

# **DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) ACT 2002**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **Part 3 – Attachment of Articles Kept in Dwellinghouses: Special Procedure**

90. This Part of the Act provides for special procedures that are to be followed when attaching property kept in dwellinghouses. These procedures follow recommendation 6 of the Working Group.
91. The Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002 which came into force on 30 December 2002 makes provision for the Rules of Court to be applied under the Act.
92. A specific application must be made to the court for an exceptional attachment order in all cases where a creditor wishes to pursue the attachment of property in a dwellinghouse. Each case will be considered individually on its own merits by judicial enquiry. The sheriff will have regard to specified criteria when considering whether to grant an exceptional attachment order. Any order granted will be restricted to articles which are not essential.

#### **Section 46 – Restriction on attachment of articles kept in dwellinghouses**

93. This section prohibits the attachment of articles kept in a dwellinghouse except in accordance with the provisions of Part 3 where an exceptional attachment order is being pursued.

#### **Section 47 – Exceptional attachment order**

94. [Section 47](#) provides for the granting of an order of court authorising the attachment of non-essential assets, on an exceptional basis, within dwellinghouses. Attachment of articles in dwellinghouses will be competent only where the court is satisfied that exceptional circumstances exist.
95. [Section 47\(2\)](#) provides that, where it is considered that exceptional circumstances exist justifying the granting of an order, assets which are not essential may be auctioned. The procedure for auction will follow that in Part 2.
96. [Section 47\(3\)](#) requires that, when considering whether to make an exceptional attachment order, the sheriff must take account of specified factors. This ensures that an appropriate assessment of individual circumstances is made.
97. [Section 47\(4\)](#) specifies the factors to be taken into account by the court. These include whether money advice has been given to the debtor, whether there is any agreement for settlement of the debt and whether there has been any previous time to pay arrangement. The court must also have regard to the nature of the debt, particularly where it relates to any trade, business or unpaid tax. To assist the court, the debtor will have the

opportunity to make a voluntary declaration about his financial circumstances, his ability to pay and any non-essential assets held (and, where they are held, their aggregate value).

98. In taking account of whether the debtor has received money advice the sheriff may, where appropriate, make that opportunity available, if necessary by intervention of a domestic visit for the purposes of providing money advice.

### ***Section 48 – Exceptional circumstances***

99. **Section 48** specifies matters about which the sheriff must be satisfied when deciding whether to grant an exceptional attachment order. The creditor must have attempted to obtain settlement by negotiation and must have attempted earnings or ordinary arrestment if appropriate in the individual circumstances of the case. The sheriff must be satisfied that an auction of the non-essential assets which the debtor has would not only meet the creditor's expenses recoverable from the auction, but also reduce the outstanding debt itself by £100.
100. **Section 48(1)(d)** requires sheriffs to make an overriding decision on whether it is reasonable in the circumstances to grant an exceptional attachment order.
101. **Section 48(2)** provides that where a creditor has not attempted other diligence first because there was not a reasonable prospect of successfully recovering the expenses and minimum sum, that creditor will be treated as having made a reasonable attempt to do so.

### ***Section 49 – Power of entry***

102. This section provides that it will not be competent to enter a dwellinghouse unless there is a person present who is over 16 years of age and is able to understand the proceedings, or the debtor has been given 4 days' notice of the intended entry. The sheriff may dispense with the requirement to give notice on application if cause can be shown.

### ***Section 50 – Unlawful acts before attachment***

103. **Section 50(1)** and **(2)** provide that the removal, sale, gifting or relinquishment of non-essential assets known to be subject to an exceptional attachment order or their wilful destruction or damage by anyone will amount to breach of the order.
104. **Section 50(3)** requires the debtor to give notification if an asset is stolen and of any insurance claim which it is intended to make. **Section 50(5)** and **(6)** make provision for a sum of money to be consigned in court by the debtor in circumstances where an asset is made unavailable before attachment has taken place in the knowledge of an exceptional attachment order's existence. The sum to be consigned will be the best estimate of the amount which the asset would have achieved at auction under **section 50(7)**. Where an attachment ceases to have effect, any sum which has been consigned in court will be paid to the creditor to the extent necessary to meet the debt with any surplus left over being paid to the debtor under **section 50(8)**.

### ***Section 51 - Valuation***

105. **Section 51** provides that assets being attached under an exceptional attachment order should be valued by the officer at the price which they would be likely to fetch on the open market.

### ***Section 52 – Articles with sentimental value***

106. **Section 52** prohibits the attachment of assets of sentimental value to the debtor not exceeding an aggregate value of £150, according to the values attributed by the

officer under Section 51. This provision will implement recommendation 9 of the Law Commission in Scot Law Com No 177.

### ***Section 53 – Removal of articles attached in dwellinghouse***

107. **Section 53(1)** provides for immediate removal of non-essential assets in execution of an exceptional attachment order once an attachment schedule has been completed unless the officer considers it impractical to do so, for example where specialist handling is required. **Section 53(2)** provides that if an article is not immediately uplifted, the officer must inform the debtor or any person in possession of the article when it will be removed. **Section 53(3)** permits only those assets likely to realise the sum due to be removed, according to the values attributed by the officer under Section 51.

### ***Section 54 - Professional valuation***

108. This section provides that the officer, if he considers it appropriate, can arrange for an article, attached under an exceptional attachment order, to be valued by a professional valuer or other suitable skilled person. It also provides for the debtor to be notified of the new value where the valuer values the attached article at a different amount than the officer did at attachment.

### ***Section 55 - Release of articles from attachment***

109. This section allows a period of 7 days from the removal of non-essential assets during which the debtor may apply to the sheriff for the return of an asset on the grounds that attachment was incompetent, that auction would be unduly harsh. It also provides for the right of the debtor to apply within 7 days for release of assets of sentimental value not exceeding an aggregate value of £150.

### ***Section 56 – Redemption***

110. **Section 56** provides for the redemption of non-essential assets within 7 days of the date on which they were attached. Redemption will be at an amount which the asset is likely to fetch if sold on the open market, according to the values attributed by the officer under Section 51 or by the specialist valuer under Section 54(1).

### ***Section 57 – Appeals***

111. **Section 57** provides for an appeal against any decision in relation to proceedings concerning an exceptional attachment order to be made to the sheriff principal with the leave of the sheriff and on a point of law only. **Section 57(2)** provides that the decision of the sheriff principal will be final.