

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 8 – Attachment of Money

Release of money attached

Section 183 – Creditor’s application for payment order

609. This section permits the creditor to apply to the sheriff for an order (a “payment order”) permitting the creditor to receive payment of the sum recoverable out of the attached money. A payment order can be applied for only in relation to attached money not already released.
610. The creditor must apply for a payment order within 14 days of the date on which the report of the money attachment is made (subsection (3)), otherwise the money attachment ceases to have effect (see section 187(1)). The application is to be in the form prescribed in rules of court. The creditor must send a copy of the application to the debtor, the judicial officer and any other interested party (subsection (4)). The debtor or any person claiming ownership of the attached money may oppose the application (subsection (6)). An opposition to the order must be made in the form prescribed in court rules, within 14 days of the application for a payment order (subsection (7)). The sheriff must allow the creditor, debtor and any third party who opposes the order to make representations or alternatively the sheriff can hold a hearing (subsection (8)). If the opposition is on the grounds that the money attached is not owned by the debtor, the burden of proving that falls on the debtor or the third party claiming ownership (subsection (9)).
611. Under subsection (5), the sheriff must make a payment order unless—
- there has been a material irregularity in the execution of the money attachment (subsection (10)), for example that the money attachment has been executed on a Sunday without authority from the sheriff;
 - the sheriff is satisfied that the money is not owned by the debtor (subsection (12));
 - there is an opposition to the payment order being made (subsection (6)).
612. If there is a material irregularity or an opposition is upheld, the money attachment ceases to have effect and the money must be returned to the original owner (either the debtor or a third party who correctly claimed ownership). If the opposition was only in relation to some of the money attached then the attachment only ceases in relation to that money and only that money is returned.

613. Subsection (12) provides that the sheriff may make an order declaring that the money attachment ceases to have effect if the sheriff is satisfied that any money attached is not owned by the debtor. After such an order is made a judicial officer may attach other money which the debtor owns and which is kept at the same place where the original money attachment was carried out.

Section 184 – Effect of payment order

614. Section 184(1) provides that a payment order authorises a judicial officer to realise the value of money attached and pay the creditor the sum recoverable (with any surplus to the debtor) whilst first retaining an amount to meet the officer's fees and outlays. By virtue of amendments in paragraph 13(3) of schedule 5 to this Act, the disposal of the money is subject to section 37 of the 1985 Act. This has the effect of equalising diligences executed within 60 days before the sequestration of a debtor with the sequestration itself. In those circumstances, the sum to be disposed of becomes part of the debtor's sequestrated estate and is distributed accordingly.
615. Subsections (2) and (3) authorise the officer to act as the irrevocable agent of the debtor in relation to attached cheques and negotiable instruments and to do anything the debtor could have done to realise the value of the instrument, for example, presenting a cheque for payment.
616. Subsection (4) imposes a duty on the officer to obtain the highest amount as is reasonably practicable for any instrument being realised.

Section 185 – Release of money where attachment unduly harsh

617. This section provides the sheriff with power, on the application of the a debtor before a payment order is made or a money attachment ceases, to order the release of the money attached (or a portion of it) up to £1,000, or other sum set by the Scottish Ministers in regulations, on the grounds that the attachment is unduly harsh to the debtor.
618. It is for the sheriff to decide whether, in all the circumstances, the attachment is unduly harsh. This is likely to require a balancing exercise by the sheriff as to the impact of the money attachment on the debtor (and possibly any relevant third parties such as dependents or employees) as compared with the detrimental effect to the creditor of releasing up to £1,000 of the money attached.
619. Where the attached money includes a banking instrument the judicial officer is authorised by any order under this section to realise the value of the instrument, to pay the debtor the amount set out in the order and to deposit any remaining money in a bank account. Again, the judicial officer is entitled to act as irrevocable agent of the debtor when doing so.
620. Subsection (7) provides that where a judicial officer has realised the value of an instrument so as to pay a sum back to the debtor as required by an order under this section, and the amount realised is less than the amount specified in the order, the order is deemed to have specified that lesser amount and the officer need pay only that amount to the debtor.

Section 186 – Invalidity and cessation of money attachment

621. This section provides the sheriff with the power to order a money attachment to cease and to return any money attached (or a sum equal to the money's value if the money has already been realised) to the debtor (or third party owner) where either there was a material irregularity in the execution of the money attachment or the sheriff is satisfied that the money attached did not belong to the debtor.
622. If the sheriff is satisfied that only part of the money attached did not belong to the debtor, the sheriff can order that part to be returned to the third party who does own the

money in question. The judicial officer may attach other money owned by the debtor and kept in the place the original attachment was executed.

623. An order can be made on the sheriff's own initiative (for example, if the report of the money attachment discloses an irregularity or an issue about ownership) or can be applied for by the debtor or a third party. A hearing may be held or representations made prior to an order being made and the sheriff has to provide reasons for making an order (or refusing to do so, if it has been applied for).

Section 187 – Termination of money attachment

624. This section provides that where the creditor fails to apply for a payment order before 14 days have expired from the date on which the report of the money attachment is made, or fails to send a copy of the application to the judicial officer, as required by section 183(4)(b), the money attachment ceases to have effect. It also provides for a money attachment to cease to have effect on payment of the sum recoverable by the money attachment. Where payment of the sum due is offered but not accepted within a reasonable time, the money attachment will also cease.

Section 188 – Redemption of banking instrument

625. [Section 188\(1\)](#) permits a debtor, at any time before 14 days have expired from the date on which the report of the money attachment is made, to buy back a banking instrument. But subsection (2) prevents a debtor from doing so if the instrument is already the subject of an order for immediate realisation (see section 181).
626. If the debtor wishes to buy back the instrument, the debtor must buy it at the value specified in the judicial officer's report of the money attachment (subsection (3)).
627. When the debtor pays the judicial officer, the officer has to issue a receipt and report the buy-back to the sheriff (subsection (4)). The issuing of the receipt stops the money attachment from having any effect on the instrument that has been bought back.