

SCHEDULE 6

(introduced by section 20)

FREEZING ORDERS IN RESPECT OF PROPERTY LIABLE TO FORFEITURE

Application for freezing order

- 1 (1) A freezing order may be made by the Court of Session on an application in pursuance of a direction given by the Scottish Ministers under section 20 of this Act.
- (2) Any such application may be made on an ex parte application to a judge in chambers.

Grounds for making order

- 2 The court may make a freezing order if it is satisfied—
 - (a) that a forfeiture order has been made in proceedings before the ICC; or
 - (b) that there are reasonable grounds for believing that a forfeiture order may be made in such proceedings,and that the property to which the order relates consists of or includes property that is or may be affected by such a forfeiture order.

Effect of order

- 3 (1) A “freezing order” is an order prohibiting any person from dealing with property specified in the order otherwise than in accordance with such conditions and exceptions as may be specified in the order.
- (2) A freezing order shall provide for notice to be given to persons affected by the order.

Variation or discharge of order

- 4 (1) A freezing order may be varied or discharged in relation to any property—
 - (a) on an application in pursuance of a direction given by the Scottish Ministers under section 20 of this Act; or
 - (b) on the application of any person affected by the order.
- (2) A freezing order shall be discharged on the conclusion of the ICC proceedings in relation to which the order was made.

Power to appoint receiver

- 5 (1) The powers conferred by this paragraph may be exercised if a freezing order is in force.
- (2) The Court of Session may at any time appoint a receiver—
 - (a) to take possession of any property specified in the order; and
 - (b) in accordance with the court’s directions, to manage or otherwise deal with the property in respect of which the receiver is appointed,subject to such exceptions and conditions as may be specified by the court.
- (3) The Court of Session may require any person having possession of property in respect of which a receiver is appointed under this paragraph to give possession of it to the receiver.

- (4) The powers conferred on a receiver by this paragraph shall be exercised with a view to securing that the property specified in the order is available for satisfying the forfeiture order or, as the case may be, any forfeiture order that may be made in the ICC proceedings in relation to which the order was made.
- (5) A receiver appointed under this paragraph shall not be liable to any person in respect of any loss or damage resulting from any action which the receiver believed on reasonable grounds that the receiver was entitled to take, except in so far as the loss or damage is caused by the receiver's negligence.

Inhibition of property affected by freezing order

- 6 (1) On the application of the Scottish Ministers, the Court of Session may, in respect of heritable property in Scotland affected by a freezing order (whether such property generally or particular such property), grant warrant for inhibition against any person specified in the freezing order.
- (2) The warrant for inhibition—
 - (a) shall have effect as if granted on the dependence of an action for debt by the Scottish Ministers against the person and may be executed, recalled, loosed or restricted accordingly; and
 - (b) shall have the effect of letters of inhibition and shall forthwith be registered by the Scottish Ministers in the Register of Inhibitions and Adjudications.
- (3) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868 (c. 101) (effective date of inhibition) shall apply in relation to an inhibition for which warrant is granted under sub-paragraph (1) above as it applies to an inhibition by separate letters or contained in a summons.
- (4) The fact that an inhibition has been executed under this paragraph in respect of property shall not prejudice the exercise of a receiver's powers under or for the purposes of this schedule in respect of that property.
- (5) An inhibition executed under this paragraph ceases to have effect when, or in so far as, the freezing order ceases to have effect in respect of the property in respect of which the warrant for inhibition was granted.
- (6) If, by virtue of sub-paragraph (5) above, an inhibition ceases to have effect to any extent, the Scottish Ministers shall—
 - (a) apply for the recall, or as the case may be restriction, of the inhibition; and
 - (b) ensure that the recall, or restriction, is registered in the Register of Inhibitions and Adjudications.

Seizure to prevent removal from Scotland

- 7 (1) Where a freezing order has been made, a constable may, for the purpose of preventing any property specified in the order being removed from Scotland, seize the property.
- (2) Property seized under this paragraph shall be dealt with in accordance with the directions of the Court of Session.

Sequestration

- 8 (1) Where the estate of a person is sequestrated—

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- (a) property for the time being subject to a freezing order made before the date of sequestration (within the meaning of section 12(4) of the 1985 Act); and
 - (b) any proceeds of property realised by virtue of paragraph 5(2) above for the time being in the hands of a receiver appointed under that paragraph,
- is excluded from the debtor's estate for the purposes of that Act.
- (2) Where an award of sequestration is made before a freezing order is made, the powers conferred on a receiver appointed under paragraph 5(2) above shall not be exercised in relation to—
- (a) property for the time being comprised in the whole estate of the debtor (within the meaning of section 31(8) of the 1985 Act);
 - (b) any income of the debtor which has been ordered under section 32(2) of that Act to be paid to the permanent trustee; or
 - (c) any estate which under section 31(10) or 32(6) of that Act vests in the permanent trustee;
- and it shall not be competent to submit a claim in relation to the freezing order to the interim trustee in accordance with section 22 of that Act or the permanent trustee in accordance with section 48 of that Act.
- (3) Nothing in the 1985 Act shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on a receiver so appointed.
- (4) Where, during the period before sequestration is awarded, an interim trustee stands appointed under section 2(5) of the 1985 Act and any property in the debtor's estate is subject to a freezing order, the powers conferred on the interim trustee by virtue of that Act do not apply to property for the time being subject to the freezing order.
- (5) In any case in which, notwithstanding the coming into force of the 1985 Act, the Bankruptcy (Scotland) Act 1913 (c. 20) applies to a sequestration, sub-paragraph (2) above shall have effect as if for paragraphs (a) to (c) there were substituted—
- “(a) property which is for the time being comprised in the whole property of the debtor which vests in the trustee under section 97 of the Bankruptcy (Scotland) Act 1913 (c. 20);
 - (b) any income of the bankrupt which has been ordered under section 98(2) of that Act to be paid to the trustee;
 - (c) any estate which under section 98(1) of that Act vests in the trustee.”.

Winding up

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- (1) Where an order for the winding up of a company has been made under the 1986 Act, or a resolution has been passed by a company for voluntary winding up under that Act, the functions of the liquidator (or any provisional liquidator) shall not be exercisable in relation to—
- (a) property for the time being subject to a freezing order made before the relevant time; and
 - (b) any proceeds of property realised by virtue of paragraph 5(2) above for the time being in the hands of a receiver appointed under that paragraph.
- (2) Where such an order is made, or such a resolution is passed, before a freezing order is made, the powers conferred on a receiver appointed under paragraph 5(2) above shall not be exercised in relation to any property held by the company in relation to which the functions of the liquidator are exercisable—

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- (a) so as to inhibit the liquidator from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
 - (b) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.
- (3) Nothing in the 1986 Act shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on a receiver so appointed.
- (4) In this paragraph "the relevant time" means—
- (a) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up;
 - (b) where such an order has been made and, before the presentation of the petition for the winding up of the company by the court, such a resolution had been passed by the company, the time of the passing of the resolution; and
 - (c) in any other case where such an order has been made, the time of the making of the order.
- (5) In any case in which a winding up of a company commenced or is treated as having commenced before 29th December 1986 (the date on which the 1986 Act came into operation), this paragraph shall have effect with the substitution for references to that Act of references to the Companies Act 1985.

Property subject to floating charge

- 10 (1) This paragraph applies where—
- (a) any property held subject to a floating charge by a company is property which is subject to a freezing order; and
 - (b) a receiver has been appointed by, or on the application of, the holder of the charge (a "floating charge receiver").
- (2) The powers of the floating charge receiver shall not be exercisable in relation to so much of the property as is for the time being subject to a relevant order.
- (3) If the floating charge receiver was appointed before the freezing order was made, the powers conferred on the court by paragraphs 1, 2, 4 and 5 above, and the powers of a receiver appointed under paragraph 5(2) above, shall not be exercised in the way mentioned in sub-paragraph (4) below in relation to any property—
- (a) which is held by the company; and
 - (b) in relation to which the functions of the floating charge receiver are exercisable.
- (4) The powers shall not be exercised—
- (a) so as to inhibit the floating charge receiver from exercising functions of the floating charge receiver for the purpose of distributing property to the company's creditors;
 - (b) so as to prevent the payment out of any property of expenses (including the remuneration of the floating charge receiver) properly incurred in the exercise of the floating charge receiver's functions in respect of the property.
- (5) Nothing in the 1986 Act shall be taken to restrict (or enable the restriction of) the exercise of the powers conferred on a receiver so appointed.

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- (6) In this paragraph—
- “floating charge” includes a floating charge within the meaning of section 462 of the Companies Act 1985 (c. 6) (power of incorporated company to create floating charges); and
 - “relevant order” means—
 - (a) in relation to heritable property situated in Scotland, a warrant for inhibition—
 - (i) registered, by virtue of paragraph 6(2)(b) above, in the Register of Inhibitions and Adjudications; and
 - (ii) taking effect before the appointment of the floating charge receiver; and
 - (b) in relation to any other property, a freezing order made before such appointment.

Protection of insolvency practitioners

- 11 (1) This paragraph applies where an insolvency practitioner seizes or disposes of property which is subject to a freezing order and the insolvency practitioner—
- (a) reasonably believes that such seizing or disposing is done in the exercise of the functions of the insolvency practitioner; and
 - (b) would be entitled so to seize or dispose of the property if it were not subject to a freezing order.
- (2) The insolvency practitioner shall not be liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as the loss or damage is caused by the insolvency practitioner’s negligence.
- (3) The insolvency practitioner shall have a lien on the property seized or the proceeds of its sale—
- (a) for such of the expenses of the insolvency practitioner as were incurred in connection with the liquidation, sequestration or other proceedings in relation to which the seizure or disposal purported to take place; and
 - (b) for so much of the remuneration of the insolvency practitioner as may be reasonably assigned for the practitioner’s acting in connection with those proceedings.
- (4) Sub-paragraphs (1) to (3) above are without prejudice to the generality of any provision contained in the 1986 Act.
- (5) In this paragraph “insolvency practitioner” means a person acting as an insolvency practitioner in relation to property subject to a freezing order.
- (6) For the purpose of sub-paragraph (5) above any question whether a person is acting as an insolvency practitioner in Scotland or in England and Wales shall be determined in accordance with section 388 of the 1986 Act, except that—
- (a) the reference in section 388(2)(a) to a permanent or interim trustee in the sequestration of a debtor’s estate shall be taken to include a reference to a trustee in sequestration;
 - (b) section 388(5) shall be disregarded; and
 - (c) the expression shall also include the Official Receiver acting as receiver or manager of property.

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- (7) For the purpose of sub-paragraph (5) above any question whether a person is acting as an insolvency practitioner in Northern Ireland shall be determined in accordance with Article 3 of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405), except that—
- (a) Article 3(5) shall be disregarded; and
 - (b) the expression shall also include the Official Receiver acting as receiver or manager of property.

Interpretation

- 12 (1) For the purposes of this schedule—
- “the 1985 Act” means the Bankruptcy (Scotland) Act 1985 (c. 66);
 - “the 1986 Act” means the Insolvency Act 1986 (c. 45);
 - “company” means any company which may be wound up under the 1986 Act;
 - “dealing with property” includes (without prejudice to the generality of that expression)—
 - (a) where a debt is owed to a person, making a payment to any person in reduction of the amount of the debt; and
 - (b) removing the property from Scotland; and
 - “property” includes money and all other property, heritable or moveable, real or personal and including things in action and other intangible or incorporeal property.
- (2) For the purposes of this schedule ICC proceedings are concluded—
- (a) when there is no further possibility of a forfeiture order being made in the proceedings; or
 - (b) on the satisfaction of a forfeiture order made in the proceedings (whether by the recovery of all the property liable to be recovered, or otherwise).
- (3) For the purposes of paragraphs 8 to 11 above references to a freezing order include references to a freezing order made under Schedule 6 to the 2001 Act.