



# Bankruptcy (Scotland) Act 2016

## 2016 asp 21

### PART 18

#### GENERAL

#### **225 Regulations: general**

- (1) This section relates to regulations made under this Act by the Scottish Ministers.
- (2) Such regulations may make different provision for different cases or classes of case.
- (3) Subject to subsections (4) and (5), the regulations are subject to the negative procedure.
- (4) Regulations under—
  - (a) section 2(4), (5) or (8)(a), 4(2)(b), 7(1), 9(4), 89(1), 94(7), 112(7)(g), 166(2)(b) or (c), 169, 170(1)(b) or (e), 174(2) or (3), 175(1), 181(2), 183(1)(a) or (b), 184(1)(b) or (2)(a), 186(3) or (9), 194(1) or 223,
  - (b) section 224(1) and containing provisions which add to, replace or omit any part of the text of an Act or of an Act of the Scottish Parliament, or
  - (c) paragraph 2(7) of schedule 1,are subject to the affirmative procedure.
- (5) Regulations made under section 237(2) are not subject to the negative procedure or to the affirmative procedure.

#### **226 Modification of regulation making powers**

Any power in a provision of this Act to make regulations may, in so far as the provision relates to a matter to which the EC insolvency proceedings regulation applies, be exercised for the purpose of making provision in consequence of the EC insolvency proceedings regulation.

#### **227 Variation of references to time, money etc.**

For any reference in this Act to—

- (a) a period of time,
- (b) an amount of money, or

(c) a fraction,  
there may be prescribed, in substitution, some other period or as the case may be some other amount or fraction.

## 228 Interpretation

- (1) In this Act, unless the context otherwise requires—
- “the 2002 Act” means the Debt Arrangement and Attachment (Scotland) Act 2002,
- “Accountant in Bankruptcy” (or “AiB”) is to be construed in accordance with section 199,
- “accounting period” is to be construed in accordance with section 130(2),
- “apparent insolvency” and “apparently insolvent” are to be construed in accordance with section 16,
- “appropriate bank or institution” means—
- (a) the Bank of England,
  - (b) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 to accept deposits,
  - (c) an EEA firm of the kind mentioned in paragraph 5(b) of schedule 3 of that Act which has permission under paragraph 15 of that schedule (as a result of qualifying for authorisation under paragraph 12 of that schedule) to accept deposits, or
  - (d) a person who is exempt from the general prohibition in respect of accepting deposits as a result of an exemption order made under section 38(1) of that Act,
- “associate” is to be construed in accordance with section 229,
- “bankruptcy restrictions order” has the meaning given by section 155(1),
- “business” means the carrying on of any activity, whether for profit or not,
- “centre of main interests” has the same meaning as in the EC insolvency proceedings regulation,
- “commissioner”, except in the expression “examining commissioner”, is to be construed in accordance with section 76,
- “common financial tool” has the meaning given by section 89(1),
- “court” means Court of Session or sheriff,
- “creditor” includes a member State liquidator deemed to be a creditor under section 207,
- “DAS register” has the meaning given by section 195(4)(b),
- “date of sequestration” has the meaning given by section 22(7),
- “debt advice and information package” has the meaning given by section 3(2),
- “debtor” includes, without prejudice to the expression’s generality, an entity whose estate may be sequestrated by virtue of section 6, a deceased debtor, a deceased debtor’s executor or a person entitled to be appointed a deceased debtor’s executor,
- “debtor application” means an application for sequestration made to AiB under section 2(1)(a), 5(a) or 6(3)(a), (4)(b) or (7)(a),
- “debtor contribution order” has the meaning given by section 90(1),
- “debtor’s contribution” has the meaning given by section 89(1),

“the EC insolvency proceedings regulation” means Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings,

“establishment” has the meaning given by Article 2(h) of the EC insolvency proceedings regulation,

“examination” means a private examination under section 118 or a public examination under section 119,

“examining commissioner” is to be construed in accordance with section 120(3),

“interim bankruptcy restrictions order” is to be construed in accordance with section 160,

“interim trustee” is to be construed in accordance with sections 53 and 54,

“main proceedings” means proceedings opened in accordance with Article 3(1) of the EC insolvency proceedings regulation and falling within the definition of insolvency proceedings in Article 2(a) of that regulation and—

(a) in relation to England and Wales and Scotland, set out in Annex A to that regulation under the heading “United Kingdom”, and

(b) in relation to another member State, set out in Annex A to that regulation under the heading relating to that member State,

“member State liquidator” means a person falling within the definition of liquidator in Article 2(b) of the EC insolvency proceedings regulation appointed in proceedings to which it applies in a member State other than the United Kingdom,

“money adviser” has the meaning given by section 4(2),

“ordinary debt” is to be construed in accordance with section 129(1)(g),

“original trustee” is to be construed in accordance with section 49(1)(a),

“postponed debt” has the meaning given by section 129(4),

“preferred debt” has the meaning given by section 129(2),

“prescribed” means prescribed by regulations made by the Scottish Ministers,

“protected trust deed” is to be construed in accordance with section 163,

“qualified creditor” and “qualified creditors” are to be construed in accordance with section 7(1),

“qualified to act as an insolvency practitioner” is to be construed in accordance with section 390 of the Insolvency Act 1986 (persons not qualified to act as insolvency practitioners),

“register of insolvencies” has the meaning given by section 200(1)(c),

“relevant person” has the meaning given by section 118(2),

“replacement trustee” is to be construed in accordance with section 49(1)(b),

“secondary proceedings” means proceedings opened in accordance with Articles 3(2) and 3(3) of the EC insolvency proceedings regulation, falling within the definition of winding-up proceedings in Article 2(c) of that regulation and—

(a) in relation to England and Wales and Scotland, set out in Annex B to that regulation under the heading “United Kingdom”, and

(b) in relation to another member State, set out in Annex B to that regulation under the heading relating to that member State,

“secured creditor” means a creditor who holds a security for a debt over any part of the debtor’s estate,

“security” means any security, heritable or moveable, or any right of lien, retention or preference,

“sederunt book” means the sederunt book maintained under section 50(1)(e),

“sequestration proceedings” includes a debtor application (and analogous expressions are to be construed accordingly),

“statement of assets and liabilities” means a document (including a copy of a document) in such form as may be prescribed containing—

- (a) a list of the debtor’s assets and liabilities,
- (b) a list of the debtor’s income and expenditure, and
- (c) such other information as may be prescribed,

“statement of undertakings” means the statement of debtor undertakings sent to the debtor under section 51(14) or 54(4) or, in the case of a debtor application, given by the debtor in making the application,

“statutory meeting” has the meaning given by section 43,

“temporary administrator” means a temporary administrator referred to by Article 38 of the EC insolvency proceedings regulation,

“territorial proceedings” means any proceedings opened in accordance with Articles 3(2) and 3(4) of the EC insolvency proceedings regulation, falling within the definition of insolvency proceedings in Article 2(a) of that regulation and—

- (a) in relation to England and Wales and Scotland, set out in Annex A to that regulation under the heading “United Kingdom”, and
- (b) in relation to another member State, set out in Annex A to that regulation under the heading relating to that member State,

“trust deed” means—

- (a) a voluntary trust deed granted by or on behalf of a debtor whereby the debtor’s estate (other than such of that estate as would not, under any provision of this or any other enactment, vest in the trustee were that estate sequestrated) is conveyed to the trustee for the benefit of the debtor’s creditors generally, 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,

“trustee vote” is to be construed in accordance with section 49(1) and (2), and

“unfair preference” means a preference created as is mentioned in subsection (1) of section 99 by a transaction to which subsection (5) of that section applies.

(2) The expressions in the definition of “appropriate bank or institution” in subsection (1) must be read with—

- (a) section 22 of the Financial Services and Markets Act 2000,
- (b) any relevant order under that section, and
- (c) schedule 2 of that Act.

(3) In paragraph (b)(i) of the definition of “trust deed” in subsection (1), “the 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)—

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- (i) owned, or
    - (ii) leased under a long lease (“long lease” having the same meaning as in section 9(2) of the Land Registration etc. (Scotland) Act 2012), and
  - (b) was the debtor’s sole or main residence.
- (4) For the purposes of subsection (3)(b), a dwellinghouse may be the debtor’s 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.
- (5) Any reference in this Act to a debtor being absolutely insolvent is to be construed as a reference to the debtor’s liabilities being greater than the debtor’s assets; and any reference to a debtor’s estate being absolutely insolvent is to be construed accordingly.
- (6) Any reference in this Act to value of the creditors is, in relation to any matter, a reference to the value of their claims as accepted for the purposes of that matter.
- (7) Any reference in this Act to “the creditors” in the context of their giving consent or doing any other thing is, unless the context otherwise requires, to be construed as a reference to the majority in value of such creditors as vote in that context at a meeting of creditors.
- (8) Any reference in this Act to any of the actings mentioned in subsection (9) barring the effect of any enactment or rule of law relating to the limitation of actions is to be construed as a reference to that act having the same effect, for the purposes of that enactment or rule of law, as an effective acknowledgement of the creditor’s claim.
- (9) The actings are—
- (a) the presentation of a petition for sequestration,
  - (b) the concurrence in a debtor application, and
  - (c) the submission of a claim.
- (10) Any reference in this Act to any such enactment as is mentioned in subsection (8) does not include a reference to an enactment which implements or gives effect to any international agreement or obligation.
- (11) Any reference in this Act, however expressed, to the time when a petition for sequestration is presented is to be construed as a reference to the time when the petition is received by the sheriff clerk.
- (12) Any reference in this Act, however expressed, to the time when a debtor application is made is to be construed as a reference to the time when the application is received by AiB.

## **229 Meaning of “associate”**

- (1) For the purposes of this Act, any question whether a person is an associate of another person must be determined in accordance with the following provisions of this section.
- (2) Subsection (1) is subject to section 230(1).
- (3) And any reference, whether in the following provisions of this section or in regulations under section 230(1), to a person being an associate of another person is to be taken to be a reference to their being associates of each other.
- (4) A person (in this subsection referred to as “A”) is an associate of a natural person (in this subsection referred to as “B”) if A is—

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*Status: This is the original version (as it was originally enacted).*

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- (a) B’s spouse or civil partner,
  - (b) a relative of B or of B’s spouse or civil partner, or
  - (c) the spouse or civil partner of such a relative.
- (5) A person (in this subsection referred to as “C”) is an associate of any person (in this subsection referred to as “D”) with whom C is in partnership and of any person who is an associate of D.
- (6) A firm is an associate of any person who is a member of the firm.
- (7) For the purposes of this section, a person (in this subsection referred to as “E”) is a relative of a natural person (in this subsection referred to as “F”) if E is F’s brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant treating any relationship of the half-blood as a relationship of the whole-blood and the stepchild or adopted child of someone (in this subsection referred to as “S”) as S’s child.
- (8) References in this section to a spouse or civil partner include references to a former spouse or civil partner and a reputed spouse or civil partner.
- (9) A person (in this subsection referred to as “G”) is an associate of any person whom G employs or by whom G is employed.
- (10) For the purposes of subsection (9), any director or other officer of a company is to be treated as employed by the company.
- (11) A company is an associate of another company if—
- (a) the same person has control of both, or if a person (in this subsection referred to as “H”) has control of one and persons who are H’s associates have control of the other, or
  - (b) a group of two or more persons has control of each company and the groups either—
    - (i) consist of the same persons, or
    - (ii) could be regarded as consisting of the same persons by treating (in one case or more) a member of either group as replaced by a person of whom that member is an associate.
- (12) A company is an associate of another person (in this subsection referred to as “J”) if—
- (a) J has control of it, or
  - (b) J and persons who are J’s associates together have control of it.
- (13) For the purposes of this section, a person (in this subsection referred to as “K”) is taken to have control of a company—
- (a) if the directors of the company, or of another company which has control of it, (or any of them) are accustomed to act in accordance with K’s directions or instructions, or
  - (b) if K is entitled to exercise, or control the exercise of,  $\frac{1}{3}$  or more of the voting power at any general meeting of the company or of another company which has control of the company.
- (14) Where two or more persons together satisfy either of the conditions mentioned in subsection (13), they are taken to have control of the company.
- (15) In subsections (10) to (14), “company” includes any body corporate (whether incorporated in Great Britain or elsewhere).

**230 “Associates”: regulations for the purposes of section 229**

- (1) The Scottish Ministers may by regulations—
  - (a) amend section 229 so as to provide further categories of persons who, for the purposes of this Act, are to be associates of other persons, and
  - (b) provide that any or all of subsections (4) to (15) of that section (or any subsection added to that section by virtue of paragraph (a))—
    - (i) is to cease to apply, whether in whole or in part, or
    - (ii) is to apply subject to such modifications as they may specify in the regulations.
- (2) The Scottish Ministers may in the regulations make such incidental or transitional provision as they consider appropriate.

**231 Proceedings under EC insolvency proceedings regulation: modified definition of “estate”**

In the application of this Act to insolvency proceedings under the EC insolvency proceedings regulation, a reference to “estate” is a reference to estate which may be dealt with in those proceedings.

**232 Crown application**

This Act binds the Crown as creditor only.

**233 Re-enactment**

Schedule 7, derived from Part 2 of schedule 7 of the Bankruptcy (Scotland) Act 1985 (and re-enacting sections 10 and 189 of the Bankruptcy (Scotland) Act 1913), has effect.

**234 Modifications, repeals, savings, revocations and transitional provisions**

- (1) Schedule 8 makes provision for the modification of enactments.
- (2) The enactments mentioned in schedule 9 are repealed, or as the case may be revoked, to the extent mentioned in the second column of that schedule.
- (3) Nothing in this Act affects—
  - (a) any of the enactments repealed, revoked or amended by this Act in the enactment’s operation in relation to—
    - (i) a sequestration as regards which the petition was presented, or the debtor application was made before, or
    - (ii) a trust deed executed before,the coming into force of this Act, or
  - (b) any power to repeal, revoke or amend any such enactment, in so far as the power relates to such operation of the enactment.
- (4) The apparent insolvency of a debtor may be constituted for the purposes of this Act even though the circumstance founded on for such constitution occurred on a date before the coming into force of this Act; and for those purposes the apparent insolvency is taken to have been constituted on the date in question.

- (5) If a debtor whose estate is sequestrated after the coming into force of this Act is liable, by virtue of a transaction entered into before the date on which section 102 of the Bankruptcy (Scotland) Act 1913 was repealed, to pay royalties or a share of the profits to any person in respect of copyright, or interest in copyright, comprised in the sequestrated estate, then that section applies in relation to the trustee in the sequestration as it applied, before its repeal, in relation to any trustee in bankruptcy (within the meaning of that Act).
- (6) Where sequestration of a debtor's estate is awarded under this Act a person—
- (a) does not commit an offence under any provision of this Act in respect of anything done before the date of commencement of that provision, but
  - (b) instead commits an offence under the Bankruptcy (Scotland) Act 1985 (or as the case may be under the Bankruptcy (Scotland) Act 1913) in respect of anything so done which would have been an offence under that Act if the award of sequestration had been made under that Act.
- (7) Unless the context otherwise requires, any reference in any enactment or document—
- (a) to notour bankruptcy, or to a person being notour bankrupt, is to be construed as a reference to apparent insolvency, or to a person being apparently insolvent, within the meaning of section 16 of this Act,
  - (b) to a person's estate being sequestrated under the Bankruptcy (Scotland) Act 1913 or the Bankruptcy (Scotland) Act 1985 is to be construed as, or as including, a reference to its being sequestrated under this Act, and
  - (c) to a trustee in sequestration or to a trustee in bankruptcy, is to be construed as a reference to a trustee in a sequestration within the meaning of this Act, (analogous references being construed accordingly).
- (8) Unless the context otherwise requires, any reference in any enactment or document—
- (a) to a “gratuitous alienation” is to be construed as including a reference to an alienation challengeable under section 98(2), or
  - (b) to a “fraudulent preference” or to an “unfair preference” is to be construed as including a reference to an unfair preference within the meaning of this Act.

## **235 Continuity of the law**

- (1) The repeal and re-enactment of a provision by this Act does not affect the continuity of the law.
- (2) Anything done, or having effect as if done, under (or for the purposes of or in reliance on) a provision repealed by this Act, being a provision in force or effective immediately before the coming into force of this Act, has effect after that coming into force as if done under (or for the purposes of or in reliance on) the corresponding provision of this Act.
- (3) Any reference (express or implied) in this Act or in any other enactment or document to a provision of this Act is to be construed, so far as the context permits, as including, as respects times, circumstances or purposes in relation to which the corresponding repealed provision had effect, a reference to that corresponding provision.
- (4) Any reference (express or implied) in any enactment or document to a provision repealed by this Act is to be construed, so far as the context permits, as including, as respects times, circumstances or purposes in relation to which the corresponding provision of this Act has effect, a reference to that corresponding provision.



- (5) Subsections (1) to (4) have effect in place of section 19(3) to (5) of the Interpretation and Legislative Reform (Scotland) Act 2010 (effect of repeal and re-enactment); but nothing in this section affects any other provision of that Act.
- (6) This section is without prejudice to section 234(3) and to any specific transitional provision or saving contained in this Act.
- (7) References in this section to this Act include subordinate legislation made under or by virtue of this Act.

**236      Sequestrations to which this Act applies**

This Act applies to sequestrations as regards which the petition is presented, or the debtor application is made on or after the day on which this section comes into force.

**237      Commencement**

- (1) This section and sections 225, 226, 228 to 230 and 238 come into force on the day after Royal Assent.
- (2) The remaining provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
- (3) Different days may, under subsection (2), be appointed for different purposes and for different provisions.

**238      Short title**

The short title of this Act is the Bankruptcy (Scotland) Act 2016.