and 4 of the Act.