



A Quick Guide to Scottish Debt Recovery

In Scotland there are three different types of court action depending on the debt value:

As of January 2008:

Small claims - debts up to £3,000

Summary Cause – debts £3,001 to £5,000

Ordinary Actions – debts over £5,000

The small claim is, in fact, a species of the summary cause.

Generally all straightforward debt actions will be taken in the Sheriff Court of the defender's residence or the court where the defender trades.

SUMMARY CAUSE ACTIONS

A court action is commenced by the claimant preparing a summons on a pre-printed form. Supporting invoices or a statement of account should be produced to the court along with the summons.

A copy of the summons will require to be served (issued) on the defender. This is done by the claimant's lawyer – usually by recorded delivery post – and thereafter by sheriff officer if postal service is unsuccessful.

With any summons there will be two critical dates, being the return date and calling date. Generally the return date is the day when the defender must return any document to the court whilst the calling date (always 7 days after the return date) is the date the case will call in court for a hearing.

What happens if the claim is undisputed?

If in response to the summons the defender does nothing the pursuer can ask for judgment (known as minuting for decree) by completing a pre-printed form. Judgment will be granted at the 'calling date'. The court takes about three weeks to send the judgment to the claimant's lawyer. However, where appropriate (in cases where the defender is an individual or small trader) the defender may admit liability and offer to

make payment of the debt by instalments or by a deferred lump sum – known as a Time to Pay Direction or Time to Pay Order.

ORDINARY ACTIONS

Unlike summary cause there are no pre-printed forms. The writ will be drafted and forwarded to the court. The defender has 21 days after service of the writ to decide what action to take.

Defender's responses

There are various ways the defender can respond to the service copy writ. The defender does nothing – the claimant can, on the expiry of 21 days, minute for decree. If the defender admits the claim and makes a payment offer the claimant completes an appropriate form and sends it to the court. If the offer is unacceptable the case will call in court and the court will decide if the application should be granted. The court takes about three weeks to send the judgment to the claimant's lawyer.

Enforcement of Decrees

The responsibility for enforcing sheriff court decrees falls on sheriff officers.

The generic term for Scottish enforcement is known as 'diligence'. Different measures are employed depending on whether the defender's moveable property is situated either outwith or within a dwellinghouse. The effectiveness of diligence can best be described as a 'filtering process' with the slow payers settling earlier on in the enforcement regime.

Judgment enforcement in Scotland was radically reformed by the Debt Arrangement and Attachment (Scotland) Act 2002 and will be enhanced following implementation of the Bankruptcy and Diligence (Scotland) Act 2007. The legislation deals more sympathetically with individual consumer debtors. Commercial debtors have less protection.

THE DEBT ARRANGEMENT SCHEME

A central feature of the 2002 Act is the Debt Arrangement Scheme available to individuals and sole traders, allowing them the opportunity of repaying their debts in a

managed way over a given period of time without the threat of enforcement. Such individuals should have surplus income to repay their debt by instalments.

During the existence of a DAS judgement enforcement and applications for the debtor's bankruptcy will be prohibited. Also, it will be incompetent to carry out judgement enforcement whilst an application is being considered.

Charge for Payment

Before commencing judgement enforcement the sheriff officer serves a charge, which is a formal written request, on the defender. It requests payment of the principal debt, interest and charges. It requires that the debt be paid within 14 days.

DETAILED EXAMINATION OF ATTACHMENT ORDERS

Attachment orders will most often be used for business-to-business debts where it is obvious goods are outwith a dwellinghouse.

How does the Act define dwellinghouse?

There is no definition of 'dwellinghouse' but it does not include:

- a garage, even although it forms part of the structure or building which consists of or includes the dwellinghouse, or □ other structures or buildings used in connection with the dwellinghouse.

The effect of this is that all items stored within a garage, including a car, can be attached by an attachment order even although it is obvious the debt may be consumer.

How does the sheriff officer carry out the attachment?

Entry and valuation

Basically the officer enters the property and values the articles being attached at a price which they are likely to fetch if sold on the open market.

Reporting the attachment

The attachment must then be reported to the court within 14 days (s.18).

Removal and auction of attached articles

Once the report of the attachment has been received by the sheriff, arrangement can then be made for the removal and sale of the articles. The officer gives seven days notice to the debtor of the date specified for the articles removal and may open shut and lockfast places for this purpose.

Any articles which were attached but not removed will no longer be subject to the attachment order. The auction of the removed articles shall not take place until at least seven days after the articles have been removed.

There are various actions in relation to the attached articles which are unlawful after their attachment and prior to their removal such as their removal, their gift, damage or destruction. In these circumstances a further attachment may be competent.

Can a debtor stop the process?

The debtor can make an application to the sheriff requesting the attachment should be lifted on the grounds the aggregate value of the attached articles is substantially below the aggregate of the prices they are likely to fetch if sold at auction.

How To Attach Articles Kept In Dwellinghouses

To provide improved debtor protection, the Act has introduced the Exceptional Attachment Order.

However, if granted, an exceptional attachment order will still allow for the debtor's goods being valued and attached by the order which can thereafter be removed for auction and subsequent sale.

EXAMINATION OF EXCEPTIONAL ATTACHMENT ORDERS

Unlike attachment orders which, in effect, will be available to creditors on demand on all occasions (although subject to conditions) an exceptional attachment order will only be granted on specific application being made by the creditor to the sheriff.

Creditors should note a whole host of items are exempt leaving only 'luxury' items being capable of attachment.

Before commencing the procedure a charge for payment has to be served.

How is an application for an exceptional attachment order made?

An Exceptional Attachment Order will only be granted on application by the creditor which the sheriff may grant on being satisfied certain matters exist and also that there are exceptional circumstances.

In the event these exceptional circumstances exist the sheriff will grant the order.

However, the order will only apply to 'non-essential' assets of the debtor kept in any dwellinghouse specified in the application'.

What are the exceptional circumstances?

The exceptional circumstances which must exist before granting an exceptional attachment order are an effort to encourage less intrusive enforcement. They include negotiations, arrestment and earnings arrestment (attachment of earnings) which should be first attempted. Also the sheriff will require to be satisfied that there is a reasonable prospect the sum recovered from an auction of the debtor's nonessential assets would be at least aggregate to the following:

-a reasonable estimate of any chargeable expense, and

-£100.

Subject to exceptional circumstances existing, what matters will the sheriff take into account in deciding whether to make the order? These include:

1. The nature of the debt (and in particular, whether the debt incurred relates to any tax or duty or any trade or business carried on by the debtor).
2. Whether the debtor resides in the dwellinghouse specified in the application.
3. Whether the debtor carries on a trade or business in that dwellinghouse.
4. Whether money advice has been given to the debtor.
5. Any agreement between the debtor and creditor for the settlement of the debt; and whether a time to pay direction or time to pay order has been entered into but not adhered to.

So subject to the conditions of the Act being fulfilled, the sheriff may more readily grant an exceptional attachment order in relation to the jobbing builder who carried on business from his house (essentially a commercial debt) as opposed to a consumer who has fallen into arrears with credit card repayments.

What is the effect of an exceptional attachment order?

The exceptional attachment order shall have the following effect:

1. Authorise the attachment, removal and auction of the debtor's non-essential assets kept in any dwellinghouse specified in the application.
2. Specify a period during which the order is executed.
3. Empower the officer to open shut and lockfast places for the purposes of executing the order. The officer must be satisfied there is a person in the house not younger than 16 and capable of understanding the procedures being carried out. Failing this forced entry can still be taken subject to four days notice being given.

Does the sheriff have any other powers?

Before deciding whether to make an exceptional attachment order the sheriff may make an order for a visit to the debtor by a person specified for the purpose of giving money advice to the debtor; or such other order as the sheriff may think fit.

When are the attached articles removed?

The sheriff officer shall 'unless it is impractical to do so immediately remove any article attached by an exceptional attachment order from the dwellinghouse'.

Where however, it is impractical to remove the articles immediately then the sheriff officer shall give more notice to the debtor for the date arranged for their removal.

When can the articles be sold and can the debtor redeem them?

Articles cannot be auctioned until seven days have passed since their removal from the dwellinghouse.

