



# Debt Arrangement and Attachment (Scotland) Act 2002

2002 asp 17

## PART 2

### ATTACHMENT

#### *General and miscellaneous provisions*

#### **34 Articles belonging to a third party**

- (1) Where at any time before an attached article is auctioned—
  - (a) a third party claims to own the article; and
  - (b) either—
    - (i) the officer is satisfied that the claim is valid and neither the debtor nor any other person in possession of the article disputes the claim; or
    - (ii) the sheriff, on an application by the third party, makes an order stating that the sheriff is <sup>F1</sup>satisfied that the claim is valid],the attachment of that article is to cease to have effect.
- (2) The making of an application to the sheriff for the purposes of subsection (1)(b)(ii) above does not preclude the third party making the application from taking any other proceedings for the recovery of an article which is owned by the third party.
- (3) Where the attachment of an article ceases, under subsection (1) above, to have effect, the officer may attach other articles which are owned by the debtor and kept at the place at which the original attachment was executed.

#### **Textual Amendments**

- F1** Words in s. 34(1)(b)(ii) substituted (31.3.2007) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007](#) (asp 3), s. 227(3), [Sch. 5 para. 30\(10\)](#) (with s. 223); S.S.I. 2007/82, art. 4(e)(ii)

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### **35 Articles in common ownership**

(1) Articles which are owned in common by a debtor and a third party may be attached and disposed of in satisfaction of the debts of the debtor.

(2) Where at any time before an attached article is auctioned—

- (a) a third party claims to own the article in common with the debtor;
- (b) either—
  - (i) the officer is satisfied that the claim is valid; or
  - (ii) the sheriff, on an application by the third party, makes an order stating that the sheriff is so satisfied; and
- (c) the third party pays to the officer a sum equal to the value of the debtor's interest in the article,

the debtor's interest in the article shall transfer to the third party.

(3) Where the sheriff is satisfied—

- (a) that an article which has been removed from the place at which it was attached is owned in common by the debtor and a third party; and
- (b) that the auction of the article would be unduly harsh to the third party in the circumstances,

the sheriff may, on an application by the third party before the attached article is auctioned, order that the attachment of that article is to cease to have effect.

(4) Where—

- (a) the debtor's interest in an article owned in common by the debtor and a third party is, under subsection (2) above, transferred to the third party; or
- (b) the attachment of an article which is so owned ceases, in pursuance of an order made under subsection (3) above, to have effect,

the officer may attach other articles which are owned by the debtor and kept at the place at which the original attachment was executed.

### **36 Procedure where articles in common ownership are sold at auction**

(1) This subsection applies where—

- (a) a third party claimed, before an attached article was auctioned, to own the article in common with the debtor;
- (b) the debtor's interest in the article has not transferred to the third party under section 35(2) above;
- (c) the attachment of the article has not, by virtue of an order made under section 35(3) above, ceased to have effect;
- (d) the third party's interest in the article has, following the auction of the article, been transferred to another person; and
- (e) either—
  - (i) the third party's claim is, after that transfer of interest, admitted by the creditor and the debtor; or
  - (ii) where the third party's claim is not so admitted, the sheriff, on an application by the third party after that transfer of interest, is satisfied that the claim is valid.

(2) Where subsection (1) above applies, the creditor shall—

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- (a) where the article has been sold at the auction, pay to the third party the fraction of the proceeds of the sale of the article which corresponded to the third party's interest in the article; or
  - (b) where the ownership of the article has passed to the creditor under section 31(2)(a) above, pay to the third party the fraction of the value of the article which corresponded to the third party's interest in the article.
- (3) The reference in subsection (2)(b) above to the value of an article is a reference to the value of the article as fixed under subsection (2) or (3) of section 15 above or, as the case may be, section 51 or 54(1) below.

### **37 Attachment terminated by payment or tender of full amount owing**

An attachment is to cease to have effect if the sum recoverable is—

- (a) paid to the creditor, the officer or any other person who has authority to receive payment on behalf of the creditor; or
- (b) tendered to any of those persons and the tender is not accepted within a reasonable time.

### **38 Assistance to debtor**

The sheriff clerk shall, if requested by the debtor—

- (a) provide the debtor with information as to the procedures available to him under any provision of this Part or Part 3 of this Act; and
- (b) assist the debtor in the completion of any form required in connection with any proceedings under any provision of this Part or Part 3 of this Act,

but the sheriff clerk shall not be liable for any error or omission by him in performing the duties imposed on him by this section.

### **39 Expenses chargeable in relation to attachment etc.**

- (1) Schedule 1 to this Act has effect for the purposes of determining the liability, as between the creditor and the debtor, for expenses incurred in serving a charge and in the process of attachment and auction.
- (2) The Scottish Ministers may by order modify that schedule so as to—
  - (a) add or remove types of expenses to or, as the case may be, from those referred to in that schedule; or
  - (b) vary any of the descriptions of the types of expenses there referred to.

### **40 Recovery from debtor of expenses of attachment**

- (1) Subject to subsections (2) and (4) below, any expenses chargeable against the debtor which are incurred in an attachment (including the service of the charge preceding it and the auction following it) are recoverable from the debtor by the attachment concerned but not by any other legal process, and any such expenses which have not been recovered by the time the attachment and auction is completed will cease to be chargeable against the debtor.
- (2) The sheriff shall grant decree for payment of—

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- (a) any expenses awarded by the sheriff against the debtor in favour of the creditor under paragraph 4 or 7 of schedule 1 to this Act; or
  - (b) any additional sum of expenses awarded by the sheriff against the debtor in favour of the creditor under paragraph 5 of that schedule.
- (3) Subsection (4) below applies where an attachment is—
- (a) recalled under section [F29(2)(d) or (10)(b)] (effect of time to pay order on diligence) of the Debtors (Scotland) Act 1987 (c.18) in relation to a time to pay order;
  - (b) in effect immediately before the date of sequestration (within the meaning of the Bankruptcy (Scotland) Act 1985 (c.66)) of the debtor’s estate;
  - (c) in effect immediately before the [F3]appointment of an administrator] under Part II of the Insolvency Act 1986 (c.45);
  - (d) in effect against property of the debtor immediately before a floating charge attaches to all or part of that property under section 53(7) (attachment on appointment of receiver by holder of charge) or 54(6) (attachment on appointment of receiver by court) of that Act of 1986;
  - (e) in effect immediately before the commencement of the winding up, under Part IV or V of that Act of 1986, of the debtor; or
  - (f) rendered unenforceable by virtue of the creditor entering into a composition contract or acceding to a trust deed for creditors or by virtue of the subsistence of a protected trust deed within the meaning of Schedule 5 to the Bankruptcy (Scotland) Act 1985 (c.66).
- (4) Where this subsection applies—
- (a) the expenses of the attachment which were chargeable against the debtor remain so chargeable; and
  - (b) if the debtor’s obligation to pay the expenses is not discharged under or by virtue of the time to pay order, sequestration, [F4]appointment], receivership, winding up, composition contract or trust deed for creditors, those expenses are recoverable by further attachment.

#### Textual Amendments

- F2** Words in s. 40(3)(a) substituted (22.4.2009) by *Bankruptcy and Diligence etc. (Scotland) Act 2007* (asp 3), s. 227(3), **Sch. 5 para. 30(11)(a)(i)** (with s. 223); S.S.I. 2009/67, art. 3(2)(3), Sch. 1 (with arts. 4-6) (as amended (31.1.2011) by S.S.I. 2011/31, art. 5(b))
- F3** Words in s. 40(3)(c) substituted (31.3.2007) by *Bankruptcy and Diligence etc. (Scotland) Act 2007* (asp 3), s. 227(3), **Sch. 5 para. 30(11)(a)(ii)** (with s. 223); S.S.I. 2007/82, art. 4(e)(ii)
- F4** Word in s. 40(4)(b) substituted (31.3.2007) by *Bankruptcy and Diligence etc. (Scotland) Act 2007* (asp 3), s. 227(3), **Sch. 5 para. 30(11)(b)** (with s. 223); S.S.I. 2007/82, art. 4(e)(ii)

#### 41 Ascription of sums recovered by attachment or while attachment is in effect

- (1) This section applies to any amounts recovered by an attachment or paid to account of the amounts recoverable by the attachment while the attachment is in effect.
- (2) An amount to which this section applies shall be ascribed to the following in the order in which they are mentioned—
- (a) the expenses already incurred in respect of—
    - (i) the attachment;

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- [<sup>F5</sup>(ia) any previous interim attachment the expenses of which are chargeable against and recoverable from the debtor under section 9Q(1)(a) of this Act;]
- (ii) any previous diligence the expenses of which are chargeable against and recoverable from the debtor under section 40(4) above or section 93(5) of the Debtors (Scotland) Act 1987 (c.18);
- (b) any interest, due under the decree or other document of debt on which the attachment proceeds, which has accrued at the date of execution of the attachment;
- (c) any sum (including any expenses) due under the decree or other document of debt, other than any expenses or interest mentioned in paragraphs (a) and (b) above.

#### Textual Amendments

- F5** S. 41(2)(a)(ia) inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), s. 227(3), [Sch. 5 para. 30\(12\)](#) (with s. 223); S.S.I. 2008/115, art. 3(2)(3), Sch. 1 (with arts. 4-6, 10, 15) (as amended: (23.2.2009) by S.S.I. 2009/67, art. 7; (31.1.2011) by S.S.I. 2011/31, art. 5(a); and (4.10.2014) by S.S.I. 2014/173, arts. 1(2), 3)

#### 42 Restriction on fees payable by debtor

No fees shall be payable by a debtor in connection with—

- (a) any application by the debtor;
- (b) objections by the debtor to an application by any other person; or
- (c) a hearing held,

under any provision of this Part or Part 3 of this Act, to any officer of any office or department connected with the Court of Session or the sheriff court the expenses of which are paid wholly or partly out of the Scottish Consolidated Fund.

#### 43 Power to provide for lay representation

In section 32(1) (power of Court of Session to regulate civil procedure in sheriff court) of the Sheriff Courts (Scotland) Act 1971 (c.58), after paragraph (k) there is inserted—

- “(l) permitting a party to proceedings which relate to an attachment to be represented, in such circumstances as may be specified in the act of sederunt, by a person who is neither an advocate nor a solicitor.”.

#### 44 Legal aid

Part II of Schedule 2 (proceedings for which civil legal aid is not available) to the Legal Aid (Scotland) Act 1986 (c.47) is amended as follows—

- (a) in paragraph 4—
  - (i) after “1987” there is inserted “ or Part 2 or 3 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) ”; and
  - (ii) after “Act”, where it second occurs, there is inserted “ of 1987 ”; and
- (b) in paragraph 5, after “1987” there is inserted “ or Part 2 or 3 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) ”.

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## **45 Interpretation of this Part and Parts 3 and 4**

In this Part and in Parts 3 and 4 of this Act—

“chargeable expenses” means expenses chargeable against the debtor in accordance with this Part of this Act;

“dwellinghouse” does not include—

- (a) a garage, even although it forms part of the structure or building which consists of or includes the dwellinghouse; or
- (b) other structures or buildings used in connection with the dwellinghouse,

but does include a mobile home or other place used as a dwelling;

“exceptional attachment order” has the meaning given by section 47(1) below;

“mobile home” means a caravan, houseboat or other moveable structure used as a dwelling;

“non-essential assets” has the meaning given by schedule 2 to this Act;

“officer” means the officer of court appointed by a creditor for the purposes of executing an attachment and arranging for the removal and auction of the articles attached;

“sum recoverable” means the debt in respect of which the attachment is executed together with any interest thereon and any chargeable expenses; and

“summary warrant” means a summary warrant granted under, or by virtue of, any enactment.

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