



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 10

### ARRESTMENT IN EXECUTION AND ACTION OF FURTHCOMING

#### 206 Arrestment in execution

After section 73 of the 1987 Act, insert—

#### “PART 3A

#### ARRESTMENT AND ACTION OF FURTHCOMING

##### **73A Arrestment and action of furthcoming to proceed only on decree or document of debt**

- (1) Arrestment and action of furthcoming or sale shall be competent only in execution of—
  - (a) subject to subsection (2) below, a decree; or
  - (b) a document of debt.
- (2) Arrestment and action of furthcoming or sale in execution of a summary warrant shall be competent only if—
  - (a) the debtor has been charged to pay the debt due by virtue of the summary warrant; and
  - (b) the period for payment specified in the charge has expired without payment being made.
- (3) Any rule of law, having effect immediately before the coming into force of this section, as to the decrees or documents on which arrestment and action of furthcoming or sale can proceed shall, in so far as inconsistent with this section, cease to have effect.

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(4) In this Part of this Act—

“decree” means—

- (a) a decree of the Court of Session, of the High Court of Justiciary or of the sheriff;
- (b) a decree of the Court of Teinds;
- (c) a summary warrant;
- (d) a civil judgment granted outside Scotland by a court, tribunal or arbiter which by virtue of any enactment or rule of law is enforceable in Scotland;
- (e) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by the sheriff;
- (f) a warrant granted, in criminal proceedings, for enforcement by civil diligence; or
- (g) a liability order within the meaning of section 33(2) of the Child Support Act 1991 (c. 48),

being a decree, warrant, judgment, order or determination which, or an extract of which, authorises arrestment and action of furthcoming or sale; and

“document of debt” means—

- (a) a document registered for execution in the Books of Council and Session or the sheriff court books; or
- (b) a document or settlement which by virtue of an Order in Council under section 13 of the Civil Jurisdiction and Judgments Act 1982 (c. 27) is enforceable in Scotland,

being a document or settlement which, or an extract of which, authorises arrestment and action of furthcoming or sale.

(5) The Scottish Ministers may, by order, modify the definitions of “decree” and “document of debt” in subsection (4) above so as to—

- (a) add or remove types of decree or document to or, as the case may be, from those referred to in that provision; or
- (b) vary any of the descriptions of the types of decree or document there referred to.

### **73B Schedule of arrestment to be in prescribed form**

(1) This section applies where a creditor arrests in execution of —

- (a) a decree and the creditor has not executed an arrestment on the dependence of the action; or
- (b) a document of debt.

(2) The schedule of arrestment used in executing the arrestment shall be in (or as nearly as may be in) the form prescribed by the Scottish Ministers by regulations.

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### **73C Arrestment on the dependence followed by decree**

- (1) This section applies where a creditor obtains a decree (in this Part of this Act referred to as a “final decree”) in an action on the dependence of which the creditor has executed an arrestment.
- (2) The creditor shall, as soon as reasonably practicable, serve a copy of that final decree, in (or as nearly as may be in) the form prescribed by Act of Sederunt, on the arrestee.

### **73D Debt advice and information**

- (1) This section applies where—
  - (a) a creditor—
    - (i) obtains a final decree in an action on the dependence of which the creditor has executed an arrestment; or
    - (ii) arrests in execution of a decree or document of debt; and
  - (b) the debtor is an individual.
- (2) The creditor shall, during the period of 48 hours beginning with the time at which the copy of the final decree is served under section 73C(2) of this Act or, as the case may be, the time at which the schedule of arrestment is served, provide the debtor with a debt advice and information package.
- (3) Where the creditor fails to comply with subsection (2) above, the arrestment shall cease to have effect or, as the case may be, shall be incompetent.
- (4) In this section, “debt advice and information package” has the meaning given by section 47(4) of this Act.

### **73E Funds attached**

- (1) Subsections (2) to (5) below apply—
  - (a) where a creditor arrests in execution of—
    - (i) a decree and the creditor has not executed an arrestment on the dependence of the action; or
    - (ii) a document of debt; and
  - (b) only to the extent that the arrestee holds funds due to the debtor the value of which, at the time the arrestment is executed, is or can be ascertained (whether or not that arrestee also holds other moveable property of the debtor).
- (2) Subject to subsection (4) below and to section 73F of this Act, the funds mentioned in subsection (1)(b) above attached by the arrestment shall be the lesser of—
  - (a) the sum due by the arrestee to the debtor; or
  - (b) the aggregate of—
    - (i) the principal sum, in relation to which the decree or document is executed, owed by the debtor to the creditor;
    - (ii) any judicial expenses chargeable against the debtor by virtue of the decree;

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- (iii) the expenses of executing the arrestment;
  - (iv) interest on the principal sum up to and including the date of service of the schedule of arrestment;
  - (v) the interest on the principal sum which would be accrued in the period of 1 year beginning with the day after the date mentioned in sub-paragraph (iv) above;
  - (vi) any interest on the expenses of executing the arrestment which is chargeable against the debtor; and
  - (vii) any sum prescribed under subsection (3) below.
- (3) The Scottish Ministers may, by regulations, prescribe a sum which appears to them to be reasonable having regard to the average expenses likely to be incurred and chargeable against a debtor in a typical action of furthcoming.
- (4) Where—
- (a) the arrestee holds both funds due to and other moveable property of the debtor; and
  - (b) the sum mentioned in paragraph (b) of subsection (2) above exceeds the sum mentioned in paragraph (a) of that subsection,
- the arrestment shall, in addition to the funds equal to the sum mentioned in that paragraph (a), attach the whole moveable property so held.
- (5) Except as provided for in subsection (4) above, an arrestment to which this section applies shall not attach any moveable property of the debtor other than the sum attached under subsection (2) above.
- (6) Where, in a case to which subsections (2) to (5) above apply—
- (a) in addition to the funds mentioned in subsection (1)(b) above, the arrestee holds funds due to the debtor the value of which is not or cannot be ascertained; and
  - (b) the sum mentioned in paragraph (a) of subsection (2) above exceeds the sum mentioned in paragraph (b) of that subsection,
- the arrestment shall not attach any of the funds mentioned in paragraph (a) above.

### **73F Protection of minimum balance in certain bank accounts**

- (1) Subject to subsection (2) below, this section applies where—
- (a) a creditor arrests—
    - (i) in pursuance of a warrant granted for diligence on the dependence of an action; or
    - (ii) in execution of a decree or document of debt;
  - (b) the arrestment attaches funds standing to the credit of a debtor in an account held by a bank or other financial institution; and
  - (c) the debtor is an individual.
- (2) This section does not apply where the account is—
- (a) held in the name of a company, a limited liability partnership, a partnership or an unincorporated association; or
  - (b) operated by the debtor as a trading account.

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- (3) The arrestment shall—
- (a) in a case where the sum standing to the credit of the debtor exceeds the sum mentioned in subsection (4) below, attach only the balance above that sum; and
  - (b) in any other case, attach no funds.
- (4) The sum referred to in subsection (3)(a) above is the sum first mentioned in column 1 of Table B in Schedule 2 to this Act (being the sum representing the net monthly earnings from which no deduction would be made under an earnings arrestment were such an arrestment in effect).
- (5) In subsection (1) above, “bank or other financial institution” means—
- (a) the Bank of England;
  - (b) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 (c. 8) to accept deposits;
  - (c) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that schedule (as a result of qualifying for authorisation under paragraph 12 of that schedule) to accept deposits; or
  - (d) a person who is exempt from the general prohibition in respect of accepting deposits as a result of an exemption order made under section 38(1) of that Act,
- and the expressions in this definition shall be read with section 22 of that Act, any relevant order made under that section and Schedule 2 to that Act.
- (6) The Scottish Ministers may, by regulations—
- (a) modify subsection (2) above so as to—
    - (i) add or remove types of account to or, as the case may be, from those referred to in that paragraph; or
    - (ii) vary any of the descriptions of the types of account there referred to; and
  - (b) modify the definition of “bank or other financial institution” in subsection (5) above so as to—
    - (i) add or remove types of financial institution to or, as the case may be, from those referred to in that provision; or
    - (ii) vary any of the descriptions of the types of institution there referred to.

### **73G Arrestee's duty of disclosure**

- (1) This section applies where a creditor arrests—
- (a) in pursuance of a warrant granted for diligence on the dependence of an action; or
  - (b) in execution of a decree or document of debt.
- (2) The arrestee shall, before the expiry of the period mentioned in subsection (3) below, send to the creditor in (or as nearly as may be in) the form prescribed by the Scottish Ministers by regulations, the information mentioned in subsection (4) below.

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- (3) The period referred to in subsection (2) above is the period of 3 weeks beginning with the day on which the arrestment is executed.
- (4) The information referred to in subsection (2) above is—
  - (a) where any property, other than funds due to the debtor, is attached—
    - (i) the nature of that property; and
    - (ii) the value of it in so far as known to the arrestee; and
  - (b) where any such funds are attached, the nature and value of those funds.
- (5) The arrestee shall, at the same time as sending, under subsection (2) above, the information to the creditor, send a copy of it to—
  - (a) the debtor; and
  - (b) in so far as known to the arrestee, any person—
    - (i) who owns or claims to own attached property; or
    - (ii) to whom attached funds are or are claimed to be due, solely or in common with the debtor.

### **73H Failure to disclose information**

- (1) Where an arrestee fails without reasonable excuse to send the prescribed form under section 73G(2) of this Act, the sheriff may, on the application of the creditor, make an order requiring the arrestee to pay to the creditor—
  - (a) the sum due to the creditor by the debtor; or
  - (b) the sum mentioned in section 73F(4) of this Act,
 whichever is the lesser.
- (2) Where the arrestee fails to send the prescribed form in relation to an arrestment on the dependence of an action, the sheriff—
  - (a) may not make an order under subsection (1) above until the creditor has served a copy of the final decree under section 73C(2) above; and
  - (b) may deal with the failure as a contempt of court.
- (3) Where a sum is paid by virtue of an order under subsection (1) above—
  - (a) the debt owed by the debtor to the creditor shall be reduced by that sum; and
  - (b) the arrestee shall not be entitled to recover that sum from the debtor.
- (4) An arrestee aggrieved by an order under subsection (1) above may, before the expiry of the period of 2 weeks beginning with the day on which the order is made, appeal, on point of law only, to the sheriff principal, whose decision shall be final.

### **73J Automatic release of arrested funds**

- (1) This section applies where—
  - (a) a creditor—
    - (i) obtains a final decree in an action on the dependence of which the creditor has executed an arrestment; or
    - (ii) arrests in execution of a decree or document of debt; and

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- (b) the arrestment attaches funds which are due to the debtor (whether or not it also attaches other moveable property of the debtor).
- (2) Subject to section 73L of this Act, the arrestee—
- (a) shall, on the expiry of the period mentioned in subsection (3) below, release to the creditor, from the attached funds, a sum calculated in accordance with section 73K of this Act; and
  - (b) may, where a mandate authorises the arrestee to do so, release that sum before the expiry of that period.
- (3) The period referred to in subsection (2) above is the period of 14 weeks beginning with the date of service of a copy of the final decree under section 73C(2) of this Act or, as the case may be, the date of service of the schedule of arrestment.
- (4) In this section and in sections 73K to 73P of this Act, references to funds or sums due to or by any person do not include references to funds or sums due in respect of future or contingent debts.

### **73K Sum released under section 73J(2)**

The sum released under section 73J(2) of this Act is the lowest of—

- (a) the sum attached by the arrestment;
- (b) the sum due by the arrestee to the debtor; or
- (c) the aggregate of—
  - (i) the principal sum, in relation to which the decree or document is executed or, as the case may be, which is decerned for in the final decree, owed by the debtor to the creditor;
  - (ii) any judicial expenses chargeable against the debtor by virtue of the decree or final decree;
  - (iii) the expenses of executing the arrestment;
  - (iv) interest on the principal sum up to and including the date of service of the schedule of arrestment or, as the case may be, the date of the final decree;
  - (v) the interest on the principal sum which would be accrued in the period beginning with the day after the date mentioned in subparagraph (iv) above and ending on the day on which the funds are released under section 73J(2) of this Act; and
  - (vi) any interest on the expenses of executing the arrestment which is chargeable against the debtor.

### **73L Circumstances preventing automatic release**

- (1) No funds may be released under section 73J(2) of this Act where—
- (a) a person mentioned in subsection (2) below applies, by notice of objection, to the sheriff under section 73M(1) of this Act;
  - (b) the debtor applies to the sheriff under section 73Q(2) of this Act;
  - (c) an action of multiplepointing is raised in relation to the funds attached by the arrestment; or
  - (d) the arrestment is—
    - (i) recalled;

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- (ii) restricted; or
- (iii) otherwise ceases to have effect.

- (2) The persons referred to in subsection (1)(a) above are—
- (a) the debtor;
  - (b) the arrestee; and
  - (c) any other person to whom the funds are due solely or in common with the debtor (in this section and in sections 73M and 73N of this Act, the “third party”).

### **73M Notice of objection**

- (1) Where section 73J of this Act applies—
- (a) the debtor;
  - (b) the arrestee; or
  - (c) a third party,
- may, by notice of objection, apply to the sheriff for an order recalling or restricting the arrestment.
- (2) The notice of objection referred to in subsection (1) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) be given to the persons mentioned in subsection (3) below before the expiry of the period of 4 weeks beginning with the date of service of a copy of the final decree under section 73C(2) of this Act or, as the case may be, the date of service of the schedule of arrestment; and
  - (c) specify one or more of the grounds of objection mentioned in subsection (4) below.
- (3) The persons referred to in subsection (2)(b) above are—
- (a) the creditor;
  - (b) the sheriff clerk;
  - (c) the debtor or, as the case may be, the arrestee; and
  - (d) in so far as known to the person objecting, any third party.
- (4) The grounds of objection referred to in subsection (2)(c) above are—
- (a) the warrant in execution of which the arrestment was executed is invalid;
  - (b) the arrestment has been executed incompetently or irregularly;
  - (c) the funds attached are due to the third party solely or in common with the debtor.
- (5) Where a person applies by notice of objection under subsection (1) above, that person may not, subject to subsection (6) below, raise—
- (a) an action of multiplepointing; or
  - (b) subject to subsection (7) below, any other proceedings,
- in relation to the funds attached.
- (6) Subsection (5) above is without prejudice to the right of the person—
- (a) to enter any such action or proceedings raised by any other person; and



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- (b) to raise such an action or proceedings where the sheriff makes, under section 73N(5) of this Act, an order sisting the proceedings on the objection.
- (7) A debtor who applies by notice of objection under subsection (1) above may apply to the sheriff under section 73Q(2) of this Act and, in such a case, the sheriff may deal with both applications at one hearing.

### **73N Hearings following notice of objection**

- (1) Subject to subsection (5) below, before the expiry of the period of 8 weeks beginning with the day on which an application by notice of objection is made under section 73M(1) of this Act, the sheriff shall hold a hearing to determine the objection.
- (2) At the hearing under subsection (1) above, the sheriff shall not make any order without first giving—
  - (a) the creditor;
  - (b) the arrestee;
  - (c) the debtor; and
  - (d) any third party,an opportunity to be heard.
- (3) Where the sheriff upholds the objection, the sheriff may make an order recalling or restricting the arrestment.
- (4) Where the sheriff rejects the objection, the sheriff may make an order requiring a sum determined in the order to be released to the creditor—
  - (a) in a case where the period mentioned in section 73J(3) of this Act has not expired, on the expiry of that period; or
  - (b) in any other case, as soon as reasonably practicable after the date on which the order is made.
- (5) Where—
  - (a) the sheriff is satisfied that it is more appropriate for the matters raised at the hearing to be dealt with by—
    - (i) an action of multiplepoinding; or
    - (ii) other proceedings,raised in relation to the funds attached; or
  - (b) at any time before a decision is made under subsections (3) or (4) above, such an action is or other proceedings are raised,the sheriff shall make an order sisting the proceedings on the objection.
- (6) The sheriff may make such other order as the sheriff thinks fit.
- (7) Where the sheriff makes an order under this section, the sheriff shall order the person who objected to intimate that order to such of the persons mentioned in subsection (2) above as the sheriff thinks fit.
- (8) A person aggrieved by a decision of the sheriff under this section may, before the expiry of the period of 14 days beginning with the day on which the decision is made, appeal, on point of law only, to the sheriff principal, whose decision shall be final.

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### **73P Arrestee not liable for funds released in good faith**

Where an arrestee releases funds under section 73J(2) of this Act in good faith but—

- (a) the warrant in execution of which the arrestment was executed is invalid; or
- (b) the arrestment was incompetently or irregularly executed,

the arrestee is not liable to the debtor or to any other person having an interest in the funds for damages for patrimonial loss caused by the release of funds.

### **73Q Application for release of property where arrestment unduly harsh**

- (1) This section applies where—
  - (a) a creditor—
    - (i) obtains final decree in an action on the dependence of which the creditor executed an arrestment; or
    - (ii) arrests in execution of a decree or document of debt; and
  - (b) the arrestment attaches funds due to or other moveable property of the debtor.
- (2) The debtor may apply to the sheriff for an order—
  - (a) providing that the arrestment ceases to have effect in relation to—
    - (i) the funds or other property attached; or
    - (ii) so much of those funds or that property as the sheriff specifies; and
  - (b) requiring the arrestee to release the funds or property to the debtor.
- (3) An application under subsection (2) above shall be—
  - (a) in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) made at any time during which the arrestment has effect; and
  - (c) intimated to—
    - (i) the creditor;
    - (ii) the arrestee; and
    - (iii) any other person appearing to have an interest.

### **73R Hearing on application under section 73Q for release of property**

- (1) At the hearing on an application under section 73Q(2) of this Act, the sheriff shall not make any order without first giving—
  - (a) the creditor;
  - (b) the arrestee; and
  - (c) any other person appearing to the court to have an interest, an opportunity to be heard.
- (2) Subject to subsection (3) below, if the sheriff is satisfied that the arrestment is unduly harsh—
  - (a) to the debtor; or

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- (b) where the debtor is an individual, to any person such as is mentioned in subsection (4) below,  
the sheriff shall make an order such as is mentioned in section 73Q(2) of this Act.
- (3) Before making an order under subsection (2) above the sheriff shall have regard to all the circumstances including, in a case where the debtor is an individual and funds are attached—
- (a) the source of those funds; and
  - (b) where the source of those funds is or includes earnings, whether an earnings arrestment, current maintenance arrestment or conjoined arrestment order is in effect in relation to those earnings.
- (4) The persons referred to in subsection (2)(b) above are—
- (a) a spouse of the debtor;
  - (b) a person living together with the debtor as husband and wife;
  - (c) a civil partner of the debtor;
  - (d) a person living with the debtor in a relationship which has the characteristics of the relationship between a husband and wife except that the person and the debtor are of the same sex;
  - (e) a child of the debtor under the age of 16 years, including—
    - (i) a stepchild; and
    - (ii) any child brought up or treated by the debtor or any person mentioned in paragraph (b), (c) or (d) above as a child of the debtor or, as the case may be, that person.
- (5) Where the sheriff refuses to make an order under subsection (2) above, the sheriff may, in a case where funds are attached, make an order requiring a sum determined in the order to be released to the creditor—
- (a) in a case where the period mentioned in section 73J(3) of this Act has not expired, on the expiry of that period; or
  - (b) in any other case, as soon as reasonably practicable after the date on which the order is made.
- (6) Where the sheriff makes an order under this section, the sheriff shall order the debtor to intimate that order to the persons mentioned in subsection (1) above.
- (7) A person aggrieved by a decision of the sheriff under this section may, before the expiry of the period of 14 days beginning with the day on which the decision is made, appeal, on point of law only, to the sheriff principal, whose decision shall be final.

### **73S Mandate to be in prescribed form**

- (1) A mandate authorising an arrestee to pay over any funds or hand over other property attached by an arrestment shall be in (or as nearly as may be in) the form prescribed by the Scottish Ministers by regulations.
- (2) A mandate which is not in (or as nearly as may be in) the prescribed form is invalid.
- (3) Where—
- (a) a mandate is invalid by virtue of subsection (2) above; but

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- (b) the arrestee pays over funds or hands over other property in accordance with that mandate,  
the arrestee is not liable to the debtor or to any other person having an interest in the funds or property for damages for patrimonial loss caused by paying over the funds or handing over the property provided the arrestee acted in good faith.

### **73T Arrestment of ships etc.**

For the avoidance of doubt, this Part of this Act does not apply to the arrestment of a ship, cargo or other maritime property.”.

#### **Commencement Information**

- II** S. 206 partly in force; s. 206 not in force at Royal Assent see s. 227; s. 206 in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, art. 3(1)(e){(4)}, Sch. 3 (with arts. 4-6, 10); s. 206 in force for certain further purposes at 22.4.2009 by S.S.I. 2009/67, art. 3 (with transitional modifications and savings in arts. 4-6)

**Changes to legislation:**

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