

Discussion paper on a post-decree remedy of disclosure in Scotland

1. Discovery and disclosure in other legal jurisdictions

Remedies of ‘discovery’ and ‘disclosure’ are well known in other legal jurisdictions around the world.

In the United States of America, such remedies play a pro-active role in pre-trial civil court proceedings. For example, the Federal Rules of Civil Procedure (Rules 26-37) oblige parties to disclose particular evidence at the commencement of an action. During a civil trial, parties can apply to the court for an order to establish facts, permit inspection of property, or otherwise make discovery.

Rule 69 of the Federal Rules of Civil Procedure was amended in 1970 to make all discovery procedures available to the ‘judgment creditor’ where assistance is required to execute the court’s final decree.

In England and Wales, the ‘judgment creditor’ (i.e. the person who is entitled to enforce a judgment or order against a debtor) can apply to the court for the debtor to be ordained to appear in court and be orally examined as to his or her means. Rule 3(1) of Schedule 2 to the County Court Rules Order 25, provides that such examination may also include the examination of any books or documents in the debtor’s possession, relevant to his or her

This discussion document incorporates issues canvassed in Chapter 9 of the Report of the *Improving Debt Recovery Working Group* (December 2000 – copies available free upon request to mail@govanlc.com).

Hammond Packing Co. –v- Arkansas, 212 US 322, 29 S Ct 370, 53 L Ed 530 (1909) – a case which discusses the justifiable use of such measures.

See Barron & Holtzoff, *Federal Practice and Procedure* at 1484 (Wright ed, 1958); *United States –v- McWhirter*, 376 F2d 102 (5th Cir 1967).

See Rules 2(1) and 3(1), Schedule 2, CCR Order 25 - County Court Rules (Enforcement of Judgments and Orders: General) – available on-line at www.open.gov.uk/lcd/civil

See CCR Order 29, Rule 1(1); CCR Order 25, Rule 3(5A).

See McPhail, *Sheriff Court Practice* (Second Edition, Volume 1, 1998) at 15.47 to 15.105 generally.

See McPhail, *supra*, at 15.57.

As this proposal would require reforming a particular aspect of Scots common law by way of statute. Diligence is, of course, a devolved matter in terms of Schedule 5 of the Scotland Act 1998.

See McPhail, *supra*, at 15.56.

See McPhail, *supra*, at 15.54.

In terms of the Scotland Act 1998 all legislation of the Scottish Parliament must comply with the ECHR (European Convention on Human Rights).

Klass –v- Germany (1979-80) 2 EHRR 214; *Malone –v- United Kingdom* (1984) 7 EHRR 14.

Beldjoudi –v- France (1992) 14 EHRR 801.

Such impossibility could, of course, render the creditor’s right and the court process as meaningless. The IDRWG being a voluntary initiative without paid staff or dedicated resources has not been in a position to undertake a comprehensive analysis of all relevant legal and operational considerations.

means. In certain circumstances, failure to co-operate with such disclosure procedure can result in civil imprisonment.

It will be noted that the proposal for a post-decree system of disclosure, as set out in this discussion paper, would never result in a debtor being imprisoned for non-co-operation. This is an important principle which the *Improving Debt Recovery Working Group* (IDRWG) acknowledged as a fundamental requirement. In other words, poundings and warrant sales should not be replaced by an equally inhumane civil debt recovery system.

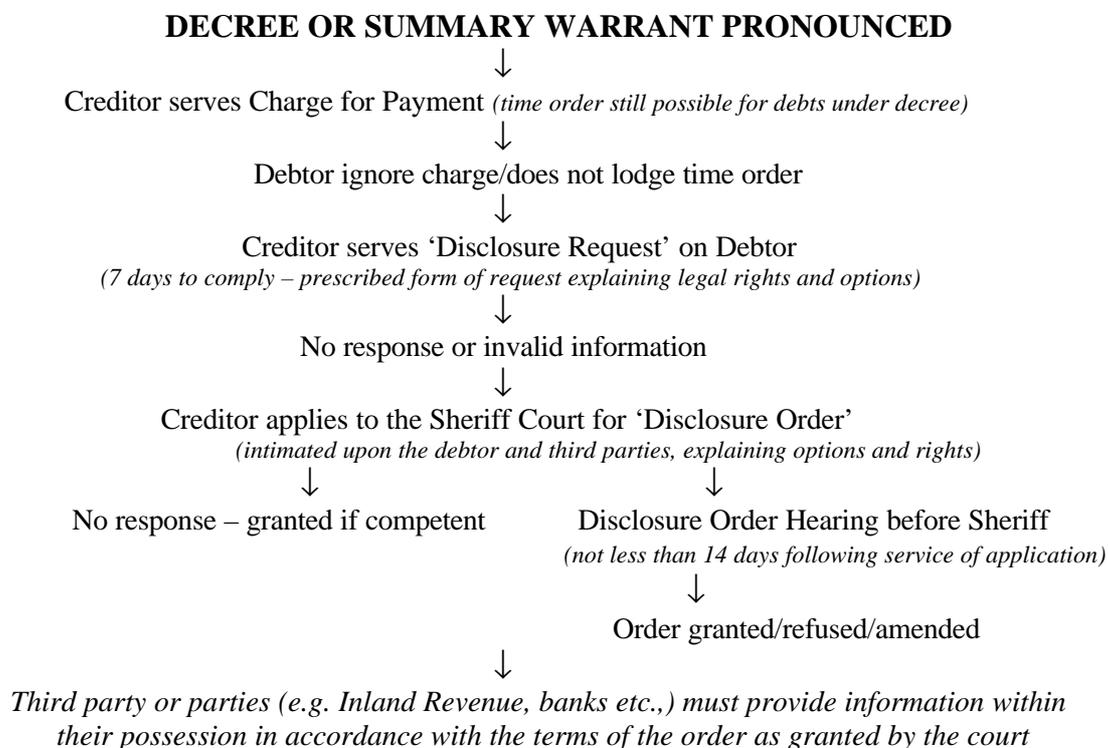
2. Why a post-decree remedy of disclosure in Scotland?

The present system of earnings and bank account arrestment could work better if it was improved. The main obstacle to this, from the creditor's point of view, lies where the creditor does not know the identity of the debtor's employer, bank or building society.

A post-decree disclosure procedure (in other words where a debt had been legally established before a court) would empower the court to grant an order in favour of the creditor, to enable the creditor to obtain relevant information and proceed with arrestment. Post-decree disclosure would only be available in controlled circumstances, and where the debtor had failed to enter into a repayment arrangement (or had failed to adhere to a repayment arrangement).

3. A proposed, controlled, system of disclosure (post-decree)

Disclosure Order – suggested court procedure for discussion



4. The operation of a remedy of disclosure in practice

The most obvious party with relevant information would be the Inland Revenue. There is already a precedent where the Child Support Agency can obtain information from the Inland Revenue pertaining to the income of an absent parent. Paragraph (1) to schedule 2 of the Child Support Act 1991 provides as follows:

1-(1) This paragraph applies where the Secretary of State or the Department of Health and Social Services for Northern Ireland requires information for the purposes of tracing-

*the current address of the absent parent; or
the current employer of the absent parent.*

(2) In such a case, no obligation as to secrecy imposed by statute or otherwise on a person employed in relation to the Inland Revenue shall prevent any information obtained or held in connection with the assessment or collection of income tax from being disclosed to-

the Secretary of State;

*the Department of Health and Social Services for Northern Ireland; or
an officer of either of them authorised to receive such information in connection with the operation of this Act or any corresponding Northern Ireland legislation.*

This proposal overcomes the only major obstacle to debt enforcement – the ignorance of the creditor. This proposal would facilitate the efficient use of enforcement methods such as earnings and bank arrestment.

5. Recovery of information at Scots Law

The principle of recovering documents and personal information in the course of a civil court action is well developed at Scots law common law – the pre-judgment procedure is known as “*recovery of documents by commission and diligence*”. The remedy normally takes place before or after the closing of the ‘record’ (the written pleadings in an ordinary cause sheriff court action) and proceeds upon a motion for specification of documents (which is considered before the sheriff).

The proposal for a new post-decree remedy of disclosure in Scotland, is in some respects, an extension of existing Scots law principles. The increasing availability of bank accounts, the increasing number of financial institutions offering banking services, changing patterns of work – pose difficulties for the remedies of arrestment.

The disclosure remedy, as suggested in this paper, would be more humane than equivalent remedies currently available in England and Wales – and indeed the U.S.A. By directing the remedy against third parties – in controlled circumstances – the sanction of civil imprisonment becomes irrelevant.

There is presently a common law ‘public interest’ defence where income tax returns are sought from the Inland Revenue. This would have to be specifically excluded by legislation if it was thought necessary to extend the remedy of disclosure – in principle – to such information. Such reform would not require UK legislation.

Of course, the most obvious use of Inland Revenue information would be in discovering the debtor's employer (in order to effect an earnings arrestment). Such information is not protected against recovery at common law. The recovery of 'private information' generally is currently entrusted to the Sheriff's discretion.

6. Disclosure and the Human Rights Act 1998

The remedy of disclosure would require to be compliant with the Human Rights Act 1998. Article 8 of schedule 1 to the 1998 Act provides as follows:

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Disclosure of private information will not breach Article 8 where it is (a) in accordance with the law; and (b) necessary for the protection of the rights and freedom of others. The law must be sufficiently clear in its terms to give its citizens an adequate indication as to the circumstances in which, and the conditions on which, the courts are empowered to interfere with the right to respect for private life. Any interference must be proportionate to the legitimate aim being pursued.

The proposed disclosure procedure would only be available to creditors as a last resort. No human rights issue would arise, as the procedure could never be relied upon until a legal liability to pay a debt had been determined by the court. Moreover, once liability had been admitted or conceded, disclosure could not arise unless the debtor had (a) refused or ignored a charge to pay a legally determined debt; and (b) had ignored or refused a request for disclosure. It would still be open at these stages for the debtor to apply for a time to pay order under the Debtors (Scotland) Act 1987 (and therefore freeze any further diligence – including a disclosure application).

Only after the exhaustion of these stages would the creditor be in a position to request the court to grant a disclosure order. The debtor would have the right to object to such an order on cause shown, as would a third party (for example, upon the ground of impossibility or other cogent ground etc.). A defence of "not reasonable to disclose" could be considered at the court hearing stage. This could be akin to the Child Support Agency protection against disclosing the name of a father, and would provide a further layer of protection in appropriate circumstances.

At this late stage in the proceedings, and with the necessary safeguards, disclosure would represent a proportionate remedy where the right to enforce a legally determined debt

would otherwise be impossible.

7. Moving forward – further issues

A disclosure remedy relying upon third party co-operation – principally the Inland Revenue and U.K financial institutions – would give rise to a number of practical considerations. For example, would the banks or the Revenue have ready access to the kind of data that a disclosure order would be looking for?

Data protection law, generally, is a reserved matter (Section B2, Part II, Schedule 5 to the Scotland Act 1998). While the remedy of disclosure pertains to Scots law diligence and civil procedure (clearly devolved issues), would disclosure legislation in the Scottish Parliament cut across an aspect of the Data Protection Act 1998 or Council Directive 95/46/EC?

Further consideration of such issues would be necessary – and ultimately, any proposed reform in this area would benefit from a Scottish Law Commission consultation.

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