Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

PART 4 S

LAND ATTACHMENT AND RESIDUAL ATTACHMENT

CHAPTER 2 S

ATTACHMENT OF LAND

Preparations for sale of attached land

92 Application for warrant to sell attached land S

(1) Where—

(a) a land attachment is in effect;

(b) the period of 6 months, beginning with the day or, as the case may be, the last day on which the notice of land attachment is registered, has expired;

(c) the sum recoverable by the land attachment exceeds the sum mentioned in subsection (3) below (in this Chapter, the "prescribed sum"); and

(d) the sum recoverable has not been paid,

the creditor may, subject to subsection (2) below, apply to the sheriff for a warrant for sale of the attached land or such part of it as may be specified in the application.

(2) The Scottish Ministers may by regulations provide that where attached land, or any part of it, is—

(a) a dwellinghouse; or

(b) a dwellinghouse of such description or class as may be specified in the regulations,

an application under subsection (1) above may be made only in relation to such part of the attached land which is not a dwellinghouse or, as the case may be, such a dwellinghouse.

Status: *This version of this cross heading contains provisions that are prospective.*
Changes to legislation: *There are currently no known outstanding effects for the Bankruptcy and Diligence etc. (Scotland) Act 2007, Cross Heading: Preparations for sale of attached land. (See end of Document for details)*

(3) The prescribed sum is—

(a) £3,000; or

(b) such other sum as may be prescribed by the Scottish Ministers by regulations.

(4) An application under subsection (1) above must—

(a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;

(b) specify—

(i) the attached land (or part of it) in relation to which the warrant for sale is sought; and

(ii) a solicitor who is willing to execute any warrant for sale granted; and

(c) be accompanied by—

(i) a report on a search in the appropriate property register in respect of the land specified in the application;

(ii) a report on a search in the Register of Inhibitions in respect of the debtor and any person who owns the attached land in common with the debtor;

(iii) a copy of the notice of land attachment;

(iv) a copy of the certificate of service of that notice on the debtor;

(v) a declaration signed by the solicitor mentioned in paragraph (b)(ii) above; and

(vi) any other document prescribed by Act of Sederunt.

(5) An application under subsection (1) above must be intimated to—

(a) the debtor;

(b) if the report mentioned in subsection (4)(c)(ii) above discloses that a notice has been registered under section 91 of this Act, the person at whose instance the notice was registered;

(c) any person holding any security or diligence ranking prior to or *pari passu* with the land attachment;

(d) any occupier of the land;

(e) any person who owns the land in common with the debtor; and

(f) any other person belonging to a class of persons prescribed by the Scottish Ministers by regulations.

(6) A person who receives intimation under subsection (5) above may, before the expiry of the period of 14 days beginning with the day on which intimation is made, lodge objections to the application.

(7) The Scottish Ministers may, by regulations, make further provision about the reports on searches mentioned in subsection (4)(c)(i) and (ii) above which are to accompany an application under subsection (1) above.

(8) Where provision is made by virtue of this Chapter or by any other enactment permitting the application under subsection (1) above to be an electronic communication—

(a) the requirement in paragraph (c) of subsection (4) above that the application be accompanied by the documents mentioned in that paragraph is satisfied by the provision of electronic communications; and

(b) the requirement that the declaration mentioned in sub-paragraph (v) of that paragraph be signed is satisfied by a certified electronic signature.

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(9) In this section, "sheriff" means a sheriff of the sheriffdom in which the attached land or any part of it is situated.

Commencement Information

I1 S. 92 partly in force; s. 92 not in force at Royal Assent see s. 227; s. 92(2)(3)(b)(4)(a)(4)(c)(vi)(5)(f)(7) in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, **art. 3(4)**, Sch. 3 (with arts. 4-6, 10)

PROSPECTIVE

93 Notice to local authority of application for warrant for sale S

(1) Where a creditor (other than a local authority) applies under section 92(1) of this Act for a warrant for sale of attached land which comprises or includes a dwellinghouse, the creditor must give notice of that fact to the local authority in whose area the dwellinghouse is situated.

(2) A notice under subsection (1) above must be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003 (asp 10).

PROSPECTIVE

94 Preliminary hearing on application for warrant to sell S

(1) The sheriff must, on receiving an application under section 92(1) of this Act and after expiry of the period mentioned in subsection (6) of that section—
- (a) hold a hearing; and
- (b) give the persons mentioned in subsection (5) of that section the opportunity of making representations.

(2) The creditor must attend the hearing whether or not the application is opposed.

(3) The sheriff must, if satisfied that the application is in order, make an order—
- (a) fixing a date for a hearing on the application under section 97 of this Act;
- (b) requiring the creditor to intimate that date to the persons mentioned in section 92(5) of this Act;
- (c) appointing a chartered surveyor or other suitably qualified person to report on the open market value of the land specified in the application (that surveyor or other person, and their report, being referred to in this Chapter as the "valuer" and the "valuation report" respectively); and
- (d) where any security or diligence is held in relation to the land specified in the application and the creditor has been unable to ascertain the amount of the sums secured by that other security or diligence, requiring the holder of that security or diligence to disclose to the creditor—
  - (i) the amount of the sums secured; and
  - (ii) where the security holder is obliged to pay any other sums which would be secured by that security to the debtor, the amount of such sums.

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PROSPECTIVE

95 Valuation report S

(1) The valuer appointed under section 94(3)(c) of this Act—

(a) may take all steps which are reasonably necessary (including inspecting the attached land) to produce a valuation report; and

(b) must send a copy of the report to—

(i) the creditor; and

(ii) the persons mentioned in section 92(5) of this Act.

(2) The debtor and any other person in occupation of attached land must allow the valuer to inspect the land and carry out any other steps which are necessary to produce the valuation report.

(3) The creditor is liable for the valuer's reasonable remuneration and outlays incurred in exercising functions under this section.

(4) Such remuneration and outlays are expenses incurred by the creditor in executing the land attachment.

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

(1) The creditor must, no later than 7 clear days before the date fixed for the hearing under section 97 of this Act, lodge—

(a) the valuation report;

(b) a continuation of the report on the search in the appropriate property register mentioned in section 92(4)(c)(i) of this Act;

(c) a continuation of the report on the search in the Register of Inhibitions mentioned in section 92(4)(c)(ii) of this Act; and

(d) a note specifying the amount outstanding under any security or diligence over the land specified in the application.

(2) Where a report lodged under subsection (1)(b) or (c) above reveals a deed registered since the date of the report mentioned in section 92(4)(c)(i) of this Act or, as the case may be, a notice under section 91 of this Act registered since the date of the report mentioned in section 92(4)(c)(ii) of this Act, the sheriff—

(a) must make an order requiring—

(i) the application; and

(ii) the date fixed for the hearing,

to be intimated to the person who registered that deed or, as the case may be, that notice; and

(b) may, if it appears necessary to do so, make an order—

(i) postponing the hearing to a later date; and

(ii) requiring the creditor to intimate that date to that person and to the persons mentioned in section 92(5) of this Act.

(3) Where the sheriff makes an order under subsection (2)(b)(i) above postponing the hearing, the sheriff may make such ancillary orders as the sheriff thinks fit including,

without prejudice to that generality, an order requiring fresh continuations of the reports on searches mentioned in subsection (1)(b) and (c) above to be lodged.

(4) Subsection (6) of section 92 of this Act applies to a person who receives intimation under subsection (2) above as it applies to a person who receives intimation under subsection (5) of that section.

(5) The Scottish Ministers may, by regulations, make further provision about the continuations of the reports on searches mentioned in subsection (1)(b) and (c) above which are to be lodged under that subsection.

Commencement Information

I2 S. 96 partly in force; s. 96 not in force at Royal Assent see s. 227; s. 96(5) in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, **art. 3(4)**, Sch. 3 (with arts. 4-6, 10)

97 Full hearing on application for warrant for sale S

(1) At the hearing on an application under section 92(1) of this Act, the sheriff must not make any order without first giving any person who has lodged objections under section 92(6) of this Act an opportunity to be heard.

(2) Subject to subsections (3) and (5) below and to sections 98, 99 and 102 of this Act, the sheriff may, if satisfied that the application is in order, make an order—
- (a) subject to subsection (4) below, granting a warrant for sale of the attached land; and
- (b) authorising the solicitor specified in the application (or such other solicitor the sheriff specifies) to execute that warrant (in this Chapter, that solicitor being referred to as the "appointed person").

(3) The sheriff may, if satisfied that granting a warrant for sale would be unduly harsh to the debtor or any other person having an interest—
- (a) make an order under subsection (2) above but suspend its effect for a period not exceeding 1 year beginning with the date on which the order is made; or
- (b) make an order refusing to grant such a warrant.

(4) The sheriff—
- (a) must specify in the warrant granted the period within which the attached land is to be sold; and
- (b) may grant warrant—
  - (i) to sell only part of the attached land;
  - (ii) to sell the attached land by lots.

(5) The sheriff must make an order refusing the application for a warrant for sale if satisfied that any of the grounds mentioned in subsection (6) below apply.

(6) The grounds referred to in subsection (5) above are that—
- (a) the land attachment is invalid;
- (b) the land attachment has ceased to have effect;
- (c) the attached land (or any part of it) is not capable of being sold;
- (d) the sum recoverable by the land attachment does not exceed the prescribed sum;

(e) a warrant for sale of the attached land (or any part of it) has been granted to another creditor of the debtor;

(f) a heritable creditor of the debtor is exercising that creditor's right to sell the attached land (or any part of it) under the security;

(g) if the attached land (or any part of it) were sold, the likely net proceeds of the sale would not exceed the sum mentioned in subsection (7) below.

(7) The sum referred to in subsection (6)(g) above is the aggregate of—

(a) the expenses of the land attachment chargeable against the debtor; and

(b) whichever is the lesser of—

(i) the sum of £1,000; and

(ii) the sum equal to 10 per cent of the sum mentioned in section 81(6)(a) of this Act or so much of that sum as is outstanding,

or such other sum or percentage as may be prescribed by the Scottish Ministers by regulations.

(8) In subsection (6)(g) above, "likely net proceeds" means the sum likely to be raised by the sale of the attached land less any sums that would be due to a creditor holding a security or diligence over the attached land which ranks prior to or *pari passu* with the land attachment.

Commencement Information

I3 S. 97 partly in force; s. 97 not in force at Royal Assent see s. 227; s. 97(7) in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, **art. 3(4)**, Sch. 3 (with arts. 4-6, 10)

98 Application for warrant for sale of sole or main residence S

(1) This section applies where—

(a) the creditor applies under section 92(1) of this Act for a warrant for sale of attached land which comprises or includes a dwellinghouse; and

(b) that dwellinghouse is the sole or main residence of—

(i) the debtor;

(ii) where the owner of the dwellinghouse is not the debtor, that owner; or

(iii) any person mentioned in subsection (2) below.

(2) Those persons are—

(a) a non-entitled spouse of the debtor or the owner;

(b) a person living together with the debtor or the owner as husband and wife;

(c) a civil partner of the debtor or the owner;

(d) a person living together with the debtor in a relationship which has the characteristics of the relationship between a husband and wife except that the person and the debtor or the owner are of the same sex;

(e) a person to whom subsection (3) below applies.

(3) This subsection applies to a person where—

(a) the debtor or the owner does not reside in the dwellinghouse;

(b) a child of the debtor or the owner, who is also a child of the person, does so reside; and

(c) the person has lived together with the debtor or the owner as is mentioned in paragraph (b) or (d) of subsection (2) above throughout the period of 6 months ending with the day on which the debtor or the owner ceased to so reside.

(4) Before making, under section 97(2) of this Act, an order granting a warrant for sale, the sheriff must have regard to the matters mentioned in subsection (5) below.

(5) Subject to subsection (6) below, those matters are—

(a) the nature of and reasons for the debt secured by the land attachment;

(b) the debtor's ability to pay, if the effect of the warrant for sale were suspended by an order under subsection (7) below, the debt outstanding (including any interest and expenses chargeable against the debtor);

(c) any action taken by the creditor to assist the debtor in paying that debt;

(d) the ability of those occupying the dwellinghouse as their sole or main residence to secure reasonable alternative accommodation.

(6) The Scottish Ministers may by regulations modify subsection (5) above to—

(a) add to;

(b) remove from; or

(c) vary,

the matters mentioned there.

(7) Where the sheriff makes, under section 97(2) of this Act, an order granting a warrant for sale, the sheriff may suspend the effect of the warrant for a period not exceeding 1 year beginning with the day on which the order is made.

(8) For the purposes of subsection (1) above, a dwellinghouse may be a sole or main residence irrespective of whether it is used, to any extent, by the debtor or a person mentioned in subsection (2) above for the purposes of any profession, trade or business.

(9) In this section—

"child" means—

(a) a child under the age of 16 years; and

(b) includes—

(i) a stepchild; and

(ii) any child brought up or treated by any person to whom subsection (3) above applies or by the debtor or the owner as a child of that person, of the debtor or of the owner;

"dwellinghouse" includes any yard, garden, outbuilding or other pertinents; and

"non-entitled spouse" is to be construed in accordance with section 1(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59).

Commencement Information

I4 S. 98 partly in force; s. 98 not in force at Royal Assent see s. 227; s. 98(6) in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, **art. 3(4)**, Sch. 3 (with arts. 4-6, 10)

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PROSPECTIVE

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

(1) This section applies where—

(a) the creditor applies under section 92(1) of this Act for a warrant for sale of attached land; and

(b) a person, at whose instance a notice was, by virtue of section 91 of this Act, registered (in this section, a "prospective purchaser"), has lodged objections to the application.

(2) At the hearing under section 97(1) of this Act, the sheriff may, if satisfied as to the matters mentioned in subsection (3) below, make an order—

(a) sisting the application;

(b) requiring the prospective purchaser to pay the price under the contract to the creditor; and

(c) making such other incidental or consequential provision as the sheriff thinks fit.

(3) The matters are that—

(a) the prospective purchaser did not, in entering into the contract for the purchase of the land, seek to defeat the rights of creditors of the debtor; and

(b) both the prospective purchaser and the debtor will proceed with the purchase under the contract without undue delay.

(4) Section 116 of this Act applies to the proceeds of sale paid to the creditor in pursuance of an order under subsection (2) above as it applies to a sale in pursuance of a warrant for sale subject to the modification that references to the "appointed person" are references to the "creditor".

PROSPECTIVE

100 Protection of purchaser under contract where warrant for sale granted S

(1) This section applies where—

(a) a warrant for sale has been granted under section 97(2) of this Act; and

(b) a person (in this section, the "prospective purchaser") had, before the notice of land attachment was registered, entered into a contract to purchase attached land from the debtor.

(2) The sheriff may, on the application of the prospective purchaser and if satisfied as to the matters mentioned in section 99(3) of this Act, make an order—

(a) suspending the warrant for sale for a period not exceeding 1 year from the day on which the order is made;

(b) requiring the prospective purchaser to pay the price under the contract to the appointed person; and

(c) making such other incidental or consequential provision as the sheriff thinks fit.

(3) Section 116 of this Act applies to the proceeds of sale paid to the appointed person in pursuance of an order under subsection (2) above as it applies to a sale in pursuance of a warrant for sale.

PROSPECTIVE

101 Provision supplementary to sections 99 and 100 S

(1) This section applies where an order is made under section 99(2) or 100(2) of this Act.

(2) The sheriff may, on the application of the creditor or the appointed person, as the case may be, if satisfied as to the matters mentioned in subsection (3) below, revoke the order under section 99(2) or, as the case may be, section 100(2) of this Act.

(3) The matters are that—
- (a) the prospective purchaser and the debtor entered into the contract for the purchase of the land in order to defeat the rights of creditors of the debtor; or
- (b) there has been undue delay in completing the purchase.

PROSPECTIVE

102 Warrant for sale of attached land owned in common S

(1) This section applies where attached land specified in an application under section 92(1) of this Act is a pro indiviso share owned in common by the debtor and a third party.

(2) Subject to subsection (3) below, the sheriff may, under section 97(2) of this Act, make an order granting a warrant for sale of the land specified in the application.

(3) The sheriff must specify in the order whether the warrant—
- (a) authorises—
  - (i) division of the land owned in common; and
  - (ii) sale of the part, specified in the warrant, which, after such division, would belong to the debtor as sole owner (in this section, the "debtor's part"); or
- (b) sale of the land owned in common and, subject to subsection (5) below, division of the proceeds.

(4) Where the warrant authorises division of the land owned in common—
- (a) with effect from the day on which the order granting the warrant is made—
  - (i) the debtor's part is subject to the land attachment; and
  - (ii) the remaining land is disburdened of the land attachment; and
- (b) this Chapter applies as if the warrant for sale granted were a warrant for sale of the debtor's part only.

(5) Where the warrant authorises sale of the land owned in common and division of the proceeds, the appointed person must—

(a) subject to the rights of any creditor of the third party holding a security over the third party's pro indiviso share of the land, pay to the third party the share of the proceeds of sale due to that person; and

(b) deal, under section 116 of this Act, with the share of the proceeds that is attributable to the debtor's share in the land as if those proceeds were proceeds from the sale of land owned by the debtor as sole owner.

(6) Where land to which this section applies is divided and sold, or sold, in pursuance of a warrant for sale, the third party who, immediately before that warrant is granted, owned the land in common with the debtor may purchase the debtor's part or, as the case may be, the land.

(7) Where the third party purchases land which is sold under a warrant authorising sale and division of the proceeds—

(a) the third party need pay to the appointed person only the share of the price attributable to the debtor's share in the land; and

(b) subsection (5)(a) above does not apply.

PROSPECTIVE

103 Intimation of sheriff's decision at full hearing S

(1) Where a warrant for sale is granted under section 97(2) of this Act, the creditor must, as soon as is reasonably practicable, send a copy of the warrant to—

(a) the debtor; and

(b) the appointed person.

(2) Where a warrant for sale is refused under section 97(3)(b) or (5) of this Act, the sheriff clerk must, as soon as is reasonably practicable, send a copy of the order to the debtor and to any other person appearing to the sheriff clerk to have an interest.

PROSPECTIVE

104 Supplementary orders as respects sale S

(1) The sheriff may, either when making an order granting a warrant for sale or subsequently, make such order as appears to the sheriff to be appropriate in connection with the sale of the attached land.

(2) In particular, the sheriff may, on the application of the appointed person—

(a) extend the period specified in the warrant granted under section 97(2) of this Act within which the land is to be sold;

(b) remove that appointed person and appoint another solicitor as the appointed person; and

(c) on the application of the creditor, the debtor or any other person appearing to the sheriff to have an interest—

(i) in a case where the appointed person has died, appoint another solicitor as the appointed person;

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(ii) in a case where the appointed person is unable to carry out the appointed person's functions due to ill health or incapacity, remove that person and appoint another solicitor as appointed person;

(iii) in any other case, on cause shown, so remove and appoint.

(3) An order made under this section after the grant of a warrant for sale must be intimated by the creditor—

(a) in such form and manner;

(b) before the expiry of such period; and

(c) to the debtor and such other persons,

as the sheriff may direct.

PROSPECTIVE

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

Where, under section 97(5) of this Act, an order is made refusing an application for a warrant for sale by virtue of a ground mentioned in paragraph (d), (e), (f) or (g) of subsection (6) of that section—

(a) the land attachment does not, by reason only of that refusal, cease to have effect; and

(b) it is competent for the creditor to make a further application under section 92(1) of this Act.

106 Termination of debtor's right to occupy land S

(1) Where an order is made granting a warrant for sale, the creditor may, by notice served on—

(a) the debtor; and

(b) any other person having a right, derived from the debtor, to occupy the land to which the warrant relates,

terminate, with effect from such day as the creditor specifies in the notice (being a day not less than 7 days after the date of service), any right of the debtor (or other person) to occupy that land.

(2) A notice under subsection (1) above must be—

(a) in (or as nearly as may be in) the form prescribed by Act of Sederunt; and

(b) served on the debtor or, as the case may be, other person.

(3) Any right of a person (other than the debtor) to occupy land which, before a notice of land attachment relating to the land was registered, would have been binding on a singular successor of the debtor is not affected by subsection (1) above.

(4) A certificate, in (or as nearly as may be in) the form prescribed by Act of Sederunt, of service of a notice such as is mentioned in subsection (1) above may be registered.

Commencement Information

I5 S. 106 partly in force; s. 106 not in force at Royal Assent see s. 227; s. 106(2)(4) in force for certain purposes at 1.4.2008 by S.S.I. 2008/115, **art. 3(4)**, Sch. 3 (with arts. 4-6, 10)

PROSPECTIVE

107 Consequences of giving notice under section 106(1) S

(1) From the date on which the creditor gives notice under section 106(1) of this Act until the land attachment ceases to have effect the creditor (in place of the debtor) has the rights and obligations of a heritable creditor in lawful possession of the land.

(2) Without prejudice to the generality of subsection (1) above, those rights and obligations—

(a) include any rights and obligations under any lease, or under any permission or right of occupancy, granted in respect of the land, including the right to receive rent from any tenant;

(b) do not include the power to grant a lease.

(3) Subsection (2)(a) above applies only as respects rent payable on or after the date on which the creditor intimates in writing to the tenant that the notice has been given.

(4) A creditor who has given notice under section 106(1) of this Act—

(a) may apply to the sheriff for an order—

(i) authorising the carrying out of works of reconstruction, alteration or improvement if they are works reasonably required to maintain the market value of the land; and

(ii) to recover from the debtor any expenses and outlays reasonably incurred in so doing;

(b) may bring an action of ejection against the debtor; and

(c) has title to bring any action of removing, intrusion or ejection which the debtor might competently have brought in respect of the land.

(5) Any—

(a) expenses or outlays incurred as mentioned in subsection (4)(a)(ii) above; and

(b) expenses of any action of removing, intrusion or ejection brought by virtue of subsection (4)(b) or (c) above,

are expenses incurred in executing the land attachment.

(6) The reference in subsection (3) above to intimation in writing includes a reference to intimation by electronic communication.

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