

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 7 – Interim Attachment**

##### *Section 173 – Interim attachment*

513. **Section 173** inserts a new Part 1A into the 2002 Act (after section 9).
514. Part 2 of the 2002 Act established the diligence of attachment in execution to replace the former diligence over the corporeal moveable property of debtors (pounding). Part 1A provides for attachment (known as “interim attachment”) on the dependence. Interim attachment will allow a creditor to attach a debtor’s tangible assets (also known as corporeal moveable property) on the dependence of a court action for payment.

#### **Interim attachment**

##### **New section 9A – Interim attachment**

515. Section 9A(1) creates interim attachment by giving the court power, subject to sections 9B to 9E, to grant a warrant which will authorise the attachment of corporeal moveable property (owned either solely by the debtor or in common with a third party) on the dependence of a court action.
516. Subsection (2) provides that a warrant for interim attachment is competent only where the court action on the dependence of which it is sought contains a conclusion for payment of a sum of money other than expenses.
517. Subsection (3) has the effect of allowing interim attachment on the dependence of petitions in the Court of Session.
518. Subsection (4) makes it clear that interim attachment is available in all sheriff court actions and also sets out definitions of “court”, “creditor” and “debtor” for this Part of the 2002 Act. It also provides that expressions used in Part 1A of the 2002 Act which are also used in Part 2 of that Act have the same meanings in Part 1A as those expressions have in Part 2, unless the context otherwise requires. As an example, in Part 1A the “officer” means “the judicial officer appointed by the creditor” by virtue of section 45 in Part 2 of the 2002 Act (as amended by paragraph 30(13) of schedule 5 to this Act).

##### **New section 9B – Articles exempt from interim attachment**

519. Section 9B provides that interim attachment may not be used to attach the following assets—
- those inside the debtor’s home;

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- those which are exempt under section 11 of the 2002 Act, namely—
  - equipment which the debtor reasonably requires for a profession, trade or business provided it doesn't exceed £1,000 in aggregate value (or any other sum prescribed in regulations);
  - any vehicle reasonably required by the debtor which is not worth more than £1,000 (or any other sum prescribed in regulations);
  - a mobile home which is the debtor's only or principal residence;
  - any equipment reasonably required for maintenance of a garden or yard beside or associated with the debtor's home; and
  - by virtue of the amendment of section 11 by schedules 4 and 5 to this Act, cargo onboard ships and money (as defined in section 175 of this Act);
- a mobile home which is the only or main residence of a person other than the debtor;
- those which are perishable or with potential to deteriorate quickly and to a great extent in condition or value; and
- material for a manufacturing process or goods to be sold as a normal part of a debtor's stock in trade.

### **Application for interim attachment**

#### **New section 9C – Application for warrant for interim attachment**

520. Section 9C(1) provides that, at any time before a final decision has been taken in a court action, the creditor may apply for warrant for interim attachment. This section should be read with section 9G, which makes it clear that warrant for interim attachment can be applied for, granted and executed before service of the summons in the action.
521. Subsection (2) requires the application for the warrant: (a) to be in the form, or nearly as may be in the form, specified in rules in court; (b) to be intimated to the debtor and any other interested party; (c) to state where an immediate warrant is being sought before a hearing on the application; and (d) to include any other information which the Scottish Ministers require such applications to contain. That power is exercisable by regulations which (by virtue of section 62 of the 2002 Act) are subject to negative resolution procedure.
522. Subsection (3) provides that, where an immediate warrant is sought before a hearing of the application under section 9E, the application for warrant for interim attachment need not be intimated.
523. Subject to section 9D, which enables the court to grant warrant without an initial hearing, subsection (4) requires the court to fix a date for a hearing on the application and to order the creditor to intimate that date to the debtor and any other person the court thinks has an interest.

#### **New section 9D – Grant of warrant without a hearing**

524. Subsections (1) and (2) of section 9D give the court power to grant a warrant for interim attachment without an initial hearing on the application provided it is satisfied that—
- the creditor has a *prima facie* case on the merits of the court action;
  - there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for interim attachment were not granted in advance of such a hearing; and

- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.
525. Subsection (3) puts the onus of satisfying the court of the case for granting warrant in advance of a hearing on the creditor.
526. Subsection (4) requires the court, on making an order granting warrant for interim attachment without a hearing on the application, to fix a date for a hearing under section 9M (recall of interim attachment) and to require the creditor to intimate that date to the debtor and any other interested party.
527. Where such a hearing has been fixed under subsection (4)(a), subsection (5) applies section 9M as if the debtor or a person having an interest had applied to the court for an order under that section.
528. In applying section 9M, this means that at the hearing the court must consider the validity of the warrant and any interim attachment executed under it. The effect of section 9M(10) is to place the onus on the creditor to satisfy the court that a recall or restriction order should not be made.
529. Where the court is satisfied the warrant is invalid it is under a duty to make an order recalling the warrant or any interim attachment which has been executed under it (the court can also make an ancillary order) (section 9M(5)).
530. Subsection (6) provides that where the court decides that a warrant should not be granted without a hearing and the creditor insists on pursuing the application, the court is obliged to fix a date for a hearing on the application under section 9E and to require the creditor to intimate that date to the debtor and any other interested party.

#### **New section 9E – Hearing on application**

531. Section 9E sets out the procedure to be followed at a hearing on an application for warrant for interim attachment. Such a hearing on an application takes place in respect of applications where the creditor either doesn't apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing.
532. Subsection (1) places a duty on the court, at the hearing, to give any person who received intimation of the hearing date (namely the debtor and any person appearing to the court to have an interest) the chance to make representations before the court makes a decision on the application.
533. Under subsections (2) and (3) the court may grant the warrant if it is satisfied as to the same matters which it is obliged to consider under section 9D(2), namely that—
- the creditor has a *prima facie* case on the merits of the court action;
  - there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor if warrant for interim attachment were not granted; and
  - it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.
534. Subsection (4) puts the onus of satisfying the court that it should grant warrant on the creditor.
535. Subsection (5) provides for intimation of the court's decision to the debtor and any other person it thinks has an interest.

536. Subsection (6) provides that in refusing the warrant the court may impose such conditions as it thinks fit. Subsection (7) gives examples of particular conditions which the court might impose. This is similar to section 15F(6) of the 1987 Act (inserted by section 169 of this Act) – see paragraph 480480 above.

### **Execution of interim attachment**

#### **New section 9F – Execution of interim attachment**

537. Section 9F(1) applies sections 12, 13, 15 and 17 (subject to modifications and not section 17(3)(b) and (4)) of the 2002 Act to the execution of interim attachment. Section 12 states on which days, and during which times, it is not competent to execute an attachment. Section 13 allows a judicial officer, when executing an attachment, to assume that articles are owned by the debtor, although the officer is required to enquire as to ownership when attaching articles. Section 15 allows an officer executing an attachment to open shut and lockfast places and requires the officer to value articles attached (or arrange for their valuation). Section 17 requires the officer to make a report of the attachment to the court.
538. Subsection (2) requires the judicial officer, immediately after executing an interim attachment, to serve a schedule of interim attachment on the debtor. Subsection (3) makes further provision in relation to the schedule which should be in accordance with the form prescribed in court rules, should be signed by the officer and should specify the attached articles and their value so far as ascertainable. By virtue of subsection (4), the judicial officer is obliged to provide the debtor with a copy of the schedule of interim attachment or, where that is not practicable, to give a copy of it to a person who is present at the location of the interim attachment. Alternatively, where there is no such person, the officer must leave a copy of the schedule at that location.
539. Subsection (5) makes it clear that references elsewhere in Part 1A of the 2002 Act to the day on which an interim attachment is executed are references to the day on which the schedule of interim attachment is given to the debtor, to a person present or left at the premises where the interim attachment was executed by a judicial officer.

#### **New section 9G – Execution of interim attachment before service**

540. Section 9G applies where an interim attachment is executed before the summons in the action is served on the debtor. By virtue of section 9A(3) and (4), “summons” (which is the initiating document in the Court of Session) is construed here as meaning also a petition (in the Court of Session) and, in the sheriff court, an initial writ (in an ordinary action and in a summary application) and a summons (in a summary cause and in a small claim).
541. Subsection (2) provides that, where the summons is not served on the debtor within 21 days of the execution of the interim attachment, the attachment ceases to have effect. This is subject to the power of the court to extend the period within which the summons needs to be served of the attachment is not to fall.
542. Subsections (3) and (4) deal with this and provide that the court may, on the application of the creditor, extend the period having regard to the efforts of the creditor to serve the summons within 21 days and any special circumstances preventing or obstructing service within that period.

### **Interim attachment: further procedure**

#### **New section 9H – Order for security of attached articles**

543. Section 9H provides the court with power, on the application of the creditor, the judicial officer or the debtor, to make an order for the safe keeping of articles subject to an interim attachment. The court can, under this section, order attached goods to be moved if they are at risk of damage, for example, by flooding. This section is the equivalent, for interim attachment, of section 20 of the 2002 Act.

### **Interim attachment: effects**

#### **New section 9J – Unlawful acts after interim attachment**

544. Section 9J applies the provisions of section 21 (except subsections (3) and (15)) of the 2002 Act (what constitutes an unlawful act after an attachment has been executed) to interim attachment, with relevant modifications.
545. **Section 21** prohibits the removal, sale, gifting or other disposal of attached articles and their wilful destruction or damage. To do so is in breach of the attachment and may be dealt with as a contempt of court. Contempt of court is punishable by any of, or a combination of, admonition, fine and, in extreme cases, imprisonment or detention. Section 21(7) requires the debtor to give notification to the creditor and the 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 court may order that others be attached. Damaged articles may, on the authority of the court, be revalued. Section 21(11) to (14) makes provision for a sum of money to be consigned into court in circumstances where an article is made unavailable (by being moved, damaged, lost, stolen or sold) by the debtor or any third party who knows the article is attached.

#### **New section 9K – Articles belonging to or owned in common by a third party**

546. Section 9K(1) provides that the court may make an order releasing an article from an interim attachment where it is satisfied a third party owns the article.
547. Subsection (2) gives the court similar power to release an article from an interim attachment where the court is satisfied that a third party owns the article in common with the debtor and that the continued attachment of the article in question would be unduly harsh to the third party.
548. Subsection (3) applies section 34(2) of the 2002 Act where a third party claims sole ownership of the article as it applies where a third party makes an application for the purposes of section 34(1)(b)(ii). This has the effect of preserving a third party's rights so that that the third party is not precluded from taking any other proceedings for the recovery of the article.
549. Subsection (4) provides that, where the interim attachment of an article ceases to have effect under subsection (1) or (2), the judicial officer may attach other articles which are owned by the debtor and kept at the place at which the original interim attachment was executed.

#### **New section 9L – Duration of interim attachment**

550. Section 9L(1) provides that an interim attachment, unless recalled, will continue to have effect—
- for a period of 6 months after the conclusion of the action on the dependence of which interim attachment was executed provided—
    - the creditor obtains a final interlocutor for payment of all or part of a principal sum concluded for;
    - the creditor obtains a final interlocutor in the creditor's favour in respect of another remedy concluded for in that action such as an action for delivery; or
    - where the final interlocutor is of absolvitor or dismissal, the court grants a decree in relation to expenses under section 9Q(1)(b);
  - until the court grants decree of absolvitor in favour of the debtor or dismisses the action and no decree for expenses under section 9Q(1)(b) is granted; or

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- when, by virtue of section 9L(3), the creditor agrees to the interim attachment ceasing to be in force in relation to every attached item.
551. Subsection (2) provides that an interim attachment ceases to have effect if an attached item is attached by the creditor in execution of the final interlocutor or decree mentioned in subsection (1)(a).
552. Subsection (3) provides that the creditor may at any time agree in writing to the interim attachment ceasing to have effect in relation to a specific attached item. The attachment ceases when the court is so notified.
553. Subsection (4) provides that the court may, on application by the creditor, extend the time an interim attachment continues to have effect after final interlocutor in the creditor's favour, but only if the application is made before the 6-month period expires and the court is satisfied that exceptional circumstances make it reasonable to grant the application.
554. Subsection (5) provides that an application by a creditor under subsection (4) for an extension to the 6-month period must be in the form prescribed in rules of court and must be intimated by the creditor to the debtor and any other interested parties. The creditor must also intimate the court's decision on the application to the same parties (see subsection (6)).
555. Where an application is made under subsection (4) but not determined before the expiry of the 6-month period, subsection (7) has the effect of extending that period until the application is disposed of.
556. Subsection (8) makes it clear that the calculation of the 6-month period under subsection (1)(a) should not include any period during which a time to pay direction, interim order or time to pay order under the 1987 Act is in existence.
557. Subsection (9) defines, for the purposes of subsection (1), what a "final interlocutor" is and when an action is "disposed of".

**Recall etc. of interim attachment**

New section 9M – Recall or restriction of interim attachment

558. Where warrant for interim attachment has been granted, the debtor or any other person having an interest can apply to the court for any order set out in section 9M(2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any interim attachment so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought.
559. Subsection (3) provides that any application under subsection (2) must be in the form set out in rules of court. The application must be sent to the creditor and any other person with an interest. Subsection (4) provides that at the hearing about an application made under subsection (2), all interested parties will be able to be heard by the court before any order is made.
560. Subsection (5) provides that, where the court is satisfied the warrant is invalid, it is under a duty to make an order recalling the warrant and any interim attachment which has been executed under it (the court can also make an ancillary order).
561. Subsection (6) imposes a duty on the court to recall the interim attachment if the court is satisfied that an interim attachment executed in pursuance of a warrant is incompetent. Again, the court can make any orders ancillary to such a recall as it thinks fit.
562. By virtue of subsection (7), where the court decides the warrant is valid it may still make an order recalling or restricting the warrant or interim attachment done under it (and any other order mentioned in subsection (2)) if it considers that an interim attachment

executed in pursuance of the warrant is irregular or ineffective or if it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, to do so. The power in subsection (7) is subject to subsections (8) and (11).

563. Subsection (8) imposes a duty on the court to make an order recalling the warrant and any interim attachment executed in pursuance of it and gives the court power to make an ancillary order, where it is no longer satisfied as to the matters set out in subsection (9). Those matters mirror the considerations which the court must take into account when determining whether to grant a warrant (see section 9E(3)).
564. Subsection (10) places the onus on the creditor to satisfy the court that a recall or restriction order should not be made.
565. Subsection (11) prevents the court from making an order under subsection (7) where, by virtue of section 9L(1)(a), the interim attachment continues to have effect after the creditor obtains a final interlocutor for payment and the relevant 6-month period has not expired.
566. Subsections (12) and (13) enable the court to impose any conditions it thinks fit when making an order which may include requiring the debtor to consign money into court, to find caution or to give some other kind of security as the court thinks fit. The court will order the debtor to inform the creditor and any other interested party about the order (subsection (14)).

#### **New section 9N – Variation of orders and variation or recall of conditions**

567. Under section 9N, the court may, on an application by the debtor, vary an order under section 9M(7) restricting a warrant for interim attachment, or vary or remove a condition imposed under section 9E(6) or 9M(12).
568. Subsection (2) provides that any application under subsection (1) is to be in the form set out in rules of court. The application must be sent to the creditor and any other person with an interest. Subsection (3) provides that at the hearing about an application made under subsection (1), all interested parties will be able to be heard by the court before any order is made.
569. Subsection (5) provides that, on making any order under this section, the court must also order the debtor to intimate the order to the creditor and any other interested parties.

#### **General and miscellaneous provisions**

##### **New section 9P – Expenses of interim attachment**

570. Section 9P(1) provides that, subject to subsection (3)(a), a creditor will generally be entitled to recover from the debtor the expenses incurred in obtaining and executing a warrant for interim attachment.
571. Subsection (2) provides that, subject to subsection (3)(b), where a warrant for interim attachment is granted and, at a later date, the court is satisfied that the creditor was acting unreasonably in applying for it, a debtor will be entitled to recover from the creditor the expenses incurred in opposing that warrant.
572. Subsection (3) provides that the court may modify or refuse those expenses mentioned in subsection (1) if it is satisfied that the creditor was acting unreasonably in applying for the warrant or if it is reasonable in all circumstances, including the outcome of the action. It can also modify or refuse those expenses mentioned in subsection (2) where it is satisfied that it is reasonable in all the circumstances, including, again, the outcome of the action.
573. Subsection (4) provides that, subject to subsections (1) to (3), the court may make such findings as it thinks fit in relation to expenses as mentioned in subsections (1) and (2).

Subsection (5) provides that expenses incurred in obtaining or opposing a warrant are expenses of process.

### **New section 9Q – Recovery of expenses of interim attachment**

574. Section 9Q(1) provides that, subject to subsection (4), any expenses chargeable against the debtor which are incurred by the creditor in carrying out an interim attachment can be recovered only by attachment of the debtor's assets—
- in execution of a decree granted by virtue of—
    - the conclusion for payment in the action on the dependence of which the warrant for interim attachment was granted; or
    - another conclusion in the creditor's favour in that action (such as decree for delivery); or
  - where the court finds for the debtor, in execution of a decree granted under this subsection for the purposes of recovering the appropriate expenses.
575. Subsection (2) provides that any expenses which cease to be recoverable under subsection (1) will no longer be chargeable against the debtor.
576. Subsections (3) and (4) provide that expenses remain chargeable against the debtor under subsection (4) where—
- an interim attachment is recalled on the making of a time to pay direction, an interim order or a time to pay order under the 1987 Act;
  - the interim attachment was in effect immediately before the date of sequestration of the debtor's estate under the 1985 Act or the appointment of an administrator under Part 2 of the Insolvency Act 1986;
  - the interim attachment was in effect against property of the debtor immediately before a floating charge attaches all or part of that property;
  - the interim attachment was in effect immediately before the commencement of the winding up, under the 1986 Act, of the debtor; or
  - the interim attachment becomes unenforceable because the creditor enters into a composition contract or accedes to a trust deed for creditors or by virtue of the subsistence of a protected trust deed for creditors.
577. Subsection (4) also has the effect that, where the debtor's obligation to pay the expenses is not discharged under the proceedings and processes referred to in subsection (3), those expenses are recoverable in pursuance of subsection (1).

### **New section 9R – Ascription of sums recovered while interim attachment is in effect**

578. Section 9R provides that, where any amounts are secured by an interim attachment or paid to account of the amounts recoverable from the debtor while the attachment is in force, and then the interim attachment ceases to have effect, those sums are ascribed to the heads of claim set out in subsection (2) in the order in which they appear.
579. Subsection (2) provides that those amounts will be credited in the following order: first, to the expenses incurred in obtaining warrant for and executing the interim attachment; secondly, to any interest on the principal sum due under decree in the action which has accrued as at the date of carrying out the interim attachment; and, finally, any sum due under that decree together with any interest which has accrued after that date.
580. Subsection (3) provides that where an interim attachment is followed by the diligence of attachment, section 41 of the 2002 Act (which deals with ascription) will apply to



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amounts to which section 9R applies as it applies to amounts to which that section applies.

### **New section 9S – Ranking of interim attachment**

581. Section 9S provides that in competition with the claims of other creditors of the debtor, whether those claims are secured by voluntary securities or other diligences or are unsecured, the interim attachment will be treated, on final conclusion of the action in the creditor's favour, as if it were an attachment under section 10 of the 2002 Act executed on the day of execution of the interim attachment.
582. Also, where an interim attachment has ceased to have effect in relation to any specific article on the attachment of it in execution of a final interlocutor in the creditor's favour, the attachment of the item will be taken to have been carried out, in respect of that item, when the interim attachment was carried out.