



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 5

### INHIBITION

#### *Creation*

#### **146 Certain decrees and documents of debt to authorise inhibition without need for letters of inhibition**

- (1) Inhibition in execution is competent to enforce—
  - (a) payment of a debt constituted by a decree or document of debt;
  - (b) subject to subsection (2) below, an obligation to perform a particular act (other than payment) contained in a decree.
- (2) Inhibition under subsection (1)(b) above is competent only if the decree is a decree—
  - (a) in an action containing an alternative conclusion or crave for payment of a sum other than by way of expenses; or
  - (b) for specific implement of an obligation to convey heritable property to the creditor or to grant in the creditor's favour a real right in security, or some other right, over such property.
- (3) In section 3 of the Writs Execution (Scotland) Act 1877 (c. 40) (warrant in extract writ to authorise diligence), after paragraph (b) insert—
  - (ba) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, inhibition against the debtor;”.
- (4) In section 7(1) of the Sheriff Courts (Scotland) Extracts Act 1892 (c. 17) (warrant in extract decree to authorise diligence), after paragraph (b) insert—
  - (ba) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, inhibition against the debtor;”.
- (5) In section 87(2) of the 1987 Act (warrant in extract decree to authorise diligence), after paragraph (b) insert—

“(ba) in relation to an ordinary debt, inhibition against the debtor;”.

- (6) It is not competent for the Court of Session to grant letters of inhibition.
- (7) In a case where inhibition is executed under subsection (1)(b) above—
- (a) sections 165 and 166 of this Act do not apply; and
  - (b) sections 158, 159, 160 and 163 of this Act have effect as if references to a “debtor” or “creditor” were references to the debtor or creditor in the obligation.
- (8) In this Part—
- “decree” has the meaning given by section 221 of this Act, except that paragraphs (c), (g) and (h) of the definition of “decree” in that section do not apply; and
- “document of debt” has the meaning given by section 221 of this Act.
- (9) The Scottish Ministers may by order modify the definitions of “decree” and “document of debt” in subsection (8) above by—
- (a) adding types of decree or document to;
  - (b) removing types of decree or document from; or
  - (c) varying the description of,
- the types of decree or document to which those definitions apply.

#### **147 Provision of debt advice and information package when executing inhibition**

Where the debtor is an individual, a schedule of inhibition served in execution of an inhibition under section 146(1) of this Act (other than an inhibition such as is mentioned in section 146(2)(b)) must be accompanied with a debt advice and information package.

#### **148 Registration of inhibition**

- (1) An inhibition is registered only by registering—
- (a) the schedule of inhibition; and
  - (b) the certificate of execution of the inhibition,
- in the Register of Inhibitions.
- (2) References in any enactment to registering or, as the case may be, recording an inhibition must, unless the context otherwise requires, be construed as references to registration in accordance with subsection (1) above.
- (3) The—
- (a) schedule of inhibition; and
  - (b) certificate of execution of the inhibition,
- must be in (or as nearly as may be in) the form prescribed by the Scottish Ministers by regulations.

#### **149 Date on which inhibition takes effect**

In the Titles to Land Consolidation (Scotland) Act 1868 (c. 101) (in this Chapter, the “1868 Act”), for section 155 (date on which inhibitions take effect) substitute—

**“155 Date on which inhibition takes effect**

- (1) An inhibition has effect from the beginning of the day on which it is registered unless the circumstances referred to in subsection (2) below apply.
- (2) Those circumstances are—
  - (a) a notice of inhibition is registered in the Register of Inhibitions;
  - (b) the schedule of inhibition is served on the debtor after that notice is registered; and
  - (c) the inhibition is registered before the expiry of the period of 21 days beginning with the day on which the notice is registered.
- (3) In those circumstances the inhibition has effect from the beginning of the day on which the schedule of inhibition is served.
- (4) A notice of inhibition must be in (or as nearly as may be in) the form prescribed.”.

*Effect*

**150 Property affected by inhibition**

- (1) Subject to section 153 of this Act, inhibition may affect any heritable property.
- (2) Any enactment or rule of law by virtue of which inhibition may affect other property ceases to have effect.
- (3) For the purposes of subsection (1) above and section 157 of the 1868 Act, a person acquires property at the beginning of the day on which the deed conveying or otherwise granting a real right in the property is delivered to that person.

**151 Effect on inhibition to enforce obligation when alternative decree granted**

Where—

- (a) an inhibition is executed to enforce a decree such as is mentioned in section 146(2)(a) of this Act; and
- (b) decree is subsequently granted in terms of the alternative conclusion or crave mentioned in that section,

the inhibition continues to have effect for the purposes of enforcing payment of the debt constituted by that subsequent decree.

**152 Effect of conversion of limited inhibition on the dependence to inhibition in execution**

Where—

- (a) a creditor obtains a decree for payment of all or part of a principal sum concluded or craved for in proceedings on the dependence of which warrant for inhibition was granted; and
- (b) the warrant was limited to specified property by virtue of section 15J(b) of the 1987 Act (property affected by inhibition on dependence),

any inhibition in execution of the decree is not limited to that property.

**153 Property affected by inhibition to enforce obligation to convey heritable property**

Where a decree such as is mentioned in section 146(2)(b) of this Act is granted, any inhibition executed to enforce that decree is limited to the property to which the decree relates.

**154 Inhibition not to confer a preference in ranking**

- (1) An inhibition does not confer any preference in any—
  - (a) sequestration;
  - (b) insolvency proceedings; or
  - (c) other process in which there is ranking.
- (2) Subsection (1) above does not affect any preference claimed in—
  - (a) a sequestration;
  - (b) insolvency proceedings; or
  - (c) any other process,where the inhibition has effect before this section comes into force.
- (3) For the avoidance of doubt, in this section, “other process” includes the process, under section 27(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35), of applying the proceeds of sale where a creditor in a standard security has effected a sale of the security subjects.
- (4) In this section, “insolvency proceedings” means—
  - (a) winding up;
  - (b) receivership;
  - (c) administration; and
  - (d) proceedings in relation to a company voluntary arrangement,within the meaning of the Insolvency Act 1986 (c. 45).

**155 Power of receiver or liquidator in creditors' voluntary winding up to dispose of property affected by inhibition**

- (1) The Insolvency Act 1986 (c. 45) is amended as follows.
- (2) After section 61(1) (which sets out the process by which a receiver may dispose of property subject to both the floating charge and to another security, other encumbrance or diligence) insert—

“(1A) For the purposes of subsection (1) above, an inhibition which takes effect after the creation of the floating charge by virtue of which the receiver was appointed is not an effectual diligence.”.
- (3) After section 166(1) (which applies the provisions of that section to a liquidator nominated by the company in a creditors' voluntary winding up) insert—

“(1A) The exercise by the liquidator of the power specified in paragraph 6 of Schedule 4 to this Act (power to sell any of the company's property) shall not be challengeable on the ground of any prior inhibition.”.

## *Termination*

### **156 Termination of effect of inhibition**

In section 44(3) of the Conveyancing (Scotland) Act 1924 (c. 27) (limitation of effect of certain entries in the Register of Inhibitions and Adjudications)—

- (a) in paragraph (a), the word “inhibitions,”, where it second occurs, is repealed; and
- (b) after that paragraph insert—
  - “(aa) all inhibitions shall cease to have effect on the lapse of five years from the date on which they take effect.”.

### **157 Inhibition terminated by payment of full amount owing**

- (1) This section applies where—
  - (a) an inhibition executed to enforce payment of a debt has effect; and
  - (b) a sum is paid, in respect of the debt constituted by the decree or document of debt authorising the inhibition, to the creditor, a judicial officer or any other person who has authority to receive payment on behalf of the creditor.
- (2) Where the sum paid amounts to the sum of—
  - (a) the debt (including any interest due under the decree or document of debt);
  - (b) the expenses incurred by the creditor in executing an inhibition (referred to in this section and in sections 165 and 166 as the “inhibition expenses”); and
  - (c) the expenses of discharging the inhibition,the inhibition ceases to have effect.
- (3) Any rule of law to the effect that an inhibition ceases to have effect on payment or tender of the debt constituted by the decree or document of debt is abolished.
- (4) This section and sections 165 and 166 of this Act do not apply to an inhibition on the dependence of an action.

### **158 Inhibition terminated by compliance with obligation to perform**

Where—

- (a) an inhibition executed to enforce an obligation to perform a particular act (other than payment) contained in a decree has effect; and
  - (b) the debtor has complied with the decree,
- the inhibition ceases to have effect.

### **159 Termination of inhibition when property acquired by third party**

- (1) Notwithstanding section 160 of this Act, an inhibition ceases to have effect (and is treated as never having had effect) in relation to property if a person acquires the property (or a right in the property) in good faith and for adequate consideration.
- (2) For the purposes of subsection (1) above, a person acquires property (or a right in the property) when the deed conveying (or granting the right in) the property is delivered to the person.

- (3) An acquisition under subsection (1) above may be from the inhibited debtor or any other person who has acquired the property or right (regardless of whether that person acquired in good faith or for value).
- (4) For the purposes of subsection (1) above, a person is presumed to have acted in good faith if the person—
- (a) is unaware of the inhibition; and
  - (b) has taken all reasonable steps to discover the existence of an inhibition affecting the property.

### *Breach*

#### **160 Breach of inhibition**

An inhibited debtor breaches the inhibition when the debtor delivers a deed—

- (a) conveying; or
- (b) otherwise granting a right in,

property over which the inhibition has effect to a person other than the inhibiting creditor.

#### **161 Prescription of right to reduce transactions in breach of inhibition**

For the avoidance of doubt, section 8(1) of the Prescription and Limitation (Scotland) Act 1973 (c. 52) (extinction of certain rights relating to property by prescriptive period of 20 years) applies to the right of an inhibitor to have a deed granted in breach of an inhibition reduced.

#### **162 Registration of notice of litigiosity and discharge of notice**

After section 159 of the 1868 Act insert—

##### **“159A Registration of notice of summons of action of reduction**

- (1) This section applies where a pursuer raises an action of reduction of a conveyance or deed of or relating to lands granted in breach of an inhibition.
- (2) The pursuer shall, as soon as is reasonably practicable after the summons in the action is signeted—
  - (a) register a notice of that signeted summons in accordance with section 159 of this Act; and
  - (b) register in the Land Register of Scotland or, as the case may be, record in the Register of Sasines a copy of that notice.
- (3) Where a decree of reduction is not obtained in the action to which the notice relates, the pursuer shall, as soon as is reasonably practicable—
  - (a) register in the Register of Inhibitions; and
  - (b) register in the Land Register of Scotland or, as the case may be, record in the Register of Sasines,
 a discharge of that notice in (or as nearly as may be in) the form prescribed.”.

### **163 Reduction of lease granted in breach of inhibition**

- (1) This section applies where an inhibited debtor grants a lease of property affected by the inhibition.
- (2) A lease which, on the date an action of reduction of the lease is raised, has an unexpired duration of not less than 5 years is reducible.
- (3) A lease which, on the date an action of reduction of the lease is raised, has an unexpired duration of less than 5 years may be reduced only if the Court of Session is satisfied that it would be fair and reasonable in all the circumstances to do so.
- (4) In calculating the unexpired duration of a lease for the purposes of subsections (2) and (3) above—
  - (a) any provision in the lease (however expressed) enabling the lease to be terminated earlier than the date on which the lease would otherwise terminate must be disregarded; and
  - (b) where the lease includes provision (however expressed) requiring the landlord to renew it, the duration of any such renewed lease must be added to the duration of the original lease.

#### *General and miscellaneous*

### **164 Power to prescribe forms in the 1868 Act**

- (1) In section 159 of the 1868 Act (no litigiosity before date notice of summons is registered), for the words from “set” to “annexed” substitute “be in (or as nearly as may be in) the form prescribed.”.
- (2) After section 159A of that Act (which is inserted by section 162 of this Act) insert—

#### **“159B Power of the Scottish Ministers to prescribe forms**

- (1) In sections 155, 159 and 159A of this Act, “prescribed” means prescribed by the Scottish Ministers by regulations.
- (2) The power conferred on the Scottish Ministers to make regulations under subsection (1) above is exercisable by statutory instrument.
- (3) A statutory instrument containing regulations made under subsection (1) above is subject to annulment in pursuance of a resolution of the Scottish Parliament.”.

### **165 Expenses of inhibition**

- (1) Subject to subsection (3) below, the inhibition expenses are chargeable against the debtor.
- (2) Inhibition expenses are recoverable from the debtor by land attachment or residual attachment executed for the purpose of enforcing payment of the debt to which the inhibition relates but not by any other legal process.

- (3) Where a creditor has executed an inhibition, the expenses of only one further inhibition in relation to the debt to which the first inhibition relates are chargeable against the debtor as inhibition expenses.
- (4) For the purposes of a sequestration or other process in which there is ranking, the inhibition expenses must be treated as part of the debt constituted by the decree or document of debt authorising the inhibition.

## **166 Ascription**

- (1) This section applies where—
  - (a) an inhibition has effect; and
  - (b) any sums are paid to account of the sums recoverable from the debtor by virtue of the decree or document of debt authorising the inhibition.
- (2) Such sums must be ascribed to the following in the order in which they are mentioned—
  - (a) the expenses which are chargeable against the debtor incurred in respect of any diligence (other than the inhibition) authorised by the decree or document of debt;
  - (b) the inhibition expenses;
  - (c) any interest which has accrued, at the date on which the inhibition takes effect, on the debt constituted by the decree or document of debt;
  - (d) the debt constituted by the decree or document of debt together with such interest as has accrued after the date on which the inhibition takes effect.

## **167 Keeper’s duty to enter inhibition on title sheet**

In section 6 of the Land Registration (Scotland) Act 1979 (c. 33) (content of title sheet)

- (a) in subsection (1)(c), at the beginning insert “subject to subsection (1A) below,”; and
- (b) after subsection (1) insert—

“(1A) The Keeper shall enter an inhibition registered in the Register of Inhibitions in the title sheet only when completing registration of an interest in land where the interest has been transferred or created in breach of the inhibition.”.

## **168 Inhibition effective against judicial factor**

- (1) Notwithstanding the appointment of a judicial factor on a debtor’s estate, an inhibition has effect.
- (2) But subsection (1) above does not apply in a case where—
  - (a) a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c. 39) (application for judicial factor on deceased person’s estate); and
  - (b) the inhibition was effective against the debtor prior to the debtor’s death.