Bankruptcy and Diligence (Scotland) Bill

Comments on Proposed Amendments at Stage 2

These comments are provided by Dr Alisdair MacPherson and Prof Donna McKenzie Skene. We are both members of the Centre for Scots Law at the University of Aberdeen.

General

Having considered the proposed amendments at Stage 2, we are broadly supportive of them but would like to make some comments about certain points and to raise issues that may require attention. Given that we are (academic) lawyers, our focus is primarily on legal matters and the consequences of proposed changes to the law, rather than policy matters.

Sequestration: Process for Petition and Recall

Amendment 7

We agree with amendment 7 on the payment of interest in relation to recall of sequestration.

Amendments 1 and 8

With reference to proposed amendments 1 and 8, it may be helpful to provide some background and history regarding legislation prior to the Bankruptcy (Scotland) Act 2016. The provisions in the Bankruptcy (Scotland) Act 1985 (which was the immediate predecessor of the 2016 Act) largely repeated the corresponding provisions in the Bankruptcy (Scotland) Act 1913, which in turn repeated the corresponding provisions in the Bankruptcy (Scotland) Act 1856 with some amendments. The 1913 Act amendments to the 1856 Act provisions did not, however, relate to the 6/14 days part of the provisions which it is now sought to amend, but to an additional provision for edictal citation, which provided for edictal citation within 21 days in the 1856 Act – this was reduced to 14 days in the 1913 Act, but was entirely omitted from the 1985 Act.

Interestingly, the Scottish Law Commission, in its 1982 Report on Bankruptcy and Related Aspects of Liquidation, questioned whether there was a need for special provisions relating to citation in bankruptcy at all, and took the view that even if there were, the bankruptcy legislation was not the place for them. They recommended that the position should be considered by the relevant rule-making bodies and confined themselves to suggesting that given the drastic nature of sequestration, there was a case for requiring personal service on the debtor. (See para 7.14 of the report.) The draft bill annexed to the report therefore simply provided in clause 12(2) for citation of the debtor without reference to the time limits in question. However, as we know, the 1985 Act as passed retained the historical provisions on 6/14 days, although it omitted any reference to edictal citation, and this is reflected in the present position.

So, the provisions are historical. Some light on the policy can perhaps be thrown on the issue by the case of *Hill v Hill* 1984 SLT (Sh Ct) 21. In that case, the debtor had in fact received more than the 14 days maximum notice, but the court said that he could not complain of having too much notice. It was considered that the minimum period of notice was for the benefit of the debtor, to give him time to prepare for the hearing, but the maximum period of notice was in fact for the benefit of the creditor.

We suspect that the reason for the specified window of citation was partly related to the summary nature of sequestration which required swift progress – hence the desire to give the debtor a minimum time to prepare but to have proceedings commenced fairly quickly. We also suspect that historically, there might not have been such a gap between the date of the warrant to cite and the date of the hearing as generally seems to be the case currently. Once the hearing is fixed, however, in practice the window for citation has to be calculated back from that, although the provision is awkwardly worded and it is clear that it can cause problems and indeed expense if a new warrant to cite is required. The Scottish Law Commission's recommendation that service be personal has now, of course, been implemented, but also contributes to the problems.

The upshot of all of this is that there is certainly a case for amending the provisions, and indeed this has previously been recommended by the Scottish Law Commission. However, it may be questioned whether either of the proposed amendments represents the best approach. While Murdo Fraser's amendment expands the window for citation, we query whether it is necessary to retain a window as such, as there may still be practical difficulties with such an approach even if the window is bigger. Thus we are more supportive of the approach adopted in Tom Arthur's amendment, which would simply result in a minimum period of notice for the debtor before the date of the hearing. We wonder, however, whether continuing to provide that the minimum period of notice is 6 days allows the debtor too short a time to prepare for the hearing, and whether the opportunity might be taken, since the provision is being amended in any event, to extend that period somewhat, perhaps in line with the normal period of citation in other proceedings. Notwithstanding the summary nature of sequestration proceedings, which remains important, this would appear to be more in keeping with the modern policy in relation to sequestration generally.

Arrestment: Funds Attached

Amendment 12

With reference to proposed amendment 12 which would increase the amounts protected from arrestments of earnings, we can understand some of the policy justifications for this (including as a response to cost-of-living pressures and to align the position with the protected minimum balance for the arrestment of funds in bank accounts). However, care should be taken to consider the consequences that would arise. It is true that the change is not intended to reduce the amount that creditors can recover, just to extend the time period for recovery, by increasing protected amounts for debtors. Nevertheless, the extra time it takes for payable amounts to be recovered, could affect the ability of some creditors to pay their own short-term debts. Earnings arrestments are an effective tool for local authorities in the recovery of debts, and seem to be significantly more so than ordinary arrestments in terms of the proportion of debt recovered. For example, see the information in Appendix 1 that has been received from City of Edinburgh Council in relation to calendar year 2022. It is uncertain what precise effects the proposed change would have on local authorities, and their timely recovery of debts, particularly at a time when their finances are constrained. We are unaware whether any calculations or financial modelling have been undertaken in this regard.

If it is decided that the amendment should be made, it may be desirable to make additional changes to mitigate the impact. Perhaps the most obvious way to do this would be to increase the percentage recovery rates beyond the protected amounts. Presently, the following are the relevant protected amounts, stated figures and percentage rates for monthly earnings:[1]

[1] From the Debtors (Scotland) Act 1987, Sch 2.

TABLE B: DEDUCTIONS FROM MONTHLY EARNINGS

Net earnings	*Deduction**
Not exceeding £655.83	Nil
Exceeding £655.83 but not exceeding £2,370.49	£15.00 or 19% of earnings exceeding £655.83, whichever is the greater
Exceeding £2,370.49 but not exceeding £3,563.83	£325.79 plus 23% of earnings exceeding £2,370.49
Exceeding £3,563.83	£600.25 plus 50% of earnings exceeding £3,563.83]

If £655.83 is to be replaced with £1,000.00, then the percentage rate of 19% above that amount could be increased to e.g. 25%, with the other percentage figures increased in a similar way with higher increases up the scale e.g. 23% could become 30% and 50% could be increased to 60%. In our view, these proposed percentages are reasonable but we are not particularly tied to them, or indeed to increasing all of the rates at the same time or by the differing levels noted, and other figures may also have merit. If this suggested approach were to be adopted, the percentages in the other tables (for deductions from weekly and daily earnings) would need to be adjusted accordingly. While we have not financially modelled the consequences of such changes, they would at least mitigate some of the effects noted above and would strengthen the case for increasing the amount protected from deductions to £1,000, thereby giving more protection to those on the lowest incomes.

Amendment 25

If the policy preference is to protect funds deriving from social security payments automatically and without the need for any challenge by the debtor, legislative provision seems to be necessary, and the amendment seeks to do this. There is currently a mechanism by which a debtor can challenge unduly harsh arrestments,[2] and this should already extend to funds deriving from social security benefits in almost every conceivable instance, but it necessitates an application to court. The protected minimum balance in a bank account also provides some protection, especially now that it is at £1,000, yet it may not be sufficient to cover all funds deriving from social security payments. While there is some case law, including the recent case of *McKenzie v City of Edinburgh Council*,[3] which indicates that bank account funds stemming from social security payments may be excluded by way of existing legislation, it is at least debatable whether this is strictly correct in terms of statutory interpretation and express provision regarding funds deriving from social security payments in an account would therefore resolve the matter definitively.[4]

We note that in the past there have been suggestions that legislating to exclude funds deriving from social security payments may raise issues of legislative competence; however, it seems obvious to us,

[2] Debtors (Scotland) Act 1987, s 73Q.
[3] 2023 SLT (Sh Ct) 127.
[4] See ADJ MacPherson and A Sweeney, "The Arrestment of Benefits: *McKenzie v City of Edinburgh Council*" 2024 *Juridical Review* 16. We also attach a proof version of this article to these comments, in case it is of interest.

and Dr Andrew Sweeney from the University of Edinburgh, that once social security benefits are obtained by an individual, the Scottish Parliament has competence, as the law of debt enforcement (diligence) is devolved.[5]

The following points are raised for consideration in relation to the wording and content of the amendment, in the event that it is decided to proceed with the change (in general terms). These points have been formulated in conjunction with Dr Andrew Sweeney (University of Edinburgh), who is in agreement with them. The references are to the proposed inserted sub-sections of s 73E of the Debtors (Scotland) Act 1987:

- It may be preferable to insert a new section into the Debtors (Scotland) Act 1987, rather than to add further sub-sections to s 73E, but we do acknowledge that the numbering of a new section would not be the neatest either.

- In (7), "wholly acquired through social security benefits" is used but perhaps another term like "wholly and directly deriving from" or "wholly and exclusively deriving from" or "exclusively and directly deriving from" would be better.

- There may also be an argument in favour of clarifying that it is to be benefits received by the debtor (subject to e.g. payments made to family members in some instances), as there might be a possibility that someone could receive payments and transfer them to someone else, at which point they should presumably lose their protection. We are aware that this may be difficult to capture.

- In (8), "wholly social security benefits" is used (rather than e.g. "funds wholly deriving from") but this should presumably line up with the terminology from (7).

- Also in (8), it may be very difficult to show that a creditor is satisfied that the attached funds are from social security benefits. The test would seem to be subjective and any suggestion that they are satisfied might be easily contested by a creditor. The debtor may produce evidence which is dismissed by the creditor and it could necessitate court action.

- The reference to "release the funds" in (8) presumably refers to removing any restrictions on the funds and enabling the debtor to draw upon the account again, but perhaps the wording could be adjusted to make sure this is easily understood (and to avoid confusion with e.g. s 73J of the Debtors (Scotland) Act 1987 where there is automatic release of funds to a creditor).

- In (9) the list of legislation under which social security benefits may be paid is non-exhaustive and may create some uncertainty. Perhaps a definition elsewhere could be drawn upon, potentially instead of or in addition to the benefits arising from the listed legislation.

- The terminology in (10) regarding the arrestee "attaching" the funds is somewhat confusing as the creditor is the arrester, so it may be advisable to remove the reference to the arrestee carrying out the attaching. It can also be queried whether the protection for the arrestee should only be limited to situations in which (8) applies, and whether it should actually apply more broadly.

- In general, it would be useful to know the policy intentions behind the particular wording chosen, and the final wording will depend upon policy preferences and intentions.

[5] See MacPherson and Sweeney, "The Arrestment of Benefits: McKenzie v City of Edinburgh Council", footnote 48: "once social security benefits are paid to the recipient, whether those funds are arrestable becomes a matter for the law of diligence, which is devolved to the Scottish Parliament."

A further matter that should probably be addressed following on from this amendment and the proposed change to the protected amount regarding earnings arrestments is their interrelationship with the protected minimum balance in a bank account (Debtors (Scotland) Act 1987, s 73F). While we support the existence of various protections for debtors, it may appear unfair to creditors if e.g. a debtor could have protection of up to £1,000 per month from earnings, plus a separately protected additional £1,000 in a bank account, as well as any social security payments on top of that being given protection as a separate sum. The protected minimum balance seems to apply irrespective of the source and other protections, so once funds enter into the account, they have that protection, even if already protected by another mechanism. Of course, if benefits sums received do extend beyond that protected minimum balance, and the change noted above is made, the protection will apply to the extent that those further funds derive from social security payments, e.g. if £1,100 was received from such payments, that full amount would be protected (not just £1,000). Perhaps it could be clarified that the same funds can be covered by various forms of protection, and that they do not automatically apply to additional funds on top of those protected through other mechanisms, just because some funds in an account are already protected. Of course, debtors can also utilise the unduly harsh arrestment provisions to obtain further protection if the circumstances justify it.[6]

Amendment 26

We agree with the suggestion that there should be an annual calculation of the inflation-adjusted level of the protected minimum sum in bank accounts, with regulations following to adjust the relevant sum as appropriate.

Arrestment: Service and Disclosure

Amendments 4 and 5

We are supportive of the requirement for arrestees to have to disclose that an arrestment has been unsuccessful. We do not have strong views as to how this should be best achieved but agree that costs incurred by arrestees should be minimised. The proposed amendment has merit in this respect. If it is decided in policy terms that there should be a wider requirement for disclosure than the amendment would provide, but there remain concerns about the onerous consequences of an arrestee having to systematically disclose following arrestments on a summary warrant, then perhaps a hybrid approach would be desirable. This could involve a requirement for arrestees to respond to arrestments arising from procedure other than summary warrants, while for arrestments based on summary warrants there could be a requirement to respond within a reasonable time but only to specific and individualised requests. Whichever approach is adopted, the requirements for specific requests should be as straightforward as possible for creditors and the response requirements for arrestees ought to be similarly straightforward, to avoid the incurring of unnecessary time and expense.

Equivalent changes may need to be made to section 7 regarding diligence against earnings too.

[6] Again, see MacPherson and Sweeney, "The Arrestment of Benefits: *McKenzie v City of Edinburgh Council*", where it is noted that the unduly harsh protective mechanism is not limited to protecting against the arrestment of sums deriving from social security payments.

Appendix 1

Diligence Data Received from City of Edinburgh Council for 2022

The data in this appendix was provided in response to a Freedom of Information request dated 11 September 2023 from A MacPherson to City of Edinburgh Council, responded to on 9 October 2023 (reference number 44533) — https://edinburgh.axlr8.uk/documents/44533/44533%20response.pdf. The information, which is in relation to calendar year 2022, was requested as part of research for an article – ADJ MacPherson and A Sweeney, "The Arrestment of Benefits: *McKenzie v City of Edinburgh Council* 2024 *Juridical Review* 16.

Q1. The number of times Summary Warrant procedure was used by City of Edinburgh Council.

27,711.

Q2. The number of Arrestments executed by or on behalf of City of Edinburgh Council (excluding Earnings Arrestments) using Summary Warrant procedure.

16,203.

Q3. The number of Earnings Arrestments executed by or on behalf of City of Edinburgh Council using Summary Warrant procedure.

1,456.

Q4. The total aggregate debts for which Arrestments (excluding Earnings Arrestments) were executed by or on behalf of City of Edinburgh Council using Summary Warrant procedure.

£50,189,759.68.

Q5. The total aggregate debts for which Earnings Arrestments were executed by or on behalf of City of Edinburgh Council using Summary Warrant procedure.

£6,278,821.47.

Q6. The total recovered aggregate amount by or on behalf of City of Edinburgh Council resulting from Arrestments, excluding Earnings Arrestments, where the Arrestments were executed using Summary Warrant procedure.

£387,286.77.

Q7. The total recovered aggregate amount by or on behalf of City of Edinburgh Council resulting from Earnings Arrestments, where the Earnings Arrestments were executed using Summary Warrant procedure.

£1,096,084.11.

Q8. When Arrestments, excluding Earnings Arrestments, were executed by or on behalf of City of Edinburgh Council, the recovery rate by or on behalf of City of Edinburgh Council resulting from such Arrestments.

0.77%.

Q9. When Earnings Arrestments were executed by or on behalf of City of Edinburgh Council, the recovery rate by or on behalf of City of Edinburgh Council resulting from such Arrestments.

17.46%.

Case and Comment

The Arrestment of Benefits: McKenzie v City of Edinburgh Council

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I. Introduction

As individuals become more indebted and fall behind with repayments, there is pressure on the Scottish Government to strengthen protections against debt enforcement procedures.[1] The most common diligence used to enforce debts is arrestment, which can capture sums of money from a debtor's bank account.[2] Yet despite the impact arrestment can have on a debtor, only minor reform of it is currently planned.[3] In this context, Sheriff Corke's judgment in *McKenzie v City of Edinburgh Council*[4] is a timely reminder that courts can also have a role in protecting debtors. Although the protection of benefits paid into a bank account granted by *McKenzie* is undoubtedly welcome to debtors, and can be justified in policy terms, the way in which this was achieved may have stretched the interpretation of s.187 of the Social Security Administration Act 1992 ("1992 Act") beyond what was intended when it was enacted. The preferable approach for protecting a debtor is instead to use the statutory protection against unduly harsh arrestments. This mechanism was noted by the sheriff and counsel in *McKenzie* but, as no competent application had been submitted, the sheriff was unable to make any finding under the relevant provision. This is unfortunate, as it provides a wider and more flexible mechanism to prevent a creditor arresting sums intended to provide the debtor with a minimum standard of living. In addition to setting out why it is the correct route for protecting a debtor in receipt of benefits, this article will also raise some practical issues where sums received by way of benefits are protected from arrestment.

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We are grateful to Scott Wortley for his suggestions in relation to statutory interpretation matters and to the anonymous reviewer for their comments.

[1] The Scottish Government has responded with the Bankruptcy and Diligence (Scotland) Bill and proposals for secondary legislation: Scottish Government, *Scotland's Statutory Debt Solutions and Diligence—Policy Review Response: Consultation* (2022). For commentary, see A.D.J. MacPherson, "Scottish Statutory Debt Solutions and Diligence: A Response in a Time of Crisis" (2023) 21(1) Edin. L.R. 64.

[2] For further details regarding arrestment and diligence more generally, see e.g. L.J. Macgregor et al, *Commercial Law in Scotland*, 6th edn (Edinburgh: W. Green, 2020), Ch.9.

[3] Policy Memorandum to the Bankruptcy and Diligence (Scotland) Bill, para.61. The proposals for arrestment are aimed at assisting creditors rather than protecting debtors.

[4] *McKenzie v Edinburgh City Council*, 2023 S.L.T. (Sh Ct) 127. It has already generated commentary, e.g. "Application for Recall of an Arrestment Pursuant to s.73M of the Debtors (Scotland) Act 1987" (2023) 173 Civ PB 7.

II. Facts

A summary warrant was granted to the City of Edinburgh Council ("the Council") on 23 May 2022, authorising the recovery of Mr McKenzie's unpaid council tax. A few months later, on 28 October 2022, and in accordance with the summary warrant, the Council had an arrestment served on the Bank of Scotland plc ("the Bank").[5] £527.59 was arrested in McKenzie's account with the Bank.[6] This was the amount available above the protected minimum balance that cannot be arrested.[7]

McKenzie applied for recall of arrestment under the Debtors (Scotland) Act 1987 ("1987 Act"), s.73M, on the basis that the arrestment had been executed incompetently or irregularly (s.73M(4)(b)): the arrested money in the bank account had been paid to him by the Department for Work and Pensions, and such a claim was non-arrestable under the 1992 Act s.187, and the Social Security (Scotland) Act 2018 s.83. The relevant parts of s.187 of the 1992 Act state that:

> "(1) Subject to the provisions of this Act, every assignment of or charge on—
> (za) universal credit; […]
> (ad) personal independence payment […]
> and every agreement to assign or charge such benefit shall be void; and, on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors."[8]

The application was served on the Council alongside a letter from the Jobcentre Plus, which confirmed that McKenzie had been claiming Universal Credit since 4 January 2019, with the most recent payment on 4 November 2022 being £689.19. McKenzie had also been receiving Personal Independence Payment[9] of £61.85 per week, but paid every four weeks, since 8 November 2020.

The importance of this case was heightened when, at the initial hearing, the Council sought to rely on the first instance decision of Sheriff Galbraith (Airdrie) in *North Lanarkshire Council v Crossan*[10] and it was suggested that this had become "the conventional view" of the law.[11] Yet it transpired that *Crossan* had been overturned on appeal by the (Temporary) Sheriff Principal (Kearney).[12] The rationale of the sheriff principal's judgment in *Crossan* became a key aspect of Sheriff Corke's judgment.

[5] Who also entered appearance as an interested party in the case.

[6] Sheriff Corke noted that the next step for the Council would be an action of furthcoming; however, although such an action is possible, the Debtors (Scotland) Act 1987 s.73J provides that arrested funds are to be automatically released after 14 weeks.

[7] Debtors (Scotland) Act 1987 s.73F. As noted by the sheriff, the protected minimum balance was £566.51 at the date of the arrestment, but was increased to £1,000 from 1 November 2022 by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 s.22(2)(a), without retrospective effect for earlier arrestments (s.22(3)) (*McKenzie* at [48]).

[8] "Charge" was accepted as including an arrestment in Scots law (at [13]) despite the lack of a clear legislative statement to that effect. Such a statement would be expected because s.187(2) does provide clarity regarding "assignation" and "sequestration". Nevertheless, it appears correct that an arrestment would fall under the definition of "charge" or "assignation".

[9] Which provides additional support for living costs for people with long-term physical or mental health conditions or disabilities.

[10] *North Lanarkshire Council v Crossan*, 2007 S.L.T. (Sh Ct) 169.

[11] *Crossan*, 2007 S.L.T. (Sh Ct) 169 at [16]–[17]. H. MacQueen and Rt. Hon. Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland*, 15th edn (London: W. Green, 2022) Vol.2, p.655, fn.71, was cited in support of such a view.

[12] *North Lanarkshire Council v Crossan*, Unreported, 2 May 2008 (Airdrie), now reported at 2023 GWD 29-246.

III. Submissions and Decision

For the Council it was argued that s.187 of the 1992 Act did not prevent the arrestment of social security benefits once paid into a bank account. Instead, "[t]he effect of section 187 of the SSAA 1992 and section 83 of the 2018 Act was to render any entitlement or right to receive certain benefits inalienable and beyond the reach of arrestment."[13] When, however, the benefits were paid into the debtor's bank account, the right to receive the benefits was replaced by the debtor's right against the bank, which no longer attracted protection under s.187. This argument was based on a common law rule that when "money [is] paid into a bank account it [is] consumed by the bank and the bank [becomes] the owner of funds deposited with it."[14] Counsel for McKenzie also contended that the case turned on the interpretation of the statutory provision, but naturally argued that s.187 had a wider effect than merely preventing an arrestment in the hands of the government. The interpretation relied upon the common law rule of alimentary payments and the underlying purpose of social security legislation.[15] This wider interpretation of s.187 prevented a creditor from arresting social security benefits in the government's hands and from arresting those benefits even after payment into the debtor's bank account. Although the debtor's right against the government to receive the benefits was extinguished and replaced by a right against his bank, the "fund" was the same and still attracted protection from s.187.

On the basis of these submissions, Sheriff Corke's decision ultimately turned on his interpretation of s.187. As he stated:

> "UC and PIP are benefits relevant for the purposes of section 187 of the SSAA 1992 so that, rather than the 2018 Act (regarding Scottish benefits) or the common law relating to alimentary funds, should be the thrust of this decision."[16]

In reaching his decision that the applicant was entitled to recall of the arrestment under s.73M of the 1987 Act, as an incompetent or irregular arrestment of benefits,[17] the sheriff adopted the legal reasoning of the sheriff principal in *Crossan*.[18] The sheriff principal had considered that the legislation's purpose was to provide the claimant and their dependants with "the necessities of life" and therefore "an interpretation of the provisions relating to immunity from diligence conferred by the Acts which allows that immunity to persist where the funds are held by the bank in identifiable form is to be preferred."[19] In addition to adopting the sheriff principal's judgment in *Crossan*, Sheriff Corke stated that it was clear that "statutory protection of alimentary benefits was the aim of section 187" and that

[13] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [33].
[14] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [33].
[15] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [32].
[16] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [14].
[17] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [1].
[18] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [41]–[44]. Albeit that it was not binding as it was from another Sheriffdom. He also agreed (at [53]) with the sheriff principal in *Crossan* that the earlier decision of *Woods v Royal Bank of Scotland*, 1913 1 S.L.T. 499 was correctly decided.
[19] *North Lanarkshire Council v Crossan*, Unreported, 2 May 2008 (Airdrie); 2023 GWD 29-246, at [51]. That the case turned on the interpretation of s.187 of the 1992 Act was also the view of the sheriff in *Crossan* at first instance (*North Lanarkshire Council v Crossan*, 2007 S.L.T. (Sh Ct) 169 at 175–176, per Sheriff Galbraith).

could extend beyond the protected minimum balance in a bank account.[20] He added that "[i]t is no protection at all to the individual if the benefit has to be paid into a bank account and the statutory protection flies off as soon as it leaves the DWP".[21] The sheriff rejected the Council's submission that s.187 should be interpreted in harmony with the underlying common law that an arrestment of a bank account attaches the bank's obligation to account to its customer (as there is no longer a claim to receive benefits). According to Sheriff Corke, s.187 "interferes with the bank/customer relationship",[22] and is thus a statutory exception to the common law rule.

IV. Analysis

1. Statutory interpretation

As the submissions show, the sheriff was presented with two competing interpretations of s.187 of the 1992 Act: a wide interpretation (argued for by McKenzie), and a narrow interpretation (argued for by the Council). The wide interpretation adopted by the sheriff in *McKenzie* is attractive as an attempt to protect debtors in receipt of benefits, and there is some support for it in case law dealing with similar legislation.[23] But when faced with a task of statutory interpretation, the court is to "consider the language of the legislation together with all the relevant interpretative factors and, in the light of those, reach a view as to how the legislator intended the enactment in question to apply to the situation before it."[24] Key factors are the legislation's context, purpose, presumptions and other relevant legislation.[25] And when these factors are examined,[26] the meaning given to s.187 in *McKenzie* seems to stretch the provision's intention.

(a) Internal context

First, the internal context of s.187(1) points against the wide meaning.[27] Sheriff Corke's judgment would apply to every benefit specified in s.187(1). Some benefit payments under s.187(1) are designed to provide the recipient with "the basic necessities of life", but this is not the case for all payments specified in the sub-section. State pension, for example, cannot be said to be designed in *all* cases to provide the recipient with alimentary payment, given the availability of other income sources.

[20] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [49].
[21] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [51].
[22] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [52].
[23] See *Woods v Royal Bank of Scotland*, 1913 1 S.L.T. 499.
[24] D. Lowe and C. Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (London: Hart Publishing, 2018), para.3.4.
[25] Lowe and Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (2018), para.3.5.
[26] Both internal and external context is relevant when interpreting legislation. On this, see J. Bell and G. Engle, *Cross on Statutory Interpretation*, 3rd edn (Oxford: Oxford University Press, 1995), at p.50.
[27] For the current approach to statutory interpretation, see *Kostal UK Ltd v Dunkley* [2021] UKSC 47 at [30], per Lord Leggatt, and [109], per Lady Arden and Lord Burrows.

(b) External context: common law and legislation

Second, the external context also undermines the wide meaning.[28] The common law is part of the contextual framework in which an Act operates and is to be interpreted,[29] and counsel for both McKenzie and the Council referred to common law rules.

Counsel for McKenzie submitted that "Scots common law had long recognised that alimentary funds are set up for the support and maintenance of the beneficiary and are not in general attachable by creditors. This [is] now recognised in section 187 of the SSAA 1992."[30] The sheriff's judgment contains no further detail on McKenzie's submission on this common law rule. It is correct that the common law has long recognised that payments designed to provide alimentary relief to the recipient are exempt from arrestment.[31] There is also authority for the rule that such protection continues where one alimentary item is exchanged for another.[32] But it is not so clear whether alimentary claims retain such status if traceable into the recipient's bank account. Stewart supports the view that alimentary funds remain exempt from arrestment if saved by the recipient in their bank account,[33] yet there is contrary authority too.[34] In *Drew v Drew*, Lord Cowan stated that:

> "If each term's aliment had been paid over to Alexander, and by him lodged in bank, so becoming part of and mixed with his ordinary funds, it could not for one moment be contended that it was protected from his general creditors."[35]

In *McKenzie*, the sheriff did not discuss the *extent* of the common law rule. Instead, the case turned on the "purpose of statutory provisions such as section 187 of the SSAA 1992" to protect alimentary payments rather than whether the section encapsulated the existing common law protection of alimentary payments.[36]

The Council relied on a different common law rule, as noted in the previous section.[37] According to this rule, once the funds were paid into McKenzie's bank account, the claim available for arrestment was the bank's obligation to account to McKenzie for the account funds. The right to receive the benefits no longer existed. Whether this common law position is displaced by the statute is ultimately a statutory interpretation question.[38] Following *Woods v Royal Bank of Scotland*,[39]

[28] On the need to read a statute in its historical context, see *R. (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [8], per Lord Bingham.

[29] D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London: LexisNexis, 2020), pp.786–787.

[30] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [32].

[31] See, e.g. Stair, *Institutions* II.5.18 and III.1.37; Erskine, *Institute* III.6.7; Bankton, *Institute* I.6.14 (Vol.1, 159), III.1.35 (Vol.2, 198); Bell, *Principles* §2276; J.G. Stewart, *A Treatise on the Law of Diligence* (Edinburgh: W. Green, 1898), pp.93ff.; G.L. Gretton, "Diligence" in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Butterworths; Law Society of Scotland, 1992), Vol.8, para.280; *John Dick v Mrs Margaret Russell* (1887) 15 R. 261.

[32] Erskine, *Institute* III.6.7.

[33] See Stewart, *A Treatise on the Law of Diligence* (1898), p.103.

[34] *Drew v Drew* (1870) 9 M. 163 at 166, per Lord Justice-Clerk Moncreiff. See also Scottish Law Commission, *Report on Diligence and Debtor Protection* (1985) Scot. Law Com. No.95, para.6.285 and Scottish Law Commission, *Report on Diligence on the Dependence and Admiralty Arrestments* (1998) Scot. Law Com. No.164, para.9.110.

[35] *Drew* (1870) 9 M. 163 at 167, per Lord Cowan.

[36] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [51].

[37] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [33]. This common law rule can be found in *Royal Bank of Scotland v Skinner*, 1931 S.L.T. 382 at 384, per Lord MacKay.

[38] *R. (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54 at [27], per Dyson JSC.

[39] *Woods v Royal Bank of Scotland* (1913) 1 S.L.T. 499 at 501, per Sheriff Welsh.

which addressed a similar statutory provision to s.187 of the 1992 Act, the sheriff held that s.187 displaced this common law rule.[40] This is perhaps surprising, for "when the provisions of a statute are ambiguous, it is a proper canon of construction that, in the absence of any sufficient indication of intention elsewhere in the statute, that meaning should be attached to them which involves the least alteration of the existing law."[41] In *McKenzie*, the "least alteration" of the common law would have been achieved by the adoption of the narrow meaning of s.187.

(c) External context: accepted interpretation and subsequent legislation

Another aspect of the external context is that the narrow interpretation of s.187 seems to have been generally accepted as correct.[42] This was despite some parties disagreeing with it in policy terms and the decision in *Woods v Royal Bank of Scotland*. The Scottish Executive, in 2002, accepted that s.187 was to be interpreted narrowly. In a consultation document, they stated that:

> "while most social security benefits are exempt from arrestment, in terms of section 187 of the Social Security Administration Act 1992, that statutory protection is lost once benefit [sic] has been paid into a bank account."[43]

This narrow interpretation of s.187, and its limited protection for debtors in receipt of social security benefits, was a factor that encouraged the then Scottish Executive to legislate for: (1) a protected minimum balance in a bank account that could not be arrested;[44] and (2) the release of funds from an arrestment where it is deemed unduly harsh.[45] These reforms were included in the Bankruptcy and Diligence etc. (Scotland) Act 2007 and demonstrate that, where the legislature wishes to introduce debtor protections, it does so unequivocally.

Prior to the passage of the Bill that became the 2007 Act, the Scottish Executive rejected the exemption from arrestment of bank account funds that originated from social security payments, due to the difficulty identifying the source of funds.[46] Amendments that would have excluded such funds in a bank account from arrestment were proposed at Stage 2 of the Bill.[47] These amendments were rejected by the Scottish Executive for various reasons, in particular because they did not

[40] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [52] and [53].

[41] *Hynd's Executor v Hynd's Trustees*, 1955 S.C. (H.L.) 1 at 16, per Lord Reid.

[42] The view of practitioners can perhaps be seen in: Accountant in Bankruptcy Diligence Working Group, *Report of Recommendations to Modernise Diligence* (March 2021), para.5.12, available at: *https://aib.gov.uk/diligence-working-group-final-report*, [Accessed 19 September 2023]. Cf F. McCarthy, "Judicial Security: Diligence" in R.G. Anderson (ed.), *Scots Commercial Law*, 2nd edn (Edinburgh: Edinburgh University Press, 2022), at para.12.30; and, less certainly, Macgregor et al, *Commercial Law in Scotland* (2020) p.310 (fn.143). For the extent to which subsequent practice can assist statutory interpretation, see Lowe and Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (2018), paras 3.58–3.60.

[43] Scottish Executive, *Consultation Paper on the Enforcement of Civil Obligations in Scotland* (2002) para.5.245 (archived website available at: *https://webarchive.nrscotland.gov.uk/3000/https://www.gov.scot/Publications/2002/04/14590/3547* [Accessed 21 September 2023]). See also para.5.229. The Scottish Executive was clear, however, that the question was yet to be "formally determined".

[44] Scottish Parliament, *Policy Memorandum to the Bankruptcy and Diligence etc. (Scotland) Bill*, para.930.

[45] This was introduced at Stage 2 of the Bankruptcy and Diligence etc. (Scotland) Bill's passage as a result of concerns raised at Stage 1. See *Scottish Parliament Official Report* (18 April 2006) col.2898-2923 and *Scottish Parliament Official Report* (24 October 2006) col.3380-3394.

[46] Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (2004), para.9.46.

[47] See the debate on amendments 273 (Michael Matheson), 316 (Jackie Baillie), 443 and 444 (Christine May), in *Scottish Parliament Official Report* (24 October 2006) col.3381–3386.

protect low income debtors who did not receive benefits and because they were outwith the Scottish Parliament's legislative competence.[48]

The Scottish Government's understanding might not carry much weight before a judge interpreting s.187, but various statutes containing the same or similar wording can be used as a tool to determine the section's purpose.[49] For example, s.91 of the Pensions Act 1995 contains strikingly similar wording.[50] The section's intention is clear from the preceding Goode Committee on Pension Law Reform, whose 1993 report justifies what became s.91 on the basis that: "[t]he evidence submitted to us shows a broad consensus in favour of exempting future pension entitlements from the claims of creditors."[51] Despite this, the Committee was equally clear that the legislation was not to "preclude execution creditors from attaching money in the hand paid to the scheme member or due for payment".[52] In other words, the purpose of the section is to protect the pension fund until paid over to the recipient. This view was recently endorsed by the English High Court,[53] and also has a long history in Scots law.[54]

Several other examples of legislation with near identical wording to s.187 of the 1992 Act could be given.[55] Of particular interest are the numerous recent SSIs that have established Scottish public sector pension schemes and which include wording substantially the same as s.187.[56] These pensions are payments from the government to individuals, in the same manner as social security payments. Due to the potential for pension payments under these SSIs to be worth significant sums, it cannot have been the intention to prevent creditors from arresting a pensioner's bank account.[57] This undermines the wider interpretation of s.187.

Whilst the judgment in *McKenzie* records no submissions on *Mulvey v Secretary of State for Social Security*,[58] and the sheriff principal in *Crossan* considered it to be "of limited usefulness",[59] the case actually provides a helpful insight into the correct interpretation. Mulvey was a judicial review of the Secretary of State's decision to deduct payments from a bankrupt's income support to recoup a

[48] See the debate on amendments 273 (Michael Matheson), 316 (Jackie Baillie), 443 and 444 (Christine May), in *Scottish Parliament Official Report* (24 October 2006), col.3383-3385. The legislative competence argument was that the proposed amendments would have related to the reserved matter of social security. "Social security schemes" remain reserved in F1 of Sch.5 to the Scotland Act 1998. The present authors' view is that once social security benefits are paid to the recipient, whether those funds are arrestable becomes a matter for the law of diligence, which is devolved to the Scottish Parliament.

[49] As appeared to be accepted by Sheriff Corke when he stated (at [51]) that: "it cannot have been the purpose of statutory provisions *such as* section 187 of the SSAA 1992 simply to save the DWP from the inconvenience of having funds arrested in its hands." (Emphasis added). See also Lord President Hope in *Mulvey v Secretary of State for Social Security*, 1996 S.C. 8 at 12.

[50] Many other examples of statutes containing wording similar to s.187 of the 1992 Act could be cited. For one, see the National Insurance Act 1911 s.111.

[51] *Pension Law Review*: Report of the Pension Law Review Committee (Goode Committee) (HMSO, 1993, Cm 2342) para.4.14.34.

[52] *Goode Committee Report* (1993), para.4.14.35.

[53] See, e.g. *Bacci v Green* [2022] EWHC 486 (Ch) at [40] per Mr Hochhauser QC.

[54] *Macdonald's Trs v Macdonald*, 1938 S.C. 536 at 550, per Lord Justice-Clerk Aitchison.

[55] See, for example, the Superannuation Act 1972, now replaced by the Public Sector Pensions Act 2013.

[56] See, e.g. Police Pension Scheme (Scotland) Regulations (SSI 2015/142), reg.217A; Local Government Pension Scheme (Scotland) Regulations (SSI 2018/141), reg.79(2).

[57] While it could be argued that the nature of benefit payments, in comparison to pensions, might justify a more protective approach, that would undermine a consistent interpretation of the wording.

[58] *Mulvey v Secretary of State for Social Security*, 1995 S.L.T. 1064; rev'd (in part) 1996 S.C. 8; aff'd 1997 S.C. (H.L.) 105. The opinion of Lord Jauncey in the House of Lords has been criticised by the Supreme Court in an English case (*R. (Payne) v Secretary of State for Work and Pensions* [2011] UKSC 60; [2012] 2 A.C. 1), but the latter case turned on the interpretation of an English statute and no criticism was aimed at the views of Lord Hope discussed here.

[59] *North Lanarkshire Council v Crossan*, Unreported, 2 May 2008 (Airdrie); 2023 G.W.D. 29-246, at [51].

pre-bankruptcy social fund loan. The case's ratio is focussed on the second part of s.187(1) ("on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors"). Nonetheless, Lord President Hope's statement on s.187's effect is not confined to the section's interaction with bankruptcy law, and he makes a clear distinction between: (1) the right to receive social security benefits; and (2) the funds in a bank account after payment of the benefits.[60]

Section 187 is designed to ensure that the right to receive benefits does not pass to the trustee. That is all that is achieved by the social security legislation. Thereafter, and because in *Mulvey* the recipient of the benefits was bankrupt, it was for underlying bankruptcy law to regulate whether the trustee could acquire the benefits income once paid to the recipient.

The same principle ought to apply to the first part of s.187, for the two parts are designed to operate in the same manner. Section 187 is intended to prevent the right to receive social security benefits from being assigned to a creditor, whether by voluntary assignation, a charge, an arrestment, or the transfer to a trustee in sequestration. But once these benefits are "converted into income" or otherwise fall into the debtor's hands it is for the law of diligence, beyond the social security legislation, to regulate whether the funds are arrestable. Instead of adopting this approach, *McKenzie* denies the broader law of diligence a role here. The result of this distinction is that s.187 grants more protection to the recipient of benefits before their bankruptcy than afterwards, since bankruptcy law does not entirely prohibit a trustee from acquiring benefits income received by the bankrupt after the date of sequestration.[61]

(d) Summary

The view here is that the meaning given to s.187 in *McKenzie* is not supported by the provision's context. If correct, there would remain the possibility of a creditor arresting the benefits once paid into the debtor's bank account. An alternative statutory protection would, however, seem to protect funds arising from alimentary payments, as shall be briefly outlined.

2. Alternative approaches

As noted above, the protected minimum balance was intended to provide some protection for bank account sums deriving from benefits. In addition, the Bankruptcy and Diligence etc. (Scotland) Act 2007 also introduced provision for an arrestment to be rendered ineffective, in full or in part, on the basis that it is found to be unduly harsh.[62] The hearing following on from such an application requires the sheriff to have regard to all the circumstances, including, where the debtor is an individual and funds are attached, "the source of those funds".[63] It is

[60] *Mulvey*, 1996 S.C. 8 at 13, per Lord President Hope.

[61] See *Mulvey*, 1997 S.C. (H.L.) 105 at 108, per Lord Jauncey. Of course, the likelihood of the trustee receiving such income is low, and this is true for income generally, as it is ordinarily excluded from property vesting in a trustee, unless there is a debtor contribution order—see Bankruptcy (Scotland) Act 2016 ss.85 and 90–97; D.W. McKenzie Skene, *Bankruptcy* (Edinburgh: W. Green, 2018), para.11-21.

[62] Under the Debtors (Scotland) Act 1987 s.73Q.

[63] Under the Debtors (Scotland) Act 1987 s.73R(2)–(3).

clear from the debate surrounding the provision's introduction that it was intended to take account of where a party's account holds funds derived from benefits.[64] But the protection from unduly harsh arrestments is not provided only to those in receipt of benefits. The court can find an arrestment unduly harsh on a low-income debtor or one who is subject to the double diligence of an earnings arrestment and a bank arrestment.[65]

If sums in an account reflect benefit payments, which are received to enable the debtor (and/or their family) to subsist, then a court would be expected to hold that the arrestment is unduly harsh to the extent of those benefits (and potentially even beyond this). In *McKenzie*, the sheriff and counsel for McKenzie (who received instructions only after the application and the initial hearing) were aware that this could have protected the debtor; however, as no such application had been made, the sheriff could make no decision on whether the arrestment was unduly harsh.[66]

It might be said that the procedure and evidence required to protect a debtor under the provisions preventing unduly harsh arrestments presents the debtor with further hardship. It is true that an application is required by the common debtor, but the evidence required would likely be little more than what was provided to the sheriff in *McKenzie*. This is because an arrestment of benefits intended to provide a minimum standard of living will always be unduly harsh. And, as stated above, the legislation caters for a wide range of circumstances, which means there ought to be an ability to test whether the arrestment is unduly harsh. This would be the correct route for determining whether, for example, a party's receipt of pension payments should be protected, rather than the blanket protection afforded by *McKenzie*. The sheriff, after hearing from the creditor, arrester and any other person with an interest, could even release only part of the funds arrested.

It remains possible that a party could seek to rely upon the common law of alimentary relief to protect benefit payments in a bank account from arrestment. However, as noted above, the authorities are conflicting on whether such funds in a bank account are so protected and the scope of any protection that does exist is unclear. Consequently, it is preferable to rely on statutory protection, particularly the unduly harsh mechanism.

3. Practical issues

Accepting that social security payments can remain exempt after transfer to a bank account, some interesting issues are raised. Only a few can be outlined here.

First, although the number of arrestments used by local authorities following a summary warrant is considerable, the rate of return appears to be very low. For example, the Council executed 16,203 arrestments using summary warrant procedure in 2022, for total aggregate debts of £50,189,749.68, and recovered only £387,286.77.[67] This represents a recovery rate of 0.77%. Bearing this data in mind,

[64] *Scottish Parliament Official Report* (24 October 2006) col.3388–3392.
[65] *Scottish Parliament Official Report* (24 October 2006) col.3389.
[66] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [3], [39], [54].
[67] This data was provided in response to a Freedom of Information request dated 11 September 2023 from A. MacPherson to City of Edinburgh Council, responded to on 9 October 2023 (reference number 44533)—*https://edinburgh.axlr8.uk/documents/44533/44533%20response.pdf*.

McKenzie deals a further blow to the effectiveness of arrestments, particularly for local authorities.

Second, a bank may be faced with the challenge of having to identify accounts holding social security benefits and also dealing with the mixing of social security payments with other funds in the same account. The Bank entered the case as an interested party with the main concern of protecting its own position, arguing that it would be "subject to a highly onerous obligation to trace the origin of funds in any common debtor's account subject to a schedule of arrestment."[68] It may be possible for a bank to develop a system by which it knows whether its customer is in receipt of social security benefits.[69] Where the sums are large, a bank may need to investigate further, but it is perhaps unlikely that a person on benefits such as universal credit would have a large surplus in an account. However, the bank's practical difficulty increases in prevalence if funds deriving from state pension are also excluded from arrestment, for many pensioners also receive income from a private or occupational pension. In any event, unless a bank can easily identify the origin of account funds, they should not be liable in any way for simply arresting upon the demand of the enforcing creditor.[70]

The bank's concern regarding the mixing of benefits with other payments is assuaged if the provisions releasing unduly harsh arrestments are used instead of s.187 of the 1992 Act. The former enables the common debtor's circumstances to be assessed. Where the common debtor receives only benefits provided to maintain a minimum standard of living, the arrestment of their bank account will likely be unduly harsh. Where, however, a common debtor has mixed benefits with other funds, they will have other sources of income or savings and the arrestment is less likely to be unduly harsh. Where the debtor has other sources of funds, a sheriff can also release so much of the funds as deemed appropriate to ensure the arrestment is not unduly harsh.[71] It is through the procedure dealing with unduly harsh arrestments that the bank's concern is addressed.

Third, local authorities seeking to arrest a bank account will need to be aware of the potential that it holds social security payments, especially as Sheriff Corke stated that "the responsibility rather lies upon the creditor not to use summary warrants to the detriment of those deemed to require protection".[72] Yet this assumes that a creditor will always be aware that its debtor is in receipt of benefits and that they have no assets or income that would be available for arrestment. A creditor should proceed reasonably on the basis of information available to them and if they arrest sums deriving from benefits, the debtor can seek the recall of the arrestment or otherwise provide evidence as to the arrestment's incompetency. If the creditor challenges this, despite evidence to the contrary, they may be liable for expenses.

Finally, the interrelationship between the protected minimum balance and the exemption of social security benefits is unclear. For example, a party has some

[68] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [40].

[69] The current Bankruptcy and Diligence (Scotland) Bill, s.6, would require an arrestee to disclose that an arrestment has been unsuccessful (not just where successful) and the reason(s) for this. However, given the uncertainty regarding arrestable assets and the common debtor's right to respect for his private life, it is unclear to what extent a bank could or should disclose that the arrested account contains social security benefits.

[70] However, Sheriff Corke left open the potential for a claim against banks (at [55]).

[71] Debtors (Scotland) Act 1987 s.73Q(2).

[72] *McKenzie*, 2023 S.L.T. (Sh Ct) 127 at [55].

money deriving from benefits e.g. £1,000 in a bank account but additional money from another source, e.g. a further £500. Does the protected amount apply to the benefits money first (i.e. it is doubly protected, with the latter sum of £500 being unprotected), or would it depend on, for example, which was received first, or would there need to be proportional allocation from both the amount received from benefits and from other sources? While the Scottish Parliament's intention may have been to enhance debtor protections, it is uncertain whether this was intended to extend to the two protections being cumulative and thereby also covering the £500 beyond the social security benefits in the example above. Again, this issue is ameliorated if the statutory provisions preventing unduly harsh arrestments are used instead of s.187.

V. Conclusion

In *McKenzie*, it was held that sums in a bank account arising from statutory benefits are not arrestable. The policy motivation of protecting the debtor is understandable and there is some authority that supports the decision, despite the transformation of one type of right (a claim for benefits) into another (a claim against a bank). This article, however, has identified an alternative approach that gives greater regard to the legislation's context and the interpretation of equivalent wording in other legislation. This alternative provides wider and more flexible protection, including for low-income debtors who do not rely solely on social security income. On the basis of *McKenzie*, there are also issues to resolve regarding: the mixing of benefits and non-alimentary sums in an account; the relationship between the protection of benefits and the protected minimum balance; and the duties of creditors and banks where sums in an account may derive from benefits. These can be more appropriately addressed by using the alternative approach.