

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 4 – Land Attachment and Residual Attachment

Chapter 2 – Attachment of land

Preparations for sale of attached land

Section 92 – Application for warrant to sell attached land

272. **Section 92** provides for the form and method of applying for a warrant to sell attached land.
273. A creditor may apply for warrant to sell attached land only where a land attachment is in effect, 6 months have elapsed since the notice of land attachment was registered, the sum recoverable by the land attachment at that time exceeds £3,000 (or another sum prescribed by the Scottish Ministers) and that sum has not been paid off. The power to change this sum is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
274. Under subsection (2), the Scottish Ministers have power to restrict the creditor’s right to apply under subsection (1) for a warrant for sale. They can do this by excluding either all dwellinghouses or dwellinghouses of a specified kind from land in relation to which such an application may be made. Such dwellinghouses could still be attached by land attachment but the attaching creditor could not apply to have them sold. This power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
275. The application must, among other things, name a solicitor who is willing to act as the “appointed person” (see sections 97(2)(b) and 108) and to sell the land if warrant is granted. Subsection (4) covers the form and content of the application and the documents which are to accompany it, including reports on the searches in the property register and the Register of Inhibitions. Subsection (5) provides for the persons to whom the application must be intimated.
276. Under subsection (6), any person who receives intimation of the application is entitled to object to it but must lodge objections within 14 days of receiving the application.
277. Under subsection (7), the Scottish Ministers may by regulations make further provision about the reports on searches that accompany an application for a warrant to sell attached land. Such regulations are subject to negative resolution procedure (see section 224(3)).

278. Subsection (8) provides for the use of electronic communications. In particular, the application must be accompanied by a declaration signed by the solicitor who the creditor proposes as the appointed person. Where that declaration is an electronic communication, the signature must be a certified electronic signature (as defined in section 221).

Section 93 – Notice to local authority of application for warrant for sale

279. This section provides that a creditor, other than a local authority, who applies for a warrant to sell attached land which comprises or includes a dwellinghouse, must notify the local authority in whose area the dwellinghouse is situated. The notification must be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003.

Section 94 – Preliminary hearing on application for warrant to sell

280. Section 94 requires the sheriff to hold a preliminary hearing which the creditor must attend and at which the persons to whom intimation of the application was given under section 92(5) are to be given the opportunity of making representations.
281. If satisfied that the application is in order, the sheriff must fix a date for a full hearing on the application. In addition, the sheriff must, among other things, appoint a surveyor or other suitably qualified person to report on the open market value of the land and, where the creditor has been unable to ascertain the amount outstanding under any security or other diligence affecting the land, require any such security or diligence holder to disclose those amounts.

Section 95 – Valuation report

282. Section 95(1) authorises the valuer, appointed under section 94(3)(c), to take all necessary steps to produce a valuation report which must be sent to the creditor and the persons to whom the application for the warrant for sale was intimated.
283. Subsection (2) provides that the debtor and any other person occupying the land must allow the valuer to inspect the land and carry out all necessary steps to produce the valuation report.
284. Subsections (3) and (4) provide that the creditor is liable to the valuer for the costs associated with the production of the report. These will be expenses of the land attachment and (under section 120) will be chargeable against (and therefore recoverable by the creditor from) the debtor.

Section 96 – Creditor's duties prior to full hearing on application for warrant for sale

285. Section 96(1) requires the creditor, at least 7 days before the date of the full hearing under section 97, to lodge the valuation report, a continuation of the reports on the searches in the property register (lodged with the initial application for warrant for sale) and in the Register of Inhibitions, and a note of any amounts outstanding under any securities or diligences affecting the land.
286. Subsection (2) provides for further intimation of the application and the date of the full hearing where a search in the property registers reveals a deed or a search in the Register of Inhibitions reveals a notice registered since the date of application. The sheriff, if it appears necessary, may postpone the date of the hearing and the creditor will be required to inform the debtor and other relevant persons of the later date. A person who receives intimation of the full hearing under this section may lodge objections (see subsection (4)).
287. A sheriff who postpones a full hearing following an application can make whatever ancillary orders he or she thinks appropriate (see subsection (3)). This can include

ordering fresh continuations of the reports on searches in the property registers and in the Register of Inhibitions.

288. Subsection (5) provides that the Scottish Ministers may by regulations make further provision about the continuations of the reports on searches in property registers and in the Register of Inhibitions that an attaching creditor must lodge with the court. Such regulations are subject to negative resolution procedure (see section 224(3)).

Section 97 – Full hearing on application for warrant for sale

289. **Section 97(1)** provides that, at the hearing on an application for warrant to sell attached land, the sheriff must not make any order without first giving any person who has lodged objections under section 92(6) an opportunity to be heard.
290. Under subsection (2), the sheriff may grant the application provided he or she is satisfied that the application is in order. This discretion is subject, however, to a number of other provisions in the Act, namely subsections (3) and (5) of this section and sections 98 (warrant for sale of dwellinghouses), 99 (protections for purchasers under missives) and 102 (land owned in common).
291. Where the sheriff grants the application, the sheriff must grant warrant for sale of the attached land and must appoint a solicitor (either the solicitor specified in the application or another of the sheriff's choosing) as the appointed person.
292. Subsection (3) provides that the sheriff may, if satisfied that granting the warrant for sale is unduly harsh to the debtor or any other interested person, either refuse the application or grant it and suspend the warrant for a period up to one year.
293. Subsection (4) provides that, where the sheriff grants warrant for sale, the sheriff must specify a time within which the land must be sold, may limit the warrant to part only of the attached land, and may authorise the sale of the attached land by lots.
294. Under subsection (5), the sheriff must refuse the application if satisfied that any of the grounds specified in subsection (6) apply. Those grounds include the ground that, if the attached land were sold, the "net likely proceeds" would not exceed the aggregate of the expenses of the land attachment and either £1,000 or 10 per cent of the outstanding debt (whichever is the lesser). The Scottish Ministers are given power by subsection (7) to alter the figure of £1,000 and the percentage of 10 per cent. That power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)). Subsection (8) defines "net likely proceeds" as the proceeds of sale less any sums due to other creditors who rank before or equally with the attaching creditor.

Section 98 – Application for warrant for sale of sole or main residence

295. **Section 98(1)** applies where the creditor applies for a warrant for sale of attached land which is or includes a dwellinghouse which is the sole or main residence of the debtor, of the owner (if that person is not the debtor) or of any of the persons specified in subsection (2).
296. Those persons are a non-entitled spouse of the debtor or owner, a cohabitee of the debtor or owner, a civil partner of the debtor or owner, a same sex cohabitee of the debtor or owner, and a former partner of the debtor or owner who resides with a child, provided that the child is also a child of the debtor or owner, and that former partner lived with the debtor or owner as husband and wife (or with the characteristics of that relationship) throughout a period of 6 months ending on the day on which the debtor or owner ceased to reside in the dwellinghouse.
297. The sheriff is not prohibited from granting a warrant for sale of a dwellinghouse where this section applies but, before making a decision, the sheriff is obliged by subsection (4) to consider the matters in subsection (5). Those matters are the nature and reasons for the debt secured by the land attachment, the debtor's ability to pay, any action taken by

the creditor to help the debtor in paying the debt and the ability of those living in the property to obtain reasonable alternative accommodation.

298. Subsection (6) allows the Scottish Ministers to modify the matters listed in subsection (5) which the sheriff has to consider. That power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
299. Subsection (7) provides that, where the sheriff grants warrant for sale, the sheriff can suspend the operation of the warrant for a period not exceeding 1 year.
300. Subsection (8) provides that a dwellinghouse may be a sole or main residence even if it is also used by the debtor or other relevant person for the purposes of any profession, trade or business. Subsection (9) defines what is meant by “child”, “dwellinghouse” and “non-entitled spouse”.

Section 99 – Protection of purchaser under contract where creditor applies for warrant for sale

301. Sections 99 to 101 deal with the situation where the debtor has concluded a contract to transfer attached land to a third party (called in those sections the “prospective purchaser”).
302. Section 99 applies where a creditor applies for a warrant to sell attached land and a person who has registered a caveat under section 91 has lodged objections to the application.
303. Subsections (2) and (3) provide that the sheriff may, if satisfied the prospective purchaser did not seek to defeat the rights of creditors of the debtor in entering into the contract and that both the purchaser and debtor will proceed quickly with the purchase, make an order suspending the application (i.e. without making a decision on whether or not to grant warrant for sale) and requiring the prospective purchaser to pay the price due under the contract to the creditor.
304. Subsection (4) provides that section 116 applies to the proceeds of sale paid to the creditor under this section as if the sale had taken place under a warrant for sale and those proceeds were the proceeds of that sale.

Section 100 – Protection of purchaser under contract where warrant for sale granted

305. This section applies where a prospective purchaser had (before notice of land attachment was registered) entered into a contract to buy attached land from the debtor and a warrant for sale is subsequently granted.
306. Subsection (2) operates in a similar way to section 99(2) and (3) and provides that the sheriff may make an order suspending the warrant for a period of up to 1 year and requiring the prospective purchaser to pay the price under the contract to the appointed person.
307. Subsection (3) operates in a similar way to section 99(4).

Section 101 – Provision supplementary to sections 99 and 100

308. This section applies where an order is made under section 99(2) or 100(2) and gives the sheriff power, on an application by the creditor or the appointed person, to revoke the order. The sheriff may do so if satisfied that the prospective purchaser and the debtor entered into the contract to defeat the rights of creditors of the debtor or if there has been undue delay in completing the sale.

Section 102 – Warrant for sale of attached land owned in common

309. **Section 102** applies where the land specified in an application for warrant to sell attached land is owned in common by the debtor and another person or persons. Land owned in common may be capable of being separated into part owned by the debtor and part owned by the co-owner. Where this is possible, the debtor's part may be sold. Where this is not possible, the whole land would have to be sold and the proceeds of sale divided, with the debtor's share going to pay the sum recoverable by the land attachment and the co-owner's share being paid to that co-owner.
310. Subsection (2) provides that, subject to subsection (3), the sheriff may make an order under section 97(2) granting warrant for sale of the land owned in common.
311. Subsection (3) provides that the sheriff must specify in the order whether the warrant authorises the division of the land owned in common and the sale only of the part belonging to the debtor or sale of all the land owned in common and, subject to subsection (5), division of the proceeds.
312. Subsection (4) provides that, where the warrant authorises division of the land, from the day on which the order granting the warrant is made the debtor's part will be subject to the land attachment and the remaining land will be released from it. The warrant will apply as if the land specified in it were the debtor's part and the warrant for sale granted were warrant for sale of that part.
313. Subsection (5) provides that, where the warrant authorises the sale of the land owned in common and a division of the proceeds, the appointed person must pay the other owner of the land the share of the proceeds of sale due to that owner and deal, as specified in section 116, with the share of proceeds that would be due to the debtor. The appointed person's duty to pay to the common owner the common owner's share of the proceeds is subject to the rights of any creditor with a security over the third party's interest in the land.
314. Subsections (6) and (7) make further provision providing that a common owner of common property may buy out the attached property and sets out the amount payable to the appointed person by such an owner if the whole land is bought by that owner and the proceeds fall to be divided.

Section 103 – Intimation of sheriff's decision at full hearing

315. **Section 103(1)** provides that, where a warrant for sale is granted under section 97(2), the creditor must send a copy of the warrant to the debtor and the appointed person.
316. Subsection (2) provides that, where a warrant is refused under section 97(3)(b) or (5), the sheriff clerk must send a copy of the order to the debtor and to any other person the sheriff clerk considers to have an interest.

Section 104 – Supplementary orders as respects sale

317. **Section 104(1)** gives the sheriff power, when either granting an application for warrant for sale or subsequently, to make any order in connection with the sale that appears to the sheriff to be appropriate. Subsection (2) provides that, in particular, on application by the appointed person, the sheriff may extend the period within which the land is to be sold or may remove that appointed person and appoint another solicitor as appointed person instead. The debtor, a creditor or any other interested party may make an application for the removal of the appointed person and the appointment of a replacement one.
318. Subsection (3) provides for the intimation, by the creditor, of orders made under subsection (1) after the granting of warrant for sale.

Section 105 – Effect of certain refusals of application for warrant for sale under section 97(5)

319. This section provides that, where an application for sale is refused on a ground specified in paragraph (d), (e), (f) or (g) of section 97(6), the land attachment will not, because of that refusal, cease to have effect and it will be competent for the creditor to make a further application for a warrant to sell the attached land.

Section 106 – Termination of debtor’s right to occupy land

320. **Section 106** provides the creditor with power to terminate the right of the debtor or other person having a right derived from the debtor to occupy land in respect of which warrant for sale has been granted.
321. This is achieved by the creditor serving a notice (which complies with subsection (2)) on the debtor or that other person. The right of the debtor or other person to occupy the land is terminated with effect from the day specified in the notice, which must be a minimum of 7 days after the date of service. A certificate of service of the notice in the form prescribed in rules of court may be registered.
322. Subsection (3) provides that where a person (other than the debtor) has a right to occupy the land which, leaving out of account the registration of the notice of land attachment, would have been good against a singular successor of the debtor, that person’s right cannot be terminated by notice under this section.

Section 107 – Consequences of giving notice under section 106(1)

323. **Section 107** governs the consequences of serving notice under section 106.
324. Subsection (1) provides that, from the date the creditor serves notice under section 106, the creditor has the rights and obligations of a heritable creditor in lawful possession of the land. This is similar to section 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970, which applies where a creditor under a standard security has obtained lawful possession of the security subjects on the default of the debtor. Subsection (2) provides that the rights and obligations in subsection (1) include any right the debtor, or other person whose right to occupy has been terminated under section 106, has to receive rent from a tenant. The creditor has that right only in relation to rent due on or after the date on which the creditor notifies the tenant of the termination of the debtor’s (or other person’s) rights, either in writing or by electronic means (see subsections (3) and (6)). The creditor also has right to any lease, and any permission or right of occupancy. The creditor does not, however, have power to grant a lease.
325. Subsection (4) gives the creditor power to apply to the sheriff for an order authorising reconstruction, alteration or improvement works if they are required to maintain the market value of the land. The creditor may also bring an action of ejection against the debtor and will have title to bring any action of removing, intrusion or ejection which the debtor might have brought in respect of the land. The costs of works needed to maintain the market value of the land and of any action brought under subsection (4) will be expenses of the land attachment recoverable from the debtor (see subsection (5))