



# Moveable Transactions (Scotland) Act 2023 2023 asp 3

## PART 2

### SECURITY OVER MOVEABLE PROPERTY

#### CHAPTER 1

##### PLEDGE

*Pledge, secured obligation and encumbered property*

#### 42 Pledge

- (1) A pledge is created in accordance with [this section](#).
- (2) Where a pledge is to be created over moveable property which is corporeal only, the pledge is created—
  - (a) by delivery of the property to the secured creditor, provided that the property is the provider's at the time of delivery,
  - (b) in a case where the property is not the provider's at the time of such delivery, on the property becoming the provider's subsequent to such delivery, or
  - (c) by registration in accordance with [section 48](#) or [49](#).
- (3) Where a pledge is to be created over moveable property which is—
  - (a) incorporeal only, or
  - (b) both corporeal and incorporeal,the pledge is created by registration in accordance with [section 48](#) or [49](#).
- (4) A pledge created by registration in accordance with [section 48](#) or [49](#) is to be known as a “statutory pledge”.
- (5) Nothing in [this section](#) affects any rule of law which existed prior to the commencement of this section whereby a pledge may be created over a negotiable

instrument, and nothing in [this Part](#) applies in relation to any pledge created in accordance with such a rule.

#### **43 Secured obligation and encumbered property**

- (1) The obligation secured by a pledge (“the secured obligation”)—
  - (a) may be any obligation owed, or which will or may become owed, to or by any person, and
  - (b) includes ancillary obligations owed (for example, to pay interest, damages and the reasonable expense of extra-judicial recovery of interest or damages).
- (2) The property over which a pledge is created and in respect of which the pledge subsists (“the encumbered property”) includes, except in so far as the provider and the secured creditor agree otherwise, the natural fruits of the property but not its incorporeal fruits.
- (3) At the time the pledge is created, the property which is to be the encumbered property must be transferable (whether or not its transferability is restricted in some way).

#### *Possessory pledge*

#### **44 Delivery**

- (1) For the purposes of [section 42\(2\)\(a\)](#) and [\(b\)](#), delivery must be carried out—
  - (a) by physically handing over, or giving control of, the property to the relevant person,
  - (b) by giving control of the premises in which the property is located to the relevant person,
  - (c) by instructing another person who has direct possession or custody of the property to hold the property on behalf of the relevant person, or
  - (d) by delivering a bill of lading representing the property to the relevant person (and where that bill is to the order of a particular person, by procuring the endorsement of the bill in favour of the secured creditor).
- (2) Property which, at the time agreement is reached on the creation of the pledge, is already in the direct possession or custody of the relevant person is deemed to have been delivered to the secured creditor for the purposes of [section 42\(2\)\(a\)](#) or, as the case may be, [\(b\)](#).
- (3) In [this section](#), “relevant person” means—
  - (a) the secured creditor, or
  - (b) a person authorised to accept delivery on behalf of the secured creditor or, where [subsection \(2\)](#) applies, authorised to hold the property on behalf of the secured creditor.
- (4) [This section](#) is without prejudice to section 2 of the Factors Act 1889.

#### *Statutory pledge*

#### **45 Constitutive document**

- (1) A statutory pledge requires a constitutive document.

- (2) The constitutive document must—
  - (a) be executed or authenticated by the provider,
  - (b) identify the property which is to be the encumbered property, and
  - (c) identify the obligation which is to be the secured obligation.
- (3) If the encumbered property is to consist of more than one item, the constitutive document must—
  - (a) identify each item separately, or
  - (b) identify the items in terms of their constituting an identifiable class.
- (4) The property identified (whether separately or as a class) as the property which is to be the encumbered property may be either property of, or property to be acquired by, the provider.
- (5) For the purposes of subsections (2) and (3), the ways in which the encumbered property or the secured obligation can be identified in the constitutive document include by making reference in the constitutive document to another document, the terms of which are not reproduced.

#### **46 Competence of individual acting as provider of a statutory pledge**

- (1) It is not competent for an individual to be the provider of a statutory pledge unless—
  - (a) the individual is acting in the course of—
    - (i) the individual’s business,
    - (ii) the activities of a charity of which the individual is a trustee, or
    - (iii) the activities of an unincorporated association (other than a charity) of which the individual is a member, and
  - (b) the encumbered property is a permitted asset, or consists only of permitted assets.
- (2) For the purpose of subsection (1)(b), an asset is a “permitted asset” if—
  - (a) it is (as the case may be)—
    - (i) used, or to be used, wholly or mainly for the purposes of the individual’s business,
    - (ii) an asset of the charity, or
    - (iii) owned by the individual on behalf of, or jointly with the other members of, the association, and
  - (b) in the case of corporeal property, it has a monetary value exceeding £3,000 immediately before the document under which it will become encumbered property is granted.
- (3) The Scottish Ministers may by regulations—
  - (a) modify subsection (2)(b) so as to modify the amount for the time being specified there,
  - (b) modify this section so as to specify types of property which are or are not permitted assets.
- (4) For the purposes of this section—
  - (a) “charity” means—
    - (i) a charity within the meaning of section 106 of the Charities and Trustee Investment (Scotland) Act 2005, or

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- (ii) an organisation managed or controlled wholly or mainly outwith Scotland and which is registered in a register equivalent to the Scottish Charity Register (kept under section 3 of that Act) for the purposes of the country in which it operates,
- (b) a trustee of a charity is one of the persons having the general control and management of the administration of the charity.

#### **47 Competence of creating statutory pledge over certain kinds of property**

- (1) It is not competent to create a statutory pledge over corporeal property which is—
  - (a) an aircraft in respect of which it is competent to register a mortgage in the register of aircraft mortgages kept by the Civil Aviation Authority,
  - (b) an aircraft object (as defined in regulation 5 of the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (S.I. 2015/912)), or
  - (c) a ship (or a share in a ship) in respect of which it is competent to register a mortgage in the register of British ships maintained for the United Kingdom under section 8 of the Merchant Shipping Act 1995.
- (2) It is not competent to create a statutory pledge over incorporeal property unless that property is—
  - (a) intellectual property, or
  - (b) an application for, or licence over, intellectual property.
- (3) The Scottish Ministers may by regulations modify [this section](#) so as to specify further kinds of incorporeal property over which it is competent to create a statutory pledge.

#### **48 Creation of statutory pledge by registration: general**

- (1) A statutory pledge is created over property which is identified in a constitutive document in accordance with [section 45](#) on the requirements mentioned in [subsection \(2\)](#) all being met.
- (2) Those requirements are that—
  - (a) the property is the provider's,
  - (b) the statutory pledge is registered, and
  - (c) the property is identifiable as property to which the constitutive document relates.
- (3) [Subsection \(2\)\(b\)](#) is subject to [section 91](#) (effective registration of statutory pledge) and, accordingly, the requirement of that subsection—
  - (a) is not met if the registration of the constitutive document is ineffective in accordance with [section 91\(1\)](#), and
  - (b) is met if and when that registration becomes effective in accordance with [section 91\(3\)](#).
- (4) [This section](#) is subject to [section 50](#) (creation of statutory pledge: insolvency).

#### **49 Creation of statutory pledge over added property**

- (1) Where a statutory pledge is amended so as to add property to the encumbered property by means of an amendment document under [section 58](#), a statutory pledge is created over the added property on the requirements mentioned in [subsection \(2\)](#) all being met.
- (2) Those requirements are that—
  - (a) the added property is the provider’s,
  - (b) the amendment is registered, and
  - (c) the added property is identifiable as property to which the amendment document relates.
- (3) [Subsection \(2\)\(b\)](#) is subject to [section 92](#) (effective registration of amendment to statutory pledge) and, accordingly, the requirement of that subsection—
  - (a) is not met if the registration of the amendment document is ineffective in accordance with [section 92\(1\)](#), and
  - (b) is met if and when that registration becomes effective in accordance with [section 92\(3\)](#).
- (4) [This section](#) is subject to [section 50](#) (creation of statutory pledge: insolvency).

#### **50 Creation of statutory pledge: insolvency**

- (1) [This section](#) applies where—
  - (a) the property identified (whether separately or as a class) as the property which is to be the encumbered property under a statutory pledge is or includes property to be acquired by the provider, and
  - (b) after the pledge is granted, the provider becomes insolvent.
- (2) The statutory pledge is not created over any property which, though identified by the constitutive document or by an amendment document as property to be encumbered, is acquired by the provider after becoming insolvent.
- (3) For the purposes of [subsection \(2\)](#)—
  - (a) a provider who is an individual, or the estate of which may be sequestrated by virtue of section 6 of the Bankruptcy (Scotland) Act 2016, becomes insolvent when—
    - (i) the provider’s estate is sequestrated,
    - (ii) the provider grants a trust deed for creditors or makes a composition or arrangement with creditors,
    - (iii) the provider is adjudged bankrupt,
    - (iv) a voluntary arrangement proposed by the provider is approved,
    - (v) the provider’s application for a debt payment programme is approved under section 2 of the Debt Arrangement and Attachment (Scotland) Act 2002, or
    - (vi) the provider becomes subject to any other order or arrangement analogous to any of those mentioned in sub-paragraphs (i) to (v) anywhere in the world, and
  - (b) a provider other than is mentioned in [paragraph \(a\)](#) becomes insolvent when—
    - (i) a decision approving a voluntary arrangement entered into by the provider has effect under section 4A of the Insolvency Act 1986 (“the 1986 Act”),

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- (ii) the provider is wound up under Part 4 or 5 of the 1986 Act or under section 367 of the Financial Services and Markets Act 2000,
  - (iii) an administrative receiver, as defined in section 251 of the 1986 Act, is appointed over all or part (being a part to which the constitutive document or any amendment document relates) of the property of the provider,
  - (iv) the provider enters administration (“enters administration” being construed in accordance with paragraph 1(2) of schedule B1 of the 1986 Act),
  - (v) an order under section 901F of the Companies Act 2006 sanctioning a compromise or arrangement entered into by the provider comes into effect over all or part of the property of the provider, or
  - (vi) the provider becomes subject to any other order, appointment or arrangement analogous to any of those mentioned in sub-paragraphs (i) to (v) anywhere in the world.
- (4) The Scottish Ministers may by regulations modify [subsection \(3\)](#).

*Property encumbered by statutory pledge: effect of transfer by provider*

## **51 Property encumbered by statutory pledge: transfer by provider**

- (1) If the provider of a statutory pledge transfers the encumbered property (or any part of it) to a third party, the transferred property remains encumbered by the pledge unless—
- (a) the consent mentioned in [subsection \(2\)](#) is obtained,
  - (b) the third party acquires the property unencumbered under any of sections [53](#) to [55](#), or
  - (c) the pledge is otherwise extinguished by the transfer, in whole or in relation to the transferred property, under section [52](#), [93](#) or [108](#).
- (2) The consent referred to in [subsection \(1\)\(a\)](#)—
- (a) is the prior written consent of the secured creditor—
    - (i) to the particular transfer, and
    - (ii) to the property in question being transferred unencumbered by the pledge, and
  - (b) does not include consent granted more than 14 days before the day of the particular transfer.
- (3) Whether to grant or withhold the consent mentioned in [subsection \(2\)](#) must remain at the discretion of the secured creditor (that is, the secured creditor may not agree in advance how that discretion will be exercised).
- (4) The Scottish Ministers may by regulations—
- (a) modify [subsection \(2\)](#) (including by specifying further descriptions of consent by reference to which [subsection \(1\)](#) is to apply),
  - (b) modify [this section](#) so as to specify further matters relevant to the granting or withholding of consent.

**52 Extinction of statutory pledge where dealings inconsistent with a fixed security**

If a secured creditor acquiesces, expressly or impliedly, in a provider's transfer of encumbered property (or any part of it) to a third party, other than by means of granting the consent mentioned in [section 51\(2\)](#), the statutory pledge under which the property (or part) was encumbered is extinguished.

**53 Acquisition in good faith from seller acting in ordinary course of business**

- (1) A purchaser of corporeal property which is encumbered property under a statutory pledge acquires it unencumbered by the statutory pledge, despite the consent mentioned in [section 51\(2\)](#) not having been obtained, if—
  - (a) the person from whom the property is acquired is acting in the ordinary course of that person's business, and
  - (b) at the time of acquisition, the purchaser is in good faith.
- (2) For the purposes of [subsection \(1\)\(b\)](#), a purchaser is not to be taken to be other than in good faith by reason only of the statutory pledge having been registered.

**54 Acquisition in good faith for personal, domestic or household purposes**

- (1) An individual who acquires corporeal property which is encumbered property under a statutory pledge acquires it unencumbered by the statutory pledge, despite the consent mentioned in [section 51\(2\)](#) not having been obtained, if—
  - (a) the property is wholly or mainly acquired for personal, domestic or household purposes,
  - (b) the acquirer gives value for the property acquired, and
  - (c) at the time of acquisition, the acquirer is in good faith.
- (2) For the purposes of [subsection \(1\)\(c\)](#), an acquirer is not to be taken to be other than in good faith by reason only of the statutory pledge having been registered.
- (3) The Scottish Ministers may by regulations modify [subsection \(1\)](#) so as to—
  - (a) limit its application to cases where the value of all that is acquired does not, at the time of acquisition, exceed a specified amount, and
  - (b) modify the amount for the time being specified there by virtue of [paragraph \(a\)](#).

**55 Acquisition in good faith of motor vehicles**

- (1) [Subsections \(2\) to \(4\)](#) apply where—
  - (a) there is a sale agreement (including a conditional sale agreement) or a hire-purchase agreement in respect of a motor vehicle,
  - (b) the motor vehicle is encumbered property under a statutory pledge,
  - (c) at the time of entering into the agreement, the purchaser or hirer is not a person carrying on a business described in [section 29\(2\)](#) of the Hire-Purchase Act 1964, and
  - (d) the purchaser or hirer is, at that time, in good faith.
- (2) On the motor vehicle being transferred to the purchaser or hirer in accordance with the agreement, that person acquires it unencumbered by the statutory pledge despite the consent mentioned in [section 51\(2\)](#) not having been obtained.

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- (3) And the statutory pledge is not to be enforced against the motor vehicle before the motor vehicle is transferred to the purchaser or hirer in accordance with the agreement.
- (4) But if the transferor is, at the time the agreement is entered into, a person carrying on a business described in section 29(2) of the Hire-Purchase Act 1964, the secured creditor is entitled to receive from the transferor the lesser of—
  - (a) the amount outstanding in respect of the secured obligation, and
  - (b) the amount received, or to be received, by the transferor in respect of the acquisition.
- (5) Where the secured creditor receives a sum under [subsection \(4\)](#)—
  - (a) the provider’s liability to the secured creditor under the secured obligation is reduced by the same amount, but
  - (b) the transferor has a right of relief against the provider in respect of the sum.
- (6) For the purposes of [subsection \(1\)\(d\)](#), a purchaser or hirer is not to be taken to be other than in good faith by reason only of the statutory pledge having been registered.
- (7) In [this section](#), “conditional sale agreement”, “hire-purchase agreement” and “motor vehicle” have the meanings given by section 29(1) of the Hire-Purchase Act 1964.
- (8) The Scottish Ministers may by regulations specify classes of motor vehicles to which [subsections \(1\) to \(7\)](#) do not apply.
- (9) Regulations under [subsection \(8\)](#) may modify sections 53 and 54 to provide that either or both of those sections do not apply to some or all of the classes of motor vehicle specified under [subsection \(8\)](#).

*Rights relating to matrimonial or family home where relevant to a statutory pledge*

## **56 Occupancy and other rights in family home following grant of statutory pledge**

- (1) The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”) and the Civil Partnership Act 2004 (“the 2004 Act”) are amended in accordance with [this section](#).
- (2) After section 2(8) of the 1981 Act and section 102(8) of the 2004 Act, insert—
 

“(8A) In subsection (1)(a), “secured loan” includes secured obligation (construed in accordance with [section 43\(1\)](#) of the Moveable Transactions (Scotland) Act 2023).”.
- (3) In section 3 of the 1981 Act and section 103 of the 2004 Act, at the end of subsection (2) insert “or the rights of any secured creditor in relation to the non-performance of a secured obligation.”.
- (4) After section 3(8) of the 1981 Act, insert—
 

“(9) In subsection (2)—

“secured creditor” has the meaning given by [section 113\(1\)](#) of the Moveable Transactions (Scotland) Act 2023, and

“secured obligation” is to be construed in accordance with [section 43\(1\)](#) of the Moveable Transactions (Scotland) Act 2023.”.



- (5) After section 103(9) of the 2004 Act, insert—
- “(10) In subsection (2)—
- “secured creditor” has the meaning given by [section 113\(1\)](#) of the Moveable Transactions (Scotland) Act 2023, and
- “secured obligation” is to be construed in accordance with [section 43\(1\)](#) of the Moveable Transactions (Scotland) Act 2023.”.
- (6) In section 6(2) of the 1981 Act and section 106(2) of the 2004 Act, in the definition of “dealing”, after the words “heritable security” insert “, the grant of a statutory pledge”.
- (7) In section 8 of the 1981 Act, after subsection (2B) insert—
- “(2C) For the purposes of subsection (2A) above, the time of granting a security, in the case of a statutory pledge, is—
- (a) the date of delivery of the constitutive document of the statutory pledge, or
- (b) where the statutory pledge is granted in an amendment document, the date of delivery of that document.”.
- (8) In section 108 of the 2004 Act, after subsection (4) insert—
- “(5) For the purposes of subsection (3), the time of granting a security, in the case of a statutory pledge, is—
- (a) the date of delivery of the constitutive document of the statutory pledge, or
- (b) where the statutory pledge is granted in an amendment document, the date of delivery of that document.”.
- (9) The title of section 8 of the 1981 Act and section 108 of the 2004 Act becomes “**Interests of creditors**”.

*Assignment, amendment, restriction or extinction of statutory pledge*

**57 Assignment of statutory pledge**

- (1) Except in so far as the provider and the secured creditor agree otherwise, a statutory pledge may be assigned.
- (2) A statutory pledge is assigned only by the secured creditor executing or authenticating a document assigning the pledge.
- (3) Subject to the provisions of that document, the assignment conveys to the assignee entitlement to the benefit of any notice served, or enforcement procedure commenced, by the assignor in respect of the statutory pledge before the assignment (to the effect that the assignee may proceed as if the assignee served that notice or commenced those procedures).

**58 Amendment of statutory pledge**

- (1) Subject to [section 59\(a\)](#), a statutory pledge may be amended only by means of a document (an “amendment document”) executed or authenticated by the secured creditor and the provider.

- (2) But an amendment document which relates only to the addition of property to the encumbered property need not be executed or authenticated by the secured creditor.
- (3) An amendment document which relates to the addition of property to the encumbered property must identify the property to be added.
- (4) If the property to be added consists of more than one item, the amendment document must—
  - (a) identify each item separately, or
  - (b) identify the items in terms of their constituting an identifiable class.
- (5) The property identified (whether separately or as a class) as the property which is to be the added property may be either property of, or property to be acquired by, the provider.
- (6) Where an amendment increases the extent of the statutory pledge—
  - (a) the statutory pledge is amended to give effect to the increase only when the amendment is registered effectively (see section 92), and
  - (b) subject to any agreement to the contrary by the parties to the amendment document, any other amendments to the statutory pledge made by the amendment document also take effect at the time mentioned in paragraph (a).
- (7) For the purposes of subsection (6), an amendment increases the extent of the statutory pledge where—
  - (a) the amendment adds property to the encumbered property, or
  - (b) both—
    - (i) the extent of the secured obligation is determinable from the terms alone of the entry for it in the statutory pledges record, and
    - (ii) the amendment increases that extent.
- (8) For the purposes of subsections (3) and (4), the ways in which property added can be identified in the amendment document include by making reference in the amendment document to another document, the terms of which are not reproduced.

## 59 Restriction or discharge of statutory pledge

A statutory pledge may be—

- (a) restricted to only part of the encumbered property, or
- (b) discharged,

by means of a written statement by the secured creditor.

*Ranking of pledges etc.*

## 60 Ranking

- (1) Subject to the provisions of [this section](#) and of any other enactment, the priority in ranking of—
  - (a) any two pledges, or
  - (b) a pledge and a right in security other than a pledge,
 is determined according to their creation, the earlier created having priority over the later.

- (2) Where a provider grants two or more statutory pledges over property which is not the property of the provider at the time the pledges are granted, the priority in ranking of the pledges is determined according to the dates on which and times at which they are registered effectively (see sections 91 and 92), the earlier having priority over the later.
- (3) Where property is subject both to a pledge and to a security arising by operation of law, the security arising by operation of law has priority over the pledge.
- (4) The priority in ranking of a pledge is the same irrespective of whether the secured obligation is an obligation owed or is an obligation which will or may become owed.
- (5) As between any two pledges, or as between a pledge and a right in security other than a pledge, the secured creditors or (as the case may be) the secured creditor and the holder of that other right may set out in a written agreement—
  - (a) that there is no priority in ranking, or
  - (b) that any priority in ranking is to be determined in a way other than would be the case in the absence of such an agreement.
- (6) An agreement under subsection (5)—
  - (a) has effect only as between the parties to it and their successors, and
  - (b) is not registrable in the register.

## **61 Amendment of Companies Act 1985 and Insolvency Act 1986**

Both in section 486(1) of the Companies Act 1985 and in section 70(1) of the Insolvency Act 1986, in the definition of “fixed security”—

- (a) the words from “a heritable security” to “1970” become paragraph (a) of the definition, and
- (b) after that paragraph insert “; or  
(b) a statutory pledge within the meaning given by section 113(1) of the Moveable Transactions (Scotland) Act 2023;”.

## **62 Effect of diligence on pledge**

- (1) Subsection (2) applies where diligence is executed in respect of property which is, or any part of which is, encumbered by a pledge.
- (2) The pledge has, in respect of the property or (as the case may be) the part, priority in ranking over the diligence except in relation to any part of the secured obligation which consists of a sum—
  - (a) advanced after execution of the diligence, and
  - (b) not required to be advanced by—
    - (i) a contractual agreement entered into before execution of the diligence, or
    - (ii) an undertaking entered into before execution of the diligence.
- (3) Subsection (4) applies where a pledge is created over property in respect of which, or in respect of part of which, diligence has been executed.
- (4) The diligence has, in respect of the property or (as the case may be) the part, priority in ranking over the pledge.

### *Enforcement of pledge*

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

In sections 64 to 77, the expression “pledge” does not include a pledge as defined in section 189(1) of the Consumer Credit Act 1974 (that is to say, does not include a pawnee’s rights over an article taken in pawn).

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

- (1) A pledge is enforceable only in accordance with the provisions of [this Part](#).
- (2) A pledge may be enforced—
  - (a) in such circumstances as are agreed between the provider and the secured creditor, or
  - (b) subject to any such agreement, where there has been a failure to perform the secured obligation.
- (3) Any agreement under [subsection \(2\)\(a\)](#) must be in writing.
- (4) In enforcing a pledge, a secured creditor must conform to reasonable standards of commercial practice.
- (5) [Subsection \(2\)](#) is subject to sections 55(3), 65 and 66.

#### **65 Pledge enforcement notice**

- (1) Before taking any other steps to enforce a pledge, the secured creditor must serve a notice in, or as nearly as may be in, the form prescribed for the purposes of [this subsection](#) (to be known as a “pledge enforcement notice”) on—
  - (a) the provider,
  - (b) the debtor in the secured obligation (if a person other than the provider),
  - (c) the holder of any other right in security over all or part of the encumbered property,
  - (d) any creditor who has executed diligence against all or part of the encumbered property, and
  - (e) in the case of a statutory pledge over property which is capable of being occupied, any occupier of all or part of the property (if a person other than the provider).
- (2) But—
  - (a) [paragraph \(c\)](#) of [subsection \(1\)](#) is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the right in security mentioned in that paragraph, and
  - (b) [paragraph \(d\)](#) of that subsection is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the diligence executed as mentioned in that paragraph.
- (3) If, by virtue of subsection (1)(e) of section 87 of the Consumer Credit Act 1974, a default notice must be served on the provider, the requirements of that section and of section 88 of that Act must be satisfied before a pledge enforcement notice is served.
- (4) The Scottish Ministers may by regulations modify [this section](#) so as to specify—

- (a) further persons, or descriptions of persons, on whom the secured creditor must serve a pledge enforcement notice (being persons who have statutory duties in relation to the provider's estate),
- (b) cases when the requirement to serve a notice on a person specified by virtue of [paragraph \(a\)](#) is to be disregarded.

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

- (1) A court order is required for enforcing a pledge only—
  - (a) as mentioned in [subsections \(2\) and \(3\)](#),
  - (b) where taking possession of, or steps in relation to, encumbered property in accordance with [section 67\(3\) or \(4\)](#).
- (2) In a case where the provider of a pledge is an individual, a court order is required for enforcing the pledge if the provider is a sole trader and enforcement is against property used wholly or mainly for the purposes of the provider's business.
- (3) A court order is required for enforcing a statutory pledge in respect of property which is the sole or main residence of an individual unless, after the pledge becomes enforceable by virtue of [section 64\(2\)](#), the following persons agree in writing to its being enforced without such an order—
  - (a) the secured creditor,
  - (b) the provider, and
  - (c) the individual whose sole or main residence is the property in question (if a person other than the provider).
- (4) The court is not to grant an order required by [subsection \(3\)](#) unless satisfied that enforcement is reasonable having had regard to all the circumstances of the case.
- (5) Those circumstances include—
  - (a) the nature of, and reason for, the default by virtue of which authority to enforce is sought,
  - (b) whether the person in default has the ability to remedy the default within a reasonable time,
  - (c) whether the secured creditor has done anything to help the person in default remedy the default,
  - (d) where it is, or was, appropriate for the person in default to take part in a debt payment programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002, whether that person is taking part, or has taken part, in such a programme, and
  - (e) whether reasonable alternative accommodation is available for (or can be expected to be available for) the individual whose sole or main residence is the property in question.

## **67 Secured creditor's right to take possession of, or steps in relation to, corporeal property**

- (1) [This section](#) applies in relation to corporeal property in respect of which a secured creditor in a statutory pledge has served a pledge enforcement notice.
- (2) Subject to any court order that is required under [section 66](#), the secured creditor is entitled to—

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- (a) take possession of the property, and
  - (b) take any reasonable steps necessary to ensure, whether or not by immobilising the property, that it is not disposed of or used in an unauthorised way, but only in accordance with [subsection \(3\)](#) or, as the case may be, [subsection \(4\)](#).
- (3) Where the property is in the possession of a relevant person, the secured creditor may take possession or steps under [subsection \(2\)](#)—
- (a) with the consent of the relevant person,
  - (b) with the consent of the court, through the agency of an authorised person, or
  - (c) personally, if authorised to do so by the court.
- (4) Where the property is not in the possession of a relevant person, the secured creditor may take possession or steps under [subsection \(2\)](#)—
- (a) with the consent of—
    - (i) the provider, given after the pledge becomes enforceable, and
    - (ii) any third party who for the time being either is in direct possession, or has custody, of the property,
  - (b) through the agency of an authorised person, or
  - (c) personally, if authorised to do so by the court.
- (5) For the purposes of [subsections \(3\)](#) and [\(4\)](#), a “relevant person” is a person who, in respect of the property or of any part of it—
- (a) has a right in security which has priority in ranking over, or ranks equally with, the pledge to which the pledge enforcement notice relates, or
  - (b) has executed diligence which has priority in ranking over, or ranks equally with, that pledge.
- (6) In taking possession of the property under [subsection \(2\)\(a\)](#), the secured creditor is entitled to remove any individual from that property, but only through the agency of an authorised person.
- (7) In [this section](#), “authorised person” means a messenger-at-arms or sheriff officer.
- (8) The Scottish Ministers may by regulations modify [this section](#) so as to specify further persons, or descriptions of persons, who are authorised persons for the purposes of [this section](#).

## **68 Secured creditor’s right to sell**

- (1) Where a pledge enforcement notice has been served in respect of property, the secured creditor is, subject to any court order that is required under [section 66](#), entitled to sell all or any of that property.
- (2) In selling property by virtue of [subsection \(1\)](#), the secured creditor must take all reasonable steps to ensure that the price obtained is the best reasonably obtainable.
- (3) The secured creditor is entitled to purchase all or any of the property but only—
- (a) in a sale by public auction, and
  - (b) for a price no lower than one which bears a reasonable relationship to market value.
- (4) Any proceeds obtained by virtue of [subsection \(1\)](#) are to be held in trust by the secured creditor until applied under [section 77](#).

## **69 Sale: unencumbered acquisition**

- (1) **This section** applies where a secured creditor sells property by virtue of [section 68\(1\)](#) and transfers the property to the purchaser.
- (2) The purchaser acquires the property unencumbered by—
  - (a) the pledge which was the subject of the pledge enforcement notice, and
  - (b) any right in security, or any diligence, ranking equally with or postponed to the pledge.
- (3) The purchaser acquires the property unencumbered by—
  - (a) any right in security which has priority in ranking over the pledge, or
  - (b) any diligence which has priority in ranking over the pledge,only if the holder of the right in security or, as the case may be, the creditor who executed the diligence consented to the sale.

## **70 Secured creditor’s right to let**

- (1) A secured creditor who, by virtue of [section 68\(1\)](#), is entitled to sell corporeal property is entitled to let all or any of that property.
- (2) In letting property by virtue of [subsection \(1\)](#), the secured creditor must take all reasonable steps to ensure that the income obtained is the best reasonably obtainable.
- (3) Any rental income obtained by virtue of [subsection \(1\)](#) is to be held in trust by the secured creditor until applied under [section 77](#).
- (4) The provider and the secured creditor may agree, whether before or after the pledge becomes enforceable by virtue of [section 64\(2\)](#), that [subsection \(1\)](#) is not to apply in relation to the corporeal property or some part of it.
- (5) Any such agreement must be in writing.

## **71 Secured creditor’s right to grant licence over intellectual property**

- (1) A secured creditor who, by virtue of [section 68\(1\)](#), is entitled to sell intellectual property is entitled to grant a licence over all or any of that property, but only if and to the extent that the provider is entitled to grant such a licence.
- (2) In granting a licence by virtue of [subsection \(1\)](#), the secured creditor must take all reasonable steps to ensure that the income obtained is the best reasonably obtainable.
- (3) Any income obtained by virtue of [subsection \(1\)](#) is to be held in trust by the secured creditor until applied under [section 77](#).
- (4) The provider and the secured creditor may agree, whether before or after the pledge becomes enforceable by virtue of [section 64\(2\)](#), that [subsection \(1\)](#) is not to apply in relation to the intellectual property or some part of it.
- (5) Any such agreement must be in writing.

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

- (1) A secured creditor who, by virtue of [section 68\(1\)](#), is entitled to sell property is entitled to take reasonable steps to—

- (a) protect, maintain and manage it, and
  - (b) preserve its value.
- (2) The right under [subsection \(1\)](#) includes, for example, the right of the secured creditor to—
- (a) effect or maintain an insurance policy in relation to the property,
  - (b) settle any liability in relation to the property,
  - (c) bring, defend or continue legal proceedings in relation to the property,
  - (d) take such other steps as the provider has agreed (whether before or after the pledge becomes enforceable by virtue of [section 64\(2\)](#)) may be taken by the secured creditor.
- (3) [Subsection \(1\)](#) is without prejudice to [section 67\(2\)\(b\)](#).

### 73 Secured creditor’s right to appropriate

- (1) Where a pledge enforcement notice has been served, the secured creditor is entitled to appropriate any or all of the encumbered property in accordance with [section 74](#) or (as the case may be) [75](#) in satisfaction, in whole or in part, of the secured obligation.
- (2) But it is not competent to appropriate by virtue of [subsection \(1\)](#)—
- (a) corporeal property, unless that property is in the possession of the secured creditor, or
  - (b) property with a value which exceeds the total of—
    - (i) the amount for the time being remaining due under the secured obligation, and
    - (ii) such expenses as have reasonably been incurred by the secured creditor in enforcing the pledge,
 unless a sum of money equivalent to the amount by which that total is exceeded is set aside by the secured creditor and held in trust until applied under [section 77](#).

### 74 Appropriation with prior agreement

- (1) A provider and a secured creditor may, before a pledge becomes enforceable by virtue of [section 64\(2\)](#), agree that the secured creditor is entitled to appropriate by virtue of [section 73\(1\)](#)—
- (a) the encumbered property, or
  - (b) any part of that property.
- (2) Any agreement under [subsection \(1\)](#) must be in writing.
- (3) Property may only be appropriated in accordance with that agreement if it is property in relation to which the provider and the secured creditor have, in the agreement, set out a method of readily determining a reasonable market price.
- (4) Property appropriated in accordance with that agreement is appropriated only for the value, at the date of appropriation, of the property’s market price as determined as mentioned in [subsection \(3\)](#).
- (5) Before exercising a right to appropriate property by virtue of [subsection \(1\)](#), the secured creditor must serve a notice on—



- (a) the provider,
  - (b) the debtor in the secured obligation (if a person other than the provider),
  - (c) the holder of any other right in security over all or part of the property, and
  - (d) any creditor who has executed diligence against all or part of the property.
- (6) But—
- (a) [paragraph \(c\)](#) of [subsection \(5\)](#) is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the right in security mentioned in that paragraph, and
  - (b) [paragraph \(d\)](#) of that subsection is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the diligence executed as mentioned in that paragraph.
- (7) A notice under [subsection \(5\)](#) must—
- (a) identify the property to be appropriated,
  - (b) specify the amount for the time being remaining due under the secured obligation,
  - (c) specify the amount expected to be obtained by the appropriation, and
  - (d) state that—
    - (i) the recipient (if a person other than the provider or the debtor) may give a written statement to the secured creditor objecting to the appropriation, and
    - (ii) if such a statement is received by the secured creditor within 14 days beginning with the day that the person objecting received the notice, the appropriation is not to proceed.
- (8) If, within the period specified in [sub-paragraph \(ii\)](#) of [subsection \(7\)\(d\)](#), the secured creditor receives a written statement as mentioned in that subsection from a recipient of a notice other than the provider or the debtor—
- (a) the appropriation is not to proceed, and
  - (b) the secured creditor must, by written statement and without delay, inform each of the other recipients of the notice that the appropriation is not proceeding.
- (9) The Scottish Ministers may by regulations modify [this section](#) so as to—
- (a) specify—
    - (i) further persons, or descriptions of persons, on whom the secured creditor must serve a notice (being persons who have statutory duties in relation to the provider’s estate),
    - (ii) cases when the requirement to serve a notice on a person specified by virtue of [sub-paragraph \(i\)](#) is to be disregarded,
  - (b) require a notice under [subsection \(5\)](#) to be in, or as nearly as may be in, such form as is for the time being prescribed (and may in consequence remove any requirements in [this section](#) as to what such a notice must contain).

## 75 Appropriation without prior agreement

- (1) [This section](#) applies in respect of property in relation to which the provider and the secured creditor have not reached agreement under [section 74\(1\)](#).

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- (2) Property may only be appropriated by virtue of [section 73\(1\)](#) if the amount obtained by the appropriation bears a reasonable relationship to the market value of the property appropriated on the date of the appropriation.
- (3) Before exercising a right to appropriate property by virtue of [section 73\(1\)](#), the secured creditor must serve a notice on—
  - (a) the provider,
  - (b) the debtor in the secured obligation (if a person other than the provider),
  - (c) the holder of any other right in security over all or part of the property, and
  - (d) any creditor who has executed diligence against all or part of the property.
- (4) But—
  - (a) [paragraph \(c\)](#) of [subsection \(3\)](#) is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the right in security mentioned in that paragraph, and
  - (b) [paragraph \(d\)](#) of that subsection is to be disregarded if the secured creditor does not know, and cannot reasonably be expected to know, of the diligence executed as mentioned in that paragraph.
- (5) Any notice served under [subsection \(3\)](#) must—
  - (a) identify the property to be appropriated,
  - (b) specify the amount for the time being remaining due under the secured obligation,
  - (c) specify the amount expected to be obtained by the appropriation, and
  - (d) state that—
    - (i) the recipient may give a written statement to the secured creditor objecting to the appropriation, and
    - (ii) if such a statement is received by the secured creditor within 14 days beginning with the day that the person objecting received the notice, the appropriation is not to proceed.
- (6) If, within the period specified in [sub-paragraph \(ii\)](#) of [subsection \(5\)\(d\)](#), the secured creditor receives a written statement as mentioned in that subsection from a recipient of a notice—
  - (a) the appropriation is not to proceed, and
  - (b) the secured creditor must, by written statement and without delay, inform each of the other recipients of the notice that the appropriation is not proceeding.
- (7) The Scottish Ministers may by regulations modify [this section](#) so as to—
  - (a) specify—
    - (i) further persons, or descriptions of persons, on whom the secured creditor must serve a notice (being persons who have statutory duties in relation to the provider’s estate),
    - (ii) cases when the requirement to serve a notice on a person specified by [sub-paragraph \(i\)](#) is to be disregarded,
  - (b) require a notice under [subsection \(3\)](#) to be in, or as nearly as may be in, such form as is for the time being prescribed (and may in consequence remove any requirements in [this section](#) as to what such a notice must contain).

## 76 Appropriation: unencumbered acquisition

Where a secured creditor appropriates property by virtue of [section 73\(1\)](#), the secured creditor acquires the property unencumbered by any right in security or any diligence.

## 77 Application of proceeds from enforcement of pledge

- (1) Any proceeds arising from the enforcement of a pledge are to be applied—
  - (a) firstly, in payment of all expenses reasonably incurred by the secured creditor in connection with the enforcement (including any incurred under [section 67\(2\)](#) or [72](#)), and
  - (b) secondly, in payment of the amount due to—
    - (i) the holder of any right in security over the property from which the proceeds arose, and
    - (ii) any creditor who has executed diligence against that property, and
  - (c) with the residue (if any) from the proceeds being paid to the provider.
- (2) Any payment made by virtue of [subsection \(1\)\(b\)](#) is to be made in conformity with the ranking of the right in security or, as the case may be, of the diligence.
- (3) But no such payment is to be made to—
  - (a) the holder of a right in security which has priority in ranking over the pledge enforced, or
  - (b) any creditor who has executed diligence which has such priority, unless that holder or creditor consented to the enforcement in question.
- (4) Where payment falls to be made, by virtue of [subsection \(1\)\(b\)](#), to more than one person with the same ranking but the proceeds are inadequate to enable those persons to be paid in full, their payments are to abate in equal proportions.
- (5) Where a question arises regarding to whom a payment under [this section](#) is to be made, the secured creditor must—
  - (a) consign the amount of the payment (so far as ascertainable) in court for the person appearing to have the best right to that payment, and
  - (b) lodge in court a statement of the amount consigned.
- (6) Where a consignment is made in pursuance of [subsection \(5\)\(a\)](#)—
  - (a) it operates as a payment of the amount due, and
  - (b) a certificate of the court is sufficient evidence of that payment.
- (7) The secured creditor must, as soon as reasonably practicable after applying the proceeds arising from the enforcement, issue the persons mentioned in [subsection \(8\)](#) with a written statement of how the proceeds have been applied under [this section](#).
- (8) The persons referred to in [subsection \(7\)](#) are—
  - (a) the provider,
  - (b) the debtor in the secured obligation (if a person other than the provider), and
  - (c) any person who both—
    - (i) is mentioned in [subsection \(1\)\(b\)](#), and
    - (ii) has consented to the enforcement in question.
- (9) In a case where—

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- (a) all or any of the property is let by the secured creditor by virtue of section 70(1), or
- (b) the secured creditor grants a licence over all or any of it by virtue of section 71(1),

subsection (7) applies in relation to any proceeds of the letting or licensing as if, for the words “as soon as reasonably practicable after applying the proceeds arising from the enforcement”, there were substituted “every month beginning with the month after the first proceeds arising from the enforcement are received”.

- (10) The Scottish Ministers may by regulations modify [this section](#) so as to specify further persons, or descriptions of persons, to whom the secured creditor must issue a written statement (being persons who have statutory duties in relation to the provider’s estate).

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

- (1) [This section](#) applies where a statutory pledge which has been registered is extinguished by virtue of—
  - (a) the enforcement of the statutory pledge,
  - (b) the enforcement of another right in security over the encumbered property of the statutory pledge, or
  - (c) the enforcement of diligence against the encumbered property of the statutory pledge.
- (2) The secured creditor must, as soon as reasonably practicable after the enforcement of the statutory pledge or, as the case may be, becoming aware of the event mentioned in [paragraph \(b\) or \(c\) of subsection \(1\)](#), make an application under [section 96\(1\)](#) for removal of the entry for the statutory pledge from the statutory pledges record.

*Liability for loss due to enforcement*

## **79 Liability for loss suffered by virtue of enforcement**

- (1) A person (“P”) is entitled to be compensated by a secured creditor for loss suffered in consequence of the secured creditor’s failure to comply with any obligation imposed on the secured creditor by any provision of [sections 64 to 78](#).
- (2) But the secured creditor has no liability under [subsection \(1\)](#)—
  - (a) in so far as P’s loss could have been avoided had P taken measures which it would have been reasonable for P to take, or
  - (b) in so far as P’s loss was not reasonably foreseeable.

*Service of documents for purposes of [this Chapter](#)*

## **80 Service of documents for purposes of [this Chapter](#)**

- (1) In relation to the service of documents for the purposes of [this Chapter](#), the provider and the secured creditor may agree (either or both)—
  - (a) that the document may or must be served on a person by being sent to an address specified in the agreement (being an address other than is mentioned

in subsection (4) of section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010),

- (b) that service is to be by a method mentioned in subsection (2) of that section and specified in the agreement.
- (2) The agreement need not refer expressly to that section or to any provision of that section.
  - (3) Any such agreement must be in writing.
  - (4) Where there is such an agreement but service cannot be effected in accordance with it, the agreement is to be disregarded in applying section 26 of that Act of 2010 for the purposes of [this Chapter](#).