

Executive Note

DRAFT : The Bankruptcy and Diligence etc. (Scotland) Act 2007 (Inhibition) Order 2009

This instrument is made in exercise of powers contained in sections 224(2) and 225 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. The instrument is subject to affirmative resolution procedure.

Policy Objectives

The Order amends and supplements the changes to the procedure for the enforcement of court decrees and documents of debt by inhibition which is a “freezing” diligence enforcement procedure against land and other heritable property, set out in the Bankruptcy and Diligence etc. (Scotland) Act 2007 (“the 2007 Act”). It adds for certain cases a registration requirement in the Register of Inhibitions.

Part 6 of the 2007 Act, introduced on 1 April 2008, contained provision relating to inhibition on the dependence of a court action (i.e. pending judgment in the action). It introduced the ability of the sheriff, when granting authority for inhibition on the dependence, to limit the effect of the inhibition to specific property.

Section 152 of the 2007 Act provides for effect of the conversion of an inhibition on the dependence limited in this way. That conversion happens automatically, as it did at common law before the 2007 Act, on decree being granted in favour of the pursuer in the action. The inhibition on the dependence converts so as to maintain the inhibition in place (for 5 years from when it had effect). For the class of cases where inhibition on the dependence is so limited to specific property at the discretion of the sheriff (under section 15J(b) of the Debtors (Scotland) Act 1987), section 152 of the 2007 Act means that any inhibition upon granting of a decree for payment of a principal sum is not limited to that property.

The Act however contains no requirement for notification to the Keeper and registration of the decree in the Register of Inhibitions and Adjudications (ROI) to make the widened effect clear to third parties who may be considering buying the land or otherwise transacting with the debtor in respect of the land.

The Keeper of the Registers of Scotland suggested that in these circumstances the widened inhibition should not have effect against property owned by the debtor unless, and until, a third party transacting with the debtor would be able to establish from a search of the ROI that there was an inhibition affecting the debtor’s property.

This view is supported by the Lord President’s Advisory Group on Diligence who agree that the comprehensiveness of the Registers should not be undermined and that the granting of a decree should be recorded in the ROI.

It is considered that the duty of recording in the ROI should lie with the creditor as the effect of the inhibition is of benefit to the creditor and it should be the creditor's responsibility to enforce their decree.

This instrument has therefore been prepared using the general powers contained in section 225 of the 2007 Act which allows incidental, supplemental or consequential provision considered necessary or expedient for the purposes of the 2007 Act, including amendment to the Act. Section 225 enables this additional provision to fill out the inhibition procedure in the Act only because the Act itself makes no provision for registration in the Register of Inhibitions, nor for when section 152 applies.

The draft Order provides for registration of an extract decree in the ROI and that the widened effect of the inhibition under section 152 of the 2007 does not take effect until registration of an extract, or copy interlocutor certified by the clerk of court, of the court decree with a notice in the form prescribed.

This allows for the intended effect of section 152 (i.e. widening of the inhibition limited by virtue of section 15J(b) of the 1987 Act) as long as the creditor takes the appropriate additional procedural step.

The Order also makes a minor clarification to the wording of section 152 to ensure it achieves its intended effect and makes transitional modification in respect of the proposed re-naming of the Register of Inhibitions and Adjudications which will not take effect until such time as adjudication for debt is abolished (by the implementation of sections 79 and 80 of the 2007 Act).

Consultation

The rules introduced by this Order will make supplemental amendments to the inhibition provisions in the Bankruptcy and Diligence etc. (Scotland) Act 2007 for a limited class of case. No formal public consultation has been carried out, but extensive discussion has taken place and draft provisions have been shared with stakeholders, including the Registers of Scotland, Scottish Court Service, and the Lord President's Advisory Group on Diligence.

Financial Effect

A Regulatory Impact Assessment has not been carried out. The change to section 152 of the Act is not expected to have significant financial effects on the Scottish Government or on business. An additional registration fee will be payable by creditors on registering the decree in the Register of Inhibitions, but will be an expense of the Inhibition chargeable against the debtor (assuming costs are recovered). It is expected that there will be few instances where inhibition on the dependence is limited to specific property at the discretion of the court, and so the number of second registrations will be negligible. Without the procedural step in the Order, debtors will be more likely to transact with property in breach of the inhibition, leading to greater potential cost to creditors, and potentially third parties.