



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 1

### BANKRUPTCY

#### *The trustee in the sequestration*

#### **6 Amalgamation of offices of interim trustee and permanent trustee**

(1) In section 2 of the 1985 Act (appointment and functions of interim trustee)—

(a) after subsection (2), insert—

“(2A) Where the sheriff awards sequestration of the debtor’s estate and an interim trustee has been appointed in pursuance of subsection (5) below, the sheriff may appoint—

- (a) the interim trustee; or
- (b) subject to subsection (2B) below, such other person as may be nominated by the petitioner,

to be the trustee in the sequestration.

(2B) A person nominated under subsection (2A)(b) above may be appointed to be the trustee in the sequestration only if—

- (a) it appears to the sheriff that the person satisfies the conditions mentioned in subsection (3) below; and
- (b) a copy of the undertaking mentioned in subsection (3)(c) below has been lodged with the sheriff.

(2C) Where the sheriff does not appoint a person to be trustee in pursuance of subsection (2A) above, the sheriff shall appoint the Accountant in Bankruptcy to be the trustee in the sequestration.”;

(b) after subsection (6), insert—

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“(6A) The interim trustee’s general function shall be to safeguard the debtor’s estate pending the determination of the petition for sequestration.

(6B) Whether or not the interim trustee is still acting in the sequestration, the interim trustee shall supply the Accountant in Bankruptcy with such information as the Accountant in Bankruptcy considers necessary to enable him to discharge his functions under this Act.”; and

(c) the heading to that section becomes “Appointment and functions of the trustee in the sequestration”.

(2) The heading to section 3 of that Act becomes “Functions of the trustee”.

(3) Unless the context otherwise requires, any reference in any enactment to—

(a) an “interim trustee”; or

(b) a “permanent trustee”,

is to be construed as a reference to a trustee in the sequestration.

## 7 Repeal of trustee’s residence requirement

(1) In section 2(3) of the 1985 Act (conditions to be met by interim trustee), paragraph (a) is repealed.

(2) In section 24(2) of that Act (eligibility for election as permanent trustee), paragraph (d) is repealed.

## 8 Duties of trustee

(1) In section 3 of the 1985 Act (functions of permanent trustee)—

(a) after subsection (3), insert—

“(3A) If the trustee has reasonable grounds to believe that any behaviour on the part of the debtor is of a kind that would result in a sheriff granting, under section 56B(1) of this Act, an application for a bankruptcy restrictions order, he shall report the matter to the Accountant in Bankruptcy.”;

(b) in subsection (4), after “(3)” insert “or (3A)”;

(c) in subsection (5), for “subsection (3)” substitute “subsections (3) and (3A)”;

and

(d) after subsection (7), insert—

“(8) The trustee shall comply with the requirements of subsections (1)(a) to (d) and (2) above only in so far as, in his view, it would be of financial benefit to the estate of the debtor and in the interests of the creditors to do so.”.

(2) In section 39 of that Act (management and realisation of estate), after subsection (8), insert—

“(9) The trustee—

(a) shall comply with the requirements of subsection (4) of this section; and

(b) may do anything permitted by this section, only in so far as, in his view, it would be of financial benefit to the estate of the debtor and in the interests of the creditors to do so.”.

(3) In section 49 of that Act (adjudication of claims), after subsection (2), insert—

“(2A) On accepting or rejecting, under subsection (2) above, every claim submitted or deemed to have been re-submitted, the trustee shall, as soon as is reasonably practicable, send a list of every claim so accepted or rejected (including the amount of each claim and whether he has accepted or rejected it) to—

- (a) the debtor; and
- (b) every creditor known to the trustee.”.

## 9 Grounds for resignation or removal of trustee

(1) In section 13 of the 1985 Act (resignation, removal etc. of interim trustee)—

- (a) in subsection (2)(a)—
  - (i) for “(whether” substitute “for any reason mentioned in subsection (2A) below or”;
  - (ii) for “a” substitute “any other”; and
  - (iii) the words “or from any other cause whatsoever)” are repealed; and
- (b) after subsection (2), insert—

“(2A) The reasons referred to in subsection (2)(a) above are that the interim trustee—

- (a) is incapable within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4); or
- (b) has some other incapacity by virtue of which he is unable to act as interim trustee.”.

(2) In section 28 of that Act (resignation and death of permanent trustee), in subsection (1), for the words from “either” to “he” substitute “the trustee—

- (a) is unable to act (whether by, under or by virtue of a provision of this Act or from any other cause whatsoever); or
- (b) has so conducted himself that he should no longer continue to act,

the Accountant in Bankruptcy”.

## 10 Termination of interim trustee’s functions

After section 13 of the 1985 Act, insert—

### “13A Termination of interim trustee’s functions where not appointed as trustee

- (1) This section applies where an interim trustee (not being the Accountant in Bankruptcy) is appointed under section 2(5) of this Act and the sheriff—
  - (a) awards sequestration and appoints another person as trustee under subsection (2A) or (2C) of section 2 of this Act; or
  - (b) refuses to award sequestration.

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- (2) Where the sheriff awards sequestration and appoints another person as trustee, the interim trustee shall hand over to the trustee everything in his possession which relates to the sequestration and shall thereupon cease to act in the sequestration.
- (3) The sheriff may make such order in relation to liability for the outlays and remuneration of the interim trustee as may be appropriate.
- (4) Within 3 months of the sheriff awarding or, as the case may be, refusing to award sequestration, the interim trustee shall—
  - (a) submit to the Accountant in Bankruptcy—
    - (i) his accounts of his intromissions (if any) with the debtor's estate; and
    - (ii) a claim for outlays reasonably incurred, and for remuneration for work reasonably undertaken, by him; and
  - (b) send a copy of his accounts and the claim to—
    - (i) the debtor;
    - (ii) the petitioner; and
    - (iii) in a case where sequestration is awarded, the trustee and all creditors known to the interim trustee.
- (5) On a submission being made to him under subsection (4)(a) above, the Accountant in Bankruptcy shall—
  - (a) audit the accounts;
  - (b) issue a determination fixing the amount of the outlays and remuneration payable to the interim trustee;
  - (c) send a copy of the determination to—
    - (i) the interim trustee; and
    - (ii) the persons mentioned in subsection (4)(b) above; and
  - (d) where a trustee (not being the Accountant in Bankruptcy) has been appointed in the sequestration, send a copy of the audited accounts and of the determination to the trustee, who shall insert them in the sederunt book.
- (6) Where the Accountant in Bankruptcy has been appointed as the trustee in the sequestration, the Accountant in Bankruptcy shall insert a copy of the audited accounts and the determination in the sederunt book.
- (7) The interim trustee or any person mentioned in subsection (4)(b) above may, within 14 days after the issuing of the determination under subsection (5)(b) above, appeal to the sheriff against the determination.
- (8) On receiving a copy of the Accountant in Bankruptcy's determination sent under subsection (5)(c)(i) above the interim trustee may apply to him for a certificate of discharge.
- (9) The interim trustee shall send notice of an application under subsection (8) above to the persons mentioned in subsection (4)(b) above and shall inform them—
  - (a) that they may make written representations relating to the application to the Accountant in Bankruptcy within the period of 14 days after such notification; and

- (b) of the effect mentioned in subsection (16) below.
- (10) On the expiry of the period mentioned in subsection (9)(a) above the Accountant in Bankruptcy, after considering any representations duly made to him, shall—
  - (a) grant or refuse to grant the certificate of discharge; and
  - (b) notify the persons mentioned in subsection (4)(b) above accordingly.
- (11) The interim trustee or any person mentioned in subsection (4)(b) above may, within 14 days after the issuing of the determination under subsection (10) above, appeal therefrom to the sheriff.
- (12) If, following an appeal under subsection (11) above, the sheriff determines that a certificate of discharge which has been refused should be granted he shall order the Accountant in Bankruptcy to grant it.
- (13) If, following an appeal under subsection (11) above, the sheriff determines that a certificate of discharge which has been granted should have been refused he shall revoke the certificate.
- (14) The sheriff clerk shall send a copy of the decree of the sheriff following an appeal under subsection (11) above to the Accountant in Bankruptcy.
- (15) The decision of the sheriff in an appeal under subsection (7) or (11) above shall be final.
- (16) The grant of a certificate of discharge under this section by the Accountant in Bankruptcy shall have the effect of discharging the interim trustee from all liability (other than any liability arising from fraud) to the debtor, to the petitioner or to the creditors in respect of any act or omission of the interim trustee in exercising the functions conferred on him by this Act.

### **13B Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee**

- (1) This section applies where the Accountant in Bankruptcy is appointed as interim trustee under section 2(5) of this Act and the sheriff—
  - (a) awards sequestration and appoints another person as trustee under section 2(2A) of this Act; or
  - (b) refuses to award sequestration.
- (2) Where the sheriff awards sequestration and appoints another person as trustee, the Accountant in Bankruptcy shall hand over to the trustee everything in his possession which relates to the sequestration and shall thereupon cease to act in the sequestration.
- (3) The sheriff may make such order in relation to liability for the outlays and remuneration of the Accountant in Bankruptcy as may be appropriate.
- (4) Within 3 months of the sheriff awarding or, as the case may be, refusing to award sequestration, the Accountant in Bankruptcy shall—
  - (a) send to the debtor and the petitioner—
    - (i) his accounts of his intromissions (if any) with the debtor's estate;

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- (ii) a determination of his fees and outlays calculated in accordance with regulations made under section 69A of this Act; and
    - (iii) the notice mentioned in subsection (5) below; and
  - (b) in a case where sequestration is awarded, send a copy of his accounts, the claim and the notice to all creditors known to him.
- (5) The notice referred to in subsection (4)(a)(iii) above is a notice in writing stating—
- (a) that the Accountant in Bankruptcy has commenced procedure under this Act leading to discharge in respect of his actings as interim trustee;
  - (b) that an appeal may be made to the sheriff under subsection (7) below; and
  - (c) the effect mentioned in subsection (9) below.
- (6) The Accountant in Bankruptcy shall, unless the sheriff refuses to award sequestration, insert a copy of the accounts and the determination in the sederunt book.
- (7) The debtor, the petitioner and any creditor may, within 14 days after the sending of the notice under subsection (4)(a)(iii) or, as the case may be, subsection (4)(b) above, appeal to the sheriff against—
- (a) the determination of the Accountant in Bankruptcy mentioned in subsection (4)(a)(ii) above;
  - (b) the discharge of the Accountant in Bankruptcy in respect of his actings as interim trustee;
  - (c) both such determination and discharge,
- and the sheriff clerk shall send a copy of the decree of the sheriff to the Accountant in Bankruptcy.
- (8) The decision of the sheriff in an appeal under subsection (7) above shall be final.
- (9) Where—
- (a) the requirements of this section have been complied with; and
  - (b) no appeal is made to the sheriff under subsection (7) above or such an appeal is made but is refused as regards the discharge of the Accountant in Bankruptcy,
- the Accountant in Bankruptcy shall be discharged from all liability (other than any liability arising from fraud) to the debtor, to the petitioner or to the creditors in respect of any act or omission of the Accountant in Bankruptcy in exercising the functions of interim trustee conferred on him by this Act.”.

## **11 Statutory meeting and election of trustee**

- (1) Section 21 of the 1985 Act (requirement to call statutory meeting) is repealed.
- (2) In section 21A of that Act (calling of statutory meeting where interim trustee is Accountant in Bankruptcy)—
  - (a) in subsection (1), the words from “where” to “Bankruptcy”, are repealed; and
  - (b) the heading to that section becomes “Calling of statutory meeting”.

- (3) The heading to section 23 of that Act becomes “Proceedings at statutory meeting before trustee vote”.
- (4) In section 24 of that Act (election of permanent trustee)—
- (a) in subsection (1), for the words “the election of the permanent trustee” substitute “a vote at which they shall—
    - (a) confirm the appointment of the trustee appointed under section 2 of this Act (referred to in this section and in sections 25 to 27 of this Act as the “original trustee”); or
    - (b) elect another person as the trustee in the sequestration (referred to in this section and in sections 13 and 25 to 29 of this Act as the “replacement trustee”),  - such a vote being referred to in this Act as a “trustee vote”.”; and
  - (b) the heading to that section becomes “Trustee vote”.
- (5) In section 25 of that Act (confirmation of permanent trustee)—
- (a) before subsection (1) insert—
    - “(A1) This section applies where a replacement trustee is elected by virtue of a trustee vote.”; and  - (b) the heading to that section becomes “Appointment of replacement trustee”.
- (6) Schedule 2 to that Act (adaptation of procedure etc. where permanent trustee not elected) is repealed.

## 12 Replacement of trustee acting in more than one sequestration

After section 28 of the 1985 Act, insert—

### “28A Replacement of trustee acting in more than one sequestration

- (1) This section applies where a trustee acting as such in two or more sequestrations—
- (a) dies; or
  - (b) ceases to be qualified to continue to act as trustee by virtue of section 24(2) of this Act.
- (2) The Accountant in Bankruptcy may, by a single petition to the Court of Session, apply—
- (a) in a case where subsection (1)(b) above applies, for the removal of the trustee from office in each sequestration in which he has so ceased to be qualified; and
  - (b) for the appointment of—
    - (i) the Accountant in Bankruptcy; or
    - (ii) such person as may be nominated by the Accountant in Bankruptcy (being a person who is not ineligible for election as replacement trustee under section 24(2) of this Act) if that person consents to the nomination,as the trustee in each sequestration in which the trustee was acting.

- (3) The procedure in a petition under subsection (2) above shall be as the Court of Session may, by act of sederunt, prescribe.
- (4) An act of sederunt made under subsection (3) above may, in particular, make provision as to the intimation to each sheriff who awarded sequestration or to whom sequestration was transferred under section 15(2) of this Act of the appointment by the Court of Session of a trustee in that sequestration.”

### **13 Requirement to hold money in interest bearing account**

In section 43 of the 1985 Act (money received by permanent trustee) —

- (a) in subsection (1)—
  - (i) for “subsection (2)” substitute “subsections (1A) and (2)”; and
  - (ii) after “an” insert “interest-bearing account in an”; and
- (b) after subsection (1), insert—

“(1A) In any case where the Accountant in Bankruptcy is the trustee, subject to subsection (2) below, all money received by the Accountant in Bankruptcy in the exercise of his functions as trustee shall be deposited by him in an interest bearing account in the name of the debtor’s estate or in the name of the Scottish Ministers in an appropriate bank or institution.”.