

## 6 ENFORCEMENT AUTHORISED BY A SUMMARY WARRANT

6.1 The formal authority which it is necessary to obtain before enforcement action may be undertaken, and the different types of authority, were discussed briefly in Part 3, paragraphs 3.3-3.4. It is not part of a review of enforcement to consider the merits or operation of the court procedures and other processes which lead to that authority being granted. However diligence which may be instructed by a holder of one particular type of authority, a summary warrant, is considered in this Part.

### Summary Warrant Procedure not Considered

6.2 Diligence which may proceed on the authority of a summary warrant after it has been granted by the court is a separate matter from summary warrant procedure itself. The merits of summary warrant procedure are not considered within this exercise. The Report *Striking the Balance - a new approach to debt management* recommended that "in conjunction with local authorities, the Executive should give further consideration to its policy on recovery of unpaid council tax and the use by local authorities of summary warrant procedure".<sup>536</sup> The Executive is addressing this issue through the joint "It Pays to Pay" Working Group on Council Tax Collection.<sup>537</sup>

### Summary Warrant Authority

6.3 A summary warrant is granted by the sheriff on the application of local and central government seeking to recover unpaid taxes, duties and similar levies.<sup>538</sup> The sheriff grants a warrant which authorises the use of diligence to recover the sum due, similarly to the warrant in a decree for payment of money. The summary warrant differs from the warrant in a decree in respect of the process by which the warrant is obtained and the diligence which is authorised by the warrant. Broadly speaking, the processes for obtaining a summary warrant and enforcing it are simpler than those for obtaining and enforcing a decree. Creditors entitled to pursue recovery of unpaid taxes and other sums by summary warrant are not obliged to do so and may, instead, raise a small claim, summary cause or ordinary action for payment of money.

6.4 Local authorities also have separate powers to require debtors against whom a summary warrant has been granted to provide details of their employment or bank accounts. A civil penalty may be imposed for failure to supply that information or for knowingly supplying inaccurate information.<sup>539</sup>

### Summary Warrant Diligence

#### Diligence Competent on the Authority of a Summary Warrant

6.5 The types of diligence which are currently authorised by a summary warrant for recovery of taxes, duties and other levies include:

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<sup>536</sup> Para 74.

<sup>537</sup> See Part 3, paras 3.53-3.54.

<sup>538</sup> E.g. taxes (income, capital gains, corporation, development land, land fill, car, insurance premium, VAT and council tax), duties (C&E, stamp, betting & gaming), levies (EU agricultural), debts (NI), penalties (stamp duty), rates and water charges.

<sup>539</sup> Local Government Finance Act 1992, c14, Sch 8, para 5 and Council Tax (Administration and Enforcement) (Scotland) Regulations 1992, Regulation 31, SI 1992/1332.

- ♦ earnings arrestment
- ♦ arrestment and action of furthcoming
- ♦ poiding and warrant sale (soon to be abolished and alternative arrangements put in place)<sup>540</sup>

#### Additional Diligence on the Authority of a Summary Warrant

6.6 The general question of whether other types of diligence should be authorised by a summary warrant also requires further consideration.

6.7 **Scottish Law Commission Consideration.** The Scottish Law Commission's recommendations for new diligences of land attachment, attachment orders and money attachment and its consideration of their use on the authority of a summary warrant were noted briefly in Parts 5E and F. The Commission has considered policy issues and consulted upon the use of certain diligences on the authority of a summary warrant and deferred consideration of others for this exercise.

6.8 In the case of land attachment, being the new diligence which the Commission recommended should replace adjudication,<sup>541</sup> the Commission had proposed that it should not be available on the authority of a summary warrant in its 1988 Discussion Paper on *Adjudications for Debt and Related Matters*.<sup>542</sup> This was supported by all consultees who responded.

6.9 The Commission had proposed that the diligence of inhibition should be competent upon the authority of a summary warrant, in its 1998 Discussion Paper on *Diligence Against Land*.<sup>543</sup> This was on the basis that it was less intrusive than the other diligences already authorised by summary warrant.<sup>544</sup> The Commission reported that responses were mixed but a slight majority supported this recommendation.<sup>545</sup>

6.10 The Commission had not sought views in its Discussion Paper on *Diligence Against Land* whether the other new diligences proposed, attachment orders and money attachment, should be competent upon the authority of a summary warrant. Accordingly, the Commission did not make any recommendation in its *Report on Diligence* and stated that the question of whether these diligences should be authorised by a summary warrant should be a matter for further consultation if it was intended to implement the recommendations for these diligences.<sup>546</sup>

6.11 As indicated, subject to the discussion in Parts 5E and F, it is intended to implement the Commission's recommendations for attachment orders and money attachment. An attachment order will in part replace the current diligence of adjudication for debt to be available for attachment of property not otherwise attached by other types of diligence or otherwise exempted, such as various forms of intellectual property and certain rights in land.<sup>547</sup> Money attachment will involve attachment of money, in sterling or other currency, in the hands of a debtor in non-residential premises.

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<sup>540</sup> See the Abolition of Poidings and Warrant Sales Act 2001, asp1 and recommendations for an alternative procedure in *Striking the Balance*.

<sup>541</sup> Scot Law Com No 183, Pt 3.

<sup>542</sup> Scot Law Com DP No 78, para 5.209.

<sup>543</sup> Scot Law Com No 107, para 3.50.

<sup>544</sup> Scot Law Com DP No 78, para 5.209.

<sup>545</sup> Scot Law Com No 177, para 1.10.

<sup>546</sup> *Ibid.*

<sup>547</sup> Scot Law Com No 183, para 4.2.

**6.12 Policy Issues.** The principal factors relevant to this question concern consistency within the enforcement system, the extent of notice given prior to execution of the diligence concerned and the nature of the type of diligence and its impact or degree of intrusion for the debtor. Currently the more intrusive types of diligence require a charge to be served prior to their execution by ordinary creditors but not by summary warrant creditors.<sup>548</sup>

**6.13** As a general proposition, the enforcement system should be open to all creditors, subject to other remedies being available to them, such as in the case of government creditors who may have the benefit of alternative statutory arrangements, for example preferences on insolvency. That general rule should be tempered by inclusion of appropriate features for debtor protection having regard to the streamlined nature of the summary warrant authority. The Commission assessed human rights aspects of their recommendations, particularly in relation to recovery of government taxes, and framed its recommendations in a manner compatible with the Convention.<sup>549</sup> Such protections may be more relevant where enforcement is undertaken against the property of individuals rather than business or commercial entities. Account should be taken of the impact of where it may be desirable to give formal notice of an intention to proceed. The fact that a government creditor who may be able to enforce upon the authority of a summary warrant can, where it is considered appropriate in any particular case, choose to raise an action for payment of money, should not be overlooked in this equation. This route is, of course, undertaken at greater cost both for the debtor, should the expenses be recovered, and for the taxpayer generally.

**6.14** On balance, it is considered appropriate to make the diligences of attachment orders and money attachment available on the authority of a summary warrant, subject to notice being given of the intention to proceed should payment not be forthcoming. The question of appropriate means of notice is considered further in the following paragraphs regarding time to pay and service of a charge. Views have already been sought and expressed in earlier consultation exercises regarding the availability of land attachment and inhibition on the authority of a summary warrant. It is not considered necessary or appropriate to repeat that exercise and it is intended to follow the greater weight of opinion. Thus, it is intended to make inhibition available on the authority of a summary warrant, but not land attachment.

#### Time to Pay Arrangements

**6.15 Background and Current Law.** One of the principal differences between diligence authorised by a summary warrant and diligence authorised by a decree for payment of money is the availability of time to pay directions and orders. Current arrangements for time to pay directions and orders were discussed in detail in Part 4A.

**6.16** In actions for payment of money,<sup>550</sup> a debtor may admit that the debt is due and make an offer to pay either by lump sum or instalments. If the creditor agrees to an instalment payment arrangement, or the sheriff sanctions it after a hearing, a time to pay direction is made. Although decree is then granted against the debtor, enforcement action cannot be taken against him provided that he complies with the terms of the direction. Such an arrangement may also be sought after the decree for payment has been granted and the sheriff will make a time to pay order specifying terms for repayment. Again, provided the debtor maintains the payments ordered, no enforcement action may be undertaken by the creditor against the debtor. However, time to pay directions and orders cannot be made in

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<sup>548</sup> See paras 6.24-6.25.

<sup>549</sup> Scot Law Com No 183, paras 1.12-1.15.

<sup>550</sup> Up to £25 000.

respect of debts due under summary warrants or in actions for payment of money for the recovery of taxes, duties and other levies.<sup>551</sup>

**6.17 Policy Issues and Scottish Law Commission Consideration.** The Scottish Law Commission noted in its 1985 Report that "some may consider that a time to pay order is inconsistent with the summary nature of the diligence procedure for recovering rates or taxes"<sup>552</sup> but nonetheless recommended that time to pay arrangements should be available under summary warrants. This recommendation was not implemented by the Government of the time. The matter was considered again by the Commission in its 2000 Report when it reiterated its view that time to pay orders (but not time to pay directions) should be available after a summary warrant had been granted.<sup>553</sup> The Commission also recommended that both time to pay directions and time to pay orders should be available when an action for payment of money was used for recovery of taxes, duties and other levies instead of summary warrant. The Commission's recommendations were supported in *Striking the Balance - a new approach to debt management*<sup>554</sup>

6.18 The need to balance the interests of the parties is particularly relevant in this context. On the one hand, as a general proposition of enforcement policy, time to pay arrangements are considered to be an appropriate means of debtor protection. The arguments in favour of debtor protections which act as diligence stoppers have already been discussed<sup>555</sup> and militate towards implementation of the Commission's recent recommendations.

6.19 On the other hand, policy considerations about the nature of the debt and creditor to whom it is owed must be taken into the equation. Public authorities are fundamentally different from other creditors. They have no discretion to choose whom they have as debtors and are obliged to provide services to all members of the public and business community without exception. It is important to society as a whole that such creditors, who act in the public interest, should be given all assistance necessary to recover the charges for services which they provide. They have a public duty to take all necessary steps to recover unpaid dues and the cost of doing so should be minimised to reduce any consequential additional burden to the public. Such sums are payable in a uniform manner, citizens are uniformly liable and are usually open to payment by instalments. Further time to pay would delay recovery of funds to government which, in turn, could affect services and impact on court business, particularly having regard to the numbers involved. Arrangements for payment of debt to government should be consistent throughout the UK and introducing a period of delay for collection within Scotland should not be undertaken lightly. This is also relevant for the debtor because many such debts are continuing liabilities and extending time to pay into the next period would exacerbate debtors' ability to pay future liabilities. Furthermore, those debtors motivated purely by a desire to impede or delay the inevitability of payment would be likely to resort to time to pay arrangements to frustrate the recovery process.

6.20 The Scottish Law Commission noted that the money advice sector had expressed concern that some local authorities did not act responsibly, failed to take account of individuals' circumstances and the lack of time to pay orders in summary warrant diligence had been raised as a specific concern in evidence given to the Committees of the Scottish Parliament as part of their consideration of abolition of poinding and warrant sale.<sup>556</sup> It has been reported that almost every multiple debt case handled by Citizens Advice Bureaux

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<sup>551</sup> 1987 Act ss 1(5) and 5(4).

<sup>552</sup> Scot Law Com No 95, para 3.55.

<sup>553</sup> Scot Law Com No 177, paras 4.21-4.27.

<sup>554</sup> Paras 67 and 74.

<sup>555</sup> Part 4, paras 4.2-4.4 and 4.39.

<sup>556</sup> Scot Law Com No 177, para 4.25.

includes a local tax debt.<sup>557</sup> The implementation of recommendations from *It Pays to Pay* for improvement of local authority procedures for collection of council tax should alleviate former difficulties. The Executive's increased provision of money advice services throughout the country and proposals for a national statutory debt arrangement scheme should also make a significant contribution in this regard.

6.21 Introduction of time to pay directions, as a step within summary warrant procedure, would change the streamlined nature of the process. That is a matter principally for consideration in the context of discussion on procedures leading up to the issue of summary warrants. Most authorities which levy rates and taxes, for which recovery may be authorised by summary warrant, have arrangements for payment instalments. Therefore, it is not considered necessary to introduce the opportunity for a time to pay direction when it has been preceded by such an option.

6.22 It is understood that informal arrangements for time to pay are also entered into between summary warrant creditors and their debtors following granting of a summary warrant. Formalising this, in a time to pay order, would, therefore, reflect current informal practice. The costs of doing so would ultimately be borne by the debtor in expenses because a separate application would have to be made by the debtor in respect of each warrant granted. In addition, an additional burden would be incurred by the courts. However, if such an arrangement was to be formalised, it would be necessary for the creditor to intimate to the debtor that a summary warrant had been granted against them for the debt owed. A suitable means of doing so would have to be devised. Current informal practice of giving such notice to the debtor prior to proceeding with diligence is understood to vary. It is not necessary to serve a formal charge for payment prior to diligence which proceeds on the authority of a summary warrant.

#### Service of a Charge for Payment Prior to Summary Warrant Diligence

6.23 **Background and Current Law.** A charge for payment is a formal document which is served by a creditor, who holds a decree or other document of debt carrying a warrant for enforcement, on his debtor. It requires payment, or such other action to obey the warrant, and gives usually 14 days notice of his intention to proceed with enforcement action in the event of failure to do so.<sup>558</sup> It has the practical effect of giving the debtor a final opportunity to settle the debt or negotiate payment terms before enforcement action is taken. It is understood often to be successful in this respect, thus avoiding enforcement action. The charge is served personally by an officer of court who reports to the court, although in limited circumstances, for example in the Scottish islands, service by post is permitted.<sup>559</sup> If payment is not made within the period of charge the creditor may proceed to do diligence.

6.24 Not all types of diligence must be preceded by a charge for payment. It is currently necessary to serve a charge for payment before proceeding with an earnings arrestment and a poinding,<sup>560</sup> (although the latter will soon be abolished and alternative arrangements put in place.)<sup>561</sup> However, it is not currently necessary for a summary warrant creditor to serve a charge for payment at all.<sup>562</sup>

6.25 According to the Scottish Law Commission's recommendations for diligence against land, mentioned in Parts 5E and F and paragraphs 6.7-6.14, it will be necessary to serve a

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<sup>557</sup> Citizens Advice Scotland, *Won't Pay or Can't Pay? - the real cost of Scotland's Council Tax debt* (2000), para 55.

<sup>558</sup> 1987 Act, s90(3).

<sup>559</sup> Execution of Diligence (Scotland) Act 1926, c16, s2.

<sup>560</sup> 1987 Act, s90(1).

<sup>561</sup> Fn 540.

<sup>562</sup> 1987 Act, s90(2).

charge for payment prior to proceeding with land attachment,<sup>563</sup> attachment orders<sup>564</sup> and money attachment.<sup>565</sup> The Commission did not suggest introducing a prior charge as part of its proposals for reform of inhibition but the process otherwise involves a mechanism for notice and opportunity to make payment before it takes effect. The Commission assessed the need for a prior charge for payment in each diligence and made its recommendations on the basis of support on consultation. It is not considered necessary or appropriate to repeat that exercise. Since the Commission left the question of whether these diligences should be competent upon the authority of a summary warrant for further consultation in this exercise, and an intention to do so is set out in paragraph 6.14, the question of a prior charge on a summary warrant requires consideration also.

**6.26 Scottish Law Commission Consideration.** When the Scottish Law Commission recommended a new system of arrestment against earnings in its 1985 Report, it took the view that service of a charge for payment ought not to be required as a pre-requisite for arrestments against earnings. This was on the basis that charges were "incompatible with the expeditious nature of summary warrant diligence, and in practice most debtors get informal warning before diligence is done against them".<sup>566</sup> More recently, the Commission has revised its opinion. In its 2000 Report it noted that, despite the increased costs associated with service, a charge for payment alerts debtors to the intention to do diligence, provides a further opportunity for establishing a payment arrangement and can give notice to the debtor of any errors in the summary warrant.<sup>567</sup>

**6.27 Policy Issues.** The Commission's later recommendation was made in the context of proposals for reform of poinding and warrant sale where the intrusive nature of that diligence in domestic cases, was of particular concern. The Commission's recommendations were not adopted and alternative new arrangements are to be introduced instead.<sup>568</sup> The Commission's later view regarding service of a charge was designed to address particular difficulties in relation to poinding which the alternative arrangements will otherwise resolve.

**6.28** As noted, a charge for payment has the practical effect of giving the debtor a final opportunity to settle the debt or negotiate payment terms before enforcement action is taken. It may be regarded as more important, from the debtor's perspective, to have that final warning and opportunity to make arrangements for payment prior to the debt being legally constituted by the court granting a summary warrant. This is particularly so where a surcharge is applied, for example for non-payment of council tax as a penalty to cover the costs of recovery. Statutory notices are served demanding payment prior to obtaining the summary warrant. The Commission's earlier view, that a charge for payment is incompatible with the expeditious nature of summary warrant diligence, is not otherwise negated and remains generally relevant. The policy considerations highlighted in the foregoing paragraphs, 6.12-6.14 are equally relevant to the question of service of a charge for payment.

**6.29** The Commission assessed whether the voluntary practice of some summary warrant creditors of issuing an informal letter should be formalised instead of service of a charge for payment. It concluded that service of a charge would be the most straightforward way of achieving introduction of a pre-requisite step before proceeding with formal enforcement.<sup>569</sup> That is so, but it would involve further costs which would be carried by the debtor in the

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<sup>563</sup> Scot Law Com No 183, para 3.38.

<sup>564</sup> *Ibid*, para 4.41.

<sup>565</sup> *Ibid*, para 5.23.

<sup>566</sup> Scot Law Com No 95, para 7.17.

<sup>567</sup> Scot Law Com No 177, para 4.8.

<sup>568</sup> See paras 6.17-6.22.

<sup>569</sup> Scot Law Com No 177, para 4.8.

direct expenses, where recovered. So too by the taxpayer, where expenses were not recovered, and for the additional administration required. The Commission had considered that a charge would be preferable for evidential purposes of establishing that the required step had been taken. It had previously noted in its 1985 Report that research at that time had found that up to 10% of certain court documents served by recorded delivery letter never reached the intended recipients.<sup>570</sup> The Commission took account of more recent similar research when making certain recommendations regarding service of inhibitions.<sup>571</sup> It noted that an evaluation of postal citation of witnesses in criminal proceedings had found that a not insubstantial proportion of those cited said that they did not receive a postal citation. However, the research conducted had found that 25% of a relatively small sample study had made this claim whilst noting that a number of those recipients may have received but inadvertently disposed of the citation.<sup>572</sup>

### Proposals for Reform

6.30 The foregoing discussions concerning time to pay and service of a charge in relation to summary warrant demonstrate that these issues are closely related conceptually and in balancing the parties and public interests. It is not considered necessary or desirable for enforcement purposes to introduce both measures into the process as this would seriously and unjustifiably undermine its summary nature. There may be a case for introduction of one or other measure or a new measure which could achieve the desired aim.

6.31 The purpose of reform in this respect would be to provide a further opportunity and encouragement to debtors to settle or negotiate payment terms ahead of diligence proceeding. This might be achieved by formalising the requirement to issue, and standardising the terms of, the post summary warrant letter prior to doing diligence and upon which it would be competent to apply for a time to pay order. This would not, however, have the benefit of personal service which has a greater degree of certainty of success. Personal service is also known to have the effect of focusing debtors' attention on resolving their situation by enabling them to obtain a personal explanation about the enforcement process from the officer and direction to advice services.

6.32 Account should also be taken of the forthcoming arrangements which the Executive intends to introduce in implementation of the recommendations from the Report *Striking the Balance*. In particular, the incorporation of advice and information for debtors at the outset of the new process. Summary warrant creditors could issue similar advice and information with their notices to debtors. This is a further matter for which the proposed Scottish Civil Enforcement Commission could oversee in development of an education and information strategy for enforcement.<sup>573</sup>

6.33 It may be that formalisation of the post summary warrant notice coupled with advice and information could serve the purpose otherwise intended by a charge for payment. That there would in future be additional types of diligence available to summary warrant creditors would be a significant development in their enforcement armoury. On that basis, the increased burden of serving a charge for payment or the opportunity for time to pay may be regarded as negated by the increased range of diligence. Whatever conclusion may be reached regarding notice and summary warrant diligence, it is the intention that the same arrangements should apply to each type of diligence for the purposes of consistency and clarity.

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<sup>570</sup> Scot Law Com No 95, para 5.14.

<sup>571</sup> Scot Law Com No 183, para 6.36.

<sup>572</sup> *Evaluation Of Postal Witness Citation and Countermanding*, ch 7.

<sup>573</sup> See para 3.109.

6.34 This is an important issue which carries a wider impact for the community at large than may usually be the case when balancing the interests of the parties directly involved. It is, therefore, considered appropriate to take further views from consultees.

**Q 6.1 Should it be competent to do diligence on the authority of a summary warrant either:**

**(a) following service of a charge for payment**

**(b) or following service of a notice in standard terms upon which it is competent to apply for a time to pay order?**

**Q 6.2 If yes to option (b), should the summary warrant notice be accompanied by advice and information for debtors?**

#### Local Authority Surcharge

6.35 In the context of summary warrant diligence, concerns have also been raised about local authorities' apparent willingness to enter into arrangements for instalment payment prior to proceeding to obtain a summary warrant. The concern has been raised on the basis that granting of a warrant authorises the recovery of a surcharge of 10% of the amount unpaid.<sup>574</sup> Since there is no mechanism for recovery of expenses under summary warrant, the surcharge may "be regarded as recompensing the authority for their work in pursuing debtors and in obtaining the summary warrant and for the lack of interest chargeable on the arrears".<sup>575</sup>

6.36 Advice agencies have highlighted the significance of the additional burden of the surcharge for those in the lowest income groups who are experiencing difficulty in paying the original debt. The relationship between the 10% surcharge and the costs of recovery have been queried. However, there is no evidence that the surcharge is discouraging authorities from reaching early agreement with debtors prior to summary warrants. Without the surcharge, the full cost of recovering arrears of council tax would fall on other taxpayers or local service budgets. These are matters of substantive policy in relation to local authority taxation which does not fall within the remit of a review of the law of diligence.

6.37 Similarly, a Scottish Law Commission recommendation for permitting deductions to be made from social security benefits before a summary warrant is granted, in order to avoid imposition of the surcharge which would increase the debt of those already unable to meet their liabilities, is a matter of substantive social security policy. It was noted that, whilst local authorities may only apply for a deductions from benefits order after a summary warrant has been granted, this is not so for other creditors for whom direct deductions may be made. This was addressed in more detail in Part 5C.

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<sup>574</sup> Local Government (Scotland) Act 1947, c43, s247(2); Local Government Finance Act 1992, c14, s97(5) and Sch 8; Local Government etc. (Scotland) Act 1994, c39, s79 and Sch 10.

<sup>575</sup> Scot Law Com No 95, para 7.54