THE ARRESTMENT OF BENEFITS: *MCKENZIE V CITY OF EDINBURGH COUNCIL*

I. INTRODUCTION

As individuals become more indebted and fall behind with repayments, there is pressure on the Scottish Government to strengthen protections against debt enforcement procedures.[1] The most common diligence used to enforce debts is arrestment, which can capture sums of money from a debtor's bank account.[2] Yet despite the impact arrestment can have on a debtor, only minor reform of it is currently planned.[3] In this context, Sheriff Corke's judgment in *McKenzie v City of Edinburgh Council*[4] is a timely reminder that courts can also have a role in protecting debtors. Although the protection of benefits paid into a bank account granted by *McKenzie* is undoubtedly welcome to debtors, and can be justified in policy terms, the way in which this was achieved may have stretched the interpretation of section 187 of the Social Security Administration Act 1992 ("1992 Act") beyond what was intended when it was enacted. The preferable approach for protecting a debtor is instead to use the statutory protection against unduly harsh arrestments. This mechanism was noted by the sheriff and counsel in *McKenzie* but, as no competent application had been submitted, the sheriff was unable to make any finding under the relevant provision. This is unfortunate, as it provides a wider and more flexible mechanism to prevent a creditor arresting sums intended to provide the debtor with a minimum standard of living. In addition to setting out why it is the correct route for protecting a debtor in receipt of benefits, this article will also raise some practical issues where sums received by way of benefits are protected from arrestment.

II. FACTS

A summary warrant was granted to the City of Edinburgh Council ("the Council") on 23 May 2022, authorising the recovery of Mr McKenzie's unpaid council tax. A few months later, on 28 October 2022, and in accordance with the summary warrant, the Council had an arrestment served on the Bank of Scotland plc ("the Bank").[5] £527.59 was arrested in McKenzie's account with the Bank.[6] This was the amount available above the protected minimum balance that cannot be arrested.[7]

McKenzie applied for recall of arrestment under the Debtors (Scotland) Act 1987 ("1987 Act"), s 73M, on the basis that the arrestment had been executed incompetently or irregularly (s 73M(4)(b)): the arrested money in the bank account had been paid to him by the Department for Work and Pensions, and such a claim was non-arrestable under the 1992 Act, s 187, and the Social Security (Scotland) Act 2018, s 83. The relevant parts of section 187 of the 1992 Act state that:

> "(1) Subject to the provisions of this Act, every assignment of or charge on—

---

[1] The Scottish Government has responded with the Bankruptcy and Diligence (Scotland) Bill and proposals for secondary legislation: Scottish Government, *Scotland's Statutory Debt Solutions and Diligence – Policy Review Response: Consultation* (2022). For commentary, see A.D.J. MacPherson, "Scottish Statutory Debt Solutions and Diligence: A Response in a Time of Crisis" (2023) 21(1) EdinLR 64.

[2] For further details regarding arrestment and diligence more generally, see e.g. L.J. Macgregor et al, *Commercial Law in Scotland*, 6th edn (Edinburgh: W. Green, 2020), ch 9.

[3] *Policy Memorandum to the Bankruptcy and Diligence (Scotland) Bill*, para 61. The reforms proposed are aimed at assisting creditors rather than protecting debtors.

[4] *McKenzie v City of Edinburgh Council* 2023 SLT (Sh Ct) 127. It has already generated commentary, e.g. "Application for Recall of an Arrestment Pursuant to s.73M of the Debtors (Scotland) Act 1987" (2023) 173 CivPB 7.

[5] Who also entered appearance as an interested party in the case.

[6] Sheriff Corke noted that the next step for the Council would be an action of furthcoming; however, although such an action is possible, the Debtors (Scotland) Act 1987 s.73J provides that arrested funds are to be automatically released after 14 weeks.

[7] Debtors (Scotland) Act 1987 s.73F. As noted by the sheriff, the protected minimum balance was £566.51 at the date of the arrestment, but was increased to £1,000 from 1 November 2022 by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 s.22(2)(a), without retrospective effect for earlier arrestments (s.22(3)) (*McKenzie* at para [48]).

> (za) universal credit; […]
>
> (ad) personal independence payment […]
>
> and every agreement to assign or charge such benefit shall be void; and, on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors."[8]

The application was served on the Council alongside a letter from the Jobcentre Plus, which confirmed that McKenzie had been claiming Universal Credit since 4 January 2019, with the most recent payment on 4 November 2022 being £689.19. McKenzie had also been receiving Personal Independence Payment[9] of £61.85 per week, but paid every four weeks, since 8 November 2020.

The importance of this case was heightened when, at the initial hearing, the Council sought to rely on the first instance decision of Sheriff Galbraith (Airdrie) in *North Lanarkshire Council v Crossan*[10] and it was suggested that this had become "the conventional view" of the law.[11] Yet it transpired that *Crossan* had been overturned on appeal by the (Temporary) Sheriff Principal (Kearney).[12] The rationale of the sheriff principal's judgment in *Crossan* became a key aspect of Sheriff Corke's judgment.

III. SUBMISSIONS AND DECISION

For the Council it was argued that section 187 of the 1992 Act did not prevent the arrestment of social security benefits once paid into a bank account. Instead, "[t]he effect of section 187 of the SSAA 1992 and section 83 of the 2018 Act was to render any entitlement or right to receive certain benefits inalienable and beyond the reach of arrestment."[13] When, however, the benefits were paid into the debtor's bank account, the right to receive the benefits was replaced by the debtor's right against the bank, which no longer attracted protection under section 187. This argument was based on a common law rule that when "money [is] paid into a bank account it [is] consumed by the bank and the bank [becomes] the owner of funds deposited with it."[14] Counsel for McKenzie also contended that the case turned on the interpretation of the statutory provision, but naturally argued that section 187 had a wider effect than merely preventing an arrestment in the hands of the government. The interpretation relied upon the common law rule of alimentary payments and the underlying purpose of social security legislation.[15] This wider interpretation of section 187 prevented a creditor from arresting social security benefits in the government's hands and from arresting those benefits even after payment into the debtor's bank account. Although the debtor's right against the government to receive the benefits was extinguished and replaced by a right against his bank, the "fund" was the same and still attracted protection from section 187.

On the basis of these submissions, Sheriff Corke's decision ultimately turned on his interpretation of section 187. As he stated:

> "UC and PIP are benefits relevant for the purposes of section 187 of the SSAA 1992 so that, rather than the 2018 Act (regarding Scottish benefits) or the common law relating to alimentary funds, should be the thrust of this decision."[16]

---

[8] "Charge" was accepted as including an arrestment in Scots law (para [13]) despite the lack of a clear legislative statement to that effect. Such a statement would be expected because section 187(2) does provide clarity regarding "assignation" and "sequestration". Nevertheless, it appears correct that an arrestment would fall under the definition of "charge" or "assignation".

[9] Which provides additional support for living costs for people with long-term physical or mental health conditions or disabilities.

[10] 2007 SLT (Sh Ct) 169.

[11] Paras [16]-[17]. H. MacQueen and Rt. Hon. Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland* 15th edn, (London: W. Green, 2022) vol 2, p. 655, fn 71, is cited in support of such a view.

[12] *North Lanarkshire Council v Crossan*, Unreported, 2 May 2008 (Airdrie), now reported at 2023 GWD 29-246.

[13] *McKenzie* at para [33].

[14] *Ibid.*

[15] *Ibid* para [32].

[16] *Ibid* para [14].

In reaching his decision that the applicant was entitled to recall of the arrestment under section 73M of the 1987 Act, as an incompetent or irregular arrestment of benefits,[17] the sheriff adopted the legal reasoning of the sheriff principal in *Crossan*.[18] The sheriff principal had considered that the legislation's purpose was to provide the claimant and their dependants with "the necessities of life" and therefore "an interpretation of the provisions relating to immunity from diligence conferred by the Acts which allows that immunity to persist where the funds are held by the bank in identifiable form is to be preferred."[19] In addition to adopting the sheriff principal's judgment in *Crossan*, Sheriff Corke stated that it was clear that "statutory protection of alimentary benefits was the aim of section 187" and that could extend beyond the protected minimum balance in a bank account.[20] He added that "[i]t is no protection at all to the individual if the benefit has to be paid into a bank account and the statutory protection flies off as soon as it leaves the DWP".[21] The sheriff rejected the Council's submission that section 187 should be interpreted in harmony with the underlying common law that an arrestment of a bank account attaches the bank's obligation to account to its customer (as there is no longer a claim to receive benefits). According to Sheriff Corke, section 187 "interferes with the bank/customer relationship",[22] and is thus a statutory exception to the common law rule.

IV. ANALYSIS

1. Statutory interpretation

As the submissions show, the sheriff was presented with two competing interpretations of section 187 of the 1992 Act: a wide interpretation (argued for by McKenzie), and a narrow interpretation (argued for by the Council). The wide interpretation adopted by the sheriff in *McKenzie* is attractive as an attempt to protect debtors in receipt of benefits, and there is some support for it in case law dealing with similar legislation.[23] But when faced with a task of statutory interpretation, the court is to "consider the language of the legislation together with all the relevant interpretative factors and, in the light of those, reach a view as to how the legislator intended the enactment in question to apply to the situation before it."[24] Key factors are the legislation's context, purpose, presumptions and other relevant legislation.[25] And when these factors are examined,[26] the meaning given to section 187 in *McKenzie* seems to stretch the provision's intention.

(a) Internal context

First, the internal context of section 187(1) points against the wide meaning.[27] Sheriff Corke's judgment would apply to every benefit specified in section 187(1). Some benefit payments under section 187(1) are designed to provide the recipient with "the basic necessities of life", but this is not the case for all payments specified in the sub-section. State pension, for example, cannot be said to be designed in *all* cases to provide the recipient with alimentary payment, given the availability of other income sources.

---

[17] *Ibid* para [1].
[18] *Ibid* paras [41]-[44]. Albeit that it was not binding as it was from another Sheriffdom. He also agreed (see para [53]) with the sheriff principal in *Crossan* that the earlier decision of *Woods v Royal Bank of Scotland* 1913 1 SLT 499 was correctly decided.
[19] *North Lanarkshire Council v Crossan*, Unreported, 2 May 2008 (Airdrie); 2023 GWD 29-246, para [51]. That the case turned on the interpretation of section 187 of the 1992 was also the view of the sheriff in *Crossan* at first instance (*North Lanarkshire Council v Crossan* 2007 SLT (Sh Ct) 169 at 175-176, per Sheriff Galbraith).
[20] *McKenzie* at para [49].
[21] *Ibid* para [51].
[22] *Ibid* para [52].
[23] See *Woods v Royal Bank of Scotland* 1913 1 SLT 499.
[24] D. Lowe and C. Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (London: Hart Publishing, 2018) para 3.4.
[25] Lowe and Potter, para 3.5
[26] Both internal and external context is relevant when interpreting legislation. On this, see J. Bell and G. Engle, *Cross on Statutory Interpretation*, 3rd edn (Oxford: Oxford University Press, 1995) 50.
[27] For the current approach to statutory interpretation, see *Kostal v Dunkley* [2021] UKSC 47 at para 30 per Lord Leggatt, and 109 per Lady Arden and Lord Burrows.

(b) External context: common law and legislation

Second, the external context also undermines the wide meaning.[28] The common law is part of the contextual framework in which an Act operates and is to be interpreted,[29] and counsel for both McKenzie and the Council referred to common law rules.

Counsel for McKenzie submitted that "Scots common law had long recognised that alimentary funds are set up for the support and maintenance of the beneficiary and are not in general attachable by creditors. This [is] now recognised in section 187 of the SSAA 1992."[30] The sheriff's judgment contains no further detail on McKenzie's submission on this common law rule. It is correct that the common law has long recognised that payments designed to provide alimentary relief to the recipient are exempt from arrestment.[31] There is also authority for the rule that such protection continues where one alimentary item is exchanged for another.[32] But it is not so clear whether alimentary claims retain such status if traceable into the recipient's bank account. Stewart supports the view that alimentary funds remain exempt from arrestment if saved by the recipient in their bank account,[33] yet there is contrary authority too.[34] In *Drew v Drew*, Lord Cowan stated that:

> "If each term's aliment had been paid over to Alexander, and by him lodged in bank, so becoming part of and mixed with his ordinary funds, it could not for one moment be contended that it was protected from his general creditors."[35]

In *McKenzie,* the sheriff did not discuss the *extent* of the common law rule. Instead, the case turned on the "purpose of statutory provisions such as section 187 of the SSAA 1992" to protect alimentary payments rather than whether the section encapsulated the existing common law protection of alimentary payments.[36]

The Council relied on a different common law rule, as noted in the previous section.[37] According to this rule, once the funds were paid into McKenzie's bank account, the claim available for arrestment was the bank's obligation to account to McKenzie for the account funds. The right to receive the benefits no longer existed. Whether this common law position is displaced by the statute is ultimately a statutory interpretation question.[38] Following *Woods v Royal Bank of Scotland*, [39] which addressed a similar statutory provision to section 187 of the 1992 Act, the sheriff held that section 187 displaced this common law rule.[40] This is perhaps surprising, for "when the provisions of a statute are ambiguous, it is a proper canon of construction that, in the absence of any sufficient indication of intention elsewhere in the statute, that meaning should be attached to them which involves the least alteration of the existing law."[41] In *McKenzie*, the "least

---

[28] On the need to read a statute in its historical context, see *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at para 8, per Lord Bingham.
[29] D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London: LexisNexis, 2020) 786-787.
[30] *McKenzie* at para [32].
[31] See, e.g., Stair, *Institutions* II.5.18 and III.1.37; Erskine, *Institute* III.6.7; Bankton, *Institute* I.6.14 (vol 1, 159), III.1.35 (vol 2, 198); Bell, *Principles* §2276; J.G. Stewart, *A Treatise on the Law of Diligence* (Edinburgh: W. Green, 1898), pp. 93ff.; G.L. Gretton, "Diligence" in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Edinburgh: Butterworths; Law Society of Scotland, 1992), vol 8, para 280; *Dick v Russell* (1887) 15 R 261.
[32] Erskine, *Institute* III.6.7.
[33] See Stewart, *Diligence* 103.
[34] *Drew v Drew* (1870) 9 M 163, at 166 per Lord Justice-Clerk Moncreiff. See also Scottish Law Commission, Report on *Diligence and Debtor Protection* (Scot Law Com No 95, 1985) para 6.285 and Scottish Law Commission, Report on *Diligence on the Dependence and Admiralty Arrestments* (Scot Law Com No 164, 1998) para 9.110.
[35] *Drew v Drew* (1870) 9 M 163 at 167 per Lord Cowan.
[36] *McKenzie* at para [51]
[37] *Ibid* para [33]. This common law rule can be found in *Royal Bank of Scotland v Skinner* 1931 SLT 382 at 384, per Lord MacKay.
[38] *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54 at para 27, per Dyson JSC.
[39] *Woods v Royal Bank of Scotland* (1913) 1 SLT 499 at 501, per Sheriff Welsh.
[40] *McKenzie* at paras [52] and [53].
[41] *Hynd's Trustee v Hynd's Trustees* 1955 SC (HL) 1 at 16, per Lord Reid.

alteration" of the common law would have been achieved by the adoption of the narrow meaning of section 187.

(c) External context: accepted interpretation and subsequent legislation

Another aspect of the external context is that the narrow interpretation of section 187 seems to have been generally accepted as correct.[42] This was despite some parties disagreeing with it in policy terms and the decision in *Woods v Royal Bank of Scotland*. The Scottish Executive, in 2002, accepted that section 187 was to be interpreted narrowly. In a consultation document, they stated that:

> "while most social security benefits are exempt from arrestment, in terms of section 187 of the Social Security Administration Act 1992, that statutory protection is lost once benefit [sic] has been paid into a bank account."[43]

This narrow interpretation of section 187, and its limited protection for debtors in receipt of social security benefits, was a factor that encouraged the then Scottish Executive to legislate for (1) a protected minimum balance in a bank account that could not be arrested,[44] and (2) the release of funds from an arrestment where it is deemed unduly harsh.[45] These reforms were included in the Bankruptcy and Diligence etc. (Scotland) Act 2007 and demonstrate that, where the legislature wishes to introduce debtor protections, it does so unequivocally.

Prior to the passage of the Bill that became the 2007 Act, the Scottish Executive rejected the exemption from arrestment of bank account funds that originated from social security payments, due to the difficulty identifying the source of funds.[46] Amendments that would have excluded such funds in a bank account from arrestment were proposed at Stage 2 of the Bill.[47] These amendments were rejected by the Scottish Executive for various reasons, in particular because they did not protect low income debtors who did not receive benefits and because they were outwith the Scottish Parliament's legislative competence.[48]

The Scottish Government's understanding might not carry much weight before a judge interpreting section 187, but various statutes containing the same or similar wording can be used as a tool to determine the

---

[42] The view of practitioners can perhaps be seen in: Accountant in Bankruptcy Diligence Working Group, *Report of Recommendations to Modernise Diligence* (March 2021), para 5.12 (available at: https://aib.gov.uk/diligence-working-group-final-report, accessed 19 September 2023). Cf F. McCarthy, "Judicial Security: Diligence" in R.G. Anderson (ed), *Scots Commercial Law*, 2nd edn (Edinburgh: Edinburgh University Press, 2022) p. 329 at para 12.30; and, less certainly, Macgregor et al, *Commercial Law in Scotland* (2020) p. 310 (fn 143). For the extent to which subsequent practice can assist statutory interpretation, see Lowe and Potter, paras 3.58-3.60.

[43] Scottish Executive, *Consultation Paper on the Enforcement of Civil Obligations in Scotland* (2002) para 5.245 (archived website available at: https://webarchive.nrscotland.gov.uk/3000/https://www.gov.scot/Publications/2002/04/14590/3547 (accessed 21 September 2023)). See also para 5.229. The Scottish Executive was clear, however, that the question was yet to be "formally determined".

[44] *Policy Memorandum to the Bankruptcy and Diligence etc. (Scotland) Bill*, para 930.

[45] This was introduced at stage 2 of the Bankruptcy and Diligence etc. (Scotland) Bill's passage as a result of concerns raised at Stage 1. See *Scottish Parliament Official Report* (18 April 2006) col 2898-2923 and *Scottish Parliament Official Report* (24 October 2006) col 3380-3394.

[46] Scottish Executive, *Modernising Bankruptcy and Diligence in Scotland: Draft Bill and Consultation* (2004), para 9.46.

[47] See the debate on amendments 273 (Michael Matheson), 316 (Jackie Baillie), 443 and 444 (Christine May), in *Scottish Parliament Official Report* (24 October 2006) col 3381-3386.

[48] *Ibid* col 3383-3385. The legislative competence argument was that the proposed amendments would have related to the reserved matter of social security. "Social security schemes" remain reserved in F1 of Schedule 5 to the Scotland Act 1998. The present authors' view is that once social security benefits are paid to the recipient, whether those funds are arrestable becomes a matter for the law of diligence, which is devolved to the Scottish Parliament.

section's purpose.[49] For example, section 91 of the Pensions Act 1995 contains strikingly similar wording.[50] The section's intention is clear from the preceding Goode Committee on Pension Law Reform, whose 1993 report justifies what became section 91 on the basis that: "[t]he evidence submitted to us shows a broad consensus in favour of exempting future pension entitlements from the claims of creditors."[51] Despite this, the Committee was equally clear that the legislation was not to "preclude execution creditors from attaching money in the hand paid to the scheme member or due for payment".[52] In other words, the purpose of the section is to protect the pension fund until paid over to the recipient. This view was recently endorsed by the English High Court,[53] and also has a long history in Scots law.[54]

Several other examples of legislation with near identical wording to section 187 of the 1992 Act could be given.[55] Of particular interest are the numerous recent SSIs that have established Scottish public sector pension schemes and which include wording substantially the same as section 187.[56] These pensions are payments from the government to individuals, in the same manner as social security payments. Due to the potential for pension payments under these SSIs to be worth significant sums, it cannot have been the intention to prevent creditors from arresting a pensioner's bank account.[57] This undermines the wider interpretation of section 187.

Whilst the judgment in *McKenzie* records no submissions on *Mulvey v Secretary of State for Social Security*,[58] and the sheriff principal in *Crossan* considered it to be "of limited usefulness",[59] the case actually provides a helpful insight into the correct interpretation. *Mulvey* was a judicial review of the Secretary of State's decision to deduct payments from a bankrupt's income support to recoup a pre-bankruptcy social fund loan. The case's ratio is focussed on the second part of section 187(1) ("on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors"). Nonetheless, Lord President Hope's statement on section 187's effect is not confined to the section's interaction with bankruptcy law, and he makes a clear distinction between (1) the right to receive social security benefits and (2) the funds in a bank account after payment of the benefits.[60]

Section 187 is designed to ensure that the right to receive benefits does not pass to the trustee. That is all that is achieved by the social security legislation. Thereafter, and because in *Mulvey* the recipient of the benefits was bankrupt, it was for underlying bankruptcy law to regulate whether the trustee could acquire the benefits income once paid to the recipient.

The same principle ought to apply to the first part of section 187, for the two parts are designed to operate in the same manner. Section 187 is intended to prevent the right to receive social security benefits from being assigned to a creditor, whether by voluntary assignation, a charge, an arrestment, or the transfer to a

---

[49] As appeared to be accepted by Sheriff Corke when he stated (para [51]) that: "it cannot have been the purpose of statutory provisions *such as* section 187 of the SSAA 1992 simply to save the DWP from the inconvenience of having funds arrested in its hands." (Emphasis added). See also Lord President Hope in *Mulvey v Secretary of State for Social Security* 1996 SC 8 at 12.

[50] Many other examples of statutes containing wording similar to section 187 of the 1992 Act could be cited. For one, see the National Insurance Act 1911 s.111.

[51] *Pension Law Review: Report of the Pension Law Review Committee* (Goode Committee) (1993, Cm 2342) para 4.14.34.

[52] *Goode Committee Report* para 4.14.35.

[53] See, e.g., *Bacci v Green* [2022] EWHC 486 (Ch) at para 40 per Mr Hochhauser QC.

[54] *Macdonald's Trs v Macdonald* 1938 SC 536 at 550, per Lord Justice-Clerk Aitchison.

[55] See, for example, the Superannuation Act 1972, now replaced by the Public Sector Pensions Act 2013.

[56] See, e.g., Police Pension Scheme (Scotland) Regulations (SSI 2015/142) reg 217A; Local Government Pension Scheme (Scotland) Regulations (SSI 2018/141) reg 79(2).

[57] While it could be argued that the nature of benefit payments, in comparison to pensions, might justify a more protective approach, that would undermine a consistent interpretation of the wording.

[58] *Mulvey v Secretary of State for Social Security* 1995 SLT 1064; rev'd (in part) 1996 SC 8; aff'd 1997 SC (HL) 105. The opinion of Lord Jauncey in the House of Lords has been criticised by the Supreme Court in an English case (*R (Payne) v Secretary of State for Work and Pensions* [2011] UKSC 60; [2012] 2 AC 1), but the latter case turned on the interpretation of an English statute and no criticism was aimed at the views of Lord Hope discussed here.

[59] *North Lanarkshire Council v Crossan*, Unreported, 2 May 2008 (Airdrie); 2023 GWD 29-246, para [51].

[60] *Mulvey* 1996 SC 8 at 13, per Lord President Hope.

trustee in sequestration. But once these benefits are "converted into income" or otherwise fall into the debtor's hands it is for the law of diligence, beyond the social security legislation, to regulate whether the funds are arrestable. Instead of adopting this approach, *McKenzie* denies the broader law of diligence a role here. The result of this distinction is that section 187 grants more protection to the recipient of benefits before their bankruptcy than afterwards, since bankruptcy law does not entirely prohibit a trustee from acquiring benefits income received by the bankrupt after the date of sequestration.[61]

(d) Summary

The view here is that the meaning given to section 187 in *McKenzie* is not supported by the provision's context. If correct, there would remain the possibility of a creditor arresting the benefits once paid into the debtor's bank account. An alternative statutory protection would, however, seem to protect funds arising from alimentary payments, as shall be briefly outlined.

2. Alternative approaches

As noted above, the protected minimum balance was intended to provide some protection for bank account sums deriving from benefits. In addition, the Bankruptcy and Diligence etc. (Scotland) Act 2007 also introduced provision for an arrestment to be rendered ineffective, in full or in part, on the basis that it is found to be unduly harsh.[62] The hearing following on from such an application requires the sheriff to have regard to all the circumstances, including, where the debtor is an individual and funds are attached, "the source of those funds".[63] It is clear from the debate surrounding the provision's introduction that it was intended to take account of where a party's account holds funds derived from benefits.[64] But the protection from unduly harsh arrestments is not provided only to those in receipt of benefits. The court can find an arrestment unduly harsh on a low-income debtor or one who is subject to the double diligence of an earnings arrestment and a bank arrestment.[65]

If sums in an account reflect benefit payments, which are received to enable the debtor (and/or their family) to subsist, then a court would be expected to hold that the arrestment is unduly harsh to the extent of those benefits (and potentially even beyond this). In *McKenzie*, the sheriff and counsel for McKenzie (who received instructions only after the application and the initial hearing) were aware that this could have protected the debtor; however, as no such application had been made, the sheriff could make no decision on whether the arrestment was unduly harsh.[66]

It might be said that the procedure and evidence required to protect a debtor under the provisions preventing unduly harsh arrestments presents the debtor with further hardship. It is true that an application is required by the common debtor, but the evidence required would likely be little more than what was provided to the sheriff in *McKenzie*. This is because an arrestment of benefits intended to provide a minimum standard of living will always be unduly harsh. And, as stated above, the legislation caters for a wide range of circumstances, which means there ought to be an ability to test whether the arrestment is unduly harsh. This would be the correct route for determining whether, for example, a party's receipt of pension payments should be protected, rather than the blanket protection afforded by *McKenzie*. The sheriff, after hearing from the creditor, arrester and any other person with an interest, could even release only part of the funds arrested.

---

[61] See *Mulvey* 1997 SC (HL) 105 at 108, per Lord Jauncey. Of course, the likelihood of the trustee receiving such income is low, and this is true for income generally, as it is ordinarily excluded from property vesting in a trustee, unless there is a debtor contribution order – see Bankruptcy (Scotland) Act 2016 ss.85 and 90-97; D.W. McKenzie Skene, *Bankruptcy* (Edinburgh: W. Green, 2018), para 11-21.

[62] Under the Debtors (Scotland) Act 1987 s.73Q.

[63] *Ibid* s.73R(2)-(3).

[64] *Scottish Parliament Official Report* (24 October 2006) col 3388-3392.

[65] *Ibid* col 3389.

[66] *McKenzie*, paras [3], [39], [54].

It remains possible that a party could seek to rely upon the common law of alimentary relief to protect benefit payments in a bank account from arrestment. However, as noted above, the authorities are conflicting on whether such funds in a bank account are so protected and the scope of any protection that does exist is unclear. Consequently, it is preferable to rely on statutory protection, particularly the unduly harsh mechanism.

3. Practical issues

Accepting that social security payments can remain exempt after transfer to a bank account, some interesting issues are raised. Only a few can be outlined here.

First, although the number of arrestments used by local authorities following a summary warrant is considerable, the rate of return appears to be very low. For example, the Council executed 16,203 arrestments using summary warrant procedure in 2022, for total aggregate debts of £50,189,749.68, and recovered only £387,286.77.[67] This represents a recovery rate of 0.77%. Bearing this data in mind, *McKenzie* deals a further blow to the effectiveness of arrestments, particularly for local authorities.

Second, a bank may be faced with the challenge of having to identify accounts holding social security benefits and also dealing with the mixing of social security payments with other funds in the same account. The Bank entered the case as an interested party with the main concern of protecting its own position, arguing that it would be "subject to a highly onerous obligation to trace the origin of funds in any common debtor's account subject to a schedule of arrestment."[68] It may be possible for a bank to develop a system by which it knows whether its customer is in receipt of social security benefits.[69] Where the sums are large, a bank may need to investigate further, but it is perhaps unlikely that a person on benefits such as universal credit would have a large surplus in an account. However, the bank's practical difficulty increases in prevalence if funds deriving from state pension are also excluded from arrestment, for many pensioners also receive income from a private or occupational pension. In any event, unless a bank can easily identify the origin of account funds, they should not be liable in any way for simply arresting upon the demand of the enforcing creditor.[70]

The bank's concern regarding the mixing of benefits with other payments is assuaged if the provisions releasing unduly harsh arrestments are used instead of section 187 of the 1992 Act. The former enables the common debtor's circumstances to be assessed. Where the common debtor receives only benefits provided to maintain a minimum standard of living, the arrestment of their bank account will likely be unduly harsh. Where, however, a common debtor has mixed benefits with other funds, they will have other sources of income or savings and the arrestment is less likely to be unduly harsh. Where the debtor has other sources of funds, a sheriff can also release so much of the funds as deemed appropriate to ensure the arrestment is not unduly harsh.[71] It is through the procedure dealing with unduly harsh arrestments that the bank's concern is addressed.

Third, local authorities seeking to arrest a bank account will need to be aware of the potential that it holds social security payments, especially as Sheriff Corke stated that "the responsibility rather lies upon the creditor not to use summary warrants to the detriment of those deemed to require protection".[72] Yet this assumes that a creditor will always be aware that its debtor is in receipt of benefits and that they have no

[67] This data was provided in response to a Freedom of Information request dated 11 September 2023 from A MacPherson to City of Edinburgh Council, responded to on 9 October 2023 (reference number 44533) – https://edinburgh.axlr8.uk/documents/44533/44533%20response.pdf.
[68] *McKenzie* at para [40].
[69] The current Bankruptcy and Diligence (Scotland) Bill, cl 6, would require an arrestee to disclose that an arrestment has been unsuccessful (not just where successful) and the reason(s) for this. However, given the uncertainty regarding arrestable assets and the common debtor's right to respect for his private life, it is unclear to what extent a bank could or should disclose that the arrested account contains social security benefits.
[70] However, Sheriff Corke left open the potential for a claim against banks (para [55]).
[71] Debtors (Scotland) Act 1987 s.73Q(2).
[72] *McKenzie* at para [55].

assets or income that would be available for arrestment. A creditor should proceed reasonably on the basis of information available to them and if they arrest sums deriving from benefits, the debtor can seek the recall of the arrestment or otherwise provide evidence as to the arrestment's incompetency. If the creditor challenges this, despite evidence to the contrary, they may be liable for expenses.

Finally, the interrelationship between the protected minimum balance and the exemption of social security benefits is unclear. For example, a party has some money deriving from benefits e.g. £1,000 in a bank account but additional money from another source, e.g. a further £500. Does the protected amount apply to the benefits money first (i.e. it is doubly protected, with the latter sum of £500 being unprotected), or would it depend on, for example, which was received first, or would there need to be proportional allocation from both the amount received from benefits and from other sources? While the Scottish Parliament's intention may have been to enhance debtor protections, it is uncertain whether this was intended to extend to the two protections being cumulative and thereby also covering the £500 beyond the social security benefits in the example above. Again, this issue is ameliorated if the statutory provisions preventing unduly harsh arrestments are used instead of section 187.

V. CONCLUSION

In *McKenzie*, it was held that sums in a bank account arising from statutory benefits are not arrestable. The policy motivation of protecting the debtor is understandable and there is some authority that supports the decision, despite the transformation of one type of right (a claim for benefits) into another (a claim against a bank). This article, however, has identified an alternative approach that gives greater regard to the legislation's context and the interpretation of equivalent wording in other legislation. This alternative provides wider and more flexible protection, including for low-income debtors who do not rely solely on social security income. On the basis of *McKenzie*, there are also issues to resolve regarding: the mixing of benefits and non-alimentary sums in an account; the relationship between the protection of benefits and the protected minimum balance; and the duties of creditors and banks where sums in an account may derive from benefits. These can be more appropriately addressed by using the alternative approach.