

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 4 – Land Attachment and Residual Attachment**

#### *Chapter 2 – Attachment of land*

#### **Land attachment**

#### *Section 81 – Land attachment*

240. **Section 81** creates a new diligence over land to be known as land attachment.
241. Subsection (2) provides that land attachment is competent only if the debt is established by a decree or document of debt, the debtor has been charged to pay the debt and the period for payment has expired without payment being made. It also provides that, where the debtor is an individual, the creditor must provide the debtor with the debt advice and information package within the 12 weeks before registering the notice of land attachment. “Decree” and “document of debt” are defined in section 128. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act (see subsection (8)).
242. Subsection (3) provides that a land attachment is created over land at the beginning of the day which falls 28 days after the last day on which a notice of land attachment is registered. The reference to the “last day” is necessary because the notice must be registered in both the property register and the personal register and may therefore be registered in one before being registered in the other. The period between registration of the notice and creation of the land attachment gives third parties notice that the attachment, which may affect a deed granted by the debtor, is pending. It covers a “registration gap”, similar to that discussed in respect of sequestration in paragraph 70 above, when a notice of land attachment has been sent for registration but a person dealing with the debtor will not be aware of it because it has yet to appear on any register.
243. Subsection (3) should be read together with the provision in sections 83(6) and 121(1). Under section 83(6), the notice of land attachment is void and no land attachment will be created if the creditor does not register a certificate of service of the notice within the 28-day period. Section 121(1) provides that the notice of land attachment ceases to have effect and, accordingly, no land attachment will be created if the debt is paid, or tendered to, the creditor or others on the creditor’s behalf within that period.
244. Subsection (4) provides for the effect of a notice of land attachment during the period after it is registered and before the land attachment is created. The notice has effect as

if it were an inhibition registered against the debtor in the Register of Inhibitions but restricted to the land described in the notice.

245. Subsection (5) provides for the effect of a land attachment. It gives the creditor a subordinate real right over the land described in the notice of land attachment as security for the “sum recoverable by the land attachment”. That sum is the sum (principal and accrued interest) for payment of which the charge was served together with any interest which may be accrued before the debt is paid plus all expenses of the land attachment which are chargeable against the debtor.
246. Subsection (7) gives the Scottish Ministers power, by regulations, to change the 28-day period. This power extends to amending any Act in which that period is mentioned (see, for instance, new section 13A being inserted into the Conveyancing and Feudal Reform (Scotland) Act 1970 by section 85). Any such regulations will be subject to negative resolution procedure (see section 224(3)).

### **Section 82 – Attachable land**

247. Section 82(1) defines what is meant by “land” in this Chapter and, therefore, the property of the debtor which may be attached by land attachment. This is land which is either owned by the debtor or is the right of long lease of land in relation to which the debtor is the tenant.
248. Subsection (2) provides that such land or long lease is attachable only if the debtor has a recorded or registered title to the land or lease. That subsection also excludes proper liferents.
249. In addition, by virtue of subsections (2) and (3), long leases which are not assignable cannot be attached by land attachment. A long lease which is assignable but only with the consent of the landlord is not to be regarded as unassignable and can be attached. Only leases which are not assignable under any circumstances may not be attached by land attachment.
250. “Land” is used throughout this Chapter of this Act (rather than “land or, as the case may be, long lease” but that needs to be read with section 128(2), which modifies such references (including references to ownership, purchase, sale, conveyance and disposition) so that they include references to, for instance, the right of long lease and to assignation.

### **Section 83 – Notice of land attachment**

251. Section 83(1) provides that a notice of land attachment must be in the form prescribed in rules of court and provide a description of the attached land. The description needed will depend on the requirements of the property register within which the notice is to be registered. To be effective, the notice must also be registered in both the relevant property register (either the Register of Sasines or the Land Register – see section 128) and in the Register of Inhibitions.
252. Subsections (2) and (3) provide that a creditor can register a notice of land attachment only where the sum which the creditor has charged the debtor to pay is more than £3,000, or any other sum which the Scottish Ministers prescribe. The power to change this sum is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
253. Subsection (4) provides that it is competent to register a single notice of land attachment in relation to two or more sums which the debtor has been charged to pay.
254. Subsection (5) specifies that the notice of land attachment must be served by a judicial officer on the debtor, any person (other than the debtor) who owns the land and any tenant under a long lease of the land, as soon as is practicable after the notice is registered.

*These notes relate to the Bankruptcy and Diligence etc. (Scotland)  
Act 2007 (asp 3) which received Royal Assent on 15 January 2007*

255. Subsection (6) provides that if the certificate of service on the debtor is not registered before the 28-day period expires, the notice will be, and will be deemed always to have been, void. Accordingly, no land attachment will be created. Subsection (7) provides for the certificate of service to be in a form prescribed in rules of court and to contain a description of the land to be attached and to be registered in the same way as the notice of land attachment.