



# Bankruptcy (Scotland) Act 1985 (repealed)

## 1985 CHAPTER 66

### *Safeguarding of interests of creditors of insolvent persons*

#### **34 Gratuitous alienations.**

- (1) Where this subsection applies, an alienation by a debtor shall be challengeable by—
  - (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, or before the granting of the trust deed or the debtor's death, as the case may be; or
  - (b) the <sup>F1</sup> . . . trustee, the trustee acting under the trust deed or the judicial factor, as the case may be.
- (2) Subsection (1) above applies where—
  - (a) by the alienation, whether before or after the coming into force of this section, any of the debtor's property has been transferred or any claim or right of the debtor has been discharged or renounced; and
  - (b) any of the following has occurred—
    - (i) his estate has been sequestrated (other than, in the case of a natural person, after his death); or
    - (ii) he has granted a trust deed which has become a protected trust deed; or
    - (iii) he has died and within 12 months after his death, his estate has been sequestrated; or
    - (iv) he has died and within the said 12 months, a judicial factor has been appointed under section 11A of the <sup>M1</sup>Judicial Factors (Scotland) Act 1889 to administer his estate and the estate was absolutely insolvent at the date of death; and
  - (c) the alienation took place on a relevant day.
- (3) For the purposes of paragraph (c) of subsection (2) above, the day on which an alienation took place shall be the day on which the alienation became completely

*Status: Point in time view as at 01/04/2008.*

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effectual; and in that paragraph “relevant day” means, if the alienation has the effect of favouring—

- (a) a person who is an associate of the debtor, a day not earlier than 5 years before the date of sequestration, the granting of the trust deed or the debtor’s death, as the case may be; or
  - (b) any other person, a day not earlier than 2 years before the said date.
- (4) On a challenge being brought under subsection (1) above, the court shall grant decree of reduction or for such restoration of property to the debtor’s estate or other redress as may be appropriate, but the court shall not grant such a decree if the person seeking to uphold the alienation establishes—
- (a) that immediately, or at any other time, after the alienation the debtor’s assets were greater than his liabilities; or
  - (b) that the alienation was made for adequate consideration; or
  - (c) that the alienation—
    - (i) was a birthday, Christmas or other conventional gift; or
    - (ii) was a gift made, for a charitable purpose, to a person who is not an associate of the debtor,
 which having regard to all the circumstances, it was reasonable for the debtor to make:

Provided that this subsection shall be without prejudice to any right or interest acquired in good faith and for value from or through the transferee in the alienation.

- (5) In subsection (4) above, “charitable purpose” means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.
- (6) For the purposes of the foregoing provisions of this section, an alienation in implementation of a prior obligation shall be deemed to be one for which there was no consideration or no adequate consideration to the extent that the prior obligation was undertaken for no consideration or no adequate consideration.
- (7) This section is without prejudice to the operation of section 2 of the <sup>M2</sup>Married Women’s Policies of Assurance (Scotland) Act 1880 (policy of assurance may be effected in trust for spouse, future spouse and children) [<sup>F2</sup>including the operation of that section as applied by section 132 of the Civil Partnership Act 2004] .
- (8) A <sup>F1</sup>. . . trustee, the trustee acting under a protected trust deed and a judicial factor appointed under section 11A of the <sup>M3</sup>Judicial Factors (Scotland) Act 1889 shall have the same right as a creditor has under any rule of law to challenge an alienation of a debtor made for no consideration or for no adequate consideration.
- (9) The <sup>F1</sup>. . . trustee shall insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

#### Textual Amendments

- F1** Words in s. 34 repealed (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), ss. 226, 227(3), [Sch. 6 Pt. 1](#) (with s. 223); S.S.I. 2008/115, [art. 3\(2\)\(3\)](#), Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))
- F2** Words in s. 34(7) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 35](#); S.S.I. 2005/604 {art. 2(c)}

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#### Modifications etc. (not altering text)

- C1** S. 34 restricted by [Drug Trafficking Offences Act 1986 \(c. 32, SIF 39:1\)](#), **s. 16(6)(a)**
- C2** S. 34 excluded (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), **ss. 154, 155, 165(2)(a)**; S.I. 1991/878, **art. 2**, Sch.
- C3** S. 34 restricted (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 182(4), **Sch. 22 para. 8(2)(a)**; S.I. 1991/878, **art. 2**, Sch.
- C4** S. 34 restricted by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), ss. 85(6)(a), 123, **Sch. 8 para. 16**
- C5** S. 34 amended by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), ss. 85(6)(b), 123, **Sch. 8 para. 16**
- C6** S. 34 restricted (3.2.1995) by 1994 c. 37, **ss. 33(6)(a), 69(2)** (with s. 66(2))  
S. 34 restricted (1.4.1996) by 1995 c. 43, ss. 44(1), 50(2), **Sch. 2 para. 1(5)**
- C7** S. 34 applied (with modifications) (4.4.2006) by [The Cross-Border Insolvency Regulations 2006 \(S.I.2006/1030\)](#), reg. 2(1), **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)
- C8** S. 34 restricted (24.3.2003) by [Proceeds of Crime Act 2002 \(c. 29\)](#), **ss. 422(2), 458(1)**; S.I. 2003/333, **art. 2(1)**, Sch. (subject to transitional provisions and savings in arts. 3-14) (as amended by S.I. 2003/531, art. 2)
- C9** S. 34 restricted (11.12.1999) by S.I. 1999/2979, **reg. 17(2)(a)**

#### Marginal Citations

- M1** 1889 c. 39.
- M2** 1880 c. 26.
- M3** 1889 c. 39.

### 35 Recalling of order for payment of capital sum on divorce.

(1) This section applies where—

- (a) a court has made an order, whether before or after the coming into force of this section, under section 5 of the <sup>M4</sup>Divorce (Scotland) Act 1976 or section 8(2) of the <sup>M5</sup>Family Law (Scotland) Act 1985, for the payment by a debtor of a capital sum or [<sup>F3</sup>a court has, under the said section 8(2), made an order for the transfer of property by him or made a pension sharing order];
- (b) on the date of the making of the order the debtor was absolutely insolvent or was rendered so by implementation of the order; and
- (c) within 5 years after the making of the order—
  - (i) the debtor's estate has been sequestrated other than after his death; or
  - (ii) he has granted a trust deed which has (whether or not within the 5 years) become a protected trust deed; or
  - (iii) he has died and, within 12 months after his death, his estate has been sequestrated; or
  - (iv) he has died and, within the said 12 months, a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer his estate.

(2) Where this section applies, the court, on an application brought by the <sup>F4</sup>. . . trustee, the trustee acting under the trust deed or the judicial factor, may make an order for recall of the order made under the said section 5 or 8(2) and for the repayment to the applicant of the whole or part of any sum already paid, or as the case may be for the return to the applicant of all or part of any property already transferred, under that order, or, where such property has been sold, for payment to the applicant of all or part of the proceeds of sale:

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Provided that before making an order under this subsection the court shall have regard to all the circumstances including, without prejudice to the generality of this proviso, the financial, and other, circumstances (in so far as made known to the court) of the person against whom the order would be made.

- (3) Where an application is brought under this section in a case where the debtor's estate has been sequestrated, the <sup>F4</sup> . . . trustee shall insert a copy of the decree of recall in the sederunt book.

#### Textual Amendments

- F3** Words in s. 35(1)(a) substituted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84, 89(1), Sch. 12 Pt. II para. 68; S.I. 2002/818, art. 3(b)
- F4** Words in s. 35 repealed (1.4.2008) by Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), ss. 226, 227(3), Sch. 6 Pt. 1 (with s. 223); S.S.I. 2008/115, art. 3(2)(3), Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

#### Modifications etc. (not altering text)

- C10** S. 35 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), Sch. 1 Article 23 paras. 1-3 (subject to paras. 6, 9)

#### Marginal Citations

- M4** 1976 c. 39.  
**M5** 1985 c. 37.

## 36 Unfair preferences.

- (1) Subject to subsection (2) below, subsection (4) below applies to a transaction entered into by a debtor, whether before or after the coming into force of this section, which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than 6 months before—
- (a) the date of sequestration of the debtor's estate (if, in the case of a natural person, a date within his lifetime); or
  - (b) the granting by him of a trust deed which has become a protected trust deed; or
  - (c) his death where, within 12 months after his death—
    - (i) his estate has been sequestrated, or
    - (ii) a judicial factor has been appointed under section 11A of the <sup>M6</sup>Judicial Factors (Scotland) Act 1889 to administer his estate and his estate was absolutely insolvent at the date of death.
- (2) Subsection (4) below shall not apply to any of the following transactions—
- (a) a transaction in the ordinary course of trade or business;
  - (b) a payment in cash for a debt which when it was paid had become payable unless the transaction was collusive with the purpose of prejudicing the general body of creditors;
  - (c) a transaction whereby the parties thereto undertake reciprocal obligations (whether the performance by the parties of their respective obligations occurs at the same time or at different times) unless the transaction was collusive as aforesaid;

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- (d) the granting of a mandate by a debtor authorising an arrestee to pay over the arrested funds or part thereof to the arrester where—
- (i) there has been a decree for payment or a warrant for summary diligence; and
  - (ii) the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution.
- (3) For the purposes of subsection (1) above, the day on which a preference was created shall be the day on which the preference became completely effectual.
- (4) A transaction to which this subsection applies shall be challengeable by—
- (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, the granting of the protected trust deed or the debtor's death, as the case may be; or
  - (b) the <sup>F5</sup> . . . trustee, the trustee acting under the protected trust deed, or the judicial factor, as the case may be.
- (5) On a challenge being brought under subsection (4) above, the court, if satisfied that the transaction challenged is a transaction to which this section applies, shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate:
- Provided that this subsection shall be without prejudice to any right or interest acquired in good faith and for value from or through the creditor in whose favour the preference was created.
- (6) A <sup>F5</sup> . . . trustee, the trustee acting under a protected trust deed and a judicial factor appointed under section 11A of the <sup>M7</sup>Judicial Factors (Scotland) Act 1889 shall have the same right as a creditor has under any rule of law to challenge a preference created by a debtor.
- (7) The <sup>F5</sup> . . . trustee shall insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

#### Textual Amendments

- F5** Words in s. 36 repealed (1.4.2008) by Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), ss. 226, 227(3), **Sch. 6 Pt. 1** (with s. 223); S.S.I. 2008/115, **art. 3(2)(3)**, Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

#### Modifications etc. (not altering text)

- C11** S. 36 restricted (24.3.2003) by Proceeds of Crime Act 2002 (c. 29), **ss. 422(2)**, 458(1); S.I. 2003/333, **art. 2(1)**, **Sch.** (subject to transitional provisions and savings in arts. 3-14) (as amended by S.I. 2003/531, art. 2)
- C12** S. 36 restricted by Drug Trafficking Offences Act 1986 (c. 32, SIF 39:1), **s. 16(6)(a)**
- C13** S. 36 excluded (25.4.1991) by Companies Act 1989 (c. 40, SIF 27), **ss. 154**, 155, 165(2)(a); S.I. 1991/878, **art. 2**, Sch.
- C14** S. 36 restricted (25.4.1991) by Companies Act 1989 (c. 40, SIF 27), ss. 182(4), **Sch. 22 para. 8(2)(a)**; S.I. 1991/878, **art. 2**, Sch.
- C15** S. 36 restricted by Criminal Justice Act 1988 (c. 33, SIF 39:1), ss. 85(6)(a), 123, **Sch. 8 para. 16**
- C16** S. 36 amended by Criminal Justice Act 1988 (c. 33, SIF 39:1), ss. 85(6)(b), 123, **Sch. 8 para. 16**
- C17** S. 36 restricted (3.2.1995) by 1994 c. 37, **ss. 33(6)(a)**, 69(2) (with s. 66(2))  
S. 36 restricted (1.4.1996) by 1995 c. 43, ss. 44(1), 50(2), **Sch. 2 para. 1(5)(a)(b)**  
S. 36 restricted (11.12.1999) by S.I. 1999/2979, **reg. 17(2)(a)**

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**C18** S. 36 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)

#### Marginal Citations

**M6** 1889 c. 39.

**M7** 1889 c. 39.

### [<sup>F6</sup>36A Recovery of excessive pension contributions.

- (1) Where a debtor's estate has been sequestrated and he—
  - (a) has rights under an approved pension arrangement, or
  - (b) has excluded rights under an unapproved pension arrangement,
 the <sup>F7</sup> . . . trustee may apply to the court for an order under this section.
- (2) If the court is satisfied—
  - (a) that the rights under the arrangement are to any extent, and whether directly or indirectly, the fruits of relevant contributions, and
  - (b) that the making of any of the relevant contributions (“the excessive contributions”) has unfairly prejudiced the debtor's creditors,
 the court may make such order as it thinks fit for restoring the position to what it would have been had the excessive contributions not been made.
- (3) Subsection (4) applies where the court is satisfied that the value of the rights under the arrangement is, as a result of rights of the debtor under the arrangement or any other pension arrangement having at any time become subject to a debit under section 29(1) (a) of the Welfare Reform and Pensions Act 1999 (debts giving effect to pension-sharing), less than it would otherwise have been.
- (4) Where this subsection applies—
  - (a) any relevant contributions which were represented by the rights which became subject to the debit shall, for the purposes of subsection (2), be taken to be contributions of which the rights under the arrangement are the fruits, and
  - (b) where the relevant contributions represented by the rights under the arrangement (including those so represented by virtue of paragraph (a)) are not all excessive contributions, relevant contributions which are represented by the rights under the arrangement otherwise than by virtue of paragraph (a) shall be treated as excessive contributions before any which are so represented by virtue of that paragraph.
- (5) In subsections (2) to (4) “relevant contributions” means contributions to the arrangement or any other pension arrangement—
  - (a) which the debtor has at any time made on his own behalf, or
  - (b) which have at any time been made on his behalf.
- (6) The court shall, in determining whether it is satisfied under subsection (2)(b), consider in particular—
  - (a) whether any of the contributions were made for the purpose of putting assets beyond the reach of the debtor's creditors or any of them, and
  - (b) whether the total amount of any contributions—
    - (i) made by or on behalf of the debtor to pension arrangements, and

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- (ii) represented (whether directly or indirectly) by rights under approved pension arrangements or excluded rights under unapproved pensions arrangements,
- is an amount which is excessive in view of the debtor's circumstances when those contributions were made.
- (7) For the purposes of this section and sections 36B and 36C ("the recovery provisions"), rights of a debtor under an unapproved pension arrangement are excluded rights if they are rights which are excluded from his estate by virtue of regulations under section 12 of the Welfare Reform and Pensions Act 1999.
- (8) In the recovery provisions—
- “approved pension arrangement” has the same meaning as in section 11 of the Welfare Reform and Pensions Act 1999;
- “unapproved pension arrangement” has the same meaning as in section 12 of that Act.]

#### Textual Amendments

- F6** Ss. 36A-36C substituted (11.11.1999 for certain purposes and 6.4.2002 in so far as not already in force) by 1999 c. 30, ss. 16, 89(5)(a); S.I. 2002/153, **art. 2(f)**
- F7** Word in s. 36A repealed (1.4.2008) by *Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3)*, ss. 226, 227(3), **Sch. 6 Pt. 1** (with s. 223); S.S.I. 2008/115, **art. 3(2)(3)**, **Sch. 2** (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, **art. 5**))

#### Modifications etc. (not altering text)

- C19** S. 36A applied (with modifications) (4.4.2006) by *The Cross-Border Insolvency Regulations 2006* (S.I. 2006/1030), **reg. 2(1)**, **Sch. 1 Article 23 paras. 1-3** (subject to **paras. 6, 9**)

### <sup>F8</sup>36B Orders under section 36A.

- (1) Without prejudice to the generality of section 36A(2) an order under section 36A may include provision—
- (a) requiring the person responsible for the arrangement to pay an amount to the <sup>F9</sup> . . . trustee,
- (b) adjusting the liabilities of the arrangement in respect of the debtor,
- (c) adjusting any liabilities of the arrangement in respect of any other person that derive, directly or indirectly, from rights of the debtor under the arrangement,
- (d) for the recovery by the person responsible for the arrangement (whether by deduction from any amount which that person is ordered to pay or otherwise) of costs incurred by that person in complying in the debtor's case with any requirement under section 36C(1) or in giving effect to the order.
- (2) In subsection (1), references to adjusting the liabilities of the arrangement in respect of a person include (in particular) reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement.
- (3) In subsection (1)(c), the reference to liabilities of the arrangement does not include liabilities in respect of a person which result from giving effect to an order or provision falling within section 28(1) of the Welfare Reform and Pensions Act 1999 (pension sharing orders and agreements).

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- (4) The maximum amount which the person responsible for an arrangement may be required to pay by an order under section 36A is the lesser of—
- (a) the amount of the excessive contributions, and
  - (b) the value of the debtor's rights under the arrangement (if the arrangement is an approved pension arrangement) or of his excluded rights under the arrangement (if the arrangement is an unapproved pension arrangement).
- (5) An order under section 36A which requires the person responsible for an arrangement to pay an amount ("the restoration amount") to the <sup>F9</sup>. . . trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (6) For the purposes of subsection (5), liabilities are correspondingly reduced if the difference between—
- (a) the amount of the liabilities immediately before the reduction, and
  - (b) the amount of the liabilities immediately after the reduction,
- is equal to the restoration amount.
- (7) An order under section 36A in respect of an arrangement—
- (a) shall be binding on the person responsible for the arrangement; and
  - (b) overrides provisions of the arrangement to the extent that they conflict with the provisions of the order.

#### Textual Amendments

- F8** Ss. 36A-36C substituted (11.11.1999 for certain purposes and 6.4.2002 in so far as not already in force) by 1999 c. 30, s. 16; S.I. 2002/153, art. 2(f)
- F9** Words in s. 36B repealed (1.4.2008) by Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), ss. 226, 227(3), Sch. 6 Pt. 1 (with s. 223); S.S.I. 2008/115, art. 3(2)(3), Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

#### Modifications etc. (not altering text)

- C20** S. 36B applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), Sch. 1 Article 23 paras. 1-3 (subject to paras. 6, 9)

#### <sup>F10</sup>36C Orders under section 36A: supplementary.

- (1) The person responsible for—
- (a) an approved pension arrangement under which a debtor has rights,
  - (b) an unapproved pension arrangement under which a debtor has excluded rights, or
  - (c) a pension arrangement under which a debtor has at any time had rights,
- shall, on the <sup>F11</sup>. . . trustee making a written request, provide the <sup>F11</sup>. . . trustee with such information about the arrangement and rights as the <sup>F11</sup>. . . trustee may reasonably require for, or in connection with, the making of applications under section 36A.
- (2) Nothing in—
- (a) any provision of section 159 of the <sup>M8</sup>Pensions Schemes Act 1993 or section 91 of the <sup>M9</sup>Pensions Act 1995 (which prevent assignation and the making of orders that restrain a person from receiving anything which he is prevented from assigning),



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- (b) any provision of any enactment (whether passed or made before or after the passing of the Welfare Reform and Pensions Act 1999) corresponding to any of the provisions mentioned in paragraph (a), or
- (c) any provision of the arrangement in question corresponding to any of those provisions,
- applies to a court exercising its powers under section 36A.
- (3) Where any sum is required by an order under section 36A to be paid to the <sup>F11</sup> . . . trustee, that sum shall be comprised in the debtor's estate.
- (4) Regulations may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
- (a) any such value as is mentioned in section 36B(4)(b);
- (b) any such amounts as are mentioned in section 36B(6)(a) and (b).
- (5) The power conferred by subsection (4) includes power to provide for calculation or verification—
- (a) in such manner as may, in the particular case, be approved by a prescribed person; or
- [<sup>F12</sup>(b) in accordance with guidance from time to time prepared by a prescribed person.]
- (6) References in the recovery provisions to the person responsible for a pension arrangement are to—
- (a) the trustees, managers or provider of the arrangement, or
- (b) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider.
- (7) In this section and sections 36A and 36B—
- “the recovery provisions” means this section and sections 36A and 36B;
- “regulations” means regulations made by the Secretary of State.
- (8) Regulations under the recovery provisions may contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.

#### Textual Amendments

- F10** Ss. 36A-36C substituted (11.11.1999 for certain purposes and 6.4.2002 in so far as not already in force) by 1999 c. 30, ss. 16, 89; S.I. 2002/153, **art. 2(f)**
- F11** Words in s. 36C repealed (1.4.2008) by Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), ss. 226, 227(3), **Sch. 6 Pt. 1** (with s. 223); S.S.I. 2008/115, **art. 3(2)(3)**, Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))
- F12** S. 36C(5)(b) substituted (1.11.2007) by Pensions Act 2007 (c. 22), ss. 17, 30(2)(c), **Sch. 5 para. 1**; S.I. 2007/3063, **art. 2(a)(b)**

#### Modifications etc. (not altering text)

- C21** S. 36C applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)

#### Marginal Citations

- M8** 1993 c. 48.
- M9** 1995 c. 26.

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**[<sup>F13</sup>36D Recovery of excessive contributions in pension-sharing cases.**

- (1) For the purposes of section 34 of this Act, a pension-sharing transaction shall be taken—
  - (a) to be a transaction, entered into by the transferor with the transferee, by which the appropriate amount is transferred by the transferor to the transferee; and
  - (b) to be capable of being an alienation challengeable under that section only so far as it is a transfer of so much of the appropriate amount as is recoverable.
- (2) For the purposes of section 35 of this Act, a pension-sharing transaction shall be taken—
  - (a) to be a pension sharing order made by the court under section 8(2) of the Family Law (Scotland) Act 1985; and
  - (b) to be an order capable of being recalled under that section only so far as it is a payment or transfer of so much of the appropriate amount as is recoverable.
- (3) For the purposes of section 36 of this Act, a pension-sharing transaction shall be taken—
  - (a) to be something (namely a transfer of the appropriate amount to the transferee) done by the transferor; and
  - (b) to be capable of being an unfair preference given to the transferee only so far as it is a transfer of so much of the appropriate amount as is recoverable.
- (4) Where—
  - (a) an alienation is challenged under section 34;
  - (b) an application is made under section 35 for the recall of an order made in divorce proceedings; or
  - (c) a transaction is challenged under section 36,
 if any question arises as to whether, or the extent to which, the appropriate amount in the case of a pension-sharing transaction is recoverable, the question shall be determined in accordance with subsections (5) to (9).
- (5) The court shall first determine the extent (if any) to which the transferor’s rights under the shared arrangement at the time of the transaction appear to have been (whether directly or indirectly) the fruits of contributions (“personal contributions”)—
  - (a) which the transferor has at any time made on his own behalf, or
  - (b) which have at any time been made on the transferor’s behalf,
 to the shared arrangement or any other pension arrangement.
- (6) Where it appears that those rights were to any extent the fruits of personal contributions, the court shall then determine the extent (if any) to which those rights appear to have been the fruits of personal contributions whose making has unfairly prejudiced the transferor’s creditors (“the unfair contributions”).
- (7) If it appears to the court that the extent to which those rights were the fruits of the unfair contributions is such that the transfer of the appropriate amount could have been made out of rights under the shared arrangement which were not the fruits of the unfair contributions, then the appropriate amount is not recoverable.
- (8) If it appears to the court that the transfer could not have been wholly so made, then the appropriate amount is recoverable to the extent to which it appears to the court that the transfer could not have been so made.

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(9) In making the determination mentioned in subsection (6) the court shall consider in particular—

- (a) whether any of the personal contributions were made for the purpose of putting assets beyond the reach of the transferor’s creditors or any of them; and
- (b) whether the total amount of any personal contributions represented, at the time the pension sharing arrangement was made, by rights under pension arrangements is an amount which is excessive in view of the transferor’s circumstances when those contributions were made.

(10) In this section and sections 36E and 36F—

“appropriate amount”, in relation to a pension-sharing transaction, means the appropriate amount in relation to that transaction for the purposes of section 29(1) of the Welfare Reform and Pensions Act 1999 (creation of pension credits and debits);

“pension-sharing transaction” means an order or provision falling within section 28(1) of the Welfare Reform and Pensions Act 1999 (orders and agreements which activate pension-sharing);

“shared arrangement”, in relation to a pension-sharing transaction, means the pension arrangement to which the transaction relates;

“transferee”, in relation to a pension-sharing transaction, means the person for whose benefit the transaction is made;

“transferor”, in relation to a pension-sharing transaction, means the person to whose rights the transaction relates.]

#### Textual Amendments

**F13** S. 36D inserted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84(1), 89(1), **Sch. 12 Pt. II para. 69**; S.I 2002/818 {art. 3(b)}

#### [<sup>F14</sup>36E Recovery orders.

(1) In this section and section 36F of this Act, “recovery order” means—

- (a) a decree granted under section 34(4) of this Act;
- (b) an order made under section 35(2) of this Act;
- (c) a decree granted under section 36(5) of this Act,

in any proceedings to which section 36D of this Act applies.

(2) Without prejudice to the generality of section 34(4), 35(2) or 36(5) a recovery order may include provision—

- (a) requiring the person responsible for a pension arrangement in which the transferee has acquired rights derived directly or indirectly from the pension-sharing transaction to pay an amount to the <sup>F15</sup> . . . trustee,
- (b) adjusting the liabilities of the pension arrangement in respect of the transferee,
- (c) adjusting any liabilities of the pension arrangement in respect of any other person that derive, directly or indirectly, from rights of the transferee under the arrangement,
- (d) for the recovery by the person responsible for the pension arrangement (whether by deduction from any amount which that person is ordered to pay or

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- otherwise) of costs incurred by that person in complying in the debtor's case with any requirement under section 36F(1) or in giving effect to the order.
- (3) In subsection (2), references to adjusting the liabilities of a pension arrangement in respect of a person include (in particular) reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement.
- (4) The maximum amount which the person responsible for an arrangement may be required to pay by a recovery order is the smallest of—
- so much of the appropriate amount as, in accordance with section 36D of this Act, is recoverable,
  - so much (if any) of the amount of the unfair contributions (within the meaning given by section 36D(6)) as is not recoverable by way of an order under section 36A of this Act containing provision such as is mentioned in section 36B(1)(a), and
  - the value of the debtor's rights under the arrangement acquired by the transferee as a consequence of the transfer of the appropriate amount.
- (5) A recovery order which requires the person responsible for an arrangement to pay an amount ("the restoration amount") to the <sup>F15</sup>. . . trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (6) For the purposes of subsection (5), liabilities are correspondingly reduced if the difference between—
- the amount of the liabilities immediately before the reduction, and
  - the amount of the liabilities immediately after the reduction,
- is equal to the restoration amount.
- (7) A recovery order in respect of an arrangement—
- shall be binding on the person responsible for the arrangement, and
  - overrides provisions of the arrangement to the extent that they conflict with the provisions of the order.]

#### Textual Amendments

- F14** S. 36E inserted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84(1), 89(1), **Sch. 12 Pt. II para. 69**; S.I. 2002/818, {art. 3(b)}
- F15** Words in s. 36E repealed (1.4.2008) by **Bankruptcy and Diligence etc. (Scotland) Act 2007** (asp 3), ss. 226, 227(3), **Sch. 6 Pt. 1** (with s. 223); S.S.I. 2008/115, **art. 3(2)(3)**, Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

#### [<sup>F16</sup>36F Recovery orders: supplementary.

- (1) The person responsible for a pension arrangement under which the transferee has, at any time, acquired rights by virtue of the transfer of the appropriate amount shall, on the <sup>F17</sup>. . . trustee making a written request, provide the trustee with such information about the arrangement and the rights under it of the transferor and transferee as the <sup>F17</sup>. . . trustee may reasonably require for, or in connection with, the making of an application for a recovery order.
- (2) Nothing in—

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- (a) any provision of section 159 of the <sup>M10</sup>Pension Schemes Act 1993 or section 91 of the <sup>M11</sup>Pensions Act 1995 (which prevent assignment and the making of orders which restrain a person from receiving anything which he is prevented from assigning),
  - (b) any provision of any enactment (whether passed or made before or after the passing of the Welfare Reform and Pensions Act 1999) corresponding to any of the provisions mentioned in paragraph (a), or
  - (c) any provision of the arrangement in question corresponding to any of those provisions,
- applies to a court exercising its power to make a recovery order.
- (3) Regulations may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
    - (a) any such value as is mentioned in section 36E(4)(c);
    - (b) any such amounts as are mentioned in section 36E(6)(a) and (b).
  - (4) The power conferred by subsection (3) includes power to provide for calculation or verification—
    - (a) in such manner as may, in the particular case, be approved by a prescribed person; or
    - [<sup>F18</sup>(b) in accordance with guidance from time to time prepared by a prescribed person.]
  - (5) References in the recovery provisions to the person responsible for a pension arrangement are to—
    - (a) the trustees, managers or provider of the arrangement, or
    - (b) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider.
  - (6) In this section—
    - “prescribed” means prescribed by regulations;
    - “the recovery provisions” means this section and sections 34, 35, 36 and 36E of this Act;
    - “regulations” means regulations made by the Secretary of State.
  - (7) Regulations under the recovery provisions may—
    - (a) make different provision for different cases;
    - (b) contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.
  - (8) Regulations under the recovery provisions shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.]

#### Textual Amendments

- F16** S. 36F inserted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84(1), 89(1), **Sch. 12 Pt. II para. 69**; S.I. 2002/818 {art. 3(b)}
- F17** Words in s. 36F repealed (1.4.2008) by **Bankruptcy and Diligence etc. (Scotland) Act 2007** (asp 3), ss. 226, 227(3), **Sch. 6 Pt. 1** (with s. 223); S.S.I. 2008/115, **art. 3(2)(3)**, Sch. 2 (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))
- F18** S. 36F(4)(b) substituted (1.11.2007) by **Pensions Act 2007** (c. 22), ss. 17, 30(2)(c), **Sch. 5 para. 2**; S.I. 2007/3063, **art. 2(a)(b)**

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#### **Marginal Citations**

**M10** 1993 c. 48.

**M11** 1995 c. 26.

**Status:**

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