

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

---

## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

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

#### *Chapter 2 – Attachment of land*

#### **Consequences of land attachment**

#### *Section 84 – Debts secured by land attachment not rendered heritable*

256. *Section 84* specifies that the creation of a land attachment will not make a moveable debt heritable, which avoids (for example) any affect on rights of succession. This is particularly relevant, if the creditor dies while the land attachment still has effect, in succession to the creditor's estate.

#### *Section 85 – Restriction on priority of ranking of certain securities*

257. This section inserts a new section 13A into the Conveyancing and Feudal Reform (Scotland) Act 1970 (the "1970 Act").

#### **New section 13A – Effect of subsequent land attachment on ranking of standard securities**

258. Section 13(1) of the 1970 Act covers the preference in ranking of standard securities. Where a creditor has registered a standard security over land, and another creditor subsequently registers a standard security over the same land, the first creditor's preference in ranking is restricted to security for present advances and those future advances which that creditor is obliged to make.
259. Section 13A applies this rule where, instead of a subsequent standard security being registered, a land attachment is created over the same land. That subsequent land attachment, being a real right in security over the land, will have effect on the existing security in the same way as a subsequent standard security. Section 13A provides that it has this effect from the day on which the land attachment is created, provided notice is given to the existing secured creditor of the registration of the notice of land attachment before the expiry of the 28-day period.

#### *Section 86 – Lease granted after registration of notice of land attachment*

260. This section applies where a notice of land attachment is registered and where, during the 28-day period mentioned in section 81(3), the debtor or a tenant of the debtor grants a lease (or sublease) of land specified in the notice. Where a land attachment is created

at the end of that period, any such lease which would be reducible were it granted in breach of an inhibition (for which see section 163) is reducible by the creditor.

### ***Section 87 – Assignment of title deeds etc.***

261. **Section 87(1)** provides that a land attachment has the effect of assigning the title deeds, searches and all unregistered conveyances affecting the attached land to the creditor. Subsection (2) entitles the creditor, where the land is sold by virtue of the land attachment, to deliver those title deeds and other documents to the purchaser and to assign to that purchaser any right the creditor has to have any title deeds not in the creditor's possession delivered to the creditor. This mirrors the effect of section 10(4) of the 1970 Act (which operates in a similar way when a creditor registers a standard security).

### ***Section 88 – Acquisition of right to execute land attachment***

262. Section 88 of the 1987 Act provides for how diligence may be done where a decree or document of debt is assigned to (or otherwise acquired by) a person who is not the original creditor (for ease of reference, called here the "assignee"). The assignee must apply to the court for warrant authorising the assignee to do any diligence authorised by the original decree or other document.
263. **Section 88** of this Act provides for how such assignation or other acquisition affects land attachment. The assignee may take, or continue to take, steps towards enforcing the debt by land attachment provided that (a) before the assignation or other acquisition, a notice of land attachment has been registered; and (b) before taking those steps, the assignee registers a notice in the relevant property register and the Register of Inhibitions. If the assignee so registers notice, the assignee is treated as having been granted a warrant under section 88(4) of the 1987 Act. The notice must be in the form prescribed in rules of court.

### ***Section 89 – Effect of debtor's death before land attachment created***

264. **Section 89(1)** applies where a debtor dies after a creditor has taken steps to begin or carry out a land attachment but before a land attachment has been created. Section 90 covers the case where a debtor dies after a land attachment is created.
265. The basic position, as set out in subsection (2), is that any steps taken cease to have effect and the charge served on the debtor becomes void.
266. Subsection (3) provides that nothing in subsection (2) stops the creditor from proceeding to raise, against any executor of the debtor, an action to constitute the debt against the debtor's estate.
267. Subsection (4) provides that any warrant for diligence in such an action authorises land attachment.

### ***Section 90 – Effect of debtor's death after land attachment created***

268. **Section 90(1)** clarifies and applies the existing law on the effect of the death of a debtor on subordinate real rights over his or her land. Where a debtor dies after a land attachment has been created, the land attachment will continue to have effect.
269. Subsection (2) gives the Court of Session power, by rules of court, to modify the procedures under this Chapter to reflect that the debtor is dead and that the land attachment is proceeding. Provisions about the service of notices of applications for warrant for sale and for foreclosure which require the creditor to serve or intimate such applications to the debtor will require to be modified, as will other procedures.

**Section 91 – Caveat by purchaser under missives**

270. A person who has entered into a contract to purchase land from a debtor, but to whom ownership of that land has not yet been transferred, may be concerned that a creditor of the debtor will execute a land attachment affecting that land. Section 91 provides a mechanism under which that person will be informed, if such a land attachment is created, of any attempt by the attaching creditor to sell that land.
271. Subsection (2) provides that such a person may register a notice in the Register of Inhibitions, in the form prescribed in rules of court, for the purpose of receiving intimation of an application under section 92(1) for a warrant for sale of the land. Under section 92(4)(c)(ii), the attaching creditor must carry out a search in that register and must intimate the application to any person who has registered a notice under this section (see section 92(5)(b)). The person who registered the notice may then lodge objections to the application (see section 92(6)) and, subject to sections 99 and 100, may be able to complete title to the land.