



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 7

### INTERIM ATTACHMENT

#### 173 Interim attachment

After section 9 of the 2002 Act, insert—

#### “PART 1A

#### INTERIM ATTACHMENT

#### *Interim attachment*

#### **9A Interim attachment**

- (1) Subject to sections 9B to 9E below, the court may grant warrant for diligence by attachment of corporeal moveable property owned (whether alone or in common) by the debtor on the dependence of an action (such attachment is to be known as interim attachment).
- (2) Warrant for interim attachment is competent only where an action contains a conclusion for payment of a sum other than by way of expenses.
- (3) This Part of this Act shall apply to petitions in the Court of Session and to parties to them as it applies to actions and to parties to them.
- (4) In this Part of this Act—
  - “action” includes, in the sheriff court—
    - (a) a summary cause;
    - (b) a small claim; and
    - (c) a summary application,

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and references to “summons”, “conclusion” and to cognate expressions shall be construed accordingly;

“court” means—

- (a) the court before which the action is in dependence; or
- (b) where, by virtue of section 9L(1)(a) below, the interim attachment has effect after the creditor obtains a final interlocutor for payment, the court which granted that interlocutor;

“creditor” means the party who concludes for payment and who seeks, obtains or executes warrant for interim attachment;

“debtor” means the party against whom the conclusion for payment is addressed; and

expressions used in this Part of this Act have, unless the context otherwise requires, the same meanings as those expressions have in Part 2 of this Act.

### **9B Articles exempt from interim attachment**

It is not competent to attach by interim attachment—

- (a) any article within a dwellinghouse;
- (b) any article which, by virtue of section 11 below, it is not competent to attach;
- (c) a mobile home which is the only or principal residence of a person other than the debtor;
- (d) any article of a perishable nature or which is likely to deteriorate substantially and rapidly in condition or value; or
- (e) where the debtor is engaged in trade, any article acquired by the debtor—
  - (i) to be sold by the debtor (whether or not after adaptation); or
  - (ii) as a material for a process of manufacturing for sale by the debtor,

in the ordinary course of that trade.

#### *Application for interim attachment*

### **9C Application for warrant for interim attachment**

- (1) A creditor may, at any time during which an action is in dependence, apply to the court for warrant for interim attachment.
- (2) An application under subsection (1) above shall—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) subject to subsection (3) below, be intimated to and provide details of—
    - (i) the debtor; and
    - (ii) any other person having an interest;
  - (c) state whether the creditor is seeking the grant, under section 9D(1) below, of warrant for interim attachment in advance of a hearing on the application under section 9E below; and
  - (d) contain such other information as the Scottish Ministers may by regulations prescribe.

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- (3) An application under subsection (1) above need not be intimated where the creditor is seeking the grant, under section 9D(1) below, of warrant in advance of a hearing on the application under section 9E below.
- (4) The court, on receiving an application under subsection (1) above, shall—
  - (a) subject to section 9D below, fix a date for a hearing on the application under section 9E below; and
  - (b) order the creditor to intimate that date to—
    - (i) the debtor; and
    - (ii) any other person appearing to the court to have an interest.

### **9D Grant of warrant without a hearing**

- (1) The court may, if satisfied as to the matters mentioned in subsection (2) below, make an order granting warrant for interim attachment without a hearing on the application under section 9E below.
- (2) The matters referred to in subsection (1) above are—
  - (a) that the creditor has a prima facie case on the merits of the action;
  - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
    - (i) the debtor being insolvent or verging on insolvency; or
    - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,were warrant for interim attachment not granted in advance of such a hearing; and
  - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.
- (3) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.
- (4) Where the court makes an order granting warrant for interim attachment without a hearing on the application under section 9E below, the court shall—
  - (a) fix a date for a hearing under section 9M below; and
  - (b) order the creditor to intimate that date to—
    - (i) the debtor; and
    - (ii) any other person appearing to the court to have an interest.
- (5) Where a hearing is fixed under subsection (4)(a) above, section 9M (except subsection (11)) below shall apply as if an application had been made to the court for an order under that section.
- (6) Where the court refuses to make an order granting warrant without a hearing under section 9E below and the creditor insists in the application, the court shall—
  - (a) fix a date for such a hearing on the application; and
  - (b) order the creditor to intimate that date to—
    - (i) the debtor; and

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(ii) any other person appearing to the court to have an interest.

### **9E Hearing on application**

- (1) At the hearing on an application for warrant for interim attachment, the court shall not make any order without first giving—
  - (a) any person to whom intimation of the date of the hearing was made; and
  - (b) any other person appearing to the court to have an interest, an opportunity to be heard.
- (2) The court may, if satisfied as to the matters mentioned in subsection (3) below, make an order granting warrant for interim attachment.
- (3) The matters referred to in subsection (2) above are—
  - (a) that the creditor has a prima facie case on the merits of the action;
  - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—
    - (i) the debtor being insolvent or verging on insolvency; or
    - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets,where warrant for interim attachment not granted; and
  - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to do so.
- (4) The onus shall be on the creditor to satisfy the court that the order granting warrant should be made.
- (5) Where the court makes an order granting or, as the case may be, refusing warrant for interim attachment, the court shall order the creditor to intimate that order to—
  - (a) the debtor; and
  - (b) any other person appearing to the court to have an interest.
- (6) Where the court makes an order refusing warrant for interim attachment, the court may impose such conditions (if any) as it thinks fit.
- (7) Without prejudice to the generality of subsection (6) above, those conditions may require the debtor—
  - (a) to consign into court such sum; or
  - (b) to find caution or to give such other security,as the court thinks fit.

### *Execution of interim attachment*

### **9F Execution of interim attachment**

- (1) Sections 12, 13, 15 and (subject to subsection (6) below) 17 below apply to execution of an interim attachment as they apply to execution of an attachment.

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- (2) The officer shall, immediately after executing an interim attachment, complete a schedule such as is mentioned in subsection (3) below (in this Part of this Act, a “schedule of interim attachment”).
- (3) The schedule of interim attachment—
  - (a) shall be—
    - (i) in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
    - (ii) signed by the officer; and
  - (b) shall specify—
    - (i) the articles attached; and
    - (ii) their value, so far as ascertainable.
- (4) The officer shall—
  - (a) give a copy of the schedule of interim attachment to the debtor; or
  - (b) where it is not practicable to do so—
    - (i) give a copy of the schedule to a person present at the place where the interim attachment was executed; or
    - (ii) where there is no such person, leave a copy of the schedule at that place.
- (5) References in this Part of this Act to the day on which an interim attachment is executed are references to the day on which the officer complies with subsection (4) above.
- (6) The application of section 17 below shall be subject to the following modifications—
  - (a) subsections (3)(b) and (4) shall not apply;
  - (b) in subsections (1), (5) and (6), the references to the sheriff shall be construed as references to the court; and
  - (c) in subsection (6)(b), the reference to the sheriff clerk shall, in the case of an action in the Court of Session, be construed as a reference to the clerk of the court.

### **9G Execution of interim attachment before service**

- (1) This section applies where an interim attachment is executed before the service of the summons on the debtor.
- (2) Subject to subsection (3) below, if the summons is not served on the debtor before the end of the period of 21 days beginning with the day on which the interim attachment is executed, the attachment shall cease to have effect.
- (3) The court may, on the application of the creditor, make an order extending the period referred to in subsection (2) above.
- (4) In determining whether to make such an order the court shall have regard to—
  - (a) the efforts of the creditor to serve the summons within the period of 21 days; and
  - (b) any special circumstances preventing or obstructing service within that period.

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*Interim attachment: further procedure*

**9H Order for security of attached articles**

- (1) The court may, on an application, at any time after articles have been attached—
- (a) by the creditor;
  - (b) the officer; or
  - (c) the debtor,
- make an order for the security of any of the attached articles.
- (2) An application for an order under subsection (1) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated—
    - (i) where it is made by the creditor or the officer, to the debtor;
    - (ii) where it is made by the debtor, to the creditor and the officer.
- (3) At the hearing on the application under subsection (1) above, the court shall not make any order without first giving—
- (a) any person to whom intimation of the application was made; and
  - (b) any other person the court is satisfied has an interest,
- an opportunity to be heard.

*Interim attachment: effects*

**9J Unlawful acts after interim attachment**

Section 21 (except subsections (3) and (15)) below applies to an interim attachment as it applies to an attachment with the following modifications—

- (a) in subsections (10) and (11), the references to the sheriff shall be construed as references to the court; and
- (b) in subsection (12), the references to sections 51 and 54(1) below shall be of no effect.

**9K Articles belonging to or owned in common by a third party**

- (1) Where—
- (a) a third party claims to own an article attached by interim attachment; and
  - (b) the court, on the application of the third party, makes an order stating that it is satisfied that the claim is valid,
- the interim attachment of that article shall cease to have effect.
- (2) Where—
- (a) a third party claims to own an article attached by interim attachment in common with the debtor;
  - (b) the court, on the application of the third party, makes an order stating that it is satisfied—

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- (i) that the claim is valid; and
  - (ii) that the continued attachment of the article would be unduly harsh to the third party,
- the interim attachment of that article shall cease to have effect.
- (3) Subsection (2) of section 34 below applies where a third party makes an application for the purposes of subsection (1)(b) above as it applies where a third party makes an application for the purposes of subsection (1)(b)(ii) of that section.
- (4) Where the attachment of an article ceases, by virtue of an order under subsection (1) or (2) above, to have effect, the officer may attach other articles which are owned by the debtor and kept at the place at which the original interim attachment was executed.

### **9L Duration of interim attachment**

- (1) An interim attachment shall, unless recalled, have effect only until—
- (a) subject to subsections (2), (4) and (7) below, where—
    - (i) the creditor obtains a final interlocutor for payment of all or part of a principal sum concluded for in the action on the dependence of which warrant for interim attachment was granted;
    - (ii) the creditor obtains a final interlocutor in the creditor's favour in respect of another remedy concluded for in that action; or
    - (iii) the final interlocutor is of absolvitor or dismissal and the court grants decree under and for the purposes of section 9Q(1)(b) below,the expiry of the period of 6 months after the action is disposed of;
  - (b) where—
    - (i) the final interlocutor is of absolvitor or dismissal; and
    - (ii) no decree under and for the purposes of section 9Q(1)(b) below is granted,the granting of that interlocutor; or
  - (c) the creditor consents, by virtue of subsection (3) below, to the interim attachment ceasing to have effect in relation to every article attached.
- (2) An interim attachment shall have effect in relation to a specific article only until the article is attached by the creditor in execution of any such final interlocutor or decree as is mentioned in subsection (1)(a) above.
- (3) The creditor may at any time consent in writing to the interim attachment ceasing to have effect in relation to a specific article attached; and the attachment shall cease to have effect when that consent is notified to the court.
- (4) The court may, on an application by the creditor, extend the period mentioned in subsection (1)(a) above but only if—
- (a) the application is made before the expiry of the period mentioned in that subsection; and
  - (b) the court is satisfied that exceptional circumstances make it reasonable to grant the application.

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- (5) An application under subsection (4) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated by the creditor to—
    - (i) the debtor; and
    - (ii) any other person having an interest.
- (6) The court shall order the creditor to intimate any decision under subsection (4) above disposing of the application under that subsection to—
- (a) the debtor; and
  - (b) any other person appearing to the court to have an interest.
- (7) Where such an application is made but not disposed of before the date on which the interim attachment would, but for this subsection, cease to have effect, the interim attachment shall continue to have effect until the application is disposed of.
- (8) In calculating the period mentioned in subsection (1)(a) above, any period during which—
- (a) a time to pay direction under section 1(1) of the Debtors (Scotland) Act 1987 (c. 18); or
  - (b) an order under—
    - (i) section 6(3) of that Act (interim order sisting diligence); or
    - (ii) section 9(4) of that Act (diligence sisted if not recalled on making of time to pay order),
 is in effect shall be disregarded.
- (9) For the purposes of subsection (1) above—
- (a) a final interlocutor is obtained when an interlocutor—
    - (i) cannot be recalled or altered; and
    - (ii) is not subject to review; and
  - (b) an action is disposed of on the date on which the final interlocutor mentioned in paragraph (a) of that subsection is obtained unless, on a later date, the creditor obtains a final interlocutor for expenses in the action, in which case it is disposed of on that later date.

#### *Recall etc. of interim attachment*

### **9M Recall or restriction of interim attachment**

- (1) This section applies where warrant is granted for interim attachment.
- (2) The debtor and any person having an interest may apply to the court for an order—
- (a) recalling the warrant;
  - (b) restricting the warrant;
  - (c) if an interim attachment has been executed in pursuance of the warrant—
    - (i) recalling; or
    - (ii) restricting,



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- that attachment;
  - (d) determining any question relating to the validity, effect or operation of the warrant; or
  - (e) ancillary to any order mentioned in paragraphs (a) to (d) above.
- (3) An application under subsection (2) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated to—
    - (i) the creditor; and
    - (ii) any other person having an interest.
- (4) At the hearing on the application under subsection (2) above, the court shall not make any order without first giving—
- (a) any person to whom intimation of the application was made; and
  - (b) any other person the court is satisfied has an interest, an opportunity to be heard.
- (5) Where the court is satisfied that the warrant is invalid it—
- (a) shall make an order—
    - (i) recalling the warrant; and
    - (ii) if interim attachment has been executed in pursuance of the warrant, recalling that interim attachment; and
  - (b) may make an order ancillary to any order mentioned in paragraph (a) above.
- (6) Where the court is satisfied that an interim attachment executed in pursuance of the warrant is incompetent, it—
- (a) shall make an order recalling the interim attachment; and
  - (b) may make an order ancillary to any such order.
- (7) Subject to subsection (8) below, where the court is satisfied that the warrant is valid but that—
- (a) an interim attachment executed in pursuance of it is irregular or ineffective; or
  - (b) 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 court may, subject to subsection (11) below, make any order such as is mentioned in subsection (2) above.
- (8) If no longer satisfied as to the matters mentioned in subsection (9) below, the court—
- (a) shall make an order such as is mentioned in subsection (5)(a) above; and
  - (b) may make an order such as is mentioned in subsection (5)(b) above.
- (9) The matters referred to in subsection (8) above are—
- (a) that the creditor has a prima facie case on the merits of the action;
  - (b) that there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by reason of—

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- (i) the debtor being insolvent or verging on insolvency; or
  - (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of the debtor's assets; and
  - (c) that it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, for the warrant or, as the case may be, any interim attachment executed in pursuance of it to continue to have effect.
- (10) The onus shall be on the creditor to satisfy the court that no order under subsection (5), (6), (7) or (8) above should be made.
- (11) Where—
- (a) by virtue of section 9L(1)(a) above, the interim attachment continues to have effect after the creditor obtains a final interlocutor for payment; and
  - (b) the period of six months mentioned in that paragraph has not expired, the court shall not make an order under subsection (7) above.
- (12) In granting an application under subsection (2) above, the court may impose such conditions (if any) as it thinks fit.
- (13) Without prejudice to the generality of subsection (12) above, those conditions may require the debtor—
- (a) to consign into court such sum; or
  - (b) to find such caution or to give such other security, as the court thinks fit.
- (14) Where the court makes an order under this section, the court shall order the debtor to intimate that order to—
- (a) the creditor; and
  - (b) any other person appearing to the court to have an interest.

#### **9N Variation of orders and variation or recall of conditions**

- (1) Where—
- (a) an order restricting warrant for interim attachment is made under section 9M(7) above; or
  - (b) a condition is imposed under—
    - (i) section 9E(6) above; or
    - (ii) section 9M(12) above,
 the debtor may apply to the court for variation of the order or, as the case may be, variation or removal of the condition.
- (2) An application under subsection (1) above shall—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated to—
    - (i) the creditor; and
    - (ii) any other person having an interest.

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- (3) At the hearing on the application under subsection (1) above, the court shall not make any order without first giving—
  - (a) any person to whom intimation of the application was made; and
  - (b) any other person the court is satisfied has an interest, an opportunity to be heard.
- (4) On an application under subsection (1) above, the court may if it thinks fit—
  - (a) vary the order; or
  - (b) vary or remove the condition.
- (5) Where the court makes an order varying the order or, as the case may be, varying or removing the condition, the court shall order the debtor to intimate that order to—
  - (a) the creditor; and
  - (b) any other person appearing to the court to have an interest.

#### *General and miscellaneous provisions*

#### **9P Expenses of interim attachment**

- (1) Subject to subsection (3)(a) below, a creditor shall be entitled to the expenses incurred—
  - (a) in obtaining warrant for interim attachment; and
  - (b) where an interim attachment is executed in pursuance of the warrant, in so executing that attachment.
- (2) Subject to subsection (3)(b) below, a debtor shall be entitled, where—
  - (a) warrant for interim attachment is granted; and
  - (b) the court is satisfied that the creditor was acting unreasonably in applying for it,to the expenses incurred in opposing that warrant.
- (3) The court may modify or refuse—
  - (a) such expenses as are mentioned in subsection (1) above if it is satisfied that—
    - (i) the creditor was acting unreasonably in applying for the warrant; or
    - (ii) such modification or refusal is reasonable in all the circumstances and having regard to the outcome of the action; and
  - (b) such expenses as are mentioned in subsection (2) above if it is satisfied as to the matter mentioned in paragraph (a)(ii) above.
- (4) Subject to subsections (1) to (3) above, the court may make such findings as it thinks fit in relation to such expenses as are mentioned in subsections (1) and (2) above.
- (5) Expenses incurred as mentioned in subsections (1) and (2) above in obtaining or, as the case may be, opposing an application for warrant shall be expenses of process.

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### **9Q Recovery of expenses of interim attachment**

- (1) Subject to subsection (4) below, any expenses chargeable against the debtor which are incurred in executing an interim attachment shall be recoverable only by attachment—
  - (a) in execution of a decree granted by virtue of—
    - (i) the conclusion for payment in the action on the dependence of which the warrant for interim attachment was granted; or
    - (ii) another conclusion in the creditor's favour in that action; or
  - (b) where the final interlocutor in the action is of absolvitor or dismissal, in execution of a decree granted under and for the purposes of this subsection.
- (2) Where any such expenses cease to be recoverable in pursuance of subsection (1) above, they cease to be chargeable against the debtor.
- (3) Subsection (4) below applies where interim attachment is—
  - (a) recalled under section 2(3), 3(1)(b), 9(2)(cb) or 10(1)(b) of the 1987 Act in relation to a time to pay direction or order;
  - (b) in effect immediately before the date of sequestration (within the meaning of the Bankruptcy (Scotland) Act 1985 (c. 66)) of the debtor's estate;
  - (c) in effect immediately before the appointment of an administrator under Part II of the Insolvency Act 1986 (c. 45);
  - (d) in effect against property of the debtor immediately before a floating charge attaches all or part of that property under section 53(7) (attachment on appointment of receiver by holder of charge) or 54(6) (attachment on appointment of receiver by court) of the 1986 Act;
  - (e) in effect immediately before the commencement of the winding up, under Part IV or V of the 1986 Act, of the debtor; or
  - (f) rendered unenforceable by virtue of the creditor entering into a composition contract or acceding to a trust deed for creditors or by virtue of the subsistence of a protected trust deed within the meaning of Schedule 5 to the 1985 Act.
- (4) Where this subsection applies—
  - (a) the expenses of the interim attachment which were chargeable against the debtor remain so chargeable; and
  - (b) if the debtor's obligation to pay the expenses is not discharged under or by virtue of the time to pay direction or order, sequestration, appointment, receivership, winding up, composition contract or trust deed for creditors, those expenses are recoverable in pursuance of subsection (1) above.

### **9R Ascription of sums recovered while interim attachment is in effect**

- (1) This section applies where—
  - (a) any amounts are—
    - (i) secured by an interim attachment; and

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- (ii) while the attachment is in effect, paid to account of the amounts recoverable from the debtor; and
  - (b) that interim attachment ceases to have effect.
- (2) Such amounts shall be ascribed to the following in the order in which they are mentioned—
  - (a) the expenses incurred in—
    - (i) obtaining warrant for; and
    - (ii) executing,  
the interim attachment;
  - (b) any interest which has accrued, in relation to a sum due under a decree granted by virtue of the conclusion in relation to which warrant for interim attachment was granted, as at the date of execution;
  - (c) any sum due under that decree together with such interest as has accrued after that date.
- (3) Where an interim attachment is followed by an attachment in execution of a decree granted by virtue of the conclusion in relation to which the warrant for the interim attachment was granted, section 41 below shall apply to amounts to which this section applies as it applies to amounts to which that section applies.

### **9S Ranking of interim attachment**

For the purposes of any enactment or rule of law as to ranking or preference—

- (a) where—
  - (i) an interim attachment has been executed; and
  - (ii) the creditor has, without undue delay, obtained an interlocutor for payment of all or part of the sum concluded for,  
that interim attachment shall be treated as if it were an attachment by virtue of section 10 below of the property attached, executed when the interim attachment was executed; and
- (b) where an interim attachment has ceased to have effect in relation to any article by virtue of section 9L(2) above, the attachment of the article in question shall be taken to have been executed when the interim attachment was executed.”.

**Changes to legislation:**

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