Yksityisoikeuden alalla ennen siirtymäkauden päättymistä meneillään olevat menettelyt ja vireille pannut oikeudenkäynnit jatkuvat EU:n lainsäädännön mukaisesti. Yhdistyneen kuningaskunnan kanssa yhteisesti sovitun mukaisesti Yhdistynyttä kuningaskuntaa koskevat tiedot säilytetään Euroopan oikeusportaalissa vuoden 2024 loppuun.

How to enforce a court decision

Skotlanti

1 What does enforcement mean in civil and commercial matters?

In Scotland the term diligence is used to describe a number of legal processes which can be executed against debtors in order to enforce payment of debts due to creditors. Diligence can only competently proceed on a lawful warrant such as a court decree or document of debt for payment of money or, more widely, an order of the civil courts generally including for performance or prevention of an act.

Types of diligence include arrestment of earnings, arrestment of goods or funds in the hands of a third party, attachment of goods or funds, inhibition and adjudication for debt.

Adjudication for debt

Adjudication for debt is a very old diligence against heritable property, the effect of which is judicial heritable security in favour of the creditor. This rarely used diligence is exclusively a Court of Session process. After decree of adjudication is granted, the extract decree is recorded or registered in the appropriate Scottish land register (Register of Sasines or the Land Register). The adjudicating creditor then obtains, in general, the same rights as other heritable creditors, but excluding a power of sale. It allows the creditor to raise an action to remove the debtor if he is in possession, or raise an action to receive rent money from tenants if the property is leased. It is only after a period of ten years that the creditor can apply to the court to become the owner and sell the property.

Arrestment of goods or funds in the hands of a third party

Arrestment is a diligence against moveable property belonging to the debtor which is in the hands of a third party. It operates by preventing the third party from releasing the arrested property. Subjects which can be arrested include debts, funds held in a bank account, shares, trusts estate, insurance policies, and corporeal moveable property. Corporeal moveable property in the hands of the debtor cannot be arrested, as the appropriate diligence for that is attachment.

Attachment of goods

Corporeal moveable property in possession of a debtor may be attached by a creditor and sold at auction as a means of recovering outstanding debts. However attachment cannot be used to seize certain items such as tools of trade or books required by the debtor for their profession, or vehicles which are reasonably required by the debtor and which do not exceed a specified value. Attachment also cannot be used to take possession of goods in the debtor's dwelling house, unless an order for exceptional attachment has been granted by the Sheriff at court. Attachment allows a creditor to attach money (cash including coins and banknotes in a foreign currency, postal orders, banking instruments, etc) which is held on a debtor’s premises, although money in a dwelling house or on the debtor’s person cannot be attached.

Earnings Arrestment

Diligence against a debtor’s earnings can be executed in the form of an earnings arrestment (for enforcement of a single debt), a current maintenance arrestment (for enforcement of ailment or a periodical allowance on divorce), or a conjoined arrestment order (an order granted by the court to enforce payment of two or more of the same type of debts, at the same time).. A deduction from earnings order can also be made in terms of the Child Support Act 1991 for anyone liable to pay child support under a maintenance arrestment. On being served with an arrestment schedule, the employer must deduct an amount from the debtor’s earnings calculated in accordance with statutory tables each payday and pay it over to the creditor until such time as the debt is settled or the debtor leaves the employment.

Ejection or Removing from property

Ejection may be undertaken on the authority of decrees for recovery of possession of heritable property, removing or ejection. Removing is the term used where a landlord seeks to recover possession of property from a tenant. Ejection is the remedy for removal of an occupier who does not hold title to occupy the heritable property.

Inhibition

Inhibition is a personal diligence which prohibits a debtor from selling or otherwise disposing of or granting any security over their heritable property, to the detriment of the inhibiting creditor. This is achieved by registering an inhibition in the Register of Inhibitions and Adjudications. An inhibition offers comfort to the inhibitor in that the debtor will have difficulty in disposing of their heritable property, but it does not give the inhibitor any real right over the property. An Inhibition is a negative or prohibitory diligence which remains effective for a period of five years, but will terminate earlier if the inhibiting creditor agrees to discharge; usually upon satisfaction of the debt.

2 Which authority or authorities are competent for enforcement?

Sheriff Officers and Messengers-at-Arms are the competent authorities for enforcement in Scotland. They will be instructed by creditors to enforce court orders or warrants against debtors which are issued by Sheriff Courts or the Court of Session, as well as documents of debt registered at the Books of Council and Session for enforcement.

3 What are the conditions under which an enforceable title or decision may be issued?

3.1 The procedure

Court orders or decrees issued by a Sheriff Court in any Sheriffdom in Scotland, or by the Court of Session, and equivalent authorities (such as a document of debt registered for enforcement), are enforceable. An extract of the decree generally bears warrant for all lawful enforcement.

Enforcement by diligence generally falls to Sheriff Officers and Messengers-at-Arms. These are independent fee paid contractors who hold a Commission from the Sheriff Principal of the Sheriffdom in which they are authorised to act. These officers are subject to the control and supervision of the court, although

they are not directly employed by the court. The Debtors (Scotland) Act 1987 sets out a statutory framework for control of their admission, training and conduct in the exercise of their official functions, while the Debt Arrangement and Attachment (Scotland) Act 2002 and the Bankruptcy and Diligence etc. (Scotland) Act 2007 further regulate their functions and conduct. Additionally, all officers of court are required to execute their duties in accordance with the Constitution and Bye-Laws of the Society of Messengers-at-Arms and Sheriff Officers.
Only in some enforcement processes is it necessary to use a lawyer.
Fees charged by Sheriff Officers and Messengers-at-Arms for executing diligence are currently prescribed by the Act of Sederunt (Fees of Sheriff Officers) 2013 (SSI 2013/345) and the Act of Sederunt (Fees of Messengers-at-Arms) 2013 (SSI 2013/346). These fee tables are changed regularly.

3.2 The main conditions

The granting of a decree in the pursuer's (the person raising the action) favour is normally sufficient for executing enforcement. However most diligences also require the service of a charge for payment and the issue of a Debt Advice and Information Package before the debt can be recovered . A charge for payment is a formal demand for payment served on a debtor for the amount owed to a creditor, including any associated interest and costs. It provides the debtor with a period of fourteen days (if the debtor is within the UK) in which to make payment. If the debt is not satisfied within the period specified, the creditor may then use diligence to recover the sums due. A Debt Advice and Information Package advises debtors to obtain money advice.
In the case of an exceptional attachment order, the creditor must return to court to seek specific authorisation to attach non-essential articles kept in the debtor's dwelling house. In considering whether to make such an order the Sheriff has regard to various matters. These are
the nature of the debt (and in particular whether the debt relates to any tax or duty or to any trade or business carried on by the debtor);
whether the debtor resides in the dwelling house specified;
whether the debtor carries on a trade or business from that dwelling house;
whether money advice has been given to the debtor;
whether any extension of time to pay orders or directions have lapsed; and
any agreement between the debtor and creditor for the settlement of the debt.
In particular, the Sheriff must be satisfied that the creditor has taken reasonable steps to negotiate a settlement of the debt and that the creditor has already taken steps to enforce the debt by way of an arrestment and an earnings arrestment and that there is a reasonable prospect that the sum recovered from auction of the debtor's non-essential assets would be at least equal to the aggregate of a reasonable estimate of chargeable expenses and £100.
Arrestment operates to attach property (funds and moveable goods) in the hands of a third party and secures a measure of preference for the arresting creditor. Where funds are arrested they are subject to automatic release after a period of fourteen weeks, provided that no objection has been lodged. Any objection should be lodged with the Sheriff at court, and be on the grounds that the arrestment is unduly harsh, that the Sheriff Officer has not carried out the arrestment properly, or that the arrested funds belong to a third party (or are owned by a third party in common with a debtor). For the release of arrested goods the creditor must raise an action of furthcoming which, if granted by the court, will instruct the arrestee to release the arrested goods.
In the case of adjudication, if the debt remains unpaid after ten years ("the legal"), the adjudger may convert his right into a right of absolute property. This is done by a Court of Session action known as an action of declarator of expiry of the legal. A debtor may defend an action of declarator of expiry of the legal on the grounds that the debt is paid.
An inhibition takes effect from the date on which the schedule of inhibition and the certificate of execution of the inhibition are registered in the Register of Inhibitions and Adjudications. However, where a notice of inhibition is registered in the Register of Inhibitions and Adjudication and the schedule of inhibition and certificate of execution are registered within 21 days of this notice, the inhibition will take effect from the date that notice is registered.

4 Object and nature of enforcement measures

4.1 What types of assets can be subject to enforcement?

There is a diligence available for every type of asset, except cash in the hands of the debtor.

4.2 What are the effects of enforcement measures?

Adjudication for debt

Adjudication has the effect of a judicial heritable security in favour of the creditor. A decree of adjudication does not give the adjudger an immediate power of sale: only a power to secure the rents if the heritable property is leased, or remove the debtor if they are in possession.

Arrestment of goods or funds in the hands of a third party

The effect of an arrestment is to freeze funds and/or moveable property belonging to the debtor in the hands of a third party. The third party is prevented from using or disposing of the goods or funds or releasing them to the debtor without the creditor's consent. In order to have arrested goods released to a creditor, the creditor must raise an action of furthcoming. Arrested funds in the hands of a financial institution are subject to automatic release after a period of 14 weeks if there has been no objection. If an arrestee parts with the subjects arrested, they are liable to the arresting creditor for its value. They will also theoretically be in contempt of court by acting in breach of an arrestment. There is a legal obligation on arrestees to disclose to an arresting creditor the existence or extent of assets attached by an arrestment. Failure to comply with this obligation may result in the Sheriff making an order requiring the arrestee to pay a sum of money to the arresting creditor.

Earnings Arrestment or Current Maintenance Order

Where an employer has been served with an earnings arrestment schedule or current maintenance order, he must deduct the calculated amount and pay it over to the creditor. If the employer does not comply with the terms, they are liable to the creditor for the amount of money that should have been paid over.

Ejection or Removing from property

A decree of ejection or removing has the effect of requiring a person to remove himself from the property specified in the extract decree. If the subject of an ejection or removal order does not voluntarily comply and remove by the date specified, Sheriff Officers may remove them and secure the property, requesting the assistance of police if necessary. A 'Charge of Removing from Heritable Property' must be served on the person to be removed, and the period of charge contained therein must have expired before a removal or ejection can take place, unless the Sheriff has dispensed with this requirement.

Inhibition

The registering of an inhibition in the Register of Inhibitions and Adjudications has the effect of preventing the debtor from selling, or otherwise disposing of, or granting a security over his heritable property to the detriment of the inhibitor. Any disposition or standard security or other deed granted by the debtor contrary to an inhibition is reducible at the instance of the inhibitor.
A decree ad factum praestandum is a decree to enforce the performance by the debtor of an act other than a payment of money and requires compliance. The terms of the decree must specify precisely what is to be done, and when applied for at court it is desirable that an alternative request be added for damages less compliance. Failure to comply cannot result in imprisonment unless the person who originally sought decree ("the applicant")makes an application to the court where decree was initially granted. It is then for the applicant to satisfy the court that the debtor is willfully refusing to comply with the decree. If so satisfied, the court may grant warrant for imprisonment of the respondent for any period not exceeding 6 months. Imprisonment does not operate to extinguish the obligation imposed by the decree.

Money attachment

This allows a creditor to attach and remove money (cash including coins and banknotes in a foreign currency, postal orders, banking instruments etc) which is held on a debtor's premises although money in a dwelling house and in the hands of the debtor cannot be attached.

4.3 What is the validity of such measures?

Adjudication for debt

After granting the decree, the extract is recorded in the appropriate Scottish land register. The decree is then valid and only after a period of 10 years is the creditor then able to apply to the court to become the owner and sell the property.

Arrestment of goods or funds in the hands of a third party

An arrestment in execution is either successful or not. For example, an arrestment can be served on a bank but if the debtor does not have an account with that bank or has insufficient funds in any accounts, then the arrestment will not catch any funds.

Attachment of goods

An attachment only has effect until the earlier of the date which is six months after the date on which an article is attached and the date which is 20 days after the date on which the attached article was removed from the place at which it was attached. An exceptional attachment order specifies the period in which it must be executed.

Earnings Arrestment or Current Maintenance Order

The service of an earnings arrestment schedule, or a current maintenance arrestment, is either successful or not. If the debtor is not in the employment of the person on whom the schedule is served, it falls. If the debtor is in employment, it remains in force until such time as the debt is satisfied or the debtor leaves that employment

Ejection or Removing from property

Execution of diligence following a decree of removing or ejection must be carried out without undue delay. There is no definition as to what might constitute undue delay. This is dependent on the particular circumstances of each case.

Inhibition

An inhibition prescribes after 5 years. It may be renewed on application to the court by inhibitor. A decree *ad factum praestandum* must specify exactly what has to be done and the time within which it must be done.

Money attachment

Money attachment will either be successful or not. For example if the Sheriff Officer finds no funds on the debtor's premises then the money attachment will have failed. If the Money Attachment is successful then the officer of the court (Sheriff Officers or Messengers at Arms) must before the expiry of the period of 14 days beginning with the day on which the money attachment is executed make a report to the Sheriff. The officer of the court must copy the report to the debtor and creditor. The attachment will cease to have effect if the Sheriff refuses to receive the report.

5 Is there a possibility of appeal against the decision granting such a measure?

An employer or the debtor can apply to the Sheriff to make an order declaring a current maintenance order invalid or that it has ceased to have effect. Also, if the debtor can satisfy the Sheriff that he is unlikely to default on payment again, the Sheriff can make an order recalling it.

The debtor, the arrestee or a third party may, by notice of objection, apply to the Sheriff for an order recalling or restricting the arrestment. This notice must be given within 4 weeks of the execution of the arrestment.

An appeal can be made against any decision of a Sheriff made in relation to an attachment or exceptional attachment. The appeal can be made, only with the leave of the Sheriff, to the Sheriff Principal and on a point of law. The decision of the Sheriff Principal on such an appeal is final.

The grounds for discharge or recall of an inhibition are where the inhibition has been procedurally inept and where the decree for payment has been reduced.

There is no appeal against removing or ejection once the decree is executed.

6 Are there any limitations on enforcement, in particular related to debtor protection or time limits?

Debtor Entering Into a Debt Solution

Should a debtor be sequestrated or enter into a trust deed, a protected trust deed, or a debt payment programme under the debt arrangement scheme, then creditors cannot take any further diligence against the debtor, subject to certain conditions. Instead the creditor would generally have to look at placing a claim for the sums due with the debtor's trustee, or adding the debt to any debt payment programme.

Moratorium on Diligence

A moratorium on diligence is to be introduced across all statutory debt solutions in Scotland through changes to the Bankruptcy (Scotland) Act 1985 which come into force on 1 April 2015 by virtue of the Bankruptcy and Debt Advice (Scotland) Act 2014. This will mean that if an individual gives notice that they want to apply for a statutory debt solution, they will be given a 6 week period of protection from any diligence action against them by their creditors. This is the same 6 week period as there presently is under the Bankruptcy and Diligence (Scotland) Act 2007 which introduced a moratorium on diligence for a debtor who intends to apply for or has applied for a debt payment programme, or a 6 week period from the date they intimate to the debt arrangement scheme administrator that it is their intention to apply for a debt payment programme. These 6 week moratorium periods can however be reduced or extended in certain circumstances. [As part of the Coronavirus (Scotland) Act 2020 the period of moratorium protection has been extended to 6 months - this amendment will remain in force until 30 September 2020 and may be extended further by regulations].

Time to Pay

In granting decree against a debtor for payment of certain types of debt, the court may make a time to pay direction to the effect that the sum payable can be paid in instalments over time. Also once diligence has commenced the court may make a time to pay order. While a time to pay direction or order is in force, it is not competent to serve a charge for payment or carry out any diligence in order to enforce payment of the debt.

Enforcement Time Limits

If after the date when an obligation has become enforceable it has subsisted for a continuous period of twenty years without a relevant claim having been made and without the subsistence of the obligation having been relevantly acknowledged, then the obligation shall extinguish. Therefore if no diligence is taken on a court decree or document of debt for a continuous period of 20 years without it also having been unequivocally admitted in writing by or on behalf of the debtor, the obligation will prescribe. However where a creditor executes diligence to enforce a decree or document of debt and the debtor clearly acknowledges to the creditor that the debt still subsists, the creditor will be given another 20 years in which to seek full satisfaction of the claim against the debtor.

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