

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 11 – Maills and Duties, Sequestration for Rent and Landlord’s Hypothec

Landlord’s hypothec and sequestration for rent

Section 208 – Abolition of sequestration for rent and restriction of landlord’s hypothec

729. Under the common law a landlord has a right in security over certain moveable property situated in land or buildings which the landlord has let. The security is known as the landlord’s hypothec and it secures 1 year’s rent due from a tenant. Before the coming into force of this section it would last for 3 months after the last due date for payment of that rent. The security could be enforced by an action of sequestration for rent provided it were raised before the end of that 3 months. The action attached the goods secured by the hypothec and permitted the landlord to obtain warrant to sell the goods in satisfaction of the rent. This action was available to a landlord in addition to any other diligence such as attachment or arrestment which would also be available to the landlord as a creditor of a tenant.
730. **Section 208(1)** abolishes the diligence of sequestration for rent and subsections (2) to (9) and (11) make various changes to the law relating to the landlord’s hypothec as a consequence.
731. The abolition of sequestration for rent does not affect any action for sequestration for rent brought before this section comes into force but the provisions in subsections (4) to (7) limiting the property which is subject to the landlord’s hypothec and therefore attachable by sequestration for rent will apply to existing actions (subsection (10)).
732. Subsection (2) preserves the landlord’s hypothec and makes clear the nature of the security it confers. It continues as a real right in security over corporeal moveable property and as a result it gives the landlord an appropriate ranking relating to property over which it confers a security. “Insolvency proceedings” for the purposes of subsection (2) are defined in subsection (12).
733. Subsection (3) clarifies the limitations on the landlord’s hypothec and abolishes it as a security over property kept in a dwellinghouse, on agricultural land or on a croft. A “dwellinghouse” for this purpose includes a mobile home, caravan or houseboat used as a dwelling.
734. Under subsection (4), the hypothec will no longer arise in relation to property owned by a person other than the tenant.

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

735. Subsection (5) provides that the hypothec does not affect any property which is acquired by a third party from the tenant in good faith or, where a landlord has interdicted a tenant from disposing of property subject to the hypothec, any property bought in good faith and for value by a third party from a tenant. But if property is sold by a tenant in breach of an interdict, the tenant remains liable for the breach despite the property no longer being subject to the hypothec due to subsection (5)(b).
736. Where property is in the shared ownership of the tenant and a third party, the hypothec can secure only the tenant's interest in the property (subsection (7)).
737. Subsection (8) provides that the landlord's hypothec is security for any rent for which the date for payment has passed and payment has not been made (so it cannot be security for future rent due) and that it continues as long as the rent remains unpaid. This overrides the common law rule that the hypothec secures 1 year's rent and lapses if not enforced by sequestration for rent within 1 month of the date the rent was due (see subsection (9)). The change made by subsection (8) will apply to any pre-existing hypothec.
738. Subsections (2) to (9) (but not subsection (3)) affect a landlord's right of hypothec which arose before this section comes into force and which subsists on that date (see subsection (11)).