

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 2 – Floating Charges**

#### **Registration and creation etc.**

#### *Section 43 – Alteration of floating charges*

129. This section deals with alterations to the terms of a floating charge.
130. [Section 43\(2\)](#) sets out the alterations to the terms of a floating charge which must be registered, namely alterations concerning the ranking of the charge with any other floating charge or any fixed security and alterations concerning the specification of the property that is subject to the charge or the obligations that are secured by the charge.
131. An unregistered agreement to alter the terms of a floating charge would remain as a contractual agreement between the parties to it but could not affect any third party.
132. A ranking agreement is essentially an agreement between secured creditors and may be of no interest to the debtor. Accordingly, subsection (4) enables an agreement between the secured creditors, in which the debtor is not a participant, to be registered, provided that the debtor is not thereby adversely affected.
133. Subsection (5) addresses the case – exemplified in *Scottish & Newcastle plc v Ascot Inns Ltd*, 1994 SLT 1140 - in which the holder of a floating charge gives consent to specific assets, or a specific class of assets of the company, being released from the scope of the floating charge while yet remaining in the ownership of the company. If, as is currently the case, the fact of such a release is not published, an acquirer from a liquidator, an administrator or a receiver appointed by the holder of the floating charge cannot be confident of their title.
134. The subsection is not directed towards the escape of individual assets from the scope of the charge on the onerous or gratuitous transfer of the asset by the company to a third party prior to attachment of the floating charge. Unless or until the company goes into liquidation or a receiver is appointed, the company should be able to deal with its secured assets as normal by (say) selling them. It is not intended that normal business events of this kind should be registered as alterations. Accordingly, subsection (6) clarifies that, for the purposes of subsection (5), 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.