

# **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*

#### **The sale**

#### *Section 108 – Appointed person*

326. **Section 108** makes provision about the appointed person and that person's functions (the main function being to carry out the sale of the attached land under the warrant).
327. Subsection (1) provides that the appointed person is an officer of the court and must act independently of the creditor, debtor and any other interested person. Subsection (2) requires the appointed person to lodge a bond of caution before exercising any functions under this Chapter.
328. Subsection (3) provides that the appointed person may apply to the sheriff who granted the warrant for sale for directions as to how to perform any of the appointed person's functions.
329. Subsection (5) provides that the appointed person is liable to the creditor, debtor, any person who owns the attached land in common with the debtor and any secured creditor for patrimonial loss as a result of negligence on the part of the appointed person in executing the warrant for sale. Subsections (6) and (7) provide that the creditor is liable for the appointed person's expenses and outlays incurred in exercising that person's functions, but that those expenses are expenses of the land attachment and the creditor can recover them from the debtor.
330. Subsection (8) gives the Scottish Ministers power to make further provision about the functions of the appointed person. This power is exercisable by regulations subject to negative resolution procedure (see section 224(3)).

#### *Section 109 – Method of sale*

331. **Section 109** provides for the appointed person's main function – selling the attached land. Subsection (3) requires the appointed person to consult the creditor about the method of sale (private bargain or public auction) which is to be used. Subsection (4) requires the appointed person to advertise the land for sale and ensure the best price is obtained.

***Section 110 – Legal incapacity or disability of debtor not to affect title of purchaser***

332. The effect of this section is that a purchaser who buys the land sold in execution of the warrant for sale can get a good title to the land without being adversely affected by any legal incapacity or disability affecting the debtor (such as the debtor being not of full age).

***Section 111 – Title of purchaser not to be affected by certain irregularities***

333. This section provides protection for purchasers who buy land sold under warrant for sale provided they acted in good faith when buying the land and provided a certificate in the form prescribed in rules of court has been granted by the appointed person confirming the land attachment was properly carried out. The validity of a disposition which is registered by such a purchaser will not be challengeable on the ground that the land attachment was not carried out properly or that it was no longer in force when the sale took place.

***Section 112 – Effect of registration of disposition on securities***

334. This section provides that, where a disposition of attached land is granted to a purchaser and registered, the land will no longer be subject to the land attachment or to any heritable security or diligence ranking equally with, or after, the land attachment.

***Section 113 – Report of sale***

335. **Section 113(1)** imposes a duty on the appointed person to lodge a report of the sale with the sheriff clerk for the court which granted the warrant. That report must be lodged within 28 days of the date on which the sale price is paid. Subsection (2) provides for the form to be as prescribed in rules of court and for the content of the report.
336. Subsection (3) provides that, if the appointed person submits a report after the specified period has expired, or refuses to submit or delays submitting a report, the sheriff may make an order providing that the appointed person will not be entitled to payment of some or all of the expenses incurred in executing the warrant for sale.

***Section 114 – Audit of report of sale***

337. This section deals with auditing the report on sale lodged under section 113(1). The sheriff must forward it to the auditor of court. Subsection (2) provides that the auditor must tax the expenses chargeable against the debtor, confirm the balance due to or by the debtor following the sale and give a report to the sheriff. The auditor will not be entitled to charge a fee for the report (see subsection (3)).
338. Subsection (4) provides that the report of sale and the auditor's report will be held by the sheriff clerk, and be available for inspection, for a time prescribed by rules of court. A fee for inspection may be prescribed in an order under section 2 of the Courts of Law Fees (Scotland) Act 1895.

***Section 115 – Sheriff's consideration of report***

339. This section provides for the sheriff's powers on receiving the auditor's report. Under subsection (1), the sheriff may, after considering that report and the report of sale lodged under section 113(1), make an order approving the report of sale subject to any amendments made following a hearing with all interested parties or by the auditor. Alternatively, the sheriff may, if satisfied that there has been a substantial irregularity in the land attachment, make an order declaring the land attachment void and making any consequential order which the sheriff considers necessary in the circumstances.
340. Subsection (3) deals with intimation of the sheriff's order by the sheriff clerk. Subsection (4) provides that any order declaring the land attachment void does not affect the title of any person who purchased the attached land under the warrant for sale.

**Section 116 – Proceeds of sale**

341. Section 116(1) provides for the distribution of the proceeds of the sale where land is sold in execution of a warrant for sale. The appointed person must disburse the proceeds in the following order—
- any expenses due to the creditor under section 114(2)(a);
  - any sums due to any creditor holding a security or diligence over the land which ranks before the land attachment;
  - any sums due to—
    - the creditor who executed the land attachment; and
    - any creditor under a security or diligence which ranks equally with the land attachment;
  - any sums due to any other creditor under any security or diligence which ranks after the land attachment; and
  - any balance due to the debtor (subject, however, to section 37(8C)(b) of the 1985 Act, which requires the appointed person, where the debtor’s estate has been sequestrated, to pay over any balance due to the debtor to the trustee in sequestration).
342. The appointed person is entitled to fees and expenses for dealing with the land attachment (unless the sheriff has limited them under section 113(3)). These shall be met by the creditor. The appointed person may deduct his or her fees and expenses from the sum paid to the creditor (see subsection (2)).
343. Subsection (3) provides that, if there is a balance of the proceeds due to the debtor, the appointed person must pay that balance to the debtor or other person authorised to give a receipt for it.
344. Subsection (4) obliges a creditor who receives the sums due under a security or diligence to grant a discharge of that security or diligence.
345. Subsections (5) and (6) provide that, if the appointed person is unable to obtain a receipt or discharge relating to the distribution of the proceeds of sale from the debtor or any creditor, the appointed person may consign the amount due to the person in the sheriff court. That consignment will discharge the duty to pay the amount due and a certificate of the sheriff clerk will be evidence of the discharge.