

# **MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023**

---

## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 1 – Assignment**

##### *Chapter 1 – Assignment of claims, protection of debtors and related matters*

#### **Assignment of claims**

##### *Section 1 – Assignment of claims: general*

5. **Section 1** sets out key rules on assignment (i.e. transfer) of claims. A claim is the right to the performance of an obligation, usually the right to payment of a debt. See section 41(1) of the Act for the full meaning of “claim”.
6. Subsection (1) has the effect that a claim must be assigned by means of a document (an “assignment document”) which is executed or authenticated by the assignor. This means that it must be signed by or on behalf of the assignor, either in ink if a hard copy (“executed”) or with an electronic signature if an e- -document (“authenticated”). The assignor means the person assigning the claim. See section 41 for the definition of “assignor” and section 120(2) for the meaning of “executed” and “authenticated”.
7. Subsection (2) requires the claim to be identified, but subsection (3) makes it clear that claims do not need to be individually identified in the assignment document, provided that these fall within an identifiable class and are identified as such. Thus, for example, it would be possible for a business to assign all invoices raised against a particular customer, or all invoices rendered in a period specified in the assignment document.
8. Subsection (4) provides that a claim that is not yet held by the assignor at the date of the assignment, including a claim that has not yet come into being, can be assigned. For example, a plumbing business may wish to assign to a factor the invoices for work not yet instructed by a customer. It is not possible to complete the assignment by intimating such a claim until the work has been done and the debtor can be identified. However, it will be possible to assign such a future claim by registering it in the Register of Assignations under section 19 of the Act.
9. Subsection (5) clarifies that the ways in which a claim can be identified in an assignment document include by making reference to another document, the terms of which are not reproduced. The term “document” is defined broadly in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and this provision would therefore include, for example, making reference to information uploaded to an electronic database.
10. Subsection (6) provides that nothing in Part 1 applies to the assignment of a claim as part of a financial collateral arrangement within the meaning of the Financial Collateral Arrangements (No.2) Regulations 2003. For example, a credit card company assigning the amounts due to it by its customers to its bank as security for its obligations

would constitute such an arrangement (specifically, a title transfer financial collateral agreement). The law in relation to such matters is left unchanged by the Act.

### ***Section 2 – Assignment of claim subject to a condition***

11. This section provides that an assignment can be made subject to a condition which must be satisfied before the claim is transferred. For example, the assignment might be conditional on the grant of planning permission or on the assignee getting married.
12. Subsection (2) requires that the condition is set out in the assignment document, in order to enable a third party to be able to discover from the document whether there is such a condition. In the case of a registered assignment document, a copy of the document will be included in the assignments record.
13. Subsection (3) provides that a condition may relate to a thing happening, or not happening (in either case regardless of whether or not it is certain that the thing will happen). The condition can also be simply the occurrence of a specified date being reached.
14. Subsection (4) enables a condition to be specified by reference to another document (for example, the loan agreement that relates to an assignment in security).

### ***Section 3 – Transfer of claims***

15. This section provides for the transfer of an assigned claim where there is a validly constituted assignment document in accordance with section 1. The person to whom the obligation under the claim must be performed is the “holder” of the claim. The assignee is the person to whom the claim is assigned (who becomes the new holder, in place of the assignor).
16. Subsection (1) provides that a claim is transferred when the four conditions in subsection (2) are all met. The conditions can be met in any order. Subsection (2) has the effect that a claim will transfer when:
  - (a) the assignor is the holder of the claim,
  - (b) the assignment is intimated (see section 8(1)), or registered in the Register of Assignations (“RoA”),
  - (c) the claim is identifiable as a claim to which the assignment document relates, and
  - (d) any condition to which the assignment is subject is met.
17. It follows that if a claim is not identifiable then the transfer is postponed until it becomes so identifiable.

#### *Example 1*

Arthur assigns to Barbara his claim to a current debt of £1,000 owed by Zoe. Barbara registers the assignment in the RoA. The claim transfers on registration because the claim as constituted by the debt exists and is clearly identifiable.

#### *Example 2*

Debra assigns to Excellent Factors claims in respect of customer invoices to be issued by her as described in schedules to be sent from time to time to the factors. Excellent Factors registers the assignment in advance of any such schedule being sent. There is no transfer at the date of registration as no claim can be identified (and might not exist). The claims listed in the first such schedule transfer when that schedule is issued as they exist and can be identified at that time.

18. Subsection (3) provides that any rule of law as to accretion is to be disregarded in determining any matter which relates to the transfer of such claims as are mentioned

in section 1(4) of the Act (assignment of a claim not yet held by the assignor). A person cannot convey property which that person does not own. However, as a general principle, accretion may operate where a person has purported to do that and then subsequently acquires the property. The effect of accretion would be to cure the defect in the title of the assignee. It is, however, not clear that accretion applies where “future” claims are assigned, so subsection (3) clarifies that it does not, with the effect that the measures in the Act replace any common law rule.

19. Subsection (4) provides that although registration of an assignment document can be one of the elements which allows a claim to transfer, it is only effective registration that counts (see section 27).
20. Subsections (5) and (6) make provision for the situation where there are competing assignment documents in relation to the same claim. In most cases, the claim will transfer to whichever assignee first registered or intimated the assignment document, because that will usually be the final requirement to be met under subsection (2) and so will give rise to the transfer. However, if the assignor is not the holder of the claim at the time of granting the competing assignment documents, then becoming so might be the final requirement to be met. That would mean that all of the competing documents would meet the requirements of subsection (2) at the same time. Similarly, the competing assignments could be made subject to conditions. Those could be the final requirement to be met under subsection (2), and might all be met at the same time. Alternatively, the claims might not be identifiable initially as claims to which the assignment documents relate. Then becoming so could be the final requirement to be met under subsection (2) and could be met in relation to the competing assignments at the same time. The result of subsection (6) is that in such cases the claim would therefore transfer to whichever of the assignees first meets the requirement as to intimation or registration.
21. Subsection (7) provides that the rule about claims transferring is subject to section 4. That section makes provision about the effect of insolvency on assignments where the claims being assigned are not held by the assignor at the time of granting the assignment document (either because the claim does not exist yet, or because it exists but someone else is the holder).
22. Subsection (8) enables the Scottish Ministers to prescribe certain categories of claim which can only be transferred by registration of the assignment. For example, in some jurisdictions, assignments in respect of invoices that have yet to be paid must be registered to have third party effect. If registration of assignments of so-called trade receivables was to become required in England and Wales then there may be support for this to be the position in Scotland as well.

#### ***Section 4 – Assignment of claims: insolvency***

23. **Section 4** sets out what the legal effect of an assignment document is in the event of the assignor’s insolvency.
24. Subsection (1) provides that this section is relevant only where the claim that was assigned was not held by the assignor at the time of granting the assignment document. This covers assigning a claim that is not yet in existence, as well assigning a claim which exists but which the assignor does not yet hold. Where the assignor becomes insolvent after granting an assignment document in respect of such a claim, this section will apply.
25. Subsection (2) provides that an assignment of such a claim is, subject to subsection (3), ineffective if the assignor becomes the holder of the claim after becoming insolvent (i.e. during the period of the insolvency or after being discharged).

#### *Example*

*These notes relate to the Moveable Transactions (Scotland)  
Act 2023 (asp 3) which received Royal Assent on 13 June 2023*

A tradesman assigns future invoices to a factor. The tradesman is sequestrated, and then issues an invoice for a new job carried out after the date of sequestration. The tradesman only becomes the holder at that point. The claim in respect of that invoice will not transfer to the factor.

26. Subsection (3) has the effect that an assignation is, however, effective where the claim is in respect of income from property in existence at the time the assignor becomes insolvent, and is not attributable to anything done or agreed to be done by the assignor after the insolvency.

*Example 1*

A musician has licensed the use of a song in an advert, and assigns the royalties due in respect of that use. The assignation is effective even if the musician becomes insolvent.

*Example 2*

A landlord assigns the future rent on a property to a bank. The landlord is sequestrated. The assignation remains effective for rents arising after the date of sequestration because the rents derive from an asset (the property) of, and not from efforts by, the landlord.

27. An assignation that is ineffective under subsection (2) does not become effective if the assignor is discharged from the insolvency. However, subsection (4) provides that claims that remain effective on an insolvency (i.e. they survive under subsection (3)) become ineffective under subsection (5) if the assignor is discharged from a sequestration or from a protected trust deed. The effect is that any claim which comes into being after such a discharge is not transferred by the assignation, with the effect that the assignor makes a fresh start after insolvency.
28. Subsections (4) and (5) will mainly benefit individuals, as only a few types of legal person can be sequestrated (for example, partnerships). This protection does not otherwise apply to legal persons, and indeed the effect of a corporate insolvency is in nearly all cases the dissolution of the corporation.
29. Subsection (6) provides for the meaning of insolvency for the purposes of section 4, in respect of both individuals and legal persons (such as limited companies).
30. Subsection (7) gives the Scottish Ministers power to amend the list of insolvency processes listed in subsection (6), as well as to apply subsections (4) and (5) to circumstances other than sequestration or the granting of a trust deed.

**Section 5 – Assignation in part**

31. Subsection (1) provides that a claim may be assigned in whole or in part.

*Example*

Andrew lends £2,000 to Brenda. He then has a claim for repayment of that sum. But he could assign £500 of that claim to Carol and the other £1,500 to Doris. These would be assignments in part.

32. Subsection (2) provides that where the claim is not one requiring payment of money, assignation in part is only permissible where the claim is divisible and one of two circumstances applies:
- (a) the first is where the debtor (i.e. the person against whom the obligation is enforceable) consents,
  - (b) the second is where the assignation in part is not likely to result in a significantly greater burden on the debtor.

33. For example, say Elaine has an obligation to deliver 30 motor vehicles to Frank. Her obligation may not become significantly more burdensome if Frank assigns part of his claim to one person and the remainder to another. If, however, Frank assigns the claim to 30 persons then the obligation may well be likely to become significantly more burdensome (and therefore not assignable in part in that manner). The assessment as to result is carried out at the time of making the assignation in part and is based on the likely outcome, which means that the assignation in part could not appear to be valid and then be challenged in future as a result of unforeseen events arising.
34. Subsection (3) enables the debtor to recover from the assignor, unless agreed otherwise with the then-assignor, the expenses attributable to a claim being assigned in part under subsection (1). For example, sending payments to several partial assignees rather than one assignee may be more costly. The additional cost in doing so is therefore recoverable.
35. This section does not make provision as to how any consent or agreement for the purposes of this section is to be constituted. It might, for example, be in the agreement which gives rise to the claim or in a subsequent agreement.

### ***Section 6 – Limitations as to assignability: general***

36. Subsection (1) continues the effect of any current enactment or rule of law that prevents the assignation of a claim. For example, the assignation of a claim to certain social security payments is barred by section 187 of the Social Security Administration Act 1992.
37. Subsection (2) excludes the preservation of other enactments or rules of law which contradict provision made in this Part of the Act that allows for the assignation to be effective. In particular, it was previously a rule of law that future claims could not be assigned (due to the impossibility of intimation until a debtor existed). That rule of law is now displaced by section 1(4) and that prevails over section 6(1).
38. Subsection (3) makes it clear that the debtor and the holder of the claim can agree (or a person giving a unilateral undertaking can state) that the claim cannot be assigned, or cannot be assigned in part. This is known as an anti-assignation (or, following England and Wales, a non-assignment) clause and is a permitted clause in a contract or undertaking.
39. Subsection (4) provides that although the language of “the holder of the claim” is used in subsection (3), this includes a person who is not yet the holder at the time of agreement. This allows anti-assignation agreements to be entered into in anticipation of becoming the holder of a claim (for example, because the assignation is of future claims).
40. Subsection (5) has the effect that subsection (3) is subject to any enactment which renders anti-assignation clauses ineffective, such as sections 1 and 2 of the Small Business, Enterprise and Employment Act 2015.
41. As with section 5, this section does not make express provision as to how any agreement or statement is to be constituted.

### ***Section 7 – Claim in respect of wages or salary***

42. This section prevents an individual assigning a claim to payments of wages or salary due to them, including for this purpose any associated payments such as bonus and redundancy payments.
43. This section will sit alongside other, more specific statutory provisions restricting the assignation of income, which also continue to have effect unless and until they are repealed. However, there are some limited cases where the assignation of such a claim is possible – for example, section 34 of the Merchant Shipping Act 1995 generally restricts the assignation of wages, but some exceptions are made to this (such as for

those payable to a relevant fund under subsection (3). Those exceptions are preserved by section 7(3).

### ***Section 8 – Intimation of the assignation of a claim***

44. **Section 3** of the Act sets out that an assigned claim may be transferred by intimation under subsection (1) of this section (where the other requirements of section 3(2) have also been met).
45. Subsection (1) sets out a new rule governing the types of intimation that must be used in order to effect the transfer of a claim which otherwise satisfies the requirements of section 3(2). It replaces the existing statutory rules on intimation in the Transmission of Moveable Property (Scotland) Act 1862, which is therefore repealed by section 40 of the Act. There are a number of different options under subsection (1), although subsection (1)(a) is likely to apply most often.
46. Subsection (1)(a) provides that either the assignee or the assignor may serve notice of the assignation on the debtor.
47. Subsection (1)(b) provides, first, for “constructive” intimation to a debtor who has knowledge of the assignation of the claim and acknowledges having such knowledge.

#### *Example*

Having become aware of the assignation other than by notice, the debtor may perform – or promise to perform – to the assignee something which the assigned claim obliges the debtor to perform to the holder of the claim. The claim is transferred by the performance or the promise without any need for written intimation to the debtor (provided that all of the other requirements as to transfer of the claim under section 3(2) have already been met).

48. Subsection (1)(b) provides, second, for intimation to be given where the debtor is a party to judicial proceedings in which the assignation is founded on.

#### *Example*

The assignee raises an action against the debtor for performance of the obligation to which the claim relates. Thus if Andrew lends £2,000 to Brenda, and then he assigns the right to repayment to Carol, intimation to Brenda would be effected by Carol raising proceedings against Brenda founding on the assignation. Provided that all of the other requirements as to transfer of the claim have already been met under section 3(2), this would therefore effect the transfer of the claim.

49. Subsection (2) provides that intimation to any one co-debtor is to be treated as intimation to all the co- debtors (as it is under the existing law).

#### *Example*

Kenneth lends £1,000 to Leslie and Max. If he assigns the right to repayment to Nicola then the claim will be transferred to her by intimation to either Leslie or Max.

50. Subsections (3) to (12) provide more detail on assignation by notice to the debtor.
51. Subsection (3) concerns the form and content of the notice. It should be read with section 15 of the Act which sets out the right of the debtor to seek information about an assignation. The notice:
- must provide the name and address of both the assignor and assignee, as well as details of the claim (or part claim) being assigned,
  - need not be set out in a single document (“document” is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and would include e-mails and attachments to e-mails),

*These notes relate to the Moveable Transactions (Scotland)  
Act 2023 (asp 3) which received Royal Assent on 13 June 2023*

- need not be signed either in ink or electronically; the effect is to authorise the practice of some factors whereby stickers are placed on invoices instructing the debtor to pay the factor, but the stickers are not signed,
  - can, in the case of a monetary claim, be in a style form prescribed by the Scottish Ministers under regulations, although there would be no consequence to using or not using such a form.
52. Subsection (4) makes it clear that, in the case of an electronic intimation, the required information may be provided through a link to a website or portal.
53. Subsection (5) permits three forms of service: (a) by personal delivery; (b) by post or courier (including ordinary post, not just registered delivery); and (c) by transmission to an address provided for electronic communication. Intimation can be made either to the “proper address” of the debtor as defined in subsection (11), or an address supplied by the debtor.
54. Subsections (6), (7) and (8) allow the parties to make a determination that a notice must be served by means of a particular one of the permitted ways (e.g. by electronic means), or to a particular address. In other words, the default rules can be replaced up to a point. Intimation by oral means is not, however, permitted. A determination of this nature must be agreed in writing between both parties (the holder of the claim and the debtor) unless the claim arises from a unilateral undertaking, in which case it can be effected by that person in writing. However, once a determination of this nature has been agreed, it can be updated by the debtor unilaterally.
55. Subsection (9) provides that a notice served by post or other postal services in the UK is deemed to be received 48 hours later unless earlier receipt can be shown. Subsection (10) sets out a similar rule for electronic transmission, though in that case it is deemed to be received after 24 hours unless earlier receipt is shown. The effect is to provide, where required, certainty as to the time of intimation. This is important in a question with third parties, such as creditors carrying out diligence, as the claim will transfer on intimation (assuming the other requirements of section 3(2) are already met). If the notice has not actually reached the debtor (for example, by going missing in the post) then the good faith protection rule in section 10 may need to be relied upon by the debtor.
56. Subsection (11) makes it clear that a determination can be entered into between a debtor and the prospective holder of a claim. It also defines certain terms by reference to the Postal Services Act 2011, as well as providing for what the “proper address” of the debtor means.
57. Subsection (12) allows service to be made on a party who is authorised to act on behalf of the debtor for that purpose, such as a solicitor.

***Section 9 – Warrandice implied in the assignation of a claim***

58. This section provides for the warranties that an assignor is deemed, unless agreed otherwise, to give to the assignee in respect of an assigned claim when granting an assignation document. It replaces the current law and clarifies the effect of warrandice. See section 17(1)(d) for the repeal of the current law.
59. Subsection (2) provides that for assignation documents granted for value, the implied warrandice reflects the common law principle of warrandice *debitum subesse* (the debt exists). This principle means that the assignor guarantees to the assignee the existence of the claim. As such, if the assignee finds that the claim is barred because, for example, the assignor personally barred themselves from seeking performance, the assignor is in breach of warrandice and must compensate the assignee.

60. Subsection (3) provides that in the case of assignation documents granted gratuitously (for no value), the implied warrandice reflects the common law principle of warrandice of facts and deeds only.
61. Subsection (4) provides that the assignee is not held to warrant that the debt will be paid. In other words, the assignor does not guarantee that the debtor is solvent and can pay the debt.
62. Subsection (5) has the effect that the warranties are, where applicable, implied in any contract relating to the assignation of a claim as well as in the assignation document itself.

## **Protection of debtors**

### ***Section 10 – Protection of debtor who performs in good faith***

63. Previously, a claim would only transfer if the assignation was intimated to the debtor. However, the effect of the changes in the Act is both to extend the scope of intimation and to enable registration as a method of effecting a transfer of a claim. As such, the debtor may not know that a claim has been assigned, and may in good faith pay an assignor who is no longer the creditor.
64. This section has the effect that a debtor who does not, and should not, know that a claim has been assigned will still be discharged from the debt to the extent of any payment made to the assignor (or any person nominated by the assignor).

#### *Example*

Paul lends Roger £5,000. Paul assigns his right to repayment to Susan, and she registers the assignation in the RoA. The effect is to transfer the claim so that payment is due to Susan. But Roger, who knows nothing of the assignation repays Paul, and Paul accepts payment rather than telling Roger to pay Susan. Roger does not require to pay Susan any amount that he has paid in good faith to Paul.

65. Subsections (1) and (2) provide for a general rule protecting a debtor who performs in good faith to the assignor where a claim has been assigned in whole or in part. Co-debtors are also discharged to the extent of the performance, as if the debt is a joint one then it is discharged (to the extent of the performance) for all debtors, albeit that one debtor may have an ability to recover from the other. The “last known holder of the claim” formulation in subsection (1) deals with the fact that there may have been a chain of assignations rather than only one.
66. Subsection (3) provides that the fact that an assignation document has been registered, or that it is deemed to have been intimated, does not of itself mean that the debtor does not perform in good faith. In particular, debtors should not be expected to have to check the RoA.
67. Good faith is not further defined in this section. However, section 116 places the onus of showing that the debtor has performed other than in good faith on the person making such an assertion. Whether or not a debtor is in good faith will depend on the facts of the case.

#### *Example*

Susan might make intimation to Roger by means of sending him a 200-page document dealing with many matters, but including the words of intimation half way down page 172. Roger may be in good faith if he still pays Paul.



***Section 11 – Further provision as to protection of debtor***

68. This section provides protection for debtors who are in good faith where an assignor is not. It also protects debtors against inadvertent errors by assignors (such as forgetting that a claim has already been assigned).
69. Subsection (1) sets out the four criteria which must each be met in order for the protection in subsection (2) to apply:
- (a) The first criterion is that the holder of the claim grants more than one assignment document in respect of the same claim (or part claim) to different people,
  - (b) The second criterion is that the claim is transferred by one of the assignment documents to the true holder (typically, by registration of the assignment),
  - (c) The third criterion is that the debtor is informed that the claim is assigned to the purported holder (either by notice from the original holder of the claim or the purported holder, or by being made party to judicial proceedings), and
  - (d) The fourth criterion is that by virtue of being so informed, the debtor performs to the purported holder.
70. Subsection (2) has the effect that if the performance to the purported holder is in good faith then the debtor is discharged from the claim (or part) to that extent, and does not need to compensate the true holder. This also extends to co-debtors (see paragraph 65 of these Notes).

*Example*

Liana owes Kimberley £1,000. Kimberley then assigns her claim to Monica. Monica registers the assignment in the RoA (and does not intimate). Kimberley then assigns the same claim again to Neil, who intimates to Liana. Liana pays Neil, who is not the true holder, but provided she is in good faith she is discharged from the obligation to pay Monica.

71. Subsection (3) imports the rules that apply under section 10 of the Act, namely that the debtor is not in bad faith merely because an assignment document has been registered in the RoA, or because intimation has been deemed to have taken place. See paragraph 66 of these Notes.
72. In relation to good faith, see paragraph 67 of these Notes and section 116 of the Act.

***Section 12 – Performance in good faith where claim assigned cannot be transferred by intimation***

73. This section protects debtors who in good faith pay the assignee as a result of an assignment document that should have been registered (see section 3(8) of the Act) but was not.
74. Subsection (1) sets out the two criteria which must each be met in order for the protection in subsection (2) to apply:
- (a) The first criterion is that the assignment relates to a claim of a type prescribed by the Scottish Ministers under section 3(8) of the Act as being a claim that can only be transferred by registration, but the assignment has not been registered and this is the only reason that the claim has not transferred,
  - (b) The second criterion is that, despite the claim not having transferred, the debtor performs in good faith to the (supposed) assignee (perhaps because the assignment has been intimated).

75. Subsection (2) provides that the debtor is discharged from the claim (or part) to the extent of the performance to the assignee. This also extends to co-debtors (see paragraph 65 of these Notes).
76. Subsection (3) sets out that the debtor will not be in good faith if the debtor knows that the assignation has not been registered, and that registration was required in order to transfer the claim, and still performs to the purported assignee (who is not the holder).

### ***Section 13 – Performance in good faith where claim assigned subject to condition***

77. This section protects debtors who do not know that an assignation document is subject to a condition, or who mistakenly believe the condition has been satisfied. Although section 15(8) and (9) of the Act grants an information-gathering right to debtors in respect of conditions, debtors are not required to be on guard against conditional assignations.
78. Subsection (1) sets out the criteria which must be met in order for the protection in subsection (2) to apply:
- (a) The first criterion is that the assignation is subject to a condition which must be satisfied before the claim transfers,
  - (b) The second criterion is that the claim has not transferred and the only reason for this is that the condition has not been satisfied,
  - (c) The third criterion is that, despite the claim not having transferred, the debtor performs in good faith to the assignee (perhaps because the assignation has been intimated without the debtor being told of the existence of the condition).
79. Subsection (2) provides that the debtor is discharged from the claim (or part) to the extent of the performance to the assignee. This also extends to co-debtors (see paragraph 65 of these Notes).
80. Subsection (3) applies the rules set out in section 10(3) here too. See paragraph 66 of these Notes.

### ***Section 14 – Asserting defence or right of compensation***

81. This section puts the common law rule *assignatus utitur jure auctoris* (the assignee takes the rights of the assignor) into statutory form. The new rule applies by default, so that it is open to the debtor and the assignor to agree that the debtor may not assert a particular right. This section does not make express provision as to how any agreement is to be constituted, although it will need to pre-date the assignation document.
82. The effect of subsection (1) is that, unless agreed otherwise, any defences which the debtor can plead against the assignor can also be pled against the assignee.

#### *Example*

Ona sells goods to Peter at a price of £1,000. The sale is on credit, and Ona assigns her claim for payment to Quentin. It turns out that the goods are defective. If this entitled Peter to refuse to pay Ona then he is equally entitled to refuse to pay Quentin. It does not matter that Quentin is in good faith.

83. Subsection (2) states that any agreement made by the parties that a defence cannot be asserted against the assignee is subject to a contrary rule in any enactment. For example, a consumer debtor may be protected by the unfair contract terms provisions in the Consumer Rights Act 2015.
84. Subsection (3) provides that a debtor is not to be treated as having been told about the assignation of a claim only because the assignation document has been registered. This

rule applies for the purpose of any enactment or rule of law about compensation, set-off, retention, balancing of accounts or counterclaims.

***Section 15 – Right to withhold performance until information as to assignment is provided***

85. This section provides protections for debtors who:
- are unsure about the veracity of the intimation made to them (subsection (1)),
  - are unsure whether an assignment document has been granted in a case where intimation has not been made to them (subsection (5)), or
  - are unsure whether the assignment of a claim is conditional and/or whether the condition has been satisfied (subsection (8)).

86. The first information right is found in subsection (1). It will often be the case that the debtor has little or no knowledge of an assignee, either before or after an assignment document is intimated. There is no requirement to include a copy of the assignment document for the purposes of intimation. Subsection (1) therefore applies where notice of an assignment document having been granted has been given to the debtor by the assignee rather than the assignor. It has the effect that the debtor may request from the assignee reasonable evidence of the assignment document having been granted.

*Example*

George owes Henry £500. Henry assigns the claim for payment to Imogen, who registers the assignment document in the RoA, and then assigns the claim to Jay, who intimates to George. George can request reasonable evidence of the assignment document granted by Imogen to Jay.

87. Subsection (2) gives an example of “reasonable evidence”, namely written confirmation from the assignor of having granted the document. There is no express requirement to provide a copy of the assignment document as it may contain information confidential to the assignor/assignee or a third party.
88. Subsection (3) makes it clear that the right to request information in subsection (1) applies equally to a purported notice of assignment and a purported assignee as it does to a valid notice of assignment and a “real” assignee.
89. Subsection (4) sets out the remedy where no reply is received to an enquiry under subsection (1). Where an assignment document has been granted, the debtor will be entitled to withhold performance from each of the assignor and the assignee until the evidence is provided by the assignee. Where an assignment document has not been granted, the debtor will be entitled to withhold performance until either the purported assignee or the purported assignee confirms in writing that an assignment document has not been granted in respect of the claim. This deals with the situation where the “assignee” is a fraudster who wants to prejudice the holder of the claim by making a fake intimation, or where the intimation has been made in error.
90. The second information right is found in subsection (5). Subsection (5) applies where the debtor has not received formal intimation of the assignment, but has reasonable grounds to believe that an assignment document has been granted. The debtor may state those grounds to the supposed assignor, and ask that party to confirm the position in writing. If an assignment document has been granted then, if the assignor provides the requested written statement, subsection (6) requires the statement to include the name and last known address of the assignee. Under subsection (7), if a written statement is requested under subsection (5), the debtor may withhold performance until a statement confirming whether the claim is the subject of an assignment document and (where applicable) fulfilling the requirements of subsection (6) is received.

91. The third information right is found in subsection (8). A claim that is the subject of a valid assignation document transfers upon the last of the requirements of section 3(2) being met. Where an assignation document is subject to a condition, that may be the last requirement to be met. Knowing that an assignation document has been granted in respect of the claim, and even that it has been intimated or registered, will only provide the debtor with part of the answer; they may still not know to whom they should perform. Subsection (8) therefore allows a debtor to ask the assignor or assignee to provide a written statement as to whether the assignation is subject to a condition. It also allows them to ask whether the condition has been fulfilled. Under subsection (9), performance can be withheld until a statement confirming the position has been received.
92. A request for evidence, or a statement of grounds, need not be in writing. The written statements which are provided in response can be provided electronically; the only requirement is that they are in writing.
93. The right to withhold performance under this section is a free-standing right and separate from the protections provided for by sections 11 to 14 of the Act.
94. However, where there are co-debtors then subsection (10) provides that it is only the debtor who actually makes an information request under subsection (1), (5) or (8) who is entitled to withhold performance pending the provision of that information.

### **Accessory security rights**

#### ***Section 16 – Accessory security rights***

95. It is an existing rule of Scots law that where a claim is transferred, the assignee is entitled to the benefit of any accessory rights enjoyed by the assignor. This section puts the rule onto a statutory footing as regards accessory security rights.
96. Subsection (1) provides for this section to apply only to a claim assigned in whole (and not to a claim assigned in part). However, it makes it clear that the rule in subsection (2) is a default rule, leaving it open to the parties to an assignation document to agree that a right will not be acquired despite a claim being assigned in whole, or to provide that a right will be acquired despite the claim being assigned only in part. If only part of the claim is assigned, it is less clear whether (and to what extent) the assignee should acquire an accessory right. Any such right may, for example, relate to the whole obligation, and parties will therefore likely make their own provision in such cases. If they do not then the partial assignation will not carry the security right.
97. Subsection (2) has the effect that the assignation will transfer any security (or, where formalities are required, the right to any security) which relates to the claim transferred and which is restricted to that claim.

#### *Example 1*

David lends Edgar £100,000. Edgar grants a standard security over his house in respect of the £100,000 debt. If David assigns the right to repayment of the £100,000 to Flora then she acquires the security unless agreed otherwise.

#### *Example 2*

As for example 1, but the standard security is granted for all sums due and that may become due. The assignation of the right to repayment of the £100,000 does not carry the security unless agreed otherwise, because the security is not restricted to the £100,000.

#### *Example 3*

Same as for example 2, but the assignation document expressly states that the all sums security is carried. Flora acquires the security.

### **Example 3**

98. In terms of subsection (3), if the assignee acquires a security under this section then the assignor is required as soon as reasonably practicable to perform any steps necessary to transfer the security. For example, in the case of a standard security, an assignation under section 14 of the Conveyancing and Feudal Reform (Scotland) Act 1970 would require to be registered in the Land Register of Scotland to be effective. If this is not done, it would be open to the assignee to enforce their right to this by making a claim for specific implement against the assignor.
99. Subsection (4) defines “security” as including both a right in security (see section 41(1) of the Act) and cautionary obligations. A cautionary obligation is an accessory obligation given by a third party to ensure that a debt will be paid (for example, a personal security or guarantee).

### **Abolition of certain rules of law**

#### ***Section 17 – Abolition of certain rules of law***

100. Subsection (1) abolishes four common law rules insofar as they apply to assignations to which Part 1 applies:
- (a) The first is any rule that a mandate (personal instruction) to deal with a claim may operate as an assignation of the claim. The existing law on this matter is unclear.
  - (b) The second is any rule under which an assignation is made ineffective by an instruction given to the debtor by the assignee to continue to perform to the assignor. There is some authority suggestive of such a rule existing, which is inconvenient in commercial practice.
  - (c) The third rule is the one permitting the assignee to sue in the name of the assignor. The effect is that the assignee must raise proceedings in their own name.
  - (d) The fourth rule is any rule in relation to the warrandice to be implied in an assignation, or a contract relating to an assignation. Section 9 now deals with this matter.
101. Subsection (2) provides that the abolition of the third rule described above does not affect any rule as regards subrogation. Subrogation is the legal principle whereby someone stands in the place of another person and acquires that person’s rights and responsibilities, which may be regarded as a form of assignation. The effect is to preserve the well-established practice that insurers sue in the name of the insured in personal injury and other insurance cases.

### **Saving**

#### ***Section 18 – Saving as respects International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015***

102. This is a saving provision which relates to certain rights (known as “associated rights”) which are governed by the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912).
103. The 2015 Regulations implement the 2001 Convention on International Interests in Mobile Equipment (the “Cape Town Convention”). The Cape Town Convention makes provision, amongst other things, for an international security right in respect of aircraft objects (as defined in the Convention). There are special rules in relation to the assignment (assignation) of such a right, and the effect of this section is that these rules take precedence over the provisions in Part 1 of the Act. For example, regulation 27

of the 2015 Regulations deals with the effect of the assignment of “associated rights” (rights to payment or to other performance) on the related international interest.

## ***Chapter 2 – Register of Assignations***

### **Register of Assignations**

#### ***Section 19 – The Register of Assignations***

104. Subsection (1) establishes a new register for the registration of assignment documents which relate to the assignment of claims. The register is to be known as the “Register of Assignations”.
105. Subsection (2) provides that the register is to be under the management of the Keeper of the Registers of Scotland. Various provisions in this Chapter also require payment of a fee to the Keeper for certain things. The Keeper has powers under section 110 of the Land Registration etc. (Scotland) Act 2012 to set the level of fees payable in relation to any register under the Keeper’s management and control. As such, the effect of subsection (2) is also that these powers apply automatically to the RoA.
106. Subsection (3) states that, subject to the requirements laid down by the Act, the Keeper has discretion as to the form in which the register is kept. That would include the RoA being kept in a wholly electronic form.
107. The RoA, as with the other registers under the Keeper’s control, is a public asset. Subsection (4) therefore provides that the Keeper is to take such steps as appear reasonable to protect the RoA from interference, unauthorised access or damage (for example by hacking).
108. See also section 39 of the Act, which provides for the Scottish Ministers by regulations to be able to make rules (“RoA Rules”) as to the keeping of the RoA and related matters.

### **Structure and contents of the register**

#### ***Section 20 – The parts of the register***

109. This section provides that the Keeper must make up and maintain, as parts of the register, the assignments record and the archive record (see sections 21 and 22).

#### ***Section 21 – The assignments record***

110. This section sets out the information which must be included in an entry in the assignments record, and provides that the assignments record is the totality of such entries.
111. The information which must be included is largely self-explanatory. However, subsection (1)(k) requires the inclusion of any other information that is required under the Act. That might include, for example, information relating to a correction that is noted on the entry under section 30(2)(a).
112. The details of the assignee will be included in an entry in the assignments record, but a search against the assignee is not permitted under section 33 of the Act (unless the Scottish Ministers specify in RoA Rules made under section 39 of the Act that such a search is permitted). It will, however, be possible for an entitled person (within the meaning given in section 36 of the Act) to request certain information about the assignment from the assignee.
113. An assignor or assignee may be a legal person with an identifying number, such as a UK limited company or limited liability partnership. The Scottish Ministers will be able to specify that these identifying numbers are to be included in the entry in the assignments record: see section 39(2)(a)(ii) of the Act.

114. This section provides that an entry in the assignments record must include a copy of the assignment document. The Scottish Ministers may, however, specify in RoA Rules that information in the record, including information in the assignment document, will not be disclosed in a search of the RoA in order to protect confidential information of the parties (see section 39(2)(f)). Rules can also be made about information which can be redacted in the copy of the assignment document which is submitted (see section 39(2)(d) and (e)).

### ***Section 22 – The archive record***

115. This section sets out that the archive record consists of—
- first, all entries and copy documents which have been transferred to that record from the assignments record as a result of the correction of the assignments record (whether because an entry has been removed from the assignments record in its entirety, or whether a document on the assignments record has been replaced),
  - second, copies of any document which discloses, or contributes to disclosing an inaccuracy in respect of which a correction has been made,
  - third, any other documents the Keeper considers it appropriate to include, and
  - fourth, any other information required to be entered in the record by RoA Rules.
116. Entries will not move from the assignment record to the archive record simply because the claim which is the subject of the assignment is performed. The assignments record is simply a record of assignment documents which have been granted and which the assignee has chosen to register. It is a snapshot of a moment in time, rather than an ongoing reflection of the status of the claim. However, an entry may be transferred to the archive record if a correction is made to reflect the fact that the entry should never have been created. For example, if a fraudulent assignment document is registered, a correction may be made to remove the entry.

## **Registration process**

### ***Section 23 – Application for registration***

117. Subsection (1) enables the assignee, and only the assignee (or the assignee’s agent – see section 120(4)), to apply to the Keeper to register an assignment document in the RoA.
118. Subsection (2) requires the Keeper to deal with applications for registration of assignment documents in the order in which they are received. The effect is to protect the priority of registration of an assignment document (and therefore of ranking of claims in, for example, an insolvency).
119. Subsection (3) sets out that the Keeper must accept the application if it is submitted with a copy of the assignment document, contains all the information the Keeper requires to make up an entry, conforms to RoA Rules, and the fee due to the Keeper is – or will be – paid. Rules can be made about information which can be redacted in the copy of the assignment document which is submitted (see section 39(2)(d) and (e)).
120. Subsection (4) provides that the Keeper must reject an application if any of the requirements mentioned in subsection (3) are not satisfied.

### ***Section 24 – Application for registration where claims assigned to different assignees***

121. This section deals with the case where one assignment document assigns different claims to different assignees. It ensures that individual assignees will still retain control over registration as it relates to the claim assigned to them. It therefore provides that

the application for registration will be made only in relation to the claim assigned to that individual.

122. Subsection (2) provides for how various terms in the Act are to be read in cases where an assignment document of this nature is being or has been registered.

### ***Section 25 – Registration***

123. Subsection (1) provides that the Keeper must, on accepting an application, make up and maintain the appropriate entry in the RoA, which includes allocating a registration number (as defined in section 120(1) of the Act).
124. Subsection (2) provides that an assignment document is taken to be registered on the date and at the time originally entered for it. In other words, even if the registration of an assignment document is ineffective and becomes effective only once it is corrected (see section 27(3)), the date and time of registration of the assignment document will still be the date and time of the initial (i.e. ineffective) registration. However, it is the time of effective registration that is critical for transfer of the claim (see section 3).

### ***Section 26 – Verification statement***

125. Subsection (1) provides that the Keeper must, after registering an assignment document, send a statement to the assignee (i.e. the applicant) and the assignor verifying what has been done – but only if the application contains email addresses for them. If an email address has not been included for either the assignor or the assignee then there is no obligation on the Keeper to send that person a statement. Subsection (2) makes provision about the content of the statement.
126. As the application will have been made by the assignee, it can be assumed that they will provide their correct email address. However, the correct email address may not be given for the assignor. In circumstances where the assignor does not receive a verification statement from the Keeper (for example, because no email address was provided by the assignee or the email address provided was incorrect) the assignor may, under subsection (3), request a copy of the verification statement from the assignee. Under subsection (4), the assignee must supply the copy within 21 days.

## **Effective registration**

### ***Section 27 – Effective registration of assignment document***

127. Subsection (1) sets out three cases in which a purported registration of an assignment document in the assignments record is ineffective, with the result that the claim will not transfer by reason of registration—
- The first case is that the entry does not include a copy of the assignment document.
  - The second case is that the entry contains an inaccuracy which, as at the time of registration is “seriously misleading” (for which see section 28(1)).
  - The third case is that the assignment document is invalid, for example because it is a forgery.
128. As such, it is crucial that the assignment document is included in the entry (and is valid). If anything else is missing from the entry, the registration will still be effective unless the entry is considered seriously misleading by reason of the omission (i.e. the second case cited above applies, under which missing or incorrect text can lead to the entry being considered seriously misleading).
129. The effect of determining whether or not an entry is seriously misleading as at the time of registration is that a supervening inaccuracy (for example, the record being



incorrectly restored after an IT malfunction) will not render ineffective any transfer of the claim which took place by reason of the initial effective registration.

130. Subsection (2) makes subsection (1) subject to section 28(1)(c) and (d), with the effect that a registration may be partially effective as regards the claim or as regards co-assignors or co-assignees.
131. Subsection (3) enables an ineffective registration to become effective by means of a correction. The effect of this provision, when read with section 29(5) of the Act, is that the registration becomes effective (and, subject to the other requirements of section 3 being met, the claim transfers) on the date of the correction.

### ***Section 28 – Seriously misleading inaccuracies in the assignments record***

132. This section makes provision as to whether an entry in the assignments record is seriously misleading as a result of an inaccuracy or inaccuracies in it. This applies for determining whether a registration is an effective registration for the purposes of section 27 of the Act. Section 29(3) of the Act provides for the meaning of “inaccuracy” in the assignments record.
133. Subsection (1)(a) of section 28 provides that an inaccuracy will be seriously misleading if any of subsections (2) to (5) apply or if, despite none of them applying, the inaccuracy or inaccuracies are such that a reasonable person would be seriously misled by the entry. In other words, if any of the examples in subsections (2) to (5) apply then the inaccuracy will be seriously misleading (whether or not any person was actually misled), but those examples are not exhaustive and there may be other inaccuracies that are found by the courts to be seriously misleading. Whether an inaccuracy is seriously misleading or not is to be determined objectively.
134. Subsection (1)(b) provides that any inaccuracy is to be disregarded to the extent that it appears in the assignment document but is not replicated elsewhere in the entry. The effect is that the person searching the record does not have to look at the document to determine whether the details in the record are seriously misleading (although a copy of the assignment document must still be part of the entry in the assignments record and can, for instance, be used as evidence to show that the entry itself was inaccurate).
135. Subsections (1)(c) and (d) deal with an inaccuracy that relates only to part of a claim, or to one co-assignor or co-assignee. These provisions have the effect that an inaccuracy in the assignments record may be seriously misleading in that respect only, and therefore the registration of the assignment document will be partly effective.
136. Subsections (2) and (3) focus on whether an entry contains an inaccuracy that prevents it being disclosed by a properly formatted search. Such an inaccuracy will generally be regarded as being seriously misleading. The point at which the search should be able to disclose an entry is by reference to the person’s name at the date the application for registration was made (which, due to the automated nature of the register, will almost always be virtually the same time as the time at which the entry for the assignment was made up in the RoA). This is necessary given that the Act does not require (as opposed to permit) the updating of an entry to correct a supervening inaccuracy such as a change of name by the assignor (for example, on marriage).
137. Subsection (2) has the effect that an entry is seriously misleading where the assignor (or co-assignor) is a person required by RoA rules to be identified in the assignments record by an identifying number (e.g. a company is likely to be required to be identified by their company number) and where, if a search of the record were to be carried out for that number using the search facility provided under section 33 of the Act, it would not disclose the entry. Given that a company’s number should not change, this situation is only likely to arise where a typo has been made in completing the initial application form, or where the data has been transferred to the register incorrectly. However, it does not matter if the company’s name is wrong as the expectation is that it should

be searched for by reference to its number (which will not change in the way that its name might).

138. Subsection (3) has the effect that an entry is seriously misleading where the assignor (or co-assignor) is not a person required by RoA rules to be identified in the assignments record by an identifying number and where, if a search of the record were to be carried out for the assignor's proper name at the date the application for registration was made, or their name at that date together with their month and year of birth, it would not disclose the entry. This might arise where, for example, there has been an error in completing the application form (or in transferring that data onto the register) and the assignee's and assignor's names have been swapped around, or where a typo has been made in providing the assignor's name or date of birth, etc. Under subsection (3), an error will be seriously misleading if it means that the search function would not find the entry. As such, if the search function is set up to allow close matches (e.g. to show entries with the surname "Thompson" when a search is made for "Thomson") then a typo in a register entry may not lead to the entry being considered seriously misleading, but if the search function provides exact matches only then a typo of this nature in the information in the register will lead to the entry being considered seriously misleading.
139. Under subsection (3), it is both the assignor's name and their month and year of birth which matter. This means that even if the search function is programmed to be more forgiving of errors in names if the month and year of birth are also included in the search (and are correct), the entry will still be seriously misleading if the name is wrong to the extent that a search by name alone would not disclose the entry, because it ought to be possible to find the entry by the name alone. However, it is also not enough for the name to be correct; if it is correct but the month/year of birth is wrong, this will also be seriously misleading.
140. Subsection (4) has the effect that an entry is seriously misleading where the name of the assignee (or co-assignee) at the date of application is incorrectly reflected in such a way that a reasonable person would be seriously misled. This might arise in much the same way that an error in the assignor's name might arise. Because it will not be possible to search by assignee under section 33 (unless RoA Rules alter the position), the position is not determined by reference to whether a search result would return the entry. The application of the reasonable person test means that minor errors such as typos might be disregarded, particularly if other information is correct, but the position will be viewed as a whole in the circumstances of each case. However, the test applies by reference to the assignee's name at the date of the application. If their name has since changed, there is no obligation on them to update the register to reflect that.
141. Subsection (5) has the effect that an entry is seriously misleading where there is a requirement (by virtue of section 21(1)(g)) for the entry to specify the type of claim assigned but the claim is described as being of the wrong type, or left blank. For example, if the type of claim is a claim to payment of royalties but by mistake it is instead entered as a claim to payment of rent or left unspecified, that would be seriously misleading.
142. Subsection (6) applies the rules in this section to circumstances where there are co-assignors and co-assignees.
143. Subsection (7) enables the Scottish Ministers to modify this section to make provision about what does, and what does not, make an entry seriously misleading and how that is to be determined.
144. Subsection (8) provides that the proper name of a person means the person's name in the form required by RoA Rules, which might also prescribe a hierarchy of document that could be used to evidence a proper name: for example, a passport, driving licence, or a birth certificate.

## **Corrections**

### ***Section 29 – Correction of the assignments record***

145. Subsection (1) of this section provides that where a court determines that the assignments record is inaccurate, it must direct the Keeper to correct the record, and may give the Keeper any further direction it considers necessary. The Keeper would be expected to act on that direction (as to do otherwise would risk the Keeper being held in contempt of court). Section 120(1) of the Act sets out that “court” means the Court of Session or the sheriff.
146. The Act does not provide for an express right of appeal against, or a review of, a registration decision by the Keeper. However, an issue relating to the accuracy of the register might be raised in other proceedings, including in a judicial review of such a decision.

#### *Example 1*

An assignment document is reduced (i.e. annulled) by the court because it has been forged by one of the purported parties to the document. The court can direct the Keeper to correct the entry in the assignments record.

#### *Example 2*

An entry is created in the assignments record for an assignment document granted by P Ltd in favour of Q Ltd. But in the application form for registration of the assignment, Q Ltd erroneously states that Z Ltd is the assignor. Z Ltd could ask the court to correct the entry, although if the inaccuracy is manifest (as is likely) then it might prefer to seek a correction under section 29(2) of the Act (or, if applicable, under any application route that might be introduced under section 32 of the Act).

147. In contrast with subsection (2), the court does not require to determine under subsection (1) whether there is a manifest inaccuracy, or indeed whether what is needed to correct the inaccuracy is manifest. The function of the court as provided for by this subsection is to make a determination, and direct accordingly.
148. Subsection (2) provides that where the Keeper becomes aware of an obvious inaccuracy, the Keeper must correct the assignments record provided that what is needed to correct the inaccuracy is also obvious. If the correction needed is not obvious, then the Keeper must instead note the inaccuracy on the entry in question. This duty does not cover where the Keeper becomes aware of the inaccuracy by way of a direction given by the court, as that situation is already dealt with by subsection (1).
149. Subsection (3) sets out what is meant by an “inaccuracy”. It provides that there is an inaccuracy in the assignments record where the information that an entry is to comprise of is inaccurate or complete, an entry does not include a copy of the assignment document (or includes such a copy but the document is invalid), or an entry has been incorrectly removed from the record.
150. Subsection (4) sets out what a correction of the assignments record may involve.
151. Subsection (5) sets out that a correction is taken to be made at the date and time entered in the RoA for the correction. This is particularly important as regards section 27(3) of the Act, under which an ineffective registration may be made effective by a correction, with the result that the claim will transfer (provided that the other requirements under section 3 are also met).

### ***Section 30 – Correction of assignments record: procedure***

152. Subsection (1) provides that where the Keeper corrects the assignments record by removing an entry, the Keeper must transfer the entry to the archive record. The Keeper must also note on the transferred entry whether the Keeper removed the entry because

it was directed to by a court, or because the Keeper became aware of an obvious inaccuracy other than as a result of such a direction.

153. Subsection (2) provides that where the Keeper corrects the assignments record by restoring, removing or amending information included in an entry, the Keeper must note on the entry that it has been corrected. In the case of the replacement of a copy document, the Keeper must also transfer the replaced copy to the archive record.
154. In both instances, the Keeper must give details of the correction including the date and time of the removal or (as the case may be) the correction of the entry. The Keeper must also include in the archive record a copy of any document which discloses or contributes to disclosing the inaccuracy which is the subject of the correction.
155. Subsection (3) provides that once the record has been corrected the Keeper must, to the extent that it is reasonable and practicable to do so, notify every person required by RoA Rules and any other person who appears to the Keeper to be affected by it materially that a correction has been made. This is not an objective test and will be confined to facts within the Keeper's knowledge.
156. Subsection (4) provides that the validity of a correction of the record will not be affected if the Keeper fails to include in the archive record a copy of any document which contributes to disclosing the correction or fails to notify any person of the correction.

### ***Section 31 – Proceedings involving the accuracy of the assignments record***

157. This section provides that the Keeper is entitled to appear and be heard in any civil proceedings where a question arises regarding the accuracy of the assignments record, or what is needed to correct it.

### ***Section 32 – Power to make provision about applications for corrections***

158. This section provides that the Scottish Ministers may by regulations modify Part 1 of the Act to make provision for or about applications to the Keeper for the correction of an entry in the register. This would allow, for example, provision comparable to the corrections process for statutory pledges in Part 2 of the Act to be introduced in respect of assignment documents (although supervening inaccuracies will not be relevant in the same way here as the RoA is not designed to show the ongoing position in relation to a claim). This section would also allow a fee to be imposed for such applications.

## **Searches and extracts**

### ***Section 33 – Searching the assignments record***

159. The RoA is a public register (see section 19(1) of the Act). Subsection (1) of this section provides that the Keeper must provide a search facility by which the assignments record may be searched.
160. Subsection (2) sets out that only such searches in the assignments record as are specified in this subsection, or as are specified under RoA Rules, are permitted. This restriction on searches has two effects:
  - First, it reduces the risk of identity theft by ensuring that it will not be possible to search against date of birth, or against the month and year of birth alone. The Scottish Ministers will also be able (through RoA Rules) to prevent dates of birth from being disclosed on the face of the Register, or to limit the number of searches by reference to the same name and different months and years of birth that can be made in a particular time period.
  - Second, it reduces the risk of unfair commercial practices by not permitting a search against the assignee (typically, a bank or finance company) which might enable a competitor to obtain a list of customers.

161. Subsection (3) provides that any person may search the assignments record on payment of any fee (or making an arrangement to pay).
162. Subsection (4) provides that no fee is payable for a search of the assignments record carried out by a not-for-profit money adviser who does not charge individuals for the services that they provide and who is acting on behalf of an individual in carrying out the search. Under subsection (5), the Scottish Ministers are given the power by regulations (subject to the negative procedure) to make further provision about what “not-for-profit money adviser” means for these purposes.
163. The Act does not make provision for the Keeper to provide a search mechanism for the archive record, nor for a person to be entitled to use that mechanism. The Scottish Ministers may, however, make provision to that effect in RoA Rules made under section 39(1)(c) of the Act. It is also open to any person to obtain from the Keeper an extract of an entry in either the assignments record or archive record under section 35 of the Act.
164. Section 27 of the Act has the effect that it must be possible to carry out searches for the purposes of the “seriously misleading” test. It will therefore be for the Scottish Ministers to make such RoA Rules as are needed under this section for those purposes. RoA Rules will, amongst other matters, be able to determine whether the search criteria will provide for an exact match or a close match search.

#### ***Section 34 – Admissibility and evidential status of search results***

165. This section provides that a copy of a search result, relating to a search carried out by means of a search facility provided by the Keeper, may be used as evidence of certain matters and, moreover, to prove certain matters unless there is evidence to the contrary. A search result may be in printed or electronic form.
166. This section should be read with section 35, which provides that an extract from the RoA will provide evidence of the contents of the relevant entry at the relevant date. It cannot be rebutted by other evidence (though liability is imposed on the Keeper for errors in extracts under section 37(1)(e) of the Act). It should also be noted that RoA Rules may prescribe by virtue of section 39(2)(f) that certain information on the register (for example, a precise date of birth) is not to be included in search results.

#### ***Section 35 – Extracts and their evidential status***

167. This section enables any person to obtain from the Keeper an extract of any entry or part of an entry in the RoA, on payment of any fee (or making an arrangement to pay). An extract is (irrebuttable) evidence of the contents of an entry at the relevant time (which is either the time the extract is issued or, in the case of a point-in-time extract requested by virtue of subsection (3), the time to which the extract relates), and can be used for the purpose of proving a fact in any court or tribunal proceedings. Liability is imposed on the Keeper for errors in extracts under section 37(1)(e) of the Act. It should also be noted that the ability to obtain an extract is subject to the ability under section 39(2)(f) for RoA Rules to prescribe that certain information on the register (for example, a precise date of birth) is not to be included in an extract.

### **Request for information**

#### ***Section 36 – Assignee’s duty to respond to request for information***

168. This section provides for an entitled person (as defined) to be able to request information about an assignment from the person identified as the assignee in the assignments record. The request does not require to be in writing, but the response does.
169. Subsection (1) sets out that the information that may be requested is, first, whether a particular claim is assigned by the assignment document, second, whether the registered

*These notes relate to the Moveable Transactions (Scotland)  
Act 2023 (asp 3) which received Royal Assent on 13 June 2023*

assignee has granted an assignation document which will further assign the claim and, third, whether a condition to which the assignation is subject has been satisfied. The right to request these types of information is of particular importance where a claim is assigned before it is held by the assignor (a “future” claim) or in the case of a conditional assignation.

170. Subject to subsection (8) (which enables the Scottish Ministers to modify this section so as to specify further entitled persons), by virtue of subsections (2) and (3), an entitled person is:
- (a) a person who may have a right to execute diligence against the claim (including, in the case of a charge for payment, where that right will only arise once the days of charge expire without payment),
  - (b) a person who has the consent of the registered assignor to make the request.
171. Subsection (4) gives the person named as assignee in the assignments record 21 days to respond. An exception to the obligation to respond applies where—
- it is clear that the registration of the assignation document is ineffective in relation to the claim being enquired about,
  - if the request relates to whether the claim is assigned by the assignation document, it is clear from the entry that the claim is not assigned by the document, or
  - the information has been given to the person within the last three months and it has not changed.
172. Subsection (5) allows the reasonable costs of responding to the request to be charged to the person making the request.
173. If the person of whom the request is made wishes to, they can apply to the court for either an exemption from complying (in whole or in part) or an extension. Subsection (6) gives the court power to grant either of these things. For example, depending on the circumstances, 21 days may be too short a period to assemble the necessary information.
174. If the entitled person does not receive a response, they can apply to the court in respect of that failure. Subsection (7) enables the court to order the person named as the assignee to comply with the request for information within 14 days or such other period as the court specifies. Failure to comply with such an order would risk the person being held to be in contempt of court.
175. The effect of this section is that persons with a legitimate interest in a claim that may be the subject of an assignation document will be able to obtain information that might not otherwise be available by searching the RoA.

*Example*

D Ltd is a plumbing business. It assigns its “future” customer invoices to B Ltd, to be identified on schedules to be sent to B Ltd. Subsequently D Ltd becomes insolvent. Its liquidator requires to see whether certain invoices have been assigned and makes an information request under this section.

176. Where incorrect information is supplied under this section, there may be consequences under section 38.

## **Entitlement to compensation**

### ***Section 37 – Liability of Keeper***

177. This section provides for the Keeper to compensate any person who has suffered a loss in consequence of a matter specified in subsection (1). Liability under subsection (1) is strict, in that the person does not have to show that the Keeper is at fault (as opposed

to, say, arising from an unavoidable malfunction of the Keeper's automated systems). However, subsection (2) limits the losses that can be recovered by excluding certain types of claim.

178. Subsection (3) provides more information about what is meant in subsection (1)(a) by "an inaccuracy which is attributable to the making up, maintenance or operation of the register". It provides that an inaccuracy in information included in an entry in the assignments record when the entry is made up or corrected is not covered by subsection (1)(a) to the extent that the Keeper has been misled into making the inaccuracy and reasonably believed the information to be accurate. Subsection (4) provides that circumstances in which the Keeper is entitled to reasonably believe information to be accurate include if it is provided in connection with an application to which the entry relates, or by the court. As such, if the Keeper faithfully replicates the information provided in an application form and that information proves to be incorrect, that is not an inaccuracy for which the Keeper is liable, though the person who submitted the application may be liable under section 38. Subsection (4) is not exhaustive of the circumstances in which the Keeper is entitled to reasonably believe that information is accurate.

### ***Section 38 – Liability of certain other persons***

179. This section provides for certain persons to be liable, on fault being shown, for losses suffered by another person in consequence of a matter specified in subsection (1).
180. Subsection (1)(a) applies where a person suffers loss as a result of an inaccuracy in an entry in the assignments record. It applies where the person who made the application which led to the entry did not exercise reasonable care, or where the person notified the Keeper of an apparent inaccuracy without taking reasonable care.

#### *Example*

Bruce maliciously registers a forged assignment bearing to be granted by Claire in an effort to affect her credit rating. Claire has a claim against Bruce if she suffers loss.

181. Subsection (1)(b) applies where, as a result of a failure to take reasonable care, there is an inaccuracy in responding to an information request under section 36 of the Act.

#### *Example*

Information is supplied by Brian that a certain claim is not carried by an assignment from Andrew to Brian. But Brian does not take reasonable care, and the information is wrong. The person who receives the information then takes an assignment of the claim from Andrew, which will be invalid because it has already been transferred to Brian. That person will have a claim against Brian.

182. Subsection (1)(c) applies where a person has failed, without reasonable cause, to provide information under section 36 of the Act.

#### *Example*

Alan has granted an assignment document of certain claims to Bob. The Selkirk Bank is considering whether or not to lend money to Alan, and seeks information from Bob (with the consent of Alan) about which claims are assigned. Bob does not comply with the request, and the bank obtains a court order. Bob still does not comply, and the bank decides not to make the loan. Alan has a claim against Bob for loss suffered due to being unable to obtain a loan from the bank.

183. Subsection (2) imposes the same restrictions on liability as those set out in section 37(2) of the Act.

## **Rules**

### ***Section 39 – RoA Rules***

184. This section sets out that the Scottish Ministers may, by regulations, make rules (RoA Rules) providing for the operation of the RoA. They must consult the Keeper before doing so.
185. The power to make RoA Rules includes the power to authorise the redaction of information or signatures from an entry in the RoA (paragraphs (d) and (e) of subsection (2)), as well as the power in subsection (2)(f) to make certain information unavailable to searchers (which might include an individual’s date of birth). Subsection (1)(c) would also permit the rules to specify the specificity with which the search mechanism for the register is to operate – for example, whether it returns close results or only exact matches. If a correction application route is introduced under section 32, the rules could also make provision about the procedure in relation to such applications.

### ***Chapter 3 – Miscellaneous and interpretation of Part 1***

#### ***Section 40 – Repeal of Transmission of Moveable Property (Scotland) Act 1862***

186. The Transmission of Moveable Property (Scotland) Act 1862 makes provision for intimation of claims. It is superseded by the Act. It is therefore repealed by this section.

#### ***Section 41 – Interpretation of Part 1***

187. This section defines key terms used in this Part of the Act. It should be read alongside section 120 which defines some terms for the purposes of the whole Act, as well as schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.
188. In particular, subsection (1) defines a “claim” as the right to the performance of an obligation (including the fulfilment of negative obligations), but excluding for that purpose both non-monetary rights relating to land and negotiable instruments. It also makes it clear that the references in the Act to a “right in security” mean a right in security over property. The meaning of the expression is therefore limited to “true” securities where the secured creditor has a subordinate real right in the asset. A right in security includes a floating charge, but does not include a right to execute diligence in satisfaction of sums due under a court order (or equivalent).