AdviceTalks

Clerk of Committee

Economy and Fair Works Committee

Scottish Parliament

Edinburgh

EH99 1SP

21st March 2024

Dear Chair

Re: Bank Account Arrestments and Social Security Benefits

I am writing in relation to the submission you have received from the Dr Alasdiar MacPherson and Prof Donna MacKenzie Skene from the University of Aberdeen and in light of some of the recent comments to the Committee by the Minister for Community Wealth and Public Finance, Tom Arthur; and in relation to some of the other recent comments surrounding the arrestment of social security benefits in bank accounts.

In particular I would like to comment on Colin Smyth's Amendment (No 25) in Stage 2 of Bankruptcy and Diligence (Scotland) Bill 2023 that sought to amend S73E (funds attached) of the Debtors (Scotland) Act 1987.

Can social security benefit be attached in bank accounts?

In relation to the issue of whether social security benefits can be arrested in bank accounts, this is an issue that has been in front of the Scottish Courts on several occasions over the last 111 years. The earliest case I am aware of is the case of Woods v Royal Bank of Scotland 1913, which was decided at Greenock Sheriff Court and concerned a payment under the Workmen's Compensation Act 1906, which had been paid into the bank account of the debtor. This has been followed more recently in the appeal case of North Lanarkshire Council v Crossan 2008, which was decided by Temporary Sheriff Principal Kearney in Airdrie Sheriff Court. More recently this has been followed by the case of McKenzie v City Council of Edinburgh 2023, in Edinburgh Sheriff Court.

It is worth noting in all these cases, the Court decided that it was not possible to arrest social security benefit even after they were deposited into a bank account. I am not aware of any case, that is on point, where the Court held social security benefits could be arrested, that was not overturned on appeal.

In all these cases, the decisions of the court relied upon the statutory protections that were afforded these benefits, although the issue of common law protection of alimentary amounts was also considered by the Courts and was also noted by Dr MacPherson and Prof Skene. However, as almost all social security benefits are now covered by statutory protections, this is what I will focus on.

In Woods, as reported in the dase of Crossan, the relevant provision was in the Workman's Compensation Act 1906 and stated*: [benefits] "shall not pass to any other person by operation of law"*. In both Crossan and McKenze, the relevant statutory protections concerned s187(1) (certain

benefits to be inalienable) of the Social Security Administration Act1992. This stated that *every "charge"* on a debtor's benefits was void and would not pass to any person acting on behalf of their creditors. In both Crossan and more recently in McKenzie, it was accepted an arrestment was a "charge" for the purposes of S187(1).

Similar provisions also exist in other social security legislation such as s45(1) of the Tax Credits Act 2002 which states *"Every assignment of or charge on a tax credit, and every agreement to assign or charge a tax credit, is void".* More recently the Social Security (Scotland) Act 2018 in s83(1) (no assignation or charge) stated: *"Any assignation of or charge on, or agreement to assign or charge, an individual's entitlement to assistance under or by virtue of this Act is void".*

I would, therefore, submit all the case law from the last 111 years, that are on point, make clear that where statutory protections exist for social security benefits, then the law of Scotland is that they cannot be arrested, even once paid into a bank account.

However, the Minister did raise several issues that suggests he believes further consultation is necessary before a provision could be included in the Bill that would enact this protection. I respectfully cannot agree and take the view that the protection already exists, whether it's enacted in legislation or not.

I would, therefore, take the view that in proposing his amendment, Colin Smyth MSP, was not proposing the introduction of new protection for debtors but just restating and clarifying the existing law.

I believe this is desirable, as I don't believe it is widely accepted that this is the position in Scots Law, which then leads to the undesirable position where many lenders believe that it is possible for them to attach social security benefits, even when they can be identified, and have been paid into a bank account. This has the unfortunate effect that many arrestments which are incompetent go unchallenged and vulnerable debtors often lose access to funds that both the UK and Scottish Parliament and the courts have previously held should not be arrested.

In support of this I would like to address several issues that I believe were raised by Tom Arthur MSP, Dr MacPherson and Prof Skene.

Do benefits lose their character as benefits once paid into a bank account?

This issue is whether benefits, once paid into a bank account, are no longer benefits and lose the statutory protection they are afforded under legislation. This was considered in Woods, Crossan and McKenzie and has widely been explored and found to not be the case, providing they are still identifiable as benefits.

What this means, is providing the benefits have not been inmixed with other funds that are not social security benefits, then usually they can still be identified as benefits. However, once they are inmixed with other funds, they lose their character as benefits and become just funds. To provide an example that may help illustrate the point, if you mix a pot of both red and green beans, these do not lose their character, as they can still be separated; however, if red and white wine was mixed, they do lose their character, as the new thing is no longer red or white wine.

In such a situation, once benefits are inmixed with other funds, they lose their character, and the statutory protection flies off. I think this issue, however, was acknowledged in Colin Smyth's amendment, as it only proposed to protect funds that could be identified as wholly deriving from social security benefits.

There is, however, also the issue of whether when benefits are paid into a bank account, are they no longer benefits and instead become just an obligation by the bank to reimburse the customer to the value of the funds paid in. This was also considered in Woods, Crossan and McKenzie and held not to be the case. As Sheriff Corke observed in McKenzie:

> *"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. It 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. The DWP could itself face difficulties if demand grows for payment of benefits in a form not subject to arrestment."*

How does the protection of benefits interact with the Protected Minimum Balance?

The Protected Minimum Balance for bank account arrestments were introduced in 2008 by the Bankruptcy and Diligence Etc (Scotland) Act 2007. There have been arguments that this protection superseded previous protections for both social security benefits and alimentary amounts under common law.

However, this cannot be the case. First, the 2007 Act was silent on the issue of the common law position and there was no repealing of the common law by the Act. In relation to the Statutory Protections, in 2008 UK social security law was still a wholly reserved matter. As the statutory potections included in s187(1) of the Social Security Administration Act 1992 were wholly reserved, the Scottish Parliament lacked the legislative power when making the 2007 Act that would have allowed it in any way to have changed or amended the 1992 Act.

In relation to later social security legislation, such as the Social Security (Scotland) Act 2018, the statutory protections that are included in that legislation are a devolved matter, and can be amended by the Scottish Parliament, but cannot have been superseded by earlier legislation of the Parliament.

The simple fact is, therefore, in terms of the statutory protection of social security benefits, these are in addition to the Protected Minimum Amount. As Sheriff Croake observed in Mckenzie: *"statutory protection of alimentary benefits was the aim of section 187 and that could extend beyond the current £1,000 protection afforded to all by section 73F [Protected Minimum Balance]".*

Where someone has £1,400 of benefits paid into their account, and it is identifiable, it is fully protected, notwithstanding it exceeds the Protected Minimum Balance. Where they have been inmixed with other funds, and, therefore, lose their character, only the first £1,000 is protected.

How will banks be able to identify when funds are protected or not?

As the current position is that identifiable social security benefits paid into a bank account are not arrestable, because of their statutory protection, the amendment by Colin Smyth MSP would not have changed this position. However, in his amendment he did propose that banks would not be

liable for any damages or loss incurred by a customer where their benefits were arrested and even released to creditors. This, therefore, arguably increased the protection for banks.

This is important as with over 200,000 bank arrestments a year being executed in Scotland it is not desirable that banks be held liable for any losses or damages, as they will never be able to check all account when applying arrestments.

How will creditors know if funds are wholly social security benefits?

The most obvious answer is they will have to be provided evidence by debtor that this is the case. This will not create a new challenge, as currently front-line advice agencies regularly contact sheriff officers and creditors when funds have been arrested and are wholly benefits, with a view to having them released. Normally, this will be done by providing copies of bank statements showing the source of funds.

The issue that arises, however, is where some creditors and local authorities accept that the legal position is when funds are wholly derived from social security benefits they are protected, not all do. In relation to those that do accept this legal position, where they can be satisfied in relation to the question of fact (whether the funds are wholly benefits), they can then decide whether to release them. Where they are not, they may either negotiate a return of some of the funds to alleviate undue hardship, or where they refuse to, any dispute may have to be resolved through an application to the court by the debtor.

However, the problem is not all creditors do accept the current legal position. This means even when they accept the funds are wholly benefits, such as in McKenzie v City Council of Edinburgh, the case still ends up in court to resolve the question of law.

Colin Smyth MSPs amendment, therefore, would have clarified this question of law and allowed more creditors and debtors to focus on the question of fact. It may not have avoided every case from being referred to the Sheriff Court, but it would have allowed more to be resolved without the Courts involvement.

In terms of when a creditor would be satisfied, Dr MacPherson and Prof Skene have said this would be a subjective test, which is correct; but if they are not satisfied and the matter is placed in front of a sheriff, then it would then be an objective test for the court to determine whether the funds are social security benefits or not and even whether the creditor acted reasonably.

Can the Scottish Parliament legislate in relation to the statutory protections of benefits?

I understand that it has been suggested once the funds are paid to a debtor, then it is possible for the Scottish Parliament to legislate in relation to the protection of social security benefits under the law of diligence, as this is a devolved matter.

I respectfully cannot agree with this.

As we have seen in the cases of Woods, Crossan and McKenzie, the statutory protection of social security benefits flows from the clause in the legislation that gives those benefits protections.

In relation to the Social Security (Scotland) Act 2018, it is within the competence of the Scottish Parliament to legislate in relation to any provision. However, in relation to UK legislation such as the

Social Security Administration Act 1992 and the Tax Credit Act 2002, these pieces of legislation cover areas reserved to the UK Parliament. It would, therefore, not be competent, for the Scottish Parliament to amend these protections.

This leads to the question, could the Scottish Parliament legislate to amend the way that s187(1) of the 1992 Act and s45(1) of the 2002 Act are interpreted by Scottish Courts? I would take the view this would not be competent, as if you can't legislate in relation to an Act, you cannot legislate to instruct Scottish Courts how to interpret it.

Could the Scottish Parliament, therefore, legislate to say an arrestment is not a charge? I would not know why they would want to, but I would argue that is a bit like a Rwanda law, where you're asking the court to ignore the facts.

Either of which would amount to trying to amend legislation through a back door and I believe could be subject to a s35 order by Secretary of State for Scotland to strike down the offending provision or enactment.

Can the Scottish Parliament legislate to prevent bank arrestment arresting social security benefits?

As the diligence that arrests bank accounts is an Action of Arrestment and Furthcoming and these are provided for in the Debtors (Scotland) Act 1987 and the law of diligence is devolved, there is nothing to prevent the Scottish Parliament legislating in relation to what funds can and cannot be arrested, subject to any limitations that may be placed on its powers with statutory protection of funds contained in reserved UK Legislation.

Does the legislation require an exhaustive list of social security contribution benefits?

As has been noted by Dr MacPherson and Prof Skene, the amendment that was laid by Colin Smyth MSP contained an extensive list of both UK and Scottish legislation that deals with social security benefits. However, they correctly noted the list is not exhaustive. This leaves open the possibility that social security benefits not covered in the legislation would still be protected. It also means that future social security benefits that are provided for by legislation and are not in the list could also be protected.

It is also noted that in McKenzie, Sheriff Croake noted that:

> *"It is within judicial knowledge that UC is a means-tested benefit to help with living costs, and PIP is not means-tested but helps with extra living costs for those with a longterm physical or mental health condition or disability and difficulty in performing everyday tasks or getting around as a result. Both are intended to be and are alimentary in nature"*

The Court, therefore, does not require an exhaustive list of social security benefits, as it would be within the judicial knowledge of the Court what is and isn't a social security benefit.

What other protections are there where there is not an agreement as to whether funds should be released?

There is currently two ways to challenge a bank account arrestment of funds. The first of these is under S73M of the Debtors (Scotland) Act 1987 by way of a Notice of Objection. The grounds for this amongst others is the arrestment was invalid. Where the fund arrested are wholly social security

benefits, this is the appropriate grounds to challenge the arrestment, as the argument is under the statutory protection an arrestment is a charge on the benefits and the charge is void. If this objection is successful all the funds should be released, regardless of their amount.

It has been suggested by some commentators that the appropriate course of action is to challenge the arrestment on the ground its unduly harsh. This is not the case.

However, where the funds have been inmixed with other funds and have lost their character as benefits, or the funds are not benefits, but from another source, and the arrestment will cause the debtor undue hardship then the appropriate challenge is under S73Q. A successful challenge under this provision may see some or all the funds being released.

It should be noted in the case of McKenzie, the challenge was under S73M, as the funds were wholly benefits and no challenge was made on the grounds of undue hardship.

Why would we not legislate in relation to protecting benefit from bank arrestment?

As has been noted above, I am not aware of any court case, that is on point, where it has been found that social security benefits afforded statutory protection or that are alimentary in nature can be arrested. This is the current position in Scots Law.

Failure to enact this into a provision in the Debtors (Scotland) Act 1987, will not, therefore avoid any of the issues that have been raised by commentators. However, by putting this principle on a statutory basis we achieve several things:

- We provide clarity for all creditors as to what is the law and therefore, where there is no dispute as to the nature of the funds, avoid unnecessary court cases, and disputes that may see vulnerable people denied alimentary funds for lengthy periods of time.
- We increased the protections available to banks, avoiding them being liable for any loss or damages that arise from them acting in good faith and arrest funds that should not have be arrested or released to creditors.
- We realise what was the intention of Parliament in passing the Social Security (Scotland) Act 2018 in creating a benefit system (and a system of debt laws) that treats people with both dignity and respect.

Conclusion

I have read extensively the views of Prof Sken and Dr MacPherson, and particularly their case analysis of McKenzie v City Council of Edinburgh. I also read their conclusion. My impression was they do not agree that McKenzie was decided correctly (and by implication Woods or Crossan). It was also my impression that they believed the Courts have wrongly interpreted and applied S187(1) of the Social Security Administration Act 1992.

However, I also believe that many of the arguments they make are the same arguments that have been made in the case law I have mentioned, including by Counsel. These arguments have been tested and I believe have not been accepted by the Courts.

I believe their proposals are in relation to what they think the law should be, and I would dispute whether that is possible, as I believe it would involve having to amend UK legislation that it is not

within the powers of the Scottish Parliament to do. I, therefore, don't believe their proposals can every materialise as legislation in the Scottish Parliament.

On the contrary, I believe Colin Smyth (MSPs) amendments was a restatement and clarification of what the law is as it currently stands. Not only is this possible to introduce into legislation, but I believe for the reasons above and to end any further disputes as to what the law currently is, should be legislated for.

There is no reason to avoid doing that with the Bankruptcy and Diligence (Scotland) Bill 2023 and I believe if we fail to do so, we will perpetuate a wholly unacceptable situation where people will see their social security benefits being alienated from them for prolonged periods of time, whilst avoidable cases are fought unnecessarily through the Scottish Courts.

Yours Sincerely

Approved Money Adviser