

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 12 – Summary Warrants, Time to Pay and Charges to Pay

Section 209 – Summary warrants, time to pay and charges to pay

743. **Section 209(1)** amends section 10 of the 2002 Act by repealing subsection (4) of that section. Attachment under the 2002 Act is competent only after a charge to pay has been served on the debtor and the days of the charge have expired without payment. Subsection (4) provided that no charge needed to be served for attachment where the decree being enforced was a summary warrant. The repeal of that subsection means a charge is now required in all cases.
744. Subsection (2) amends section 1 of the 1987 Act by repealing section 1(5)(e). That paragraph bars a court from making a time to pay direction where the action relates to various debts being pursued by local authorities and other public creditors. The effect of this repeal is that it is now competent for the court, when granting decree for payment in a court action, to make a time to pay direction where the debt relates to—
- rates; or
 - council tax, council water charges, community charge or community water charge.
745. Subsection (3) amends section 5 of the 1987 Act by repealing section 5(4)(c) and (e). Those paragraphs bar a court from making a time to pay order where the debt is being pursued under a summary warrant or where the action relates to various debts being pursued by local authorities and other public creditors. The effect of these repeals is that the general bar against time to pay orders on summary warrant debt is removed, and that it is competent for the court to make a time to pay order after decree in respect of the types of debt formerly covered by section 1(5)(e) of the 1987 Act. It should be noted that it remains incompetent to grant a time to pay order in relation to debts of the types listed in section 5(4)(d) and (f) of the 1987 Act (that is, various taxes and duties and social security contributions) regardless of whether they are enforced under a summary warrant or an ordinary decree for payment. Subsection (4) contains amendments consequential on the changes made by subsections (2) and (3).
746. Section 90 of the 1987 Act makes general provision about charges to pay for attachment and for earnings arrestment. Subsection (5) amends section 90 in consequence of the amendment contained in subsection (1) so that the references in section 90 to an attachment being incompetent unless a charge has been served are removed. Provision about that is now contained in the 2002 Act. Subsection (5) also amends section 90 with the effect that a charge to pay is required before a creditor with a debt enforceable under a summary warrant can use the diligence of earnings arrestment.

747. Paragraphs (b), (d) and (e) of subsection (5) further amend section 90 with the effect that the provisions relating to charges to pay (i.e. that it must be in the form set out in rules of court, that diligence must be executed within 2 years of the charge and that a further charge can be served to reconstitute the right to do diligence) apply to all diligences where a charge to pay must be served before diligence is competent (this includes the new diligences of money attachment, land attachment and residual attachment as well as arrestment under a summary warrant decree).

210 – Time to pay directions and time to pay orders

748. **Section 210** amends the 1987 Act so that the court is under a duty to grant a time to pay direction or a time to pay order if it is satisfied that it is reasonable in all circumstances, having regard to certain factors. It does so by amending sections 1 (time to pay directions) and 5 (time to pay orders) of the 1987 Act to assist the judiciary in deciding whether or not to grant an application for a time to pay direction or a time to pay order. It requires them to take certain factors into account before deciding on the application. These factors are listed in new sections 1(1A)(a) to (e) and 5(2A)(a) to (e) of the 1987 Act.
749. **Section 210** should be read together with the amendments of sections 3 and 10 of the 1987 Act contained in paragraphs 16(3)(a) and (9)(a) of schedule 5 to this Act, which are consequential on (for example) the new diligence of land attachment.
750. Section 3 of the 1987 Act allows a debtor or a creditor to apply to the court which made a time to pay direction for variation or recall of the direction or for the recall or restriction of certain listed diligences. Section 3(1)(a), as amended, will have the effect of requiring the court to consider the reasonableness of the application in the light of all the circumstances.
751. Section 10 of the 1987 Act makes similar provision to section 3 but for time to pay orders. Section 10(1)(a), as amended, will have the effect of requiring the sheriff to consider the reasonableness of the application to vary or recall the time to pay order in the light of all the circumstances.