

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 9 – Diligence Against Earnings**

##### ***Section 199 – Simultaneous operation of arrestments against earnings where net earnings insufficient***

650. This section amends section 58 of the 1987 Act so that, where a debtor is subject to both an earnings arrestment and a current maintenance arrestment, those arrestments will rank equally in the deductions from the debtor's earnings if the debtor's net earnings are not sufficient to allow deduction of the full amounts due under each. Under section 58(2) as it stood before the amendments made by this section, the earnings arrestment took priority over the current maintenance arrestment.
651. Subsection (1) inserts new subsections (2) to (4) into section 58 in place of subsection (2). These subsections set out formulae which the employer must use to calculate an equal proportion of the available net earnings to satisfy both creditors when both types of arrestment are operating at the same time.
652. Schedule 3 to the 1987 Act makes provision for the disbursement by the sheriff clerk of deductions made by a debtor's employer under a conjoined arrestment order. Again, under the law before this Act (for which see paragraph 4 of schedule 3), where the sum available for disbursement was not sufficient to allow the full amounts due to each creditor to be paid, priority was given to ordinary debts (i.e. debts which are recoverable by earnings arrestment).
653. Subsection (3) amends paragraph 4 and inserts a new paragraph 4A so that, where the sum available for disbursement is not sufficient, it is divided proportionately among the various creditors rather than priority being given to ordinary debts. Subsection (2) makes a minor amendment of section 63(5)(b) (which deals with how the debtor's employer calculates the sum to be deducted where a conjoined arrestment order is in effect) to clarify the language of that paragraph.

##### ***Section 200 – Arrestment of earnings: deductions from holiday pay***

654. **Section 200**, among other things, inserts a new section 49A into the 1987 Act.

#### **New section 49A – Deductions where net earnings include holiday pay**

655. New section 49A provides that any holiday pay which is paid on the same day on which normal earnings are paid is to be treated separately from the normal earnings for the purpose of calculating any deductions to be made under an earnings arrestment. On such a pay-day, the amount to be deducted from the normal earnings is calculated

in accordance with section 49 as if the holiday pay had not been paid. A separate calculation is then made to determine the deduction to be made from the holiday pay. The holiday pay is treated broadly as if it were normal earnings relating to the period during with the debtor is on holiday.

656. This makes a change to the previous system under which holiday pay was added to the normal earnings and the deduction was calculated on the basis of that aggregated payment.

### ***Section 201 – Provision of debt advice and information package***

657. This section amends sections 47 (earnings arrestments), 51 (current maintenance arrestments) and 60 (conjoined arrestment orders) of the 1987 Act to impose duties on creditors to provide debtors with debt advice and information packages no earlier than 12 weeks before executing diligence against the debtors' earnings. Subsection (4) also amends section 73 (the interpretation provision for Part 3 of the 1987 Act) to add a definition of "debt advice and information package".

### ***Section 202 – Intimation of arrestment schedule***

658. This section amends section 70 of the 1987 Act. Subsection (2) amends section 70(1) to require the judicial officer, when serving an earnings arrestment schedule or a current maintenance arrestment schedule on the employer, to take all reasonably practicable steps to provide a copy of the schedule to the debtor.
659. Subsection (3) inserts new subsections (4A) and (4B) which place a duty on employers on whom an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order is served, in the case of an earnings or current maintenance arrestment, to provide the debtor with a copy of the schedule and, in all cases, to notify the debtor of the date on which the first deduction from salary is to be made together with the amount to be deducted.

### ***Section 203 – Provision of information***

660. **Section 203** inserts four new sections into the 1987 Act concerned with the provision of information.

#### **New section 70A – Employer's duty to provide information**

661. New section 70A is inserted into the 1987 Act and places a duty on an employer, on whom an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order is served, to provide the debtor, creditor and, in the case of a conjoined arrestment order, the sheriff clerk with certain specified information. It also specifies the dates on which the information is to be provided. The information to be provided is set out in subsection (3) and relates to details of the debtor's pay and any deductions from it. A power is given to the Scottish Ministers to prescribe, by regulations, other types of information to be provided under this subsection. That power is exercisable by regulations subject to negative resolution procedure. Subsection (5) also imposes a duty on employers, where an arrestment against earnings is in effect to advise the creditor and, in the case of a conjoined arrestment order, the sheriff clerk if the debtor ceases to be employed by the employer and to provide details of any new employer of the debtor if known.

#### **New section 70B – Failure to give notice under section 70A(5)**

662. This section provides that where an employer fails to notify the creditor when a debtor's employment is terminated and provide details of any new employment, the sheriff may, on the application by the creditor, make an order requiring the employer to provide whatever information is known by that employer to the creditor. The sheriff may also order the employer to pay the creditor an amount not exceeding twice the amount which

that creditor would have received on the debtor's next pay day had the debtor still been employed by the employer. Subsection (2) provides that payment of this amount will reduce the debt owed to the creditor by the same amount.

663. Under subsection (3) the employer may, within 14 days of the order being made, appeal, on point of law only, to the sheriff principal, whose decision will be final.
664. By virtue of an amendment of section 105 of the 1987 Act by paragraph 16(13)(c) of schedule 5 to this Act, section 70B does not apply to Her Majesty as an employer.

#### **New section 70C – Creditor's duty to provide information**

665. This section specifies the information to be provided by the creditor to the employer and, in the case of a conjoined arrestment order, to the sheriff clerk and the dates on which that information is to be supplied. The information to be provided relates to how much of the debt is still outstanding and how much the creditor has received under the arrestment towards paying off that debt.

#### **New section 70D – Debtor's duty to provide information**

666. This section provides that a debtor, who is subject to an arrestment against the debtor's earnings, must notify the creditor and, in the case of a conjoined arrestment order, the sheriff clerk of any change of his or her employer.

#### ***Section 204 – Conjoined arrestment orders: jurisdiction***

667. This section amends section 73(1)(c) of the 1987 Act to make it clear that the references to the sheriff in particular sections of the 1987 Act are to the sheriff who has jurisdiction over (a) the principal place of employment of the debtor, (b) where that principal place of employment is outside Scotland, any other place of employment in Scotland or (c) where neither of the foregoing apply, the debtor's domicile.

#### ***Section 205 – Arrestment of seamen's wages***

668. By virtue of section 73(3)(c) of the 1987 Act, wages of seamen (other than fishermen) were not treated as earnings for the purposes of earnings arrestments under the 1987 Act (although they could be subject to a current maintenance arrestment). This section repeals section 73(3)(c) of the 1987 Act. This has the effect of removing this exemption. This section also, as a consequence, repeals section 73(4), which contains definitions of "seaman" and "fishing boat" (expressions used in section 73(3)(c)) which are no longer required.