Executive Note

The Diligence (Scotland) Regulations 2009
SSI/2009/68

This instrument is made in exercise of powers contained in sections 155(4), 159 and 159A(3) of the Titles to Land Consolidation (Scotland) Act 1868, sections 73B(2), 73G(2) and 73S(1) of the Debtors (Scotland) Act 1987 and sections 148(3), 149, 162, 164(1), 206 and 224 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. It is subject to negative resolution procedure.

Policy Objectives

This instrument prescribes forms in respect of provisions made by Part 5 (inhibition) and Part 10 (arrestment in execution and action of furthcoming) of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

Part 5 – Inhibition

Inhibition is a personal diligence against a debtor and has effect against their heritable property. Inhibition has the effect of preventing a debtor from transacting with their property to the detriment of the inhibiting creditor. The process was previously provided for substantially in the common law.

Part 5 of the 2007 Act reforms aspects of the law in respect of inhibition and provides for the provision of a number of forms by regulations as follows:-

- Section 148 deals with the registration of an inhibition and provides for the form of Schedule of Inhibition and Certificate of Execution of Inhibition to be prescribed;
- Section 149 clarifies when an inhibition takes effect and provides for the form of Notice of Inhibition to be prescribed;
- Sections 160-163 relate to the breach of an inhibition and to actions of reduction of a conveyance or deed granted in breach of an inhibition. Section 162 inserts new section 159A into the Titles to Land Consolidation (Scotland) Act 1868 and provides that the form of discharge of notice of Summons for breach of inhibition is to be prescribed;
- Section 164 provides power to prescribe forms in the 1868 Act and inserts new section 159B into that Act requiring the form of Notice of Summons for breach of inhibition to be prescribed.

Part 10 – Arrestment in execution and action of furthcoming

Arrestment is a diligence used against the property of a debtor in the hands of a third party. Arrestment is most commonly directed against funds belonging to a debtor held by banks or other financial institutions but can also be used against other moveable property, for example, goods held in a warehouse.

Arrestment involves three parties – the debtor, the creditor and a third party known as the arrestee. Arrestment attaches property belonging to the debtor but does not transfer ownership or any right to dispose of or realise the value of assets to the creditor. In order to complete the diligence and have the assets sold or transferred, the creditor must raise an action of furthcoming. In practice, actions of furthcoming are rare as the debtor will often complete a voluntary mandate authorising the transfer of the arrested property to the creditor or will otherwise deal with the debt.

The process for arrestment in execution and action of furthcoming was previously entirely provided for in the common law. Part 10 of the 2007 Act inserts new part 3A into the Debtors (Scotland) Act 1987, amends some aspects of the law relating to arrestment in execution and requires the provision of a number of forms by regulations as follows:-

- Section 73C of new part 3A requires that the schedule of arrestment is in the form prescribed by regulation
- Section 73G of new part 3A imposes a duty of disclosure on the arrestee and requires a form to be prescribed for the arrestee to disclose what has been arrested
- Section 73G of new part 3A formalises the provision of a voluntary mandate by the debtor to allow for the release of arrested goods or funds and requires the form of the voluntary mandate to be prescribed by regulation.

Consultation

The forms prescribed in this instrument have been developed through consultation with a number of stakeholders including the Society of Messengers at Arms and Sheriff Officers, the Committee of Scottish Clearing Bankers, Registers of Scotland and the Lord President's Advisory Group on Diligence.

Financial Effect

The making of these regulations is not expected to have a financial effect on the Scottish Government.

The financial effect on stakeholders will be restricted to costs associated with the implementation of the new provisions and forms.

Accountant in Bankruptcy
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