

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 6 – Diligence on the Dependence**

##### *Section 169 – Diligence on the dependence*

451. **Section 169** inserts a new Part 1A into the 1987 Act (after section 15). This new Part sets out a new regime for the granting, execution, effect, recall and expenses of diligence on the dependence and replaces some of the pre-existing common law on this.
452. Diligence on the dependence of an action is a provisional or protective measure which is used during the progress of a court action, or just before an action is raised. As such, it gives the creditor (usually the pursuer in the action) security over the property of the person against whom the diligence is executed (usually the defender in the action) for any sum which the court may find the creditor entitled to.
453. There are two main types of diligence on the dependence, arrestment on the dependence and inhibition on the dependence. Both arrestment and inhibition can also be in execution of a decree or document of debt. Arrestment “freezes” goods or money owned by the defender which are held by a third party, who is usually called the “arrestee” (see also Part 10 of this Act and paragraphs 669 to 724 below on arrestment in execution). Inhibition has the effect of prohibiting the defender from selling heritable property by making deeds granted by the debtor in breach of the inhibition reducible (see also Part 5 of this Act and paragraphs 412 to 450 above on inhibition in execution).
454. There is also the diligence of admiralty arrestment on the dependence. This diligence follows a different process to arrestment on the dependence, although there are some broad similarities (see also Part 14 of this Act and paragraphs 770 to 807 below).
455. There is also now a new form of diligence on the dependence against goods of the debtor which the debtor holds. This is interim attachment, which is dealt with by Part 7 of this Act (see paragraphs 513 to 582 below).

#### **Availability of diligence on the dependence**

##### **New section 15A – Diligence on the dependence of action**

456. Section 15A(1) gives the Court of Session and the sheriff court equivalent powers to grant warrants for arrestment (including, to a certain extent, admiralty arrestments – see new section 15N) and inhibition on the dependence of a court action. How far the courts can exercise these powers is given further content by subsection (2) and sections 15C to 15F.

457. Subsection (1) extends the powers of sheriffs by giving them the power to grant a warrant for inhibition on the dependence. Under the present law, a pursuer who wishes to inhibit on the dependence of a sheriff court action has to obtain the warrant to do so from the Court of Session using a procedure which involves preparation and presentation of an Act and Letters of Inhibition. This procedure is abolished by section 146(6) of this Act.
458. Subsection (2) provides that a warrant for arrestment on the dependence is competent only where the action on the dependence of which it is sought contains a conclusion for payment of a sum of money other than expenses. Warrant for inhibition on the dependence is competent only where the action contains a similar conclusion for payment of money or where it contains a conclusion seeking specific implement of an obligation to convey heritable property to the creditor or to grant the creditor a real right in security, or some other right, over heritable property.
459. Subsection (3) provides that “action” in this Part of the 1987 Act includes in the sheriff court those brought as summary causes, small claims and summary applications as well as those brought as ordinary actions.

### **New section 15B – Diligence on the dependence of petition**

460. Section 15B gives the Court of Session an additional power by providing that it is competent for the court to grant warrant for diligence by arrestment or inhibition on the dependence of a petition. How this power can be exercised is again given further content by subsection (2) and by sections 15C to 15F. Again, the court can grant warrant for arrestment on the dependence only where the petition contains a prayer for payment of a sum of money other than expenses. Warrant for inhibition on the dependence can be granted where the petition contains a similar prayer for payment or where it contains a prayer for specific implement of a similar obligation as that described in section 15A(2)(b)(ii).
461. Subsection (3) provides that legislation and rules of law relating to diligence on the dependence of actions are to apply to diligence on the dependence of petitions, so far as practicable and provided the contrary intention does not appear.

### **New section 15C – Diligence on the dependence to secure future or contingent debts**

462. Section 15C provides that it will be competent for the Court of Session or the sheriff to grant warrant for diligence on the dependence of a conclusion for payment of a debt which is a future or contingent debt. Examples of such debts are aliment and financial support or a capital sum claimed in an action for divorce or nullity of marriage. These particular examples of future or contingent debts were formerly governed by section 19 of the Family Law (Scotland) Act 1985. That provision is now repealed (see schedule 6 to this Act). (See also paragraph 681681 below for a general description of what is meant by “future” and “contingent” debts).
463. Subsection (2) defines “court” for the purposes of sections 15D to 15M as the court before which the action or petition is being pursued. This will be either the Court of Session or the sheriff court except in the case of petitions, in relation to which (by virtue of section 15B) only the Court of Session may grant diligence on the dependence.

### **Application for diligence on the dependence**

#### **New section 15D – Application for diligence on the dependence**

464. Section 15D(1) provides that at any time before a final decision has been taken in a court action, the “creditor” may apply for warrant for diligence on the dependence. In the scheme of the 1987 Act, “creditor” in this new Part means the person seeking to do diligence, and “debtor” means the person against whom that diligence is sought. Those terms are used throughout this Part. Section 15D should also be read with section 15G,

which makes it clear that warrant for diligence on the dependence can be applied for, granted and executed before service of the summons in the action.

465. Subsection (2) requires the application for the warrant: (a) to be in the form, or nearly as may be in the form specified in rules in court; (b) to be intimated to the debtor and any other interested party; (c) to state where an immediate warrant is being sought before a hearing on the application; and (d) to include any other information which the Scottish Ministers require such applications to contain. That power is exercisable by regulations which (by virtue of section 104(1) of the 1987 Act) are subject to negative resolution procedure.
466. Subsection (3) provides that, where an immediate warrant is sought before a hearing of the application under section 15F, the application for warrant for diligence on the dependence need not be intimated.
467. Subject to section 15E, which enables the court to grant warrant without an initial hearing, subsection (4) requires the court to fix a date for a hearing on the application and to order the creditor to intimate that date to the debtor and any other person the court thinks has an interest.

### **New section 15E – Grant of warrant without a hearing**

468. Subsections (1) and (2) of section 15E give the court power to grant a warrant for diligence on the dependence before an initial hearing of the application provided it is satisfied that—
- the creditor has a *prima facie* case on the merits of the court action;
  - there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for diligence on the dependence were not granted in advance of such a hearing; and
  - it is reasonable in all the circumstances including the effect granting warrant may have on any person having an interest, to grant the warrant.
469. Subsection (3) puts the onus of satisfying the court of the case for granting warrant in advance of a hearing on the creditor.
470. Subsection (4) requires the court, on granting warrant for diligence on the dependence without a hearing on the application to fix a date for a hearing under section 15K (recall of diligence on the dependence) and to require the creditor to intimate that date to the debtor and any other interested party.
471. Where a hearing has been fixed under subsection (4)(a), subsection (5) applies section 15K as if the debtor or a person having an interest had applied to the court for an order under that section.
472. In applying section 15K, this means that at the hearing the court must consider the validity of the warrant and any diligence on the dependence executed under it. The effect of section 15K(10) is to place the onus on the creditor to satisfy the court that a recall or restriction order should not be made.
473. Where the court is satisfied the warrant is invalid, it is under a duty to make an order recalling the warrant or any diligence on the dependence which has been executed under it (the court can also make an ancillary order) (section 15K(5)).
474. Subsection (6) provides that, where the court decides that a warrant should not be granted without a hearing and the creditor insists on pursuing the application, the court is obliged to fix a date for a hearing on the application under section 15F and to require the creditor to so notify the debtor and any other interested party.

### **New section 15F – Hearing on application**

475. Section 15F sets out the procedure to be followed at a hearing on an application for warrant for diligence on the dependence. Such a hearing on an application takes place in respect of applications where the creditor either doesn't apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing.
476. Subsection (1) places a duty on the court, at the hearing, to give any person who received intimation of the hearing date (namely the debtor and any person appearing to the court to have an interest) the chance to make representations before the court makes a decision on the application.
477. Under subsections (2) and (3) the court may grant the warrant if it is satisfied as to the same matters which it is obliged to consider under section 15E(2), namely that—
- the creditor has a *prima facie* case on the merits of the court action;
  - there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for diligence on the dependence were not granted; and
  - it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.
478. Subsection (4) puts the onus of satisfying the court that it should grant warrant on the creditor.
479. Subsection (5) provides for intimation by the creditor of the court's decision to the debtor and any other person it thinks has an interest.
480. Subsection (6) provides that, in refusing the warrant, the court may impose such conditions as it thinks fit. Subsection (7) gives examples of particular conditions which the court might impose under subsection (6). So, where the court refuses to grant warrant for diligence on the dependence but is satisfied that, nevertheless, there is a risk of any ultimate decree for payment in favour of the creditor not being met, it can order the defender to consign a sum into court against that eventuality.

### **Execution before service**

#### **New section 15G – Execution of diligence before service of summons**

481. Section 15G applies where diligence on the dependence is executed before the summons in the action is served on the debtor. By virtue of sections 15A(3) and 15B(3), "summons" (which is the initiating document in a Court of Session action) is construed here as meaning also a petition (in the Court of Session) and, in the sheriff court, an initial writ (in an ordinary action and in a summary application) and a summons (in a summary cause and in a small claim).
482. Subsection (2) provides that if the summons is not served on the debtor within 21 days of the execution of the diligence on the dependence, the diligence ceases to have effect. This is subject to the power of the court to extend the period within which the summons needs to be served if the diligence is not to fall.
483. Subsections (3) and (4) deal with this and provide that the court may, on the application of the creditor, extend the period having regard to the efforts of the creditor to serve the summons within 21 days and any special circumstances preventing or obstructing service within that period.

### **Restriction on property attached**

#### **New section 15H – Sum attached by arrestment on dependence**

484. This section and section 15J change the effect of diligence on the dependence. Currently, there is no monetary or other limit of value placed on a warrant for diligence on the dependence. This means that where an arrestment on the dependence is served the whole funds owed to the debtor by the arrestee are frozen, not just the amount sued for. Similarly an inhibition upon the dependence of an action affects all heritable property of the debtor even if it is worth far more than the amount sued for.
485. Subsections (1) and (2) provide that the court, when granting warrant for arrestment on the dependence, may limit the warrant by specifying an amount, which must not exceed a maximum amount calculated by reference to the formula set out in subsection (2). The maximum limit is calculated as being the aggregate of—
- the principal sum claimed;
  - a sum of up to 20% of the principal sum (or such other percentage as the Scottish Ministers prescribe by regulations, subject to negative resolution procedure);
  - interest at the judicial rate on the principal sum which would be accrued in 1 year;
  - any sum which the Scottish Ministers prescribe by virtue of their power under subsection (3), being a sum which they think reasonably represents the likely expenses of an arrestment incurred by a creditor and chargeable against a debtor (the power being exercisable by regulations subject to negative procedure).
486. Subsection (4) provides that section 73F of the 1987 Act (which is inserted into that Act by section 206 of this Act) applies to arrestment on the dependence. The court, under section 15H, may restrict the total sum which may be arrested. But section 73F will operate whenever a creditor seeks to arrest a bank account to protect a minimum balance in that account. This paragraph should therefore be read with paragraphs 688 to 692 below.

### **New section 15J – Property affected by inhibition on dependence**

487. Section 15J provides that where a court grants warrant for inhibition on the dependence in a case where the action is specifically to oblige the debtor to convey heritable property, to grant a real right in security or to grant some other right over the property to the creditor, the court must limit the property attached to that particular property. In any other case, the court may limit the property attached to such property it may specify.

### **Recall etc. of diligence on the dependence**

#### **New section 15K – Recall or restriction of diligence on dependence**

488. Under section 15K, the debtor or any other person having an interest can apply to the court for any order set out in subsection (2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any arrestment or inhibition so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought.
489. Subsection (3) provides that any application under subsection (2) is to be in the form set out in Act of Sederunt (in other words rules of court). The application must be sent to the creditor and any other person with an interest. Subsection (4) provides that at the hearing about an application made under subsection (2), all interested parties will be able to be heard by the court before any order is made.
490. Subsection (5) provides that, where the court is satisfied the warrant is invalid, it is under a duty to make an order recalling the warrant and any diligence on the dependence which has been executed under it (the court can also make an ancillary order).
491. Subsection (6) imposes a duty on the court to recall the diligence if the court is satisfied that an arrestment or inhibition exercised in pursuance of the warrant being challenged

is incompetent. Again, the court may make any orders ancillary to such a recall as it thinks fit.

492. By virtue of subsection (7), where the court decides the warrant is valid it may still make an order recalling or restricting the warrant or diligence done under it (and any other order mentioned in subsection (2)) if it considers that an arrestment or inhibition executed in pursuance of the warrant is irregular or ineffective or if it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, to do so. The power in subsection (7) is subject to subsection (8).
493. Subsection (8) imposes a duty on the court to make an order recalling the warrant and any arrestment or inhibition executed in pursuance of it and gives the court power to make an ancillary order, where it is no longer satisfied as to the matters set out in subsection (9). Those matters mirror the considerations which the court must take into account when determining whether to grant a warrant (see section 15F(3)).
494. Subsection (10) places the onus on the creditor to satisfy the court that a recall or restriction order should not be made. Subsections (11) and (12) enable the court to impose any conditions it thinks fit when making an order which may include requiring the debtor to consign money into court, to find caution or to give some other kind of security as the court thinks fit. The court will order the debtor to inform the creditor and any other interested party about the order (subsection (13)).
495. Subsection (14) provides that this section applies regardless of whether the warrant for diligence on the dependence was obtained, or executed, before the section came into force.

#### **New section 15L – Variation of orders and variation or recall of conditions**

496. Under section 15L, the court may, on an application by the debtor, vary an order under section 15K(7) restricting a warrant for diligence on the dependence, or vary or remove a condition imposed under section 15F(6) or 15K(11). Any application under section 15L(1) is to be in the form set out in rules of court. The application must be sent to the creditor and any other person with an interest. Subsection (3) provides that at the hearing about an application made under subsection (2), all interested parties will be able to be heard by the court before any order is made. The court must order the debtor to inform the creditor and any other interested party about the order.

#### **General and miscellaneous**

##### **New section 15M – Expenses of diligence on the dependence**

497. Section 15M(1) provides that a creditor will generally be entitled to the expenses incurred in obtaining a warrant for diligence on the dependence and the costs in executing an arrestment or inhibition. This is subject to subsection (3)(a) which provides that the court may modify or refuse those expenses where it finds that the creditor was acting unreasonably in applying for the warrant or considers the modification or refusal to be reasonable in all the circumstances, including how the action was decided.
498. Subsection (2) entitles the debtor to claim the expenses incurred in opposing the warrant where the warrant was granted and the court is satisfied that the creditor was acting unreasonably in applying for the warrant. This section is subject to subsection (3)(b) which gives the court a power to modify or refuse those expenses where it is satisfied that it is reasonable in all the circumstances of the case, including the outcome of the case, to do so.
499. Subsection (4) provides that, apart from the matters covered by subsections (1) to (3), the court retains its discretion to deal with expenses as it thinks fit.
500. Subsection (5) provides that expenses incurred in obtaining or opposing warrant for diligence on the dependence are expenses of process.

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

501. Subsection (6) preserves existing rules in legislation or common law on the recovery of expenses chargeable against a debtor as are incurred in executing an arrestment or inhibition on the dependence of an action. In particular, section 93 of the 1987 Act applies to the recovery of expenses incurred in executing arrestments.

**New section 15N – Application of this Part to admiralty actions**

502. Section 15N applies this Part of this Act where it is consistent with the provisions of Part V of the [Administration of Justice Act 1956 \(c.46\)](#) (admiralty jurisdiction and arrestment of ships), to an arrestment on the dependence of an admiralty action as it applies to any other arrestment on the dependence. However, sections 15H (sum attached by arrestment on dependence), 15J (property affected by inhibition on the dependence) and 15M (expenses) do not apply. See also schedule 4 to this Act, which inserts a new section 47B on expenses into the 1956 Act.