

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 8 – Attachment of Money**

#### **Execution of money attachment**

#### ***Section 177 – Removal of money attached***

594. Subsections (1) and (2) of section 177 provide that the judicial officer executing a money attachment can attach and remove money only up to an amount which, in the opinion of the judicial officer, does not exceed the amount claimed in the charge plus any interest together with all expenses chargeable against the debtor for the money attachment. This amount of money is referred to as the “sum recoverable by the money attachment” throughout the money attachment sections. Because the expenses of the money attachment are not settled until the end of the process and the value of some banking instruments may not be immediately ascertainable, the judicial officer has to take a view on how much attached money would represent the sum recoverable.
595. Subsections (3) and (4) put a duty on the judicial officer to convert any non-sterling cash into sterling as soon as reasonably practicable and to obtain the best amount practicable for it. All cash in sterling, including that which has been converted from foreign currency, is to be deposited in a bank account (subsection (5)).
596. Subsection (6) provides that the officer does not need to attach and remove any banking instrument other than cheques unless instructed to attach instruments like this by the creditor. If the creditor does not instruct the officer to attach these other instruments, the officer cannot be liable for any loss incurred by a failure to attach those instruments. Where a banking instrument is attached, the officer must have it valued at the price it is likely to fetch on the open market unless the officer thinks a professional valuation is needed (subsection (7) and see also section 180).

#### ***Section 178 – Presumption of ownership***

597. **Section 178(1)** provides that a judicial officer carrying out a money attachment can assume that any money found in the premises where the attachment is being carried out is owned wholly or in part by the debtor. But, before attaching any money, the officer must ask anyone present about the ownership of the money and particularly ask whether the money is owned by the debtor in common with someone else (subsection (2)).
598. Subsections (3) and (4) provide that an officer cannot presume that money is owned wholly or in part by the debtor if the officer knows or ought to know that this is not the case. But a simple assertion by a person that the money is not owned by the debtor is not

enough to override the presumption that the debtor owns the money. The officer would need to be presented with more information or evidence that the money was not the debtor's before the officer would be precluded from relying on the normal assumption.

### ***Section 179 – Schedule of money attachment***

599. **Section 179(1)** provides that a judicial officer, immediately after carrying out a money attachment, must complete a schedule of money attachment. The schedule of money attachment is a document which will contain all the details about the money which has been attached. It may either be a paper document or it can be completed electronically, in which case it would need to include an electronic signature (see section 198(3)).
600. Under subsection (2)(b)(ii), the schedule must specify the value of the attached money but only so far as ascertainable because the officer may not have been able to make an accurate valuation of all the attached instruments at the time of executing the attachment.
601. Under subsection (3), the judicial officer must give a copy of the schedule to the debtor. Where this is not practicable, perhaps because the debtor is not present at the time, a copy must be given to any other person present at the place where the money attachment was executed or, if nobody is there, the officer must leave a copy at that place.
602. Subsection (4) provides that the day on which a money attachment is carried out is to be the day on which the judicial officer hands over a copy of the schedule under subsection (3). This is to make it clear when the money attachment is executed and, in particular, it clarifies that banking instruments may be attached even though the officer decides that a professional valuation of them is needed. In practical terms, it may not be possible to have such a valuation carried out on the same day as the money attachment. This section makes it clear that, nevertheless, the instruments are still attached pending that valuation.

### ***Section 180 – Valuation of banking instruments***

603. This section gives a judicial officer the power to seek a professional valuation of a banking instrument where the officer thinks it is appropriate to do so. In particular, this may be necessary for complex negotiable instruments where the value on the open market may not be obvious to a non-expert. The costs of obtaining a valuation are charged to the creditor but may be recoverable from the debtor under section 196 and paragraph 1(c) of schedule 3.

### ***Section 181 – Order for realisation of money likely to deteriorate in value***

604. This section permits a creditor, judicial officer, or debtor to apply to the sheriff for an order allowing the creditor or officer to immediately realise the value of any of the attached money. The sheriff may grant such an order if the sheriff thinks the money in question is likely to deteriorate quickly and substantially in value. An example would be a banking instrument denominated in the currency of a country where the economy was collapsing and that currency was very quickly losing value on the money markets.
605. Subsection (4) authorises the officer to act as the irrevocable agent of the debtor and to take any of the steps set out in section 184(3), so the officer can do anything to realise the value of the money that the debtor could do such as presenting a cheque payable to the debtor for payment.

### ***Section 182 – Report of money attachment***

606. **Section 182(1)** requires the judicial officer to make a report of the money attachment within 14 days of the day the money attachment is executed, unless the judicial officer has requested, and the sheriff has authorised, a longer period.

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

607. The report will be a detailed account of the money attached and must include the value of all the attached money (including any money which required a professional valuation), the details of any ownership dispute and the details of any money already released. As with the schedule of money attachment, the report can be made electronically but would require an electronic signature in accordance with section 198(3).
608. Under subsection (5) the sheriff may refuse to receive a report if the stipulated period has expired or the report is not in the correct form. Where the sheriff does refuse the report the money attachment ceases to have effect and the officer has to return the money attached or, where it has already been realised, a sum equivalent to the money attached.