



# Home Owner and Debtor Protection (Scotland) Act 2010

2010 asp 6

## PART 2

### SEQUESTRATION AND TRUST DEEDS

#### 9 Certificate for sequestration

(1) In section 5 (sequestration of estate) of the Bankruptcy (Scotland) Act 1985 (c. 66) (“the 1985 Act”)—

- (a) in subsection (2)(a), for “either subsection (2A) or” substitute “subsection”,
- (b) subsection (2A) is repealed,
- (c) in subsection (2B)(c), after sub-paragraph (ia) insert—

“(ib) has, within the prescribed period, been granted a certificate for sequestration of the debtor’s estate in accordance with section 5B of this Act,”
- (d) after subsection (2E) insert—

“(2F) In subsection (2B)(c)(ib) above “the prescribed period” means such period, ending immediately before the debtor application is made, as may be prescribed under section 5B(5)(c) of this Act.”.

(2) After section 5A of the 1985 Act insert—

#### “5B Certificate for sequestration

- (1) A certificate for sequestration of a debtor’s estate is a certificate granted by an authorised person certifying that the debtor is unable to pay debts as they become due.
- (2) A certificate may be granted only on the application of the debtor.
- (3) An authorised person must grant a certificate if, and only if, the debtor can demonstrate that the debtor is unable to pay debts as they become due.

- (4) In this section “authorised person” means a person falling within a class prescribed under subsection (5)(a).
- (5) The Scottish Ministers may by regulations—
- (a) prescribe classes of persons authorised to grant a certificate under this section;
  - (b) make provision about certification by an authorised person, including—
    - (i) the form and manner in which a certification must be made;
    - (ii) the fee, if any, which an authorised person is entitled to charge for or in connection with granting a certificate;
  - (c) prescribe a period for the purpose of section 5(2B)(c)(ib) of this Act;
  - (d) make different provision for different cases or classes of case.”.
- (3) In section 12 (when sequestration is awarded) of the 1985 Act, in subsection (1)(b), for “either subsection (2A) or”, substitute “subsection”.

## 10 Trust deeds

- (1) In section 5(4A) (definition of “trust deed”) of the 1985 Act—
- (a) after “means” insert “—
    - (a)”,
    - and
  - (b) after “generally” insert “; and
    - (b) any other trust deed which would fall within paragraph (a) but for—
      - (i) the exclusion from the estate conveyed to the trustee of the whole or part of the debtor’s dwellinghouse, where a secured creditor holds a security over it; and
      - (ii) the fact that the debtor’s estate is not conveyed to the trustee for the benefit of creditors generally because the secured creditor has, at the debtor’s request, agreed before the trust deed is granted not to claim under the trust deed for any of the debt in respect of which the security is held.”.
- (2) After section 5(4A) of the 1985 Act insert—
- “(4AA) In subsection (4A)(b) above “debtor’s dwellinghouse” means a dwellinghouse (including any yard, garden, outbuilding or other pertinents) which, on the day immediately preceding the date the trust deed was granted—
- (a) the debtor (whether alone or in common with any other person)—
    - (i) owned; or
    - (ii) leased under a long lease (long lease having the same meaning as in section 28(1) of the Land Registration (Scotland) Act 1979 (c. 33); and
  - (b) was the sole or main residence of the debtor.
- (4AB) For the purposes of subsection (4AA)(b) above, a dwellinghouse may be a sole or main residence irrespective of whether it is used, to any extent, by the debtor for the purposes of any profession, trade or business.”.

## **11 Power in relation to debtor’s family home**

In section 40 (power in relation to family home) of the 1985 Act—

- (a) in subsections (1), (2) and (3), after “trustee” in each place where it occurs insert “or the trustee acting under the trust deed”,
- (b) in subsection (2), for “twelve months” substitute “3 years”,
- (c) after subsection (3) insert—

“(3A) Before commencing proceedings to obtain the authority of the sheriff under subsection (1)(b) the trustee, or the trustee acting under the trust deed, must give notice of the proceedings to the local authority in whose area the home is situated.

(3B) Notice under subsection (3A) must be given in such form and manner as may be prescribed by the Scottish Ministers.”, and

- (d) in subsection (4)—
  - (i) after paragraph (b), insert—

“(ba) “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39);”, and
  - (ii) in paragraph (d), after “sequestration” insert “or, as the case may be, the day immediately preceding the date the trust deed was granted”.

## **12 Abolition of certain requirements to advertise in Edinburgh Gazette**

Sections 15(6) and 25(6) of the 1985 Act (which require the publication in the Edinburgh Gazette of certain notices in connection with a sequestration) are repealed.

## **13 Regulations under the 1985 Act**

- (1) In section 72 (regulations) of the 1985 Act—
  - (a) in subsection (3)(a), after sub-paragraph (ii) insert—

“(iia) section 5B(5);”, and
  - (b) in subsection (3)(b) the words—
    - (i) “the first”, and
    - (ii) from “made” to the end,are repealed.
- (2) In paragraph 5 of Schedule 5 to the 1985 Act (protected trust deeds), after paragraph (a) of sub-paragraph (2) insert—

“(aa) make different provision for different cases or classes of case;”.