

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Schedule 2 – the Scottish Civil Enforcement Commission (Introduced by Section 50)

Miscellaneous

Section 75 – Judicial officer’s actions void where officer has interest

228. *Section 75* specifies the conditions under which a judicial officer who has a particular kind of interest may not exercise his or her functions. This covers individual interest as well as circumstances where a debt is owed to or by a business associate or family member of the judicial officer. Any action by the officer in relation to such cases is void which means that it is a nullity. The prohibition on acting covered by this section relates to “prescribed functions”, which are the functions of judicial officers which the Scottish Ministers specify, by regulations, for the purposes of this section (see subsection (7)).
229. Subsection (4) (read with subsection (6)) defines, for the purposes of this section, who is a business associate of the judicial officer and what is meant by the officer having a “controlling interest” in a company or firm.
230. Subsection (5) sets out the list of family members to whom a debt might be due, or who might owe a debt, in relation to which any action by a judicial officer, which is a prescribed function, would be void under this provision. Family members, for the purposes of this section, include a co-habitee of an officer where they are living together as husband and wife and same sex co-habitees living together in a relationship akin to a relationship between husband and wife except that the officer and the person are of the same sex.

Section 76 – Measure of damages payable by judicial officer for negligence or other fault

231. This section replicates the provisions of section 85 of the 1987 Act, which is now repealed (see schedule 6). It makes it clear that no common law rule which determined the damages payable to a creditor by a messenger-at-arms or sheriff officer for negligent delay or failure to execute diligence by reference to the amount of debt being recovered is revived as a result of that repeal or the provisions in this Part. Nor is any such rule applied to a judicial officer. The effect of this is that the normal rules for quantifying damages for negligence or breach of contract apply.

Section 77 – Effect of code of practice

232. **Section 77(1)** provides that a judicial officer must exercise that officer's functions and undertake that officer's activities with regard to any code of practice published by the Commission under section 55 or 56.
233. Subsection (2) provides that failure to comply with a code of practice in itself will not cause a judicial officer to be prosecuted or liable to any civil proceedings.
234. Subsections (3) and (4) provide that a code of practice will, however, be allowed as evidence in any criminal or civil proceedings. Where a court or tribunal conducting civil or criminal proceedings, or the disciplinary committee of the Commission holding a hearing, considers a code of practice to be relevant to any question arising in the proceedings, the code can be taken into account when determining that question.

Section 78 – Electronic publications and communications

235. **Section 78** clarifies that references to publishing and notification, admission or representation "in writing" includes doing all of these things by electronic means and by use of electronic communications (defined in section 221).