

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 8 – Attachment of Money

Money attachment

Section 174 – Money attachment

583. [Section 174\(1\)](#) establishes a new diligence of “money attachment” which can be used to attach “money” (as defined in section 175) owned by a debtor.
584. Subsection (2) provides that money attachment is permitted to enforce payment of a debt only if—
- the creditor holds a court decree or other enforceable document by which the debt is constituted (the definitions of “decree” and “document of debt” which apply to this Part by virtue of section 198(1) are set out in section 221);
 - a charge to pay has been served on the debtor;
 - the period for payment set out in the charge (14 days, or 28 days if the debtor is outside the UK or the debtor’s whereabouts are unknown – see section 90(3) of the 1987 Act) has expired without the debtor having made payment of the debt; and
 - where the debtor is an individual, the creditor has, no earlier than 12 weeks before executing the money attachment, provided the debtor with a debt advice and information package (being the package issued under section 10(5) of the 2002 Act – see section 221).
585. Subsection (3) provides that money in a dwellinghouse cannot be attached. The meaning of “dwellinghouse” here has the same meaning as in section 45 of the 2002 Act (see section 198(1)). Accordingly, a dwellinghouse does not include a garage even if it is built into the house nor does it include garden sheds or other outbuildings but a caravan, houseboat or other place used as a dwelling can be regarded as a dwellinghouse. Subsection (3) also provides that money attachment is not competent when the money is capable of being arrested. That is to say the money is held on behalf of a debtor by a third party, for instance a cheque made out to a debtor is being held by the debtor’s solicitor or accountant.

Section 175 – Meaning of “money” and related expressions

586. This section deals with what is meant by “money” and so clarifies what can be attached by the new diligence.

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

587. “Money” means cash and banking instruments but excludes any cash or instrument which has an intrinsic value greater than any value it may have as a medium of exchange (which, in simple cases such as coins and notes, will be the face value). An example would be a collectable coin which has a greater value as a collectable coin than it has as a medium of exchange. Such money, whilst excluded from money attachment, will instead be attachable by the diligence of attachment.
588. “Cash” is defined as coins and banknotes in any currency. “Banking instrument” is defined as meaning—
- cheques and other instruments to which section 4 of the [Cheques Act 1957 \(c.36\)](#) applies. Section 4 covers—
 - cheques;
 - other documents issued by a customer of a bank which permit a person to receive payment from the bank of the sum stated in the document;
 - documents which enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer (often referred to as government cheques); and
 - bankers drafts;
 - any document issued by a public officer which entitles a person to payment of a sum from a government department (these are effectively another form of government cheque). Subsection (2) clarifies what the reference to “government department” includes. This term is wide and encapsulates Ministers and departments from all administrations. Documents under section 4(2)(c) of the Cheques Act 1957 are excluded from this part of the definition not because they aren't covered but simply because the reference to “cheques and other instruments” already covers them;
 - promissory notes (other than banknotes). A promissory note is an unconditional promise in writing and made by one party to another engaging to pay, on demand or at a fixed determinable future time, a sum certain in money to, or to the order of, a specified person, or to a bearer. The most common example is banknotes. However, these are already defined to mean “cash” for the purposes of money attachment and so are expressly excluded from the definition of “promissory note”;
 - other negotiable instruments. This covers other negotiable instruments which are not already expressly defined such as dividend warrants; and
 - money orders and postal orders. It is necessary to expressly include this category of instrument as they are not negotiable instruments.
589. Subsection (1) also makes it clear that references to “the value of money” in the sections relating to money attachment, unless the context otherwise requires, is a reference to—
- the amount of cash (coins and banknotes);
 - in the case of currency other than sterling, the equivalent sterling amount; and
 - in the case of a banking instrument, the amount of cash that would be obtained by realising the value of the instrument (for example, the amount credited to a bank account when a cheque is banked).
590. Subsection (3) gives the Scottish Ministers power to modify the definition of “banking instrument” by order made by statutory instrument subject to the negative resolution procedure of the Scottish Parliament. This power could be used where either a type of banking instrument referred to in this section becomes obsolete or if a new type of instrument were created in the future.

Section 176 – When money attachment not competent

591. Subsections (1) and (2) of section 176 provide that money attachment cannot be carried out on a Sunday, a public holiday in the area in which the attachment is to be carried out or on any other day designated by rules of court. An attachment must not begin before 8 a.m. or after 8 p.m. and cannot continue after 8 p.m. if it is in progress. A judicial officer can, however, apply to the sheriff for authority to commence a money attachment or to continue to carry it out outwith these times.
592. Subsection (3) provides that a second money attachment cannot be executed in the same place as a money attachment has already been executed if the second attachment is to enforce the same debt unless other money has been brought to that place after the first money attachment has taken place. The words “or is purported to be attached” make it clear that even if the first money attachment turns out to be invalid a second money attachment at the same place is not permitted because of this provision. This, however, is subject to certain exceptions (contained in sections 183(12)(b), 186(3)(b) and 191(4)). A second attachment at the same place will be allowed where, for instance, attached money has been released because it was not owned by the debtor. The judicial officer can therefore attach other money owned by the debtor.
593. Subsection (4) provides that money can be attached only once to enforce a particular debt. If money is attached and the money attachment ceases to have effect, the money is released back to the debtor. It cannot be re-attached for the same debt.

Execution of money attachment

Section 177 – Removal of money attached

594. Subsections (1) and (2) of section 177 provide that the judicial officer executing a money attachment can attach and remove money only up to an amount which, in the opinion of the judicial officer, does not exceed the amount claimed in the charge plus any interest together with all expenses chargeable against the debtor for the money attachment. This amount of money is referred to as the “sum recoverable by the money attachment” throughout the money attachment sections. Because the expenses of the money attachment are not settled until the end of the process and the value of some banking instruments may not be immediately ascertainable, the judicial officer has to take a view on how much attached money would represent the sum recoverable.
595. Subsections (3) and (4) put a duty on the judicial officer to convert any non-sterling cash into sterling as soon as reasonably practicable and to obtain the best amount practicable for it. All cash in sterling, including that which has been converted from foreign currency, is to be deposited in a bank account (subsection (5)).
596. Subsection (6) provides that the officer does not need to attach and remove any banking instrument other than cheques unless instructed to attach instruments like this by the creditor. If the creditor does not instruct the officer to attach these other instruments, the officer cannot be liable for any loss incurred by a failure to attach those instruments. Where a banking instrument is attached, the officer must have it valued at the price it is likely to fetch on the open market unless the officer thinks a professional valuation is needed (subsection (7) and see also section 180).

Section 178 – Presumption of ownership

597. **Section 178(1)** provides that a judicial officer carrying out a money attachment can assume that any money found in the premises where the attachment is being carried out is owned wholly or in part by the debtor. But, before attaching any money, the officer must ask anyone present about the ownership of the money and particularly ask whether the money is owned by the debtor in common with someone else (subsection (2)).

598. Subsections (3) and (4) provide that an officer cannot presume that money is owned wholly or in part by the debtor if the officer knows or ought to know that this is not the case. But a simple assertion by a person that the money is not owned by the debtor is not enough to override the presumption that the debtor owns the money. The officer would need to be presented with more information or evidence that the money was not the debtor's before the officer would be precluded from relying on the normal assumption.

Section 179 – Schedule of money attachment

599. **Section 179(1)** provides that a judicial officer, immediately after carrying out a money attachment, must complete a schedule of money attachment. The schedule of money attachment is a document which will contain all the details about the money which has been attached. It may either be a paper document or it can be completed electronically, in which case it would need to include an electronic signature (see section 198(3)).
600. Under subsection (2)(b)(ii), the schedule must specify the value of the attached money but only so far as ascertainable because the officer may not have been able to make an accurate valuation of all the attached instruments at the time of executing the attachment.
601. Under subsection (3), the judicial officer must give a copy of the schedule to the debtor. Where this is not practicable, perhaps because the debtor is not present at the time, a copy must be given to any other person present at the place where the money attachment was executed or, if nobody is there, the officer must leave a copy at that place.
602. Subsection (4) provides that the day on which a money attachment is carried out is to be the day on which the judicial officer hands over a copy of the schedule under subsection (3). This is to make it clear when the money attachment is executed and, in particular, it clarifies that banking instruments may be attached even though the officer decides that a professional valuation of them is needed. In practical terms, it may not be possible to have such a valuation carried out on the same day as the money attachment. This section makes it clear that, nevertheless, the instruments are still attached pending that valuation.

Section 180 – Valuation of banking instruments

603. This section gives a judicial officer the power to seek a professional valuation of a banking instrument where the officer thinks it is appropriate to do so. In particular, this may be necessary for complex negotiable instruments where the value on the open market may not be obvious to a non-expert. The costs of obtaining a valuation are charged to the creditor but may be recoverable from the debtor under section 196 and paragraph 1(c) of schedule 3.

Section 181 – Order for realisation of money likely to deteriorate in value

604. This section permits a creditor, judicial officer, or debtor to apply to the sheriff for an order allowing the creditor or officer to immediately realise the value of any of the attached money. The sheriff may grant such an order if the sheriff thinks the money in question is likely to deteriorate quickly and substantially in value. An example would be a banking instrument denominated in the currency of a country where the economy was collapsing and that currency was very quickly losing value on the money markets.
605. Subsection (4) authorises the officer to act as the irrevocable agent of the debtor and to take any of the steps set out in section 184(3), so the officer can do anything to realise the value of the money that the debtor could do such as presenting a cheque payable to the debtor for payment.

Section 182 – Report of money attachment

606. **Section 182(1)** requires the judicial officer to make a report of the money attachment within 14 days of the day the money attachment is executed, unless the judicial officer has requested, and the sheriff has authorised, a longer period.
607. The report will be a detailed account of the money attached and must include the value of all the attached money (including any money which required a professional valuation), the details of any ownership dispute and the details of any money already released. As with the schedule of money attachment, the report can be made electronically but would require an electronic signature in accordance with section 198(3).
608. Under subsection (5) the sheriff may refuse to receive a report if the stipulated period has expired or the report is not in the correct form. Where the sheriff does refuse the report the money attachment ceases to have effect and the officer has to return the money attached or, where it has already been realised, a sum equivalent to the money attached.

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.

Statement of money attachment

Section 189 – Final statement of money attachment

628. This section requires a judicial officer to make a statement to the sheriff detailing everything that has happened in the course of the money attachment. The officer has 14 days from the later of the day the creditor was paid under a payment order or the day the last of the money attached was returned to the debtor or a third party under the various provisions of this Part (subsections (1) and (2)).
629. The statement must conform to the form prescribed in court rules and must specify details about any banking instruments, the value of which have been subsequently realised, the amount realised for each instrument, any instrument with a value which has not been realised, any chargeable expenses, any sums paid to the creditor, any surplus paid or instruments returned to the debtor and any balance due to or by the debtor (subsection (4)). If the statement is made electronically it will require an electronically certified signature (see section 198(3)).
630. The officer must submit the statement within the time limit; otherwise the officer may be liable for some or all of the expenses of the money attachment unless there is a reasonable excuse for the delay (subsection (6)). The officer may also be reported to the Scottish Civil Enforcement Commission for misconduct if the statement is late or is not submitted (subsection (7) and see section 67).

Section 190 – Audit of final statement under section 189(1)

631. **Section 190(1)** provides that the sheriff must send the final statement of money attachment to the auditor of court who must check the expenses and fix the amount of expenses chargeable, confirm any balance due by or to the debtor and make a report to the sheriff. Under subsection (2), the auditor of court must not alter the statement

without first giving all interested parties an opportunity to make representations. The auditor is not entitled to a fee for making the report to the sheriff (subsection (3)).

632. Subsection (4) provides that once the report from the auditor of court has been received, the sheriff must certify the balance due by or to the debtor but may make modifications to the balance confirmed by the auditor of court. If the sheriff is satisfied that there has been a material irregularity in carrying out the money attachment (other than the timing of the judicial officer's final statement), the sheriff can declare the attachment void. A consequence of that would be that the creditor would not be entitled to any sums paid under, for example, section 188, and these would have to be paid back to the debtor (or a third party, if a third party claimed ownership of the attached money). But even if the money attachment is declared void a person who, in good faith, has purchased or otherwise obtained money that was attached can keep the money in question and remains the lawful owner (subsection (6)).

General and miscellaneous

Section 191 – Money in common ownership

633. **Section 191(1)** permits money which is owned in common between a debtor and third party to be attached. Common ownership means that more than one person owns a share of the money.
634. Subsection (2) permits a third party who owns money in common with a debtor to buy out the debtor's share in the money so that the third party becomes the sole owner. This is done by paying the judicial officer an amount equal to the debtor's interest in the money. Before being able to buy out the debtor's share, the third party must first satisfy the officer that the third party is a part owner of the money. But, if the officer is not satisfied, the third party can apply to the sheriff and if the sheriff is satisfied as to the third party's ownership the buy out can go ahead.
635. Subsection (3) provides for the third party to apply to the sheriff for an order declaring the attachment of money owned in common to be unduly harsh to the third party. The application has to be made before the money is paid to the creditor under a payment order or is realised under an order for immediate realisation (see section 181). If the sheriff makes such an order the money attachment ceases in relation to the money owned in common.
636. Under subsection (4), where the third party buys out the debtor's interest in money under subsection (2) or where a sheriff makes an order under subsection (3), the officer is permitted to attach other money owned and kept by the debtor at the place where the original attachment was carried out. This is an exception to the normal rule in section 176(3) that a second money attachment in the same place is not allowed.

Section 192 – Procedure where money owned in common is disposed of

637. **Section 192** covers the situation where a third party claims common ownership of money with a debtor and does so before payment to the creditor under a payment order or realisation under an order for immediate realisation but the money is nevertheless paid to the creditor under the payment order or is transferred to another person under the provisions for realisation.
638. If the creditor subsequently admits that the third party was a common owner of the money or the third party satisfies the sheriff of this fact, then the creditor has to pay the third party an amount equal to the third party's share of the commonly owned money.

Section 193 – Unlawful acts after money attachment

639. This section provides that a debtor who realises the value of an attached banking instrument, otherwise relinquishes the ownership of it or obtains, by fraud or other

dishonest means, a banking instrument in place of such an instrument is in breach of the money attachment. Anyone who assists the debtor to breach the money attachment (and who knew or ought to have known about the money attachment) is also treated as having breached the money attachment. Such a breach is to be treated as if the person was in contempt of court. Contempt of court is punishable by any of, or a combination of, admonition, fine and, in extreme cases, imprisonment or detention. This section would cover the circumstances in which a debtor, whose cheque had been attached by a money attachment, requested a further cheque from the payer under the pretence that the cheque had been lost or stolen.

Section 194 – Appeals

640. This section provides that an appeal against any decision of the sheriff (except decisions to grant an order for immediate realisation of an instrument under section 181) may be made to the sheriff principal only with the leave of the sheriff and on a point of law. There is no further right of appeal against the decision of the sheriff principal.

Section 195 – Recovery from debtor of expenses of money attachment

641. **Section 195(1)** provides that expenses of money attachment for which the debtor is liable, can be recovered only by the money attachment in which those expenses are incurred. There is no other permissible method for recovering those expenses.
642. Subsection (2) provides that the expenses have to be recovered before the money attachment ceases to have effect or before the money attached is paid over to the creditor. Note that the amount of money attached is to include an amount to cover expenses (section 177(2)) so that when the money is paid over to the creditor there is an amount covering expenses (and under section 184(1) a judicial officer is entitled to retain an amount to cover the officer's fees and outlays before paying the money attached over to the creditor).
643. Where the debtor opposes a payment order or other application on frivolous grounds or makes an application under the provisions of this Part on frivolous grounds, the sheriff may award expenses relating to any such application, opposition or hearing against the debtor and in favour of the creditor (see paragraph 4 of schedule 3). Subsection (3) provides that in those circumstances decree for payment of those expenses is granted against the debtor and in favour of the creditor so that the creditor can recover those expenses (in other words recovery of those expenses does not have to be done by means of the original money attachment).
644. Subsection (4) lists circumstances (all of which are a type of insolvency process apart from subsection (4)(c) which concerns the realisation of a floating charge) which may prevent a money attachment from proceeding. In those circumstances the expenses of the money attachment are still chargeable against the debtor and if they are not dealt with in the insolvency process they can be recovered by a further money attachment.

Section 196 – Liability for expenses of money attachment

645. **Section 196(1)** provides that schedule 3 to this Act will determine the creditor's or debtor's liability for the expenses involved in serving a charge and in procedures for money attachment. Power is also given to the Scottish Ministers to modify schedule 3 by adding or removing types of expenses or varying any description of expenses referred to in that schedule. This power is subject to the negative resolution procedure.