

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 4 – Land Attachment and Residual Attachment

Chapter 3 – Residual attachment

Residual attachment

Section 129 – Residual attachment

372. This section introduces a new form of diligence over property of a debtor to be known as residual attachment.
373. Subsection (2) gives the Scottish Ministers power by regulations to specify the kind of property that may be attached by residual attachment. That power is subject to subsections (3) and (4) and is subject to negative resolution procedure (see section 224(3)).
374. Only property which is transferable and which cannot be attached by any other diligence can be specified. In addition, property which is exempt from all diligence or from a particular diligence (such as the property listed in section 11 of the 2002 Act) cannot be specified. Finally, property of which the debtor is the tenant and which is either a dwellinghouse used by the debtor as a sole or main residence or which is a croft cannot be specified.
375. Subsection (5) makes it clear that property of a debtor which is of a kind specified as attachable by residual attachment can be attached even though it is owned in common by the debtor and a third party.
376. Subsections (6) and (7) give further content to the power of the Scottish Ministers to specify property under subsection (2). In particular, subsection (7) envisages that the regulations may make provision for how that particular kind of property can be attached and how its value can be realised in order to pay off the debt secured by the residual attachment.
377. As section 130 makes clear, residual attachment is available only in execution and not on the dependence and it cannot be executed as of right but must be sanctioned by the court.
378. Subsection (8) further expands the power in section 129(2) by enabling regulations to be made about the effect of the making of time to pay directions and time to pay orders on the diligence of residual attachment. It similarly gives power to make provision about the effect of sequestration on residual attachment.

Application for residual attachment order

Section 130 – Application for residual attachment order

379. This section provides for the first stage of the residual attachment process. The creditor must obtain a residual attachment order (under section 132) before then obtaining a satisfaction order (under section 136).
380. This section governs the application by a creditor for a residual attachment order. The creditor may apply only where the debt is established by a decree or a 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 a debt and information package within the 12 weeks before the application is made.
381. “Decree” and “document of debt” are defined in section 145 (as read with section 221) of the Act. 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 section 221(1)).
382. An application for residual attachment must be in the form prescribed in rules of court, must specify the property to be attached and must set out how the creditor intends to realise the value of the property which the creditor proposes to attach. The debtor and any person having an interest in the property must be notified of the application. A person notified of the application may lodge objections to the application before the 14 day period for doing so has expired (see subsection (3)).

Section 131 – Effect of application for residual attachment order

383. This section sets out the effects on the debtor and other persons where the creditor makes an application for a residual attachment order. The debtor must not, from the date the application was served until the court either makes a residual attachment order or dismisses the application, take any of the steps set out in subsection (3). Those steps are transferring or otherwise disposing of the property, burdening the property, granting any licence in relation to the property or entering into any agreement to do any of these steps. Subsection (4) provides that any such steps are void and subsection (5) provides that a breach of this section by the debtor or any other person may be dealt with as a contempt of court. Contempt of court is punishable by any of, or a combination of, admonition, fine and, in extreme cases, imprisonment or detention.

Residual attachment order

Section 132 – Residual attachment order

384. This section provides for the making and effects of a residual attachment order.
385. Subsection (1) provides that at the hearing on the application for a residual attachment, the court must allow any person who has lodged an objection a chance to be heard.
386. Subsection (2) provides that the court may, if satisfied that the application is in order, make a residual attachment order which (in terms of subsection (3)) must specify the property to be attached. The order must be intimated by the creditor to the debtor and any other person the court specifies. The order must also specify the persons on whom the schedule of residual attachment (see section 133) must be served. When making a residual attachment order, the court may make any other order the court considers appropriate. Subsection (5) makes further provision about the kinds of ancillary orders the court may make.
387. Under subsection (4), the court must refuse the application if either the property specified in it cannot be attached by residual attachment or the creditor’s proposals for realising the value of the property would be ineffective (either in realising any value

or, where the value was realised, in realising a sum which would be too small to result in the debt being paid off or reduced).

Section 133 – Schedule of residual attachment

388. This section provides for the necessary step which the creditor must take if that creditor wants to create a residual attachment (see section 134). Where the court grants a residual attachment order, the creditor may serve a schedule of residual attachment.

Section 134 – Creation and effect of residual attachment

389. This section provides a residual attachment is created at the beginning of the day after the schedule of residual attachment is served on the debtor. Subsection (2) provides for the effects of a residual attachment. The residual attachment gives the creditor a security over the attached property for the “sum recoverable by the residual 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 and all expenses of the residual attachment which are chargeable against the debtor.

Satisfaction order

Section 135 – Application for satisfaction order

390. Where a creditor has created a residual attachment over property of a debtor, and the debtor does not pay off the debt, the next step will be an application to the court for a satisfaction order.
391. **Section 135** makes provision for applications for satisfaction orders and is in similar terms to section 130 (application for residual attachment order). The application must, among other things, be accompanied by a copy of the schedule of residual attachment and any other document prescribed by rules of court. Provision is made that the application, schedule and any other document can be sent electronically. Any person wishing to object to the application must do so within 14 days of the intimation of the application to that person.

Section 136 – Satisfaction order

392. This section provides for the making and effects of a satisfaction order.
393. Subsection (1) provides that, at the hearing on the application, under section 135(1), for the satisfaction order, the court must allow those who have lodged objections an opportunity to be heard.
394. Subsection (2) provides for when the court can make a satisfaction order. The court may make a satisfaction order if it is satisfied the application is in order and provided it is not obliged by subsection (6) to refuse the application. Subsection (3) provides that a satisfaction order must specify the property to which it applies and must require the creditor to intimate it to the debtor and other persons the court specifies.
395. Under subsection (4), a satisfaction order may authorise the sale of the attached property, the transfer of the property to the creditor, the transfer of income derived from the property to the creditor or the granting by the creditor of leases or licences of the property. The types of order listed in subsection (4) are not exclusive. In addition, section 129(7)(d) envisages that the Scottish Ministers may make provision for the types of satisfaction orders that may be made in respect of particular types of property.
396. Where a satisfaction order is made which authorises sale of the property, the court must appoint a qualified person to carry out the sale and specify a period within which that should happen (the “appointed person” – see subsection (5)(a)). In the case of any kind of satisfaction order, the court may appoint a suitably qualified person to provide a report to the court on the market value of the property (subsection (5)(b)).

397. Subsections (6) and (7) determine when the court must refuse an application for a satisfaction order. The grounds in subsection (7) partially mirror those in section 132(4) (grounds for refusing application for residual attachment order).
398. Subsection (8) gives the court power, if it thinks that making a satisfaction order would be unduly harsh to the debtor or a third party, to either refuse the application or make one but suspend it for a year.

Section 137 – Intimation of court’s decision

399. Section 137(1) provides that, where a satisfaction order is made under section 136(2), the creditor must send a copy of the order to the debtor, the appointed person and any other person the court specifies.
400. Subsection (2) provides that, where an application is refused, the court must send a copy of the order to the debtor and to any other person the court considers has an interest.

Section 138 – Effect of certain refusals of application for satisfaction order

401. This section provides that the refusal of an application for a satisfaction order on the ground mentioned in section 136(7)(c) (that is, the implementation of the satisfaction order sought would not result in the debt being paid off or reduced, either because the value of the property attached would not be realised at all or the value realised would be too small) does not lift the residual attachment. In other words the creditor still has the protection of the security over the attached property – which could give that creditor priority if the debtor is sequestrated. In addition, the creditor can make another application for a satisfaction order at a later date, perhaps with a different proposal as to how the value of the attached property might be realised.

Termination, discharge etc. of residual attachment

Section 139 – Termination by payment etc.

402. This section covers the situation where the debt owed is paid or tendered after a residual attachment is created. It provides that the residual attachment will cease to have effect if the full sum recoverable by the residual attachment is either paid or tendered to the creditor, the appointed person, a judicial officer or another person authorised to receive payment on behalf of the creditor. Where a satisfaction order has been made, the residual attachment will not cease to have effect unless the sum is paid or tendered before the contract of sale is concluded (where the satisfaction order authorises sale) or the property is otherwise disposed of.

Section 140 – Recall

403. This section provides for the court’s powers to recall or restrict a residual attachment.
404. Subsections (1) and (2) provide that the debtor or any other person having an interest may apply to the court for an order recalling or restricting the residual attachment. The application must be in the form prescribed in rules of court and be notified to the creditor.
405. Subsection (3) provides that the court, if satisfied that a residual attachment is invalid, has been carried out incompetently or irregularly or that it has ceased to be in force, may make an order recalling the residual attachment. Subsection (4) provides that, where the court is satisfied that significantly more property is attached than need be and it is reasonable to do so, it may make an order restricting the effect of the residual attachment to only that part of the property to which it relates.
406. Subsection (5) provides that an order for recall or restriction must be in the form prescribed by rules of court.

Section 141 – Duration of residual attachment

407. This section provides that, subject to the court extending the period under subsection (2), a residual attachment will cease to have effect at the end of 5 years beginning with the day after the day the schedule of residual attachment is served. Subsections (2) and (3) provide that the court may extend that period on the application of the creditor and may do so on more than one occasion.

Section 142 – Effect of death of debtor

408. This section provides that where the creditor has taken steps to carry out a residual attachment but has not served a schedule of residual attachment on the debtor before the death of the debtor, no residual attachment is created and the residual attachment order will fall. Where a residual attachment is created before the death of the debtor, it will continue and the creditor will be entitled to continue the attachment against the debtor's executor or other representative. Rules of court may modify the procedures for residual attachment under this Chapter to reflect the circumstances covered by this section.

General and miscellaneous

Section 143 – Expenses of residual attachment

409. This section provides that the expenses incurred by the creditor in carrying out the residual attachment will be chargeable against the debtor and can be recovered only by the attachment and not by any other legal process. Any expenses not recovered by the time the residual attachment is completed will cease to be chargeable against the debtor. Subsection (5) gives the court power, if satisfied that the debtor has objected on frivolous grounds to an application for a satisfaction order, to award expenses against the debtor not exceeding an amount prescribed by the Scottish Ministers by regulations.

Section 144 – Ascription

410. This section provides that, where any sums are recovered by residual attachment or are paid by the debtor while the attachment is in force, those sums must be ascribed to the following heads of claim in the following order—

- the expenses of the residual attachment chargeable against the debtor;
- interest on the debt due as at the date the residual attachment order was made;
- the debt due and any interest on it which has accrued since the making of that order.

Section 145 – Interpretation

411. This section defines what is meant by expressions used in this Chapter. It also provides the Scottish Ministers with power to modify the definitions of “decree” and “document of debt”. That power is exercisable by regulations subject to negative resolution procedure (see section 224(3)).