



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 6

### DILIGENCE ON THE DEPENDENCE

#### 169 Diligence on the dependence

After section 15 of the 1987 Act, insert—

#### “PART 1A

#### DILIGENCE ON THE DEPENDENCE

#### *Availability of diligence on the dependence*

#### 15A Diligence on the dependence of action

- (1) Subject to subsection (2) below and to sections 15C to 15F of this Act, the Court of Session or the sheriff may grant warrant for diligence by—
- (a) arrestment; or
  - (b) inhibition,
- on the dependence of an action.
- (2) Warrant for—
- (a) arrestment on the dependence of an action is competent only where the action contains a conclusion for payment of a sum other than by way of expenses; and
  - (b) inhibition on the dependence is competent only where the action contains—
    - (i) such a conclusion; or
    - (ii) a conclusion for specific implement of an obligation to convey heritable property to the creditor or to grant in the creditor's

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favour a real right in security, or some other right, over such property.

- (3) In this Part of this Act, “action” includes, in the sheriff court—
- (a) a summary cause;
  - (b) a small claim; and
  - (c) a summary application,
- and references to “summons”, “conclusion” and to cognate expressions shall be construed accordingly.

### **15B Diligence on the dependence of petition**

- (1) Subject to subsection (2) below and to sections 15C to 15F of this Act, the Court of Session may grant warrant for diligence by—
- (a) arrestment; or
  - (b) inhibition,
- on the dependence of a petition.
- (2) Warrant for—
- (a) arrestment on the dependence of a petition is competent only where the petition contains a prayer for payment of a sum other than by way of expenses; and
  - (b) inhibition on the dependence is competent only where the petition contains—
    - (i) such a prayer; or
    - (ii) a prayer for specific implement of an obligation to convey heritable property to the creditor or to grant in the creditor's favour a real right in security, or some other right, over such property.
- (3) The provisions of this Act (other than section 15A), of any other enactment and of any rule of law relating to diligence on the dependence of actions shall, in so far as is practicable and unless the contrary intention appears, apply to petitions in relation to which it is competent to grant warrant for such diligence and to the parties to them as they apply to actions and to parties to them.

### **15C Diligence on the dependence to secure future or contingent debts**

- (1) It shall be competent for the court to grant warrant for diligence on the dependence where the sum concluded for is a future or contingent debt.
- (2) In this section and in sections 15D to 15M of this Act, the “court” means the court before which the action is depending.

#### *Application for diligence on the dependence*

### **15D Application for diligence on the dependence**

- (1) A creditor may, at any time during which an action is in dependence, apply to the court for warrant for diligence by—
- (a) arrestment; or

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- (b) inhibition,  
on the dependence of the action.
- (2) An application under subsection (1) above shall—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) subject to subsection (3) below, be intimated to and provide details of—
    - (i) the debtor; and
    - (ii) any other person having an interest;
  - (c) state whether the creditor is seeking the grant, under section 15E(1) of this Act, of warrant for diligence on the dependence in advance of a hearing on the application under section 15F of this Act; and
  - (d) contain such other information as the Scottish Ministers may by regulations prescribe.
- (3) An application under subsection (1) above need not be intimated where the creditor is seeking the grant, under section 15E(1) of this Act, of warrant in advance of a hearing on the application under section 15F of this Act.
- (4) The court, on receiving an application under subsection (1) above, shall—
  - (a) subject to section 15E of this Act, fix a date for a hearing on the application under section 15F of this Act; and
  - (b) order the creditor to intimate that date to—
    - (i) the debtor; and
    - (ii) any other person appearing to the court to have an interest.

### **15E Grant of warrant without a hearing**

- (1) The court may, if satisfied as to the matters mentioned in subsection (2) below, make an order granting warrant for diligence on the dependence without a hearing on the application under section 15F of this Act.
- (2) The matters referred to in subsection (1) above are—
  - (a) that the creditor has a prima facie case on the merits of the action;
  - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
    - (i) the debtor being insolvent or verging on insolvency; or
    - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,were warrant for diligence on the dependence not granted in advance of such a hearing; and
  - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.
- (3) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.
- (4) Where the court makes an order granting warrant for diligence on the dependence without a hearing on the application under section 15F of this Act, the court shall—

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- (a) fix a date for a hearing under section 15K of this Act; and
  - (b) order the creditor to intimate that date to—
    - (i) the debtor; and
    - (ii) any other person appearing to the court to have an interest.
- (5) Where a hearing is fixed under subsection (4)(a) above, section 15K of this Act shall apply as if an application had been made to the court for an order under that section.
- (6) Where the court refuses to make an order granting a warrant without a hearing under section 15F of this Act and the creditor insists in the application, the court shall—
- (a) fix a date for such a hearing on the application; and
  - (b) order the creditor to intimate that date to—
    - (i) the debtor; and
    - (ii) any other person appearing to the court to have an interest.

#### **15F Hearing on application**

- (1) At the hearing on an application for warrant for diligence on the dependence, the court shall not make any order without first giving—
- (a) any person to whom intimation of the date of the hearing was made; and
  - (b) any other person the court is satisfied has an interest,
- an opportunity to be heard.
- (2) The court may, if satisfied as to the matters mentioned in subsection (3) below, make an order granting warrant for diligence on the dependence.
- (3) The matters referred to in subsection (2) above are—
- (a) that the creditor has a prima facie case on the merits of the action;
  - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
    - (i) the debtor being insolvent or verging on insolvency; or
    - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,
 were warrant for diligence on the dependence not granted; and
  - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.
- (4) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.
- (5) Where the court makes an order granting or, as the case may be, refusing warrant for diligence on the dependence, the court shall order the creditor to intimate that order to—
- (a) the debtor; and
  - (b) any other person appearing to the court to have an interest.
- (6) Where the court makes an order refusing warrant for diligence on the dependence, the court may impose such conditions (if any) as it thinks fit.

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- (7) Without prejudice to the generality of subsection (6) above, those conditions may require the debtor—
- (a) to consign into court such sum; or
  - (b) to find caution or to give such other security, as the court thinks fit.

*Execution before service*

**15G Execution of diligence before service of summons**

- (1) This section applies where diligence by—
- (a) arrestment; or
  - (b) inhibition,
- on the dependence of an action is executed before service of the summons on the debtor.
- (2) Subject to subsection (3) below, if the summons is not served on the debtor before the end of the period of 21 days beginning with the day on which the diligence is executed, the diligence shall cease to have effect.
- (3) The court may, on the application of the creditor, make an order extending the period referred to in subsection (2) above.
- (4) In determining whether to make such an order the court shall have regard to—
- (a) the efforts of the creditor to serve the summons within the period of 21 days; and
  - (b) any special circumstances preventing or obstructing service within that period.

*Restriction on property attached*

**15H Sum attached by arrestment on dependence**

- (1) The court may, subject to subsection (2) below, when granting warrant for arrestment on the dependence, limit the sum which may be attached to funds not exceeding such amount as the court may specify.
- (2) The maximum amount which the court may specify under subsection (1) above shall be the aggregate of—
- (a) the principal sum concluded for;
  - (b) a sum equal to 20 per cent of that sum or such other percentage as the Scottish Ministers may, by regulations, prescribe;
  - (c) a sum equal to 1 year's interest on the principal sum at the judicial rate; and
  - (d) any sum prescribed under subsection (3) below.
- (3) The Scottish Ministers may, by regulations, prescribe a sum which appears to them to be reasonable having regard to the expenses likely to be—
- (a) incurred by a creditor; and
  - (b) chargeable against a debtor,

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in executing an arrestment on the dependence.

- (4) For the avoidance of doubt, section 73F of this Act applies to any sum attached under this section.

### **15J Property affected by inhibition on dependence**

Where the court grants warrant for diligence by inhibition on the dependence—

- (a) in a case where the action is brought for specific implement of an obligation—
- (i) to convey heritable property to the creditor;
  - (ii) to grant in the creditor's favour a real right in security over such property; or
  - (iii) to grant some other right over such property,
- the court shall limit the property inhibited to that particular property; and
- (b) in any other case, the court may limit the property inhibited to such property as the court may specify.

*Recall etc. of diligence on the dependence.*

### **15K Recall or restriction of diligence on dependence**

- (1) This section applies where warrant is granted for diligence on the dependence.
- (2) The debtor and any person having an interest may apply to the court for an order—
- (a) recalling the warrant;
  - (b) restricting the warrant;
  - (c) if an arrestment or inhibition has been executed in pursuance of the warrant—
    - (i) recalling; or
    - (ii) restricting,
 that arrestment or inhibition;
  - (d) determining any question relating to the validity, effect or operation of the warrant; or
  - (e) ancillary to any order mentioned in paragraphs (a) to (d) above.
- (3) An application under subsection (2) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated to—
    - (i) the creditor; and
    - (ii) any other person having an interest.
- (4) At the hearing on the application under subsection (2) above, the court shall not make any order without first giving—
- (a) any person to whom intimation of the application was made; and
  - (b) any other person the court is satisfied has an interest,
- an opportunity to be heard.

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- (5) Where the court is satisfied that the warrant is invalid it—
- (a) shall make an order—
    - (i) recalling the warrant; and
    - (ii) if an arrestment or inhibition has been executed in pursuance of the warrant, recalling that arrestment or inhibition; and
  - (b) may make an order ancillary to any order mentioned in paragraph (a) above.
- (6) Where the court is satisfied that an arrestment or inhibition executed in pursuance of the warrant is incompetent, it—
- (a) shall make an order recalling that arrestment or inhibition; and
  - (b) may make an order ancillary to any such order.
- (7) Subject to subsection (8) below, where the court is satisfied that the warrant is valid but that—
- (a) an arrestment or inhibition executed in pursuance of it is irregular or ineffective; or
  - (b) it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, to do so,
- the court may make any order such as is mentioned in subsection (2) above.
- (8) If no longer satisfied as to the matters mentioned in subsection (9) below, the court—
- (a) shall make an order such as is mentioned in subsection (5)(a) above; and
  - (b) may make an order such as is mentioned in subsection (5)(b) above.
- (9) The matters referred to in subsection (8) above are—
- (a) that the creditor has a prima facie case on the merits of the action;
  - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
    - (i) the debtor being insolvent or verging on insolvency; or
    - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets; and
  - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, for the warrant or, as the case may be, any arrestment or inhibition executed in pursuance of it to continue to have effect.
- (10) The onus shall be on the creditor to satisfy the court that no order under subsection (5), (6), (7) or (8) above should be made.
- (11) In granting an application under subsection (2) above, the court may impose such conditions (if any) as it thinks fit.
- (12) Without prejudice to the generality of subsection (11) above, the court may impose conditions which require the debtor—
- (a) to consign into court such sum; or
  - (b) to find such caution or to give such other security,

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as the court thinks fit.

- (13) Where the court makes an order under this section, the court shall order the debtor to intimate that order to—
- (a) the creditor; and
  - (b) any other person appearing to the court to have an interest.
- (14) This section applies irrespective of whether warrant for diligence on the dependence is obtained, or executed, before this section comes into force.

### **15L Variation of orders and variation or recall of conditions**

- (1) Where—
- (a) an order restricting warrant for diligence on the dependence is made under section 15K(7); or
  - (b) a condition is imposed by virtue of—
    - (i) section 15F(6); or
    - (ii) section 15K(11),
 of this Act, the debtor may apply to the court for variation of the order or, as the case may be, variation or removal of the condition.
- (2) An application under subsection (1) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated to—
    - (i) the creditor; and
    - (ii) any other person having an interest.
- (3) At the hearing on the application under subsection (1) above, the court shall not make any order without first giving—
- (a) any person to whom intimation of the application was made; and
  - (b) any other person the court is satisfied has an interest,
- an opportunity to be heard.
- (4) On an application under subsection (1) above, the court may if it thinks fit—
- (a) vary the order; or
  - (b) vary or remove the condition.
- (5) Where the court makes an order varying the order or, as the case may be, varying or removing the condition, the court shall order the debtor to intimate that order to—
- (a) the creditor; and
  - (b) any other person appearing to the court to have an interest.

### *General and miscellaneous*

### **15M Expenses of diligence on the dependence**

- (1) Subject to subsection (3)(a) below, a creditor shall be entitled to such expenses as the creditor incurs—



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- (a) in obtaining warrant for diligence on the dependence; and
  - (b) where an arrestment or inhibition is executed in pursuance of the warrant, in so executing the arrestment or inhibition.
- (2) Subject to subsection (3)(b) below, a debtor shall be entitled, where—
- (a) warrant for diligence on the dependence is granted; and
  - (b) the court is satisfied that the creditor was acting unreasonably in applying for it,
- to the expenses incurred in opposing that warrant.
- (3) The court may modify or refuse—
- (a) such expenses as are mentioned in subsection (1) above if it is satisfied that—
    - (i) the creditor was acting unreasonably in applying for the warrant; or
    - (ii) such modification or refusal is reasonable in all the circumstances and having regard to the outcome of the action; and
  - (b) such expenses as are mentioned in subsection (2) above if it is satisfied as to the matter mentioned in paragraph (a)(ii) above.
- (4) Subject to subsections (1) to (3) above, the court may make such finding as it thinks fit in relation to such expenses as are mentioned in subsections (1) and (2) above.
- (5) Expenses incurred as mentioned in subsection (1) and (2) above in obtaining or, as the case may be, opposing an application for warrant shall be expenses of process.
- (6) Subsections (1) to (5) above are without prejudice to any enactment or rule of law as to the recovery of expenses chargeable against a debtor as are incurred in executing an arrestment or inhibition on the dependence of an action.

## 15N Application of this Part to admiralty actions

This Part of this Act (other than sections 15H, 15J and 15M) shall apply, in so far as not inconsistent with the provisions of Part V of the Administration of Justice Act 1956 (c. 46) (admiralty jurisdiction and arrestment of ships), to an arrestment on the dependence of an admiralty action as it applies to any other arrestment on the dependence.”.

### Annotations:

#### Commencement Information

- II** S. 169 partly in force; s. 169 not in force at Royal Assent see s. 227; s. 169 in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, art. 3(1)(b)(i) (with arts. 4-6, 10); s. 169 in force for certain further purposes at 22.4.2009 by S.S.I. 2009/67, art. 3 (with transitional modifications and savings in arts. 4-6)

## 170 Prescription of arrestment

After section 95 of the 1987 Act, insert—

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### **“95A Prescription of arrestment**

- (1) Subject to subsection (2) below, an arrestment which is not insisted in prescribes—
  - (a) where it is on the dependence of an action, at the end of the period of 3 years beginning with the day on which a final interlocutor is obtained by the creditor for payment of all or part of a principal sum concluded for; or
  - (b) where it is in execution of an extract decree or other extract registered document relating to a due debt, at the end of the period of 3 years beginning with the day on which the arrestment is executed.
- (2) Where the arrestment secures or enforces a future or contingent debt due to the creditor, it prescribes, if not insisted in, at the end of the period of 3 years beginning on the day on which the debt becomes due.
- (3) In a case where—
  - (a) a time to pay direction;
  - (b) an interim order under section 6(3) of this Act; or
  - (c) a time to pay order,
 has been made, there shall be disregarded, in computing the period at the end of which the arrestment prescribes, the period during which the time to pay direction, interim order or time to pay order is in effect.
- (4) Nothing in this section shall apply to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.
- (5) Subsections (1) to (3) above apply irrespective of whether the arrestment is executed, or warrant for it obtained, before this section comes into force.
- (6) For the purposes of subsection (1)(a) above, a final interlocutor is obtained when an interlocutor cannot be recalled or altered and is not subject to review.”.

### **171 Abolition of letters of loosing**

- (1) Subject to subsection (2) below, it is no longer competent for any court to loose an arrestment.
- (2) Subsection (1) above does not affect—
  - (a) any enactment or rule of law relating to the loosing of an arrestment of a ship or its cargo; or
  - (b) the exercise of any other power of the court to recall or restrict an arrestment.

PROSPECTIVE

### **172 Abolition of adjudication in security**

Any enactment or rule of law enabling adjudication in security to be used ceases to have effect.

**Status:**

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**Changes to legislation:**

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