

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 5 – Inhibition

Creation

Section 146 – Certain decrees and documents of debt to authorise inhibition without need for letters of inhibition

412. This section replaces the existing common law on when it is competent to inhibit in execution (for inhibition on the dependence, see Part 6 of this Act).
413. Subsection (1) provides that inhibition in execution is competent to enforce payment of a debt constituted by a decree or document of debt or to enforce an obligation to perform a particular act (sometimes referred to as an obligation *ad factum praestandum*). Inhibition is competent only to enforce that kind of obligation where it is contained in a decree (so it is not competent to inhibit in execution of an obligation contained in a document of debt) and the action in which the decree is obtained either contained an alternative conclusion or crave for payment of money (for example, payment of damages if the obligation was not adhered to) or was an action demanding the conveyance of or granting of a real right in heritable property (subsection (2)).
414. Subsections (3) to (5) insert provisions relating to an inhibition for ordinary debt into the Writs Execution (Scotland) Act 1877, Sheriff Courts (Scotland) Extracts Act 1892 and the 1987 Act which provide that extract decrees or documents for payment automatically carry a warrant for inhibition (including extracts of decrees granted in the sheriff court). Previously, the sheriff could not grant warrant for inhibition in execution and a creditor wishing to inhibit in execution of a sheriff court decree had to apply by letters of inhibition to the Court of Session. The amendments made by these subsections mean that there is now no need to apply for such letters of inhibition and subsection (6) abolishes this procedure.
415. Subsection (7) provides that the sections 165 and 166 (dealing with expenses and allocation of sums paid to account) do not apply to inhibitions executed to enforce the performance of an obligation. This is because there is no principal sum along with which expenses could be recovered under section 166 and no sum can be paid to account when there is no principal sum being recovered. This section also modifies the references to “debtor” and “creditor” in sections 158 to 160 and 163 to make it clear that, in the case of inhibition to enforce performance of an obligation, those references make sense even though no money debt is involved.

416. Subsection (8) defines “decree” and “document of debt” by reference to section 221 of the Act. Subsection (9) provides for those definitions to be modified by the Scottish Ministers by regulations. Those regulations will be subject to negative resolution procedure (see section 224(3)).

Section 147 – Provision of debt advice and information package when executing inhibition

417. **Section 147** provides that a creditor executing certain inhibitions must provide the debtor (where the debtor is an individual) with a debt advice and information pack. Those inhibitions are—
- inhibitions in execution of a decree for payment and
 - inhibitions in execution of a decree containing an obligation (other than an obligation to convey heritable property or to grant rights in such property) to perform a particular act where the action in which that decree was obtained also contained an alternative conclusion or crave for payment of money (other than expenses).
418. An inhibition in execution will be incompetent if the debtor is not provided with the debt advice and information package at the same time as the schedule of inhibition is served. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act (see section 221).

Section 148 – Registration of inhibition

419. This section provides that an inhibition is registered only by registering the schedule and certificate of inhibition in the Register of Inhibitions. This section should be read with section 155 of the Titles to Land Consolidation (Scotland) Act 1868 (as substituted by section 149 of this Act). The schedule and certificate must be in the form prescribed by the Scottish Ministers by regulations (such regulations being subject to negative resolution procedure (see section 224(3))).

Section 149 – Date on which inhibition takes effect

420. This section replaces section 155 of the Titles to Land Consolidation (Scotland) Act 1868 with a new version of that section.
421. New section 155 provides that an inhibition takes effect on the day it is registered unless
- a separate notice of inhibition is registered in the Register of Inhibitions;
 - the schedule of inhibition is served on the debtor after that notice is registered; and
 - the inhibition is registered before 21 days have expired from the date of registering the notice.
422. In those circumstances, the inhibition takes effect from the date of the serving of the schedule. A notice of inhibition must be in the form prescribed by the Scottish Ministers by regulations. By virtue of section 159B of the 1868 Act (inserted by section 164 of this Act), such regulations are subject to negative resolution procedure.

Effect

Section 150 – Property affected by inhibition

423. **Section 150(1)** provides that inhibition may affect any heritable property. This is subject, however, to section 153, which limits the property that may be affected by an inhibition in certain cases.

424. Subsection (2) provides that any rule of law authorising inhibition against any other category of property is abolished. In particular, the rule that inhibition may affect property which may be subject to the diligence of adjudication (which is not limited to heritable property) is abolished by this provision.
425. Subsection (3) states that property is acquired on the day the deed transferring the property is delivered. For the purposes of subsection (1) this means that, where a person has a deed delivered to them which transfers ownership of a house to them, an inhibition executed against that person will affect the house even if the person's title to the house has yet to be registered. This subsection also applies to section 157 of the Titles to Land Consolidation (Scotland) Act 1868 which states that inhibition does not affect property acquired by a debtor after the inhibition is executed. So if inhibition is executed before the day that a deed transferring a house is delivered, the house will not be affected by the inhibition.

Section 151 – Effect on inhibition to enforce obligation when alternative decree granted

426. This section provides that where there is an inhibition to enforce a decree for performance of a particular act and subsequently a decree for the alternative conclusion for payment is granted (for example, following failure to comply with the original decree), the inhibition continues in force and is treated as if it was executed to enforce payment under the later decree. Without this provision, the inhibition would lapse and a new inhibition would have to be executed to enforce the decree for payment.

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

427. This section applies to the situation where a creditor obtains a decree for payment of all or part of a principal sum in an action in which the creditor had executed inhibition on the dependence. Under section 15J(b) of the 1987 Act (inserted by section 169 of this Act) the court can limit the warrant allowing inhibition on the dependence to specified property. The effect of this section is that when that limited inhibition turns into an inhibition in execution of the decree (which happens when decree is granted) it is no longer limited to that property.

Section 153 – Property affected by inhibition to enforce obligation to convey heritable property

428. This section provides that where an inhibition is executed to enforce a decree for implement of an obligation to convey or grant a real right in heritable property, the inhibition is limited to the heritable property to which the decree relates. This section therefore modifies, in the cases to which it applies, the effect of section 150.

Section 154 – Inhibition not to confer a preference in ranking

429. This section abolishes the rule that an inhibition confers a preference by exclusion in any sequestration, insolvency proceedings or other process in which there is ranking. Inhibitions no longer confer any preference. However, this section does not affect any preference in a sequestration or proceedings where the inhibition is executed before this section comes into force even if the ranking process itself does not begin until after the section comes into force. Subsection (4) defines “insolvency proceedings”.

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

430. Section 155(2) amends the Insolvency Act 1986 by inserting section 61(1A) which provides that an inhibition which comes into force after the creation of a floating charge is not an effectual diligence. This means the inhibition does not restrict the power of a receiver appointed under such a floating charge to deal with any property which would

normally be affected by the inhibition. Section 38(3) of this Act determines the date of the creation of a floating charge.

431. Subsection (3) inserts section 166(1A) into the Insolvency Act which provides that a liquidator in a winding up can exercise his or her power under Schedule 4 of that Act to sell property without that being affected by any inhibition in effect against the company's property.

Termination

Section 156 – Termination of effect of inhibition

432. This section repeals the second reference to “inhibitions” in section 44(3)(a) of the Conveyancing (Scotland) Act 1924 and inserts section 44(3)(aa). Both amendments have the effect of clarifying that all inhibitions will cease to have effect after 5 years have expired from the date on which they come into force. They are not, therefore, subject to the 5-year negative prescription period nor to the rules on interruption or extension of that period.

Section 157 – Inhibition terminated by payment of full amount owing

433. This section applies where an inhibition is executed to enforce payment of a debt and a sum is paid in respect of that debt to the creditor, a judicial officer or any other person who has authority to receive payment on behalf of the creditor. Where the sum paid amounts to the total debt plus interest, the inhibition expenses and the expenses of discharging the inhibition, the inhibition will cease to have effect. This replaces the common law rule that payment or the tendering of payment of the debt alone (excluding expenses) brought the inhibition to an end (see subsection (3)). But this section does not apply to inhibition on the dependence (see subsection (4)).

Section 158 – Inhibition terminated by compliance with obligation to perform

434. This section provides that where a decree for the performance of a particular act (a decree *ad factum praestandum*) is complied with, any inhibition executed to enforce that decree ceases to have effect.

Section 159 – Termination of inhibition when property acquired by third party

435. **Section 159(1)** provides that, despite the fact that the conveyance or granting of a right in property affected by an inhibition is a breach of the inhibition (see section 160), an inhibition ceases to affect the property if the conveyance or granting of the right is for value and is made to a person acquiring the property or right who acts in good faith. In other words, the person acting in good faith acquires the property or right free of the encumbrance of the inhibition. This applies regardless of whether the person acquiring the property does so from the inhibited debtor or from another person who themselves had acquired from the debtor (or who acquired from such a person etc.) (see subsection (3)). Only the person acquiring the property or right needs to act in good faith for the inhibition to cease to affect that property.
436. Subsection (2) is in similar terms to section 137(3) and provides that, for the purposes of subsection (1), a person acquires property or a right in it when the deed conveying the property or granting the right is delivered to that person.
437. Subsection (4) provides that a person is assumed to act in good faith if the person does not know about the inhibition and has taken all reasonable steps to find out whether or not an inhibition exists affecting the property in question. An example of taking all reasonable steps might be where a buyer of a house instructs a search taken up to the date of completion of the sale (or whatever date close to that is reasonable according to current practice) in the Register of Inhibitions against the seller and any previous owner

against whom an inhibition could be in force affecting the house and the search fails to disclose the existence of the inhibition.

Breach

Section 160 – Breach of inhibition

438. This section provides that an inhibited debtor breaches an inhibition when the debtor delivers a deed to a third party transferring or granting a right in any property which is affected by the inhibition. As with sections 150(3) and 159(2) it is the date of delivery of the deed which is relevant. That is the date on which the breach occurs, rather than the date of conclusion of the missives for the transfer or the dates of grant or registration of the deed.

Section 161 – Prescription of right to reduce transactions in breach of inhibition

439. This section removes any doubt that the 20 year period of long negative prescription (set out in section 8(1) of the Prescription and Limitation (Scotland) Act 1973) applies to the right of an inhibitor to have a deed, granted in breach of an inhibition, reduced.

Section 162 – Registration of notice of litigiosity and discharge of notice

440. This section inserts new section 159A into the Titles to Land Consolidation (Scotland) Act 1868.

New section 159A – Registration of notice of summons of action of reduction

441. This section applies where an inhibiting creditor raises an action of reduction of a deed granted in breach of an inhibition. The inhibiting creditor must register a notice of the signeted summons in the action in the Register of Inhibitions and in the Land Register of Scotland or the Register of Sasines (see subsection (2)). This provides notice in the personal and the property registers that the land in question is litigious pending the outcome of the action of reduction. An inhibiting creditor who fails to obtain a decree of reduction will discharge the notice in the form prescribed by regulations so that the land no longer appears as litigious in the property registers (see subsection (3)).

Section 163 – Reduction of lease granted in breach of inhibition

442. This section applies where an inhibited debtor grants a lease of land affected by inhibition. A lease granted in those circumstances will be reducible if it has at least 5 years left before comes to an end as at the date on which the action for reduction of the lease is raised. A lease which is not capable of lasting 5 years after that date will be reducible only if the Court of Session is satisfied that in all circumstances it would be fair and reasonable to reduce it. Subsection (4) specifies how to calculate the unexpired duration of a lease.

General and miscellaneous

Section 164 – Power to prescribe forms in the 1868 Act

443. **Section 164(1)** amends section 159 of the 1868 Act to replace the reference to notices registered under that section being in the form of Schedule RR to that Act with a reference to them being in such form as may be prescribed. Subsection (2) inserts new section 159B into the 1868 Act (new section 159A already being inserted by section 162 of this Act). Section 159B provides that the power to prescribe the form of notices in sections 155, 159 and 159A of the 1868 Act is exercisable by the Scottish Ministers by regulations subject to the negative resolution procedure of the Scottish Parliament.

Section 165 – Expenses of inhibition

444. Section 165(1) provides that the expenses incurred by the creditor in carrying out an inhibition will be chargeable against the debtor but (by virtue of subsection (3)) the expenses of only one further inhibition in relation to the same debt as the original inhibition will be chargeable against the debtor. This makes it clear that, although an inhibition lasts for only 5 years (see section 156), the creditor can re-inhibit at the end of that period. However, the expenses of doing so on one occasion only are recoverable from the debtor.
445. Subsection (2) provides that inhibition expenses will be recoverable from the debtor only by land attachment or residual attachment executed to recover the debt to which the inhibition relates. There is no other legal method available to recover these expenses.
446. Subsection (4) provides that in a sequestration or other process where there is ranking, the inhibition expenses will be treated as part of the debt to which the inhibition relates. This section and sections 157 and 166 do not apply to an inhibition on the dependence (see section 157(4)).

Section 166 – Ascription

447. This section applies where an inhibition executed to enforce payment of a debt is in force and any payment is made by the debtor on account of the total recoverable by the inhibiting creditor. The payments made on account are allocated to the sum recoverable in the following order—
- the expenses of any other diligence chargeable against the debtor;
 - the inhibition expenses;
 - interest on the sum due as at the date the inhibition came into force;
 - the debt to which the inhibition relates and any interest due after the date the inhibition comes into force.

Section 167 – Keeper’s duty to enter inhibition on title sheet

448. This section inserts subsection (1A) into section 6 of the Land Registration (Scotland) Act 1979.
449. New subsection (1A) provides that the Keeper must enter an inhibition registered in the Register of Inhibitions in the title sheet of a property only where the property (or a right in it) has been transferred or created in breach of the inhibition.

Section 168 – Inhibition effective against judicial factor

450. This section provides that, irrespective of the appointment of a judicial factor on an inhibited debtor’s estate, the inhibition will continue in force. This will not be the case where the inhibited debtor is dead and a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889.