

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 1 – Bankruptcy

The trustee in the sequestration

Section 6 – Amalgamation of offices of interim trustee and permanent trustee

25. This section amends sections 2 and 3 of the 1985 Act. It has the effect, when read together with the repeal of section 2(4) of the 1985 Act (see Part 1 of schedule 6 to this Act), that in a sequestration where an interim trustee has been appointed, he or she is no longer required to—
- ascertain the reasons for and circumstances surrounding the insolvency; or
 - ascertain the state of the debtor’s liabilities and assets.
26. Those functions will instead be carried out by the trustee in sequestration who is appointed when sequestration is awarded and who combines the existing roles of the interim trustee and permanent trustee from the date of the award.
27. The interim trustee now has the sole function of safeguarding the debtor’s estate pending a decision on the award of sequestration. The interim trustee can now be in place only for the limited period between the creditor presenting the petition for sequestration and the award of (or refusal to award) sequestration.
28. The interim trustee is obliged to co-operate with the AiB and supply whatever information the AiB may need to carry out the AiB’s functions (in particular the AiB has a general supervisory function in relation to all interim trustees (see section 1A(1)(a)(i) of the 1985 Act)). The obligation to supply information applies to both interim trustees who are in office and who have left office, either because the case was dismissed or another trustee has replaced them. If an interim trustee’s obligation under this provision was extinguished after they left office, the AiB’s ability to supervise and investigate the way in which a sequestration was managed would be restricted. The AiB would not be able to rely on getting information from an interim trustee unless they remained in office.
29. Subsection (3) provides for all references to interim trustees and permanent trustees in other legislation to be read as references to the new style trustee in sequestration unless it is clear from the context that a reference to the interim trustee should continue to be a reference to the new style of interim trustee.

Section 7 – Repeal of trustee’s residence requirement

30. [Section 7](#) removes the requirements in sections 2(3)(a) and 24(2)(d) of the 1985 Act that all trustees must live within the jurisdiction of the Court of Session.

Section 8 – Duties of trustee

31. [Section 8\(1\)](#) inserts new subsections (3A) and (8) into section 3 of the 1985 Act, which as amended by this Act provides for the functions of the trustee in sequestration.
32. Section 3(3A) of the 1985 Act clarifies that the trustee has a duty to report any behaviour of the debtor to the AiB, if the trustee considers that the behaviour would merit a bankruptcy restrictions order or undertaking. Any such report will be absolutely privileged.
33. Section 3(8) of the 1985 Act qualifies the responsibility of the trustee to adhere to some of the requirements of section 3. In particular, the trustee is now given leeway to depart from functions of:
- recovering, managing and realising the debtor’s estate;
 - distributing the estate amongst the creditors according to their respective entitlements;
 - ascertaining the reasons for the debtor’s insolvency, and the circumstances surrounding it; and
 - ascertaining the state of the debtor’s liabilities and asset,
- if the trustee thinks that doing so is in the best interests of the creditors and would be financially beneficial to the estate.
34. In a similar vein, subsection (2) inserts new subsection (9) into section 39 of the 1985 Act, which provides that the trustee need not do anything permitted by section 39 nor comply with the requirements about realising secured property unless that is in the best interests of the creditors and would be financially beneficial to the estate.
35. Subsection (3), by inserting a new subsection (2A) into section 49 of the 1985 Act, also imposes an obligation on the trustee to circulate details of the creditors’ claims and the amount accepted to the debtor and all known creditors.

Section 9 – Grounds for resignation or removal of trustee

36. This section deals with the reasons for which an interim trustee or a trustee can resign or be removed from office.
37. Subsection (1) makes amendments to section 13 of the 1985 Act removing the interim trustee’s right to resign “for any reason whatsoever”. The interim trustee must now be incapable of acting, as defined by section 1(6) of the [Adults with Incapacity \(Scotland\) Act 2000 \(asp 4\)](#), or be incapacitated in some other way.
38. Subsection (2) inserts words into section 28(1) of the 1985 Act making it clear that the trustee in sequestration continues to be permitted to resign if he or she is unable for any reason to act as trustee.

Section 10 – Termination of interim trustee’s functions

39. This section inserts new sections 13A and 13B into the 1985 Act.

New section 13A – Termination of interim trustee’s functions where not appointed as trustee

40. Section 13A provides for the termination of an interim trustee’s functions when a sequestration petition is dismissed or sequestration is awarded and someone other than the interim trustee is appointed as trustee in sequestration. The interim trustee must, within 3 months of the determination of the petition, submit his or her accounts along with any claim for remuneration to the AiB for audit (this does not apply under section 13B where the AiB is the interim trustee). The interim trustee is also obliged to circulate copies of the accounts to the debtor, the creditors and the new trustee. All of these people are permitted to appeal to the sheriff against the AiB’s determination fixing the fees and outlays payable to the interim trustee.
41. The sheriff may make such determination of who is liable for the fees and outlays of the interim trustee appointed under section 2(5) of the 1985 Act as may be appropriate, with the determination of that amount to be by AiB, whose decision is final.
42. The amendments of the 1985 Act made by schedule 1 to this Act mean that there would be no mechanism for discharging interim trustees, within the new meaning of that term. Sections 13A(6) to (11) provide that mechanism.
43. Subsections (11), (12), (13) and (14) of section 13A clarify what happens when the AiB grants, or refuses to grant, a discharge to an interim trustee. The debtor, the creditors, the interim trustee or the new trustee can appeal to the sheriff against the decision of the AiB. If the appeal is successful the sheriff can order the AiB to either issue a certificate of discharge that has been refused, or withdraw one that has been granted.

New section 13B – Termination of Accountant in Bankruptcy’s functions as interim trustee where not appointed as trustee

44. New section 13B of the 1985 Act is similar to section 13A but caters for the case where the AiB was the interim trustee but does not become the replacement trustee when sequestration is awarded.

Section 11 – Statutory meeting and election of trustee

45. An interim trustee, other than the AiB, is currently obliged to call and hold a statutory meeting of creditors within 60 days of the date of the award of sequestration. Subsections (1) and (2) of section 11 repeal section 21 and amend section 21A of the 1985 Act so that the trustee in sequestration may hold a statutory meeting at such time and place as the trustee may determine, and shall give notice to the creditors of any such meeting not later than 60 days after the date of award of the sequestration (and not the date of the sequestration which, in a creditor petition, is the date of the warrant for service on the debtor and which is currently the starting point for the time limit when the AiB is the trustee).
46. Subsections (4) and (5), combined with various amendments made by schedule 1, make alterations to the 1985 Act dealing with the process of voting for a trustee when a statutory meeting is called. Under the new process the creditors can vote to retain the trustee in sequestration who was appointed on the award being made or they can vote to replace that person with a new trustee in sequestration.

Section 12 – Replacement of trustee acting in more than one sequestration

47. Currently, the AiB must make applications for each case and in every sheriff court in which an insolvency practitioner was appointed as trustee, when that trustee is no longer qualified to act. This section inserts a new section 28A into the 1985 Act which simplifies this procedure to allow the AiB to make one application, to the Court of Session, covering all cases and seeking a court order filling the vacated offices of the original trustee with a new trustee.

*These notes relate to the Bankruptcy and Diligence etc. (Scotland)
Act 2007 (asp 3) which received Royal Assent on 15 January 2007*

48. An Act of Sederunt (that is to say court rules) may provide that intimation of the appointment of a new trustee under section 28A is made to the sheriff who awarded the sequestration or to the sheriff to whom it is transferred.

Section 13 – Requirement to hold money in interest bearing account

49. Section 43 of the 1985 Act provides that monies received by a trustee must be deposited in an appropriate bank or institution, as defined in section 73(1) of the Act. This section amends section 43 to introduce a requirement for monies to be deposited in an interest bearing account.