



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 2

### FLOATING CHARGES

#### *Registration and creation etc.*

#### **37 Register of Floating Charges**

- (1) The Keeper of the Registers of Scotland (in this Part, the “Keeper”) must establish and maintain a register to be known as the Register of Floating Charges.
- (2) The Keeper must accept an application for registration of—
  - (a) any document delivered to the Keeper in pursuance of section 38, 41, 42, 43 or 44 of this Act; and
  - (b) any notice delivered to the Keeper in pursuance of section 39 or 45(2) of this Act,provided that the application is accompanied by such information as the Keeper may require for the purposes of the registration.
- (3) On receipt of such an application, the Keeper must note the date of receipt of the application; and, where the application is accepted by the Keeper, that date is to be treated for the purposes of this Part as the date of registration of the document or notice to which the application relates.
- (4) The Keeper must, after accepting such an application, complete registration by registering in the Register of Floating Charges the document or notice to which the application relates.
- (5) The Keeper must—
  - (a) make the Register of Floating Charges available for public inspection at all reasonable times;
  - (b) provide facilities for members of the public to obtain copies of the documents in the Register; and

- (c) supply an extract of a document in the Register, certified as a true copy of the original, to any person requesting it.
- (6) An extract certified as mentioned in subsection (5)(c) above is sufficient evidence of the original.
- (7) The Keeper may charge such fees—
  - (a) for registering a document or notice in the Register of Floating Charges; or
  - (b) in relation to anything done under subsection (5) above,as the Scottish Ministers may by regulations prescribe.
- (8) The Scottish Ministers may by regulations make provision as to—
  - (a) the form and manner in which the Register of Floating Charges is to be maintained;
  - (b) the form of documents (including notices as mentioned in sections 39(1) and 45(2) of this Act) for registration in that Register, the particulars they are to contain and the manner in which they are to be delivered to the Keeper.
- (9) Provision under subsection (8) above may, in particular, facilitate the use—
  - (a) of electronic communication;
  - (b) of documents in electronic form (and of certified electronic signatures in documents).

### **38 Creation of floating charges**

- (1) It continues to be competent, for the purpose of securing any obligation to which this subsection applies, for a company to grant in favour of the creditor in the obligation a charge (known as a “floating charge”) over all or any part of the property which may from time to time be comprised in the company’s property and undertaking.
- (2) Subsection (1) above applies to any debt or other obligation incurred or to be incurred by, or binding upon, the company or any other person.
- (3) From the coming into force of this section, a floating charge is (subject to section 39 of this Act) created only when a document—
  - (a) granting a floating charge; and
  - (b) subscribed by the company granting the charge,is registered in the Register of Floating Charges.
- (4) References in this Part to a document which grants a floating charge are to a document by means of which a floating charge is granted.

### **39 Advance notice of floating charges**

- (1) Where a company proposes to grant a floating charge, the company and the person in whose favour the charge is to be granted may apply to have joint notice of the proposed charge registered in the Register of Floating Charges.
- (2) Subsection (3) below applies where—
  - (a) a notice under subsection (1) above is registered in the Register of Floating Charges; and
  - (b) within 21 days of the notice being so registered, a document—

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*Status: This is the original version (as it was originally enacted).*

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- (i) granting a floating charge conforming with the particulars contained in the notice; and
  - (ii) subscribed by the company granting the charge,
- is registered in the Register of Floating Charges.
- (3) Where this subsection applies, the floating charge so created is to be treated as having been created when the notice under subsection (1) above was so registered.

#### **40 Ranking of floating charges**

- (1) Subject to subsections (4) and (5) below, a floating charge—
- (a) created on or after the coming into force of this section; and
  - (b) which has attached to all or any part of the property of a company,
- ranks as described in subsection (2) below.
- (2) The floating charge referred to in subsection (1) above—
- (a) ranks with—
    - (i) any other floating charge which has attached to that property or any part of it; or
    - (ii) any fixed security over that property or any part of it,according to date of creation; and
  - (b) ranks equally with any floating charge or fixed security referred to in paragraph (a) above which was created on the same date as the floating charge referred to in subsection (1) above.
- (3) For the purposes of subsection (2) above—
- (a) the date of creation of a fixed security is the date on which the right to the security was constituted as a real right; and
  - (b) the date of creation of a floating charge subsisting before the coming into force of this section is the date on which the instrument creating the charge was executed by the company granting the charge.
- (4) Where all or any part of the property of a company is subject to both—
- (a) a floating charge; and
  - (b) a fixed security arising by operation of law,
- the fixed security has priority over the floating charge.
- (5) Where the holder of a floating charge over all or any part of the property of a company has received intimation in writing of the subsequent creation of—
- (a) another floating charge over the same property or any part of it; or
  - (b) a fixed security over the same property or any part of it,
- the priority of ranking of the first-mentioned charge is restricted to security for the matters referred to in subsection (6) below.
- (6) Those matters are—
- (a) the present debt incurred (whenever payable);
  - (b) any future debt which, under the contract to which the charge relates, the holder is required to allow the debtor to incur;
  - (c) any interest due or to become due on the debts referred to in paragraphs (a) and (b) above;

- (d) any expenses or outlays which may be reasonably incurred by the holder; and
- (e) in the case of a floating charge to secure a contingent liability (other than a liability arising under any further debts incurred from time to time), the maximum sum to which the contingent liability is capable of amounting, whether or not it is contractually limited.

(7) Subsections (1) to (6) above, and any provision made under section 41(1) of this Act, are subject to sections 175 and 176A (provision for preferential debts and share of assets) of the Insolvency Act 1986 (c. 45).

#### **41 Ranking clauses**

- (1) The document granting a floating charge over all or any part of the property of a company may make provision regulating the order in which the charge ranks with any other floating charge or any fixed security (including a future floating charge or fixed security) over that property or any part of it.
- (2) Provision under subsection (1) above—
  - (a) may displace in whole or part—
    - (i) subsections (1) and (2) of section 40 of this Act;
    - (ii) subsections (5) and (6) of that section;
  - (b) may not affect the operation of subsection (4) of that section (whether as against subsections (1) and (2) of that section or other provision under subsection (1) above).
- (3) Accordingly, subsections (1), (2), (5) and (6) of that section have effect subject to any provision made under subsection (1) above.
- (4) Provision under subsection (1) above is not valid unless it is made with the consent of the holder of any subsisting floating charge, or any subsisting fixed security, which would be adversely affected by the provision.
- (5) A document of consent for the purpose of subsection (4) above may be registered in the Register of Floating Charges.

#### **42 Assignment of floating charges**

- (1) A floating charge may be assigned (and the rights under it vested in the assignee) by the registration in the Register of Floating Charges of a document of assignment subscribed by the holder of the charge.
- (2) An assignment under subsection (1) above may be in whole or to such extent as may be specified in the document of assignment.
- (3) This section is without prejudice to any other enactment, or any rule of law, by virtue of which a floating charge may be assigned.

#### **43 Alteration of floating charges**

- (1) A document of alteration may alter (whether by addition, deletion or substitution of text or otherwise) the terms of a document granting a floating charge.
- (2) If (and in so far as) an alteration to the terms of a document granting a floating charge concerns—

- (a) the ranking of the charge with any other floating charge or any fixed security;  
or
  - (b) the specification of—
    - (i) the property that is subject to the charge; or
    - (ii) the obligations that are secured by the charge,the alteration is not valid unless subsection (3) below is satisfied.
- (3) This subsection is satisfied if the alteration is made by a document of alteration which is—
- (a) subscribed by—
    - (i) the company which granted the charge;
    - (ii) the holder of the charge; and
    - (iii) the holder of any other subsisting floating charge, or any subsisting fixed security, which would be adversely affected by the alteration;  
and
  - (b) registered in the Register of Floating Charges.
- (4) But paragraph (a)(i) of subsection (3) above does not apply in respect of an alteration which—
- (a) relates only to the ranking of the floating charge first-mentioned in that subsection with any other floating charge or any fixed security; and
  - (b) does not adversely affect the interests of the company which granted the charge.
- (5) The granting, by the holder of a floating charge, of consent to the release from the scope of the charge of any particular property, or class of property, which is subject to the charge is to be treated as constituting an alteration—
- (a) to the terms of the document granting the charge; and
  - (b) as to the specification of the property that is subject to the charge.
- (6) For the purpose of subsection (5) above, property is not to be regarded as released from the scope of a floating charge by reason only of its ceasing to be the property of the company which granted the charge.

#### **44 Discharge of floating charges**

- (1) A floating charge may be discharged by the registration in the Register of Floating Charges of a document of discharge subscribed by the holder of the charge.
- (2) A discharge under subsection (1) above may be in whole or to such extent as may be specified in the document of discharge.
- (3) This section is without prejudice to any other means by which a floating charge may be discharged or extinguished.

#### **45 Effect of floating charges on winding up**

- (1) Where a company goes into liquidation, a floating charge created over property of the company attaches to the property to which it relates.

- (2) But, in a case mentioned in subsection (7)(a) below, there is no attachment under subsection (1) above until such time as a notice of attachment is registered in the Register of Floating Charges on the application of the holder of the charge.
- (3) The attachment of a floating charge to property under subsection (1) above is subject to the rights of any person who—
- (a) has effectually executed diligence on the property to which the charge relates or any part of it;
  - (b) holds over that property or any part of it a fixed security ranking in priority to the floating charge; or
  - (c) holds over that property or any part of it another floating charge so ranking.
- (4) Interest accrues in respect of a floating charge which has attached to property until payment is made of any sum due under the charge.
- (5) Part IV, except section 185, of the Insolvency Act 1986 has (subject to subsection (1) above) effect in relation to a floating charge as if the charge were a fixed security over the property to which it has attached in respect of the principal of the debt or obligation to which it relates and any interest due or to become due on it.
- (6) Subsections (1) to (5) above do not affect the operation of—
- (a) sections 53(7) and 54(6) (attachment of floating charge on appointment of receiver) of the Insolvency Act 1986;
  - (b) sections 175 and 176A of that Act; or
  - (c) paragraph 115(3) of Schedule B1 (attachment of floating charge on delivery of a notice by an administrator) to that Act.
- (7) For the purposes of this section, reference to a company going into liquidation—
- (a) in a case where a court of a member State has under the EC Regulation jurisdiction as respects the company which granted the relevant floating charge, means the opening of insolvency proceedings in that State;
  - (b) in any other case, is to be construed in accordance with section 247(2) and (3) of the Insolvency Act 1986 (c. 45).
- (8) In subsection (7)(a) above—
- “the EC Regulation” is the Regulation of the Council of the European Union published as Council Regulation (EC) No 1346/2000 on insolvency proceedings;
- “court” is to be construed in accordance with Article 2(d) of that Regulation;
- “insolvency proceedings” is to be construed in accordance with Article 2(a) of that Regulation;
- “member State” means a member State of the European Union apart from the United Kingdom.

#### **46 Repeals, savings and transitional arrangements**

- (1) Part XVIII (floating charges: Scotland) of the Companies Act 1985 (c. 6) is repealed.
- (2) Nothing in this Part (except sections 40 and 41 so far as they concern the ranking of floating charges subsisting immediately before the coming into force of this section) affects the validity or operation of floating charges subsisting before the coming into force of this section.

- (3) So, despite the repeal of Chapters I and III of Part XVIII of that Act by subsection (1) above, the provisions of those Chapters are to be treated as having effect for the purposes of floating charges subsisting immediately before the coming into force of this section.
- (4) In particular—
- (a) floating charges subsisting immediately before the coming into force of this section rank with each other as they ranked with each other in accordance with section 464 of the Companies Act 1985 immediately before that section was repealed by subsection (1) above; and
  - (b) a floating charge subsisting immediately before the coming into force of this section ranks with a fixed security so subsisting as it ranked with the security in accordance with section 464 of the Companies Act 1985 immediately before that section was repealed by subsection (1) above.
- (5) Section 140 (floating charges (Scotland)) of the Companies Act 1989 (c. 40) is repealed (but, despite being repealed, is to be treated as having effect for the purposes of subsections (3) and (4) above).

## 47 Interpretation

In this Part—

“company” means an incorporated company (whether or not a company within the meaning of the Companies Act 1985 (c. 6));

“fixed security”, in relation to any property of a company, means any security (other than a floating charge or a charge having the character of a floating charge) which on the winding up of the company in Scotland would be treated as an effective security over that property including, in particular, a heritable security (within the meaning of section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35)).

*Related further provision*

## 48 Formalities as to documents

- (1) In section 6 (registration of documents) of the Requirements of Writing (Scotland) Act 1995 (c. 7), after subsection (1)(a), insert—
- “(aa) to register a document in the Register of Floating Charges;”.
- (2) In section 46 (extract decree of reduction to be recorded) of the Conveyancing (Scotland) Act 1924 (c. 27)—
- (a) in subsection (2), for the words “This section” substitute “Subsection (1) above”; and
  - (b) after subsection (2), insert—
- “(3) This section shall apply in relation to a document registered in the Register of Floating Charges as it applies in relation to a deed or other document pertaining to a heritable security which is recorded in the Register of Sasines (and the references to recording are to be read accordingly).”.

- (3) In section 8 (rectification of defectively expressed documents) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c. 73), after subsection (5), insert—

“(5A) Subsection (5) above applies in relation to document registered in the Register of Floating Charges as it applies in relation to a document recorded in the Register of Sasines (and the references to recording are to be read accordingly).”.

#### 49 Industrial and provident societies

- (1) For section 3 (application to registered societies of provisions relating to floating charges) of the Industrial and Provident Societies Act 1967 (c. 48) substitute—

##### **“3 Application to registered societies of provisions relating to floating charges**

- (1) The provisions of Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (in this section referred to as the “relevant provisions”) shall apply to a registered society as they apply to an incorporated company.
- (2) Where, in the case of a registered society—
- (a) there are in existence—
    - (i) a floating charge created under the relevant provisions (as applied by this section), and
    - (ii) an agricultural charge created under Part II of the Agricultural Credits (Scotland) Act 1929 (c. 13), and
  - (b) any assets of the society are subject to both charges,
- sections 40(1) to (3) (including as subject to section 41(1) to (4)) and 45(3) (c) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 shall have effect for the purposes of determining the ranking with one another of those charges as if the agricultural charge were a floating charge created under the relevant provisions on the date of creation of the agricultural charge.”.
- (2) Section 4 (filing of information relating to charges) of that Act is repealed.
- (3) In section 5 (supplemental provisions) of that Act—
- (a) for paragraph (b) of subsection (1) substitute—
 

“(b) any security, except a floating charge, granted by a registered society over any of its assets,”; and
  - (b) the references to section 4 of that Act are to be treated as references to that section as it had effect immediately before its repeal by subsection (2) above.