

# MOVEABLE TRANSACTIONS (SCOTLAND) ACT 2023

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2 – Security over Moveable Property**

##### *Chapter 1 - Pledge*

#### **Enforcement of pledge**

##### *Section 63 – The expression “pledge” in sections 64 to 77*

284. Sections 64 to 77 set out a statutory framework for the enforcement of both possessory and statutory pledges.
285. This section provides that the expression “pledge” for the purposes of those sections does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974. The effect is that a 1974 Act pledge (described in that Act as a ‘pawn’) falls to be enforced under the enforcement regime in respect of loans by pawnbrokers in that Act.

##### *Section 64 – Enforcement of pledge: general*

286. This section sets out, as a general rule, that a pledge can only be enforced using the methods provided for by the Act.

##### *Example*

Barry lends David £1,000, and in exchange David grants a statutory pledge over a vintage car worth £100,000. The Act does not permit the forfeiture of encumbered property, and it is therefore unlawful for Barry to require in the event of a default that the car is forfeited to him so that he receives a windfall worth £99,000.

287. Subsections (2) and (3) have the effect that a pledge may be enforced in any lawful manner where the secured obligation is defaulted upon, or in such circumstances are as agreed in writing by the provider and the secured creditor. For example, the parties might agree in writing that the pledge will be enforced only if a certain number of days have elapsed without the default being remedied.
288. Subsection (4) requires the secured creditor to conform to reasonable standards of commercial practice. Similar provision can be found in regulation 24 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912). What is unreasonable for the purposes of subsection (4) will differ from case to case, but might include taking an excessively long period to complete an enforcement procedure.
289. Subsection (4) does not, however, specify to whom the duty to conform to reasonable standards is owed, and so the general law will apply. The duty might for example be

owed to any of the provider, the debtor (if different), another creditor, or an office-holder such as the liquidator of a limited company. See also the analogous duties in sections 68(2), 70(2) and 71(2) on the enforcing creditor to obtain the best reasonably attainable value where encumbered property is sold, let or licensed.

290. Subsection (5) provides that the ability to enforce a pledge is subject to section 55(3) (the prohibition on enforcing a pledge against a motor vehicle before it is transferred to a purchaser or hirer), section 65 (the requirement to serve a pledge enforcement notice) and section 66 (the requirement for a court order in certain cases).

### ***Section 65 – Pledge enforcement notice***

291. Subsection (1) provides for a pledge enforcement notice to be served on the provider and other specified interested persons (if any). This must be done before any enforcement action can be taken by the secured creditor. A notice would, for example, require to be served on any person occupying a motorhome or houseboat encumbered by a statutory pledge. However, subsection (2) provides some exceptions for cases where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons with a right to receive a notice.
292. The form of the notice will be set out in regulations made by the Scottish Ministers (see section 120 for the meaning of “prescribed”). Ministers are able to prescribe different forms of notice for different categories of provider or occupier (see section 118(1)(b) which allows the regulation-making power to be exercised in a way that makes different provision for different purposes). For example, a form for individual providers who are able to grant a pledge under section 46 might contain information on how to obtain legal advice and the information that the creditor will need to obtain a court order before the pledge can be enforced. If the form used is not quite the same as the prescribed form, it may still satisfy the requirement to serve the notice but it is likely that any divergence would have to be trivial.
293. Subsection (3) makes it clear that the requirement to serve a pledge enforcement notice is subject to section 88 of the Consumer Credit Act 1974, which requires a 14-day default notice (as defined in section 87 of that Act) to be served before the enforcement of any right in security which is subject to that Act. As such, if the 1974 Act applies then a default notice under that Act will have to be served 14 days before the pledge enforcement notice can be served.
294. The Scottish Ministers are also able by regulations under subsection (4) to require that, in addition, a pledge enforcement notice must be given to specified persons who have statutory duties in relation to the provider’s property (as is the case, for example, in an insolvency). Exceptions to this may also be provided for (for example, where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of the person).

### ***Section 66 – Whether court order required for enforcement***

295. Subsection (1) confirms that a court order is only required for enforcement in the circumstances set out.
296. Under subsection (2), a court order is required before a pledge is enforced against an individual where the individual is a sole trader and the enforcement is against business assets.
297. Subsection (3) deals with property subject to a statutory pledge which is the sole or main residence of an individual, although that will be unusual as a pledge can only be granted over moveable property. It may, however, be relevant on occasion in relation to, say, a caravan or a houseboat. A court order is required unless there is a written agreement to enforcement, after the pledge becomes enforceable, between the person in residence, the provider (if a different person) and the secured creditor. If such an order is sought, it

cannot be granted unless it is reasonable to do so (see subsection (4)), and subsection (5) sets out some of the factors which may require to be considered by the court.

***Section 67 – Secured creditor’s right to take possession of, or steps in relation to, corporeal property***

298. This section provides for the enforcement of a statutory pledge by the secured creditor following service of a pledge enforcement notice and, where appropriate, following the obtaining of a court order. It enables the secured creditor to take possession of the encumbered property from, typically, the provider.
299. As well as the taking of possession being enabled under subsection (2)(a), subsection (2) (b) enables the creditor to take any reasonable steps necessary to ensure that the property is not disposed of or used in any unauthorised way. This is aimed at larger assets such as machinery where it might be more convenient to sell them on site. The secured creditor may simply want to immobilise the asset, so that it cannot be removed before any planned sale.
300. Possession may only be lawfully taken using one of three methods. First, it may be taken where consent has been obtained from certain persons. Second, it may be taken by an authorised person under subsection (7), such as a sheriff officer. This may or may not require the consent of the court depending on who holds the property. Third, it may be taken by the secured creditor personally if authorised by the court.
301. Subsection (3) deals with the situation where the property is in the possession of an equal or higher ranking secured creditor, or a creditor who has executed higher or equivalently ranking diligence against the property. In such cases, that person is the person whose consent is relevant if opting for the first method of taking possession. For example, it may be that the higher ranking creditor does not wish to enforce its security and so is willing to give consent.
302. Subsection (4) deals with the situation where the property is in the possession of anyone else. This will usually be the provider, but could be a third party. In such cases, the provider’s consent is required if opting for the first method of taking possession. Where the property is held by a third party then that person’s consent is needed as well.
303. Subsection (6) enables the secured creditor, acting through an authorised person, to remove any individual from the encumbered property. This might be necessary where the encumbered property is, for example, a motorhome or houseboat.
304. Subsection (7) defines “authorised person” for the purposes of this section, but this is subject to subsection (8) which enables the Scottish Ministers to, by regulations, specify other persons as authorised persons.

***Section 68 – Secured creditor’s right to sell***

305. This section sets out the standard remedy for the secured creditor following service of a pledge enforcement notice (and where appropriate the obtaining of a court order): a right to sell the property at the best reasonably attainable price (subsections (1) and (2)). The secured creditor will need to be able to convey the encumbered property to the purchaser, and may first require to take possession of the property under section 67 of the Act.
306. The secured creditor may also purchase the encumbered property themselves, but only in the limited circumstances set out in subsection (3).
307. Subsection (4) requires that the secured creditor holds the proceeds of sale in trust until they are distributed under section 77 of the Act. It is similar in effect to section 27 of the Conveyancing and Feudal Reform (Scotland) Act 1970, which provides for the proceeds of sale under a standard security over land. A standard security is another form of subordinate real right in security.

**Section 69 – Sale: unencumbered acquisition**

308. This section provides for the effect of a sale of the encumbered property under section 68 on the rights of:
- (a) any creditor under another security that encumbers the property, and
  - (b) any unsecured creditor who has attached or arrested the property in connection with enforcing a court order for payment (diligence).
309. It provides that the purchaser acquires the property free of the pledge that is being enforced, and of any rights in security or diligence which rank equally with or after the pledge.
310. It provides a separate rule for higher ranking rights in security or diligence. These continue to encumber the property unless the relevant creditor consented to the sale.

**Section 70 – Secured creditor’s right to let**

311. This section has the effect that where it is lawful to sell encumbered property under section 68 of the Act, it is also lawful to lease the property provided it is done for the best reasonably obtainable income. Just as with a sale, the income is to be held in trust until distributed under section 77.
312. Subsections (4) and (5) provide for the parties to be able to agree in writing at any time to exclude leasing as a remedy available to the secured creditor on enforcement. For example, the provider may wish to have sale as the sole remedy on the basis that this would pay off the secured debt more quickly (and the creditor may also favour speed).

**Section 71 – Secured creditor’s right to grant license over intellectual property**

313. A licence of intellectual property is effectively a lease of that type of property (although it is not necessarily exclusive), and this section has therefore a similar purpose and effect for such property as section 70 does for property that can be leased – see paragraphs 311 and 312 of these Notes. However, the right to grant a licence over intellectual property only applies to the extent that the provider themselves would be entitled to do so.

**Section 72 – Secured creditor’s right to protect and manage the property**

314. This section provides for a secured creditor who is entitled to sell encumbered property under section 68 to be able to take additional measures to protect *et cetera* the property as specified in the section, and to preserve its value. These rights operate in addition to the rights under section 67(2)(b) to take reasonable steps to ensure that property is not disposed of or used in an unauthorised way (which might also be characterised as a right to protect the property and therefore be covered by subsection (1)).

**Section 73 – Secured creditor’s right to appropriate**

315. Sections 73 to 76 of the Act provide for a secured creditor who has served a pledge enforcement notice to be able, in specified circumstances, to appropriate the encumbered property themselves as the means of enforcement of the pledge. This is not the same as forfeiture of the property, which is not permitted. Forfeiture is where ownership of an asset is simply forfeited altogether, regardless of its value, meaning in this context that if the value of the item exceeded the debt then the surplus would not be returned to the debtor. In contrast, appropriation allows ownership to transfer to the creditor (subject to all interested parties agreeing) but, to the extent that the value of the item exceeds the debt and costs of enforcement, the creditor is required to return the surplus to the debtor.
316. This section provides in subsection (1) for the general right to appropriate. A creditor who appropriates property becomes the owner of the property.

317. Subsection (2) excludes appropriation in specified cases. In particular, it prohibits the appropriation of:
- corporeal property that is not possessed by the creditor (for practical reasons), and
  - property where the value is greater than the amount remaining due under the secured obligation (including reasonable expenses) without reimbursing the excess.
318. There is the potential for abuse of a right to appropriate encumbered property, as the value of the property could greatly exceed the sum due to the secured creditor. Subsection (2)(b) therefore safeguards the interests of the provider of the pledge by providing for the secured creditor to be able to appropriate property with a value greater than the sum due to the creditor, but only if the creditor holds a sum representing the excess value in trust pending distribution under section 77 of the Act.
319. [Sections 74](#) and [75](#) provide for, respectively, appropriation with, and without, a prior agreement to the use of appropriation by the secured creditor as a remedy on enforcement.

### ***Section 74 – Appropriation with prior agreement***

320. Subsections (1) and (2) allow the provider and the secured creditor to agree in writing, in advance of any enforcement of the secured obligation, that the creditor may appropriate the encumbered property (subject to certain conditions).
321. An agreement to appropriate may only have effect as respects property in respect of which the agreement sets out a method of easily determining a reasonable market price (see subsection (3)). That might include, for example, an agreement in relation to appropriation of used cars which states that an average of the prices listed in a specified used car guide is to be used to determine the value on appropriation.
322. Under subsection (4), appropriation occurs only at the market value, as determined in accordance with that agreement, on the date of appropriation. If the value of the item is more than the secured debt, section 73(2)(b) will apply and the balance must be held in trust and applied in accordance with the provisions of the Act.
323. Subsection (5) requires notice of the intended appropriation to be given to the parties it will affect. The list is self-explanatory, though it should be noted that it may be expanded by regulations under subsection (9)(a)(i). There are also exemptions under subsection (6) where the secured creditor does not know, and cannot reasonably be expected to know, of the existence of certain persons. These can be expanded by regulations under subsection (9)(a)(ii) where a similar exemption is appropriate in respect of someone added to the list by regulations under subsection (9)(a)(i).
324. Subsection (7) sets out that the notice of intended appropriation must identify the property to be appropriated, and specify both the amount owing to the secured creditor and the amount expected to be obtained by the appropriation. It is recognised that in cases where the asset is insufficient to meet the full value of the debt, the exact amount to be obtained by the appropriation may not be known in advance since the asset's value is to be based on the date of appropriation. The notice must also give the parties notice of their right to object (where applicable) and explain the consequences of such an objection being received within the relevant time limit.
325. Subsection (8) gives a number of the parties on whom the notice is served a right to veto the appropriation, provided that their objection is received by the secured creditor within 14 days beginning with the day of receipt of the notice of the intended appropriation. However, the provider and the debtor are excluded from having a right of veto because the section is concerned with cases where the provider has expressly entered into a prior agreement allowing appropriation. Where the appropriation is vetoed, the secured creditor must inform the other recipients of the notice of the intended appropriation that it is no longer going ahead.

326. Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides for a number of assumptions as to when documents will be received if they are sent in certain ways. While these presumptions can be rebutted by evidence to the contrary, they are likely to be relevant to a party objecting when calculating if it is likely that the objection will be received in sufficient time.
327. Subsection (9)(b) allows the Scottish Ministers by regulations to modify this section so as to replace the requirements as to what the notice must contain with a requirement to instead use a form laid out by Ministers in regulations. It also allows them to modify any such form from time to time.

### ***Section 75 – Appropriation without prior agreement***

328. This section is similar to section 74 but deals with the situation where there is no prior agreement to appropriation. Given that there is no agreement, the provider is entitled to object in principle to the use of appropriation in respect of the particular encumbered property, as is the debtor (who will often, but not always, also be the provider).
329. Under subsection (2), any appropriation must be for an amount which bears a reasonable relationship to the market value of the property on the date of the appropriation. Thus machinery worth £10,000 cannot be appropriated as being worth £1,000. However, where the value is greater, this is not a complete bar to appropriation: instead, the balance must be held in trust as envisaged by section 73(2)(b).
330. Subsection (3) requires notice of the intended appropriation to be given to the parties it will affect. The list, the exemptions in subsection (4), and the powers in subsection (7) (a) to expand each of those, are the same as in section 74 (see paragraph 323 of these Notes).
331. Subsection (5) sets out the requirements in relation to the notice. These are the same as section 74 (see paragraph 324 of these Notes) with the only difference being that, as noted above, every recipient of the notice has a right to object under this section given that there is no prior agreement. Subsection (7)(b) provides the same ability as in section 74(9)(b) for the Scottish Ministers to provide that a prescribed form is to be used instead (see paragraph 327 of these Notes).
332. Subsection (6) applies the rules about the right of veto. This operates in the same way as in section 74 (see paragraphs 325 and 326 of these Notes) other than that, as noted above, every recipient of the notice can exercise the veto under this section.

### ***Section 76 – Appropriation: unencumbered acquisition***

333. This section provides that any other right in security over, or diligence in respect of, the encumbered property is extinguished by an appropriation by virtue of section 73 of the Act. This covers both appropriations with and without prior agreement.
334. Any other secured creditor or a creditor who has executed diligence will have been given notice of the intended appropriation under section 74 or 75 of the Act (unless the creditor did not know – or could not reasonably be expected to know – of the security or diligence). A creditor who is given notice has the right to object and the ability to veto the appropriation. Failure to do so will result in their security or diligence being extinguished.

### ***Section 77 – Application of proceeds from enforcement of pledge***

335. This section provides for the distribution of any proceeds received by the secured creditor as a result of enforcing a possessory or statutory pledge.
336. Subsection (1) provides that the secured creditor must first pay the expenses of the enforcement, and then pay the sums due to secured creditors or creditors who have executed diligence (with subsection (2) providing that payments are to be made in

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

accordance with the priority of their claims). Any residue is paid to the provider (see in that respect paragraph (b) of the definition of “provider” in section 113(1) of the Act).

337. Payments are to be abated in equal proportions where full payment is not possible (see subsection (4)).

*Example*

The encumbered property is sold for £100,000. There are two equal ranking rights in security. Jack is owed £200,000. Jill is owed £50,000. Jack is paid £80,000 and Jill £20,000, which is 40% of what is due to each of them.

338. Subsection (3), however, provides that no payment is to be made to creditors with a higher ranking security or diligence than the pledge being enforced unless they have consented to the enforcement. If they have not consented then their right still subsists, and that will affect the marketability of the encumbered property (see section 69(3) in that respect). It might mean, for example, that is only practicable for the secured creditor to lease the encumbered property.
339. Subsections (5) and (6) provide for the situation, likely to be uncommon, where it is unclear who is to be paid. The effect is that the secured creditor must consign an amount in court for the benefit of the person who appears to have the best right to the payment.
340. Subsections (7) and (8) provide for statements to be given to relevant parties as to how the proceeds as a whole have been distributed. Under subsection (10), the Scottish Ministers have a power to expand this list to include specified persons who have statutory duties in relation to the provider’s property (as is the case, for example, in an insolvency).
341. Subsection (9) applies the rule about statements to let or licenced property. In those cases, it will not just be a one-off statement that is required. As such, the rule is that a statement must be given every month, beginning with the month after the first enforcement proceeds are received.

***Section 78 – Mandatory application for removal of an entry from the statutory pledges record***

342. This section imposes a duty on the secured creditor of a statutory pledge to apply under section 96 of the Act for the correction of the RSP where the pledge is extinguished by any of the enforcement of the pledge, enforcement of any other secured right, or the enforcement of diligence.

*Example*

Adam grants a statutory pledge for a debt of £10,000 to Eve over machinery. Adam then grants a second-ranking statutory pledge to Cain for a debt of £5,000 over the same machinery. Adam subsequently defaults on his secured obligation to Cain.

Eve consents to Cain enforcing the second pledge subject to Eve, as higher ranking creditor, being paid from the proceeds. The plant and machinery is sold for £20,000. Cain divides the proceeds so that Eve is paid £10,000, Cain keeps £5,000, and the remaining £5,000 is paid to Adam.

Eve and Cain are both subject to a duty to remove their pledges from the statutory pledges record.