

## **Money attachment – another new diligence.**

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**Last November a new form of diligence was created allowing creditors to seize money belonging to a debtor in satisfaction of a debt. Julie Hamilton of MacRoberts explains.**

In principle, all assets owned by a debtor should be susceptible to enforcement of a debt. Previously creditors were unable to take diligence against cash owned by a debtor. To rectify this anomaly, a special category of diligence – money attachment – has been introduced by Part 8 of the Bankruptcy and Diligence etc. (Scotland) Act 2007.

### **When can a money attachment be used?**

The creditor must first obtain a decree (i.e. judgement) or other document of debt and then serve a charge for payment. If the charge expires (usually after 14 days) and no money has been paid, the creditor can instruct sheriff officers to carry out a money attachment.

### **What is attached?**

Cash (sterling and other currencies), cheques, negotiable instruments, promissory notes, money orders can all be uplifted and removed. However, sheriff officers have no power to enter a debtor's house, so in practice the attachment will probably be confined to a debtor's place of business. Money attachment cannot be carried out on Sundays or public holidays, or between 8pm and 8am unless the court allows it.

### **How is the money attached?**

There is a presumption that money found on the premises belongs to the debtor, although sheriff officers must make reasonable enquiries at the time the money is removed. The sheriff officer must submit a report to the court which sets out how much money has been attached, and the creditor then has 14 days to apply to the court for a payment order authorising the sheriff officer to release the money to them (after deduction of the sheriff officers' own fees).

### **Can the debtor object?**

The debtor or the third party can oppose the payment order and, if they do, a court hearing will be held to allow both parties to make representations to the sheriff. The onus of proof is on the debtor or the third party to show that the money attached does not belong to the debtor. The debtor can also apply to court for an order to return the money if, in all the circumstances, the attachment is unduly harsh. If the court agrees, some or all the money must be returned to the debtor. If there has been some procedural irregularity in how the money attachment has been executed, the sheriff can also order that the attachment shall cease to have effect. In those circumstances all of the money must be returned to the debtor.

### **Practicalities**

The new rules are not complex, but to protect the debtor they must be followed to the letter: if not, the money attachment could be invalidated. This could be particularly onerous on sheriff officers, who will have to do most of the work. Another practical difficulty (and one of the reasons why a diligence over money has not been

introduced until now) is that it is not easy to identify money as belonging to anyone. Under the new rules, arguments over who owns the money attached are to be resolved in court but this could be easier said than done! Finally, the increasing use of debit and credit card payments begs the question whether money attachment will be used much in practice. Perhaps it's real usefulness will be in enforcing debts against cash businesses – shops, bars, clubs, restaurants – where there is likely to be a lot of money on the premises. In those cases, a well-timed and properly executed money arrestment could be valuable enforcement tool.

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**This article featured in the January 2010 issue of Cabletalk.**

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