

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 8 – Attachment of Money

Money attachment

Section 174 – Money attachment

583. *Section 174(1)* establishes a new diligence of “money attachment” which can be used to attach “money” (as defined in section 175) owned by a debtor.
584. Subsection (2) provides that money attachment is permitted to enforce payment of a debt only if—
- the creditor holds a court decree or other enforceable document by which the debt is constituted (the definitions of “decree” and “document of debt” which apply to this Part by virtue of section 198(1) are set out in section 221);
 - a charge to pay has been served on the debtor;
 - the period for payment set out in the charge (14 days, or 28 days if the debtor is outside the UK or the debtor’s whereabouts are unknown – see section 90(3) of the 1987 Act) has expired without the debtor having made payment of the debt; and
 - where the debtor is an individual, the creditor has, no earlier than 12 weeks before executing the money attachment, provided the debtor with a debt advice and information package (being the package issued under section 10(5) of the 2002 Act – see section 221).
585. Subsection (3) provides that money in a dwellinghouse cannot be attached. The meaning of “dwellinghouse” here has the same meaning as in section 45 of the 2002 Act (see section 198(1)). Accordingly, a dwellinghouse does not include a garage even if it is built into the house nor does it include garden sheds or other outbuildings but a caravan, houseboat or other place used as a dwelling can be regarded as a dwellinghouse. Subsection (3) also provides that money attachment is not competent when the money is capable of being arrested. That is to say the money is held on behalf of a debtor by a third party, for instance a cheque made out to a debtor is being held by the debtor’s solicitor or accountant.

Section 175 – Meaning of “money” and related expressions

586. This section deals with what is meant by “money” and so clarifies what can be attached by the new diligence.

These notes relate to the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) which received Royal Assent on 15 January 2007

587. “Money” means cash and banking instruments but excludes any cash or instrument which has an intrinsic value greater than any value it may have as a medium of exchange (which, in simple cases such as coins and notes, will be the face value). An example would be a collectable coin which has a greater value as a collectable coin than it has as a medium of exchange. Such money, whilst excluded from money attachment, will instead be attachable by the diligence of attachment.
588. “Cash” is defined as coins and banknotes in any currency. “Banking instrument” is defined as meaning—
- cheques and other instruments to which section 4 of the [Cheques Act 1957 \(c.36\)](#) applies. Section 4 covers—
 - cheques;
 - other documents issued by a customer of a bank which permit a person to receive payment from the bank of the sum stated in the document;
 - documents which enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer (often referred to as government cheques); and
 - bankers drafts;
 - any document issued by a public officer which entitles a person to payment of a sum from a government department (these are effectively another form of government cheque). Subsection (2) clarifies what the reference to “government department” includes. This term is wide and encapsulates Ministers and departments from all administrations. Documents under section 4(2)(c) of the Cheques Act 1957 are excluded from this part of the definition not because they aren't covered but simply because the reference to “cheques and other instruments” already covers them;
 - promissory notes (other than banknotes). A promissory note is an unconditional promise in writing and made by one party to another engaging to pay, on demand or at a fixed determinable future time, a sum certain in money to, or to the order of, a specified person, or to a bearer. The most common example is banknotes. However, these are already defined to mean “cash” for the purposes of money attachment and so are expressly excluded from the definition of “promissory note”;
 - other negotiable instruments. This covers other negotiable instruments which are not already expressly defined such as dividend warrants; and
 - money orders and postal orders. It is necessary to expressly include this category of instrument as they are not negotiable instruments.
589. Subsection (1) also makes it clear that references to “the value of money” in the sections relating to money attachment, unless the context otherwise requires, is a reference to—
- the amount of cash (coins and banknotes);
 - in the case of currency other than sterling, the equivalent sterling amount; and
 - in the case of a banking instrument, the amount of cash that would be obtained by realising the value of the instrument (for example, the amount credited to a bank account when a cheque is banked).
590. Subsection (3) gives the Scottish Ministers power to modify the definition of “banking instrument” by order made by statutory instrument subject to the negative resolution procedure of the Scottish Parliament. This power could be used where either a type of banking instrument referred to in this section becomes obsolete or if a new type of instrument were created in the future.

Section 176 – When money attachment not competent

591. Subsections (1) and (2) of section 176 provide that money attachment cannot be carried out on a Sunday, a public holiday in the area in which the attachment is to be carried out or on any other day designated by rules of court. An attachment must not begin before 8 a.m. or after 8 p.m. and cannot continue after 8 p.m. if it is in progress. A judicial officer can, however, apply to the sheriff for authority to commence a money attachment or to continue to carry it out outwith these times.
592. Subsection (3) provides that a second money attachment cannot be executed in the same place as a money attachment has already been executed if the second attachment is to enforce the same debt unless other money has been brought to that place after the first money attachment has taken place. The words “or is purported to be attached” make it clear that even if the first money attachment turns out to be invalid a second money attachment at the same place is not permitted because of this provision. This, however, is subject to certain exceptions (contained in sections 183(12)(b), 186(3)(b) and 191(4)). A second attachment at the same place will be allowed where, for instance, attached money has been released because it was not owned by the debtor. The judicial officer can therefore attach other money owned by the debtor.
593. Subsection (4) provides that money can be attached only once to enforce a particular debt. If money is attached and the money attachment ceases to have effect, the money is released back to the debtor. It cannot be re-attached for the same debt.