

EXECUTIVE NOTE

THE BANKRUPTCY FEES ETC. (SCOTLAND) REGULATIONS 2012

SSI 2012/118

The above instrument is made in exercise of the powers conferred by sections 5(4B)(b), 69A and 72(1) of the Bankruptcy (Scotland) Act 1985 (“the 1985 Act”). It is subject to the negative procedure. These Regulations revoke and replace the Bankruptcy Fees (Scotland) Regulations 1993 (“the 1993 Regulations”) and the amending instruments set out in Schedule 2 to these Regulations.

Policy Objectives

1. Section 69A of the Bankruptcy (Scotland) Act 1985 allows the Scottish Ministers to prescribe the fees and outlays to be payable to the Accountant in Bankruptcy in respect of the exercise of her statutory functions as carried out under the 1985 Act. The purpose of this instrument is to stipulate the charges levied by the Accountant in Bankruptcy. This instrument consolidates and updates the fees set in the 1993 Regulations.
2. The Table of Fees in Schedule 1 to the Regulations is divided into 2 parts. Part 1 lists the fees payable for the functions of the Accountant in Bankruptcy in respect of the functions carried out as interim and/or trustee in a bankruptcy. Part 2 lists the fees payable for all other statutory functions of the Accountant.
3. The fees are levied to recover part of the administration costs incurred by the Accountant in Bankruptcy in respect of the statutory duties undertaken. For cases where the Accountant in Bankruptcy is appointed as trustee, the fees are subsidized by the public purse as part of the overall Accountant in Bankruptcy (“AiB”) budget from the Scottish Government in those cases where the realisation of the debtor’s estate does not hold sufficient funds. Where the AiB is not appointed as trustee the fees stated in Part 2 of the Schedule are paid to the AiB from the debtor’s estate whether there is any realisation or not.
4. The AiB has been moving towards a position where they recover all of their costs, where possible, through the fees they charge and have made significant reductions year on year to their funding from the Scottish Government.
5. In order to progress towards full cost recovery, the fee structure is being adjusted to properly reflect the services provided by the AiB so it is equitable and sustainable to support the AiB in the future. In order to achieve this, process modelling has been undertaken of the services provided, which has included identifying and making efficiencies. This modelling has resulted in detailed costings of the AiB’s functions.
6. In light of the modelling, the efficiency drive and in recognition of the current economic climate, the majority of the fee rates will remain at 2009-10 levels. However, the changes to specific fees where indicated in Schedule 1 to the Regulations are to ensure that the rate charged covers, so far as possible, the actual cost of delivering the functions undertaken.

Background

7. Bankruptcy or sequestration is the state of being legally and publicly declared to be unable to meet debts when they fall due. It can apply to an individual, a partnership, a corporate body or an incorporated body. When the insolvent person is declared bankrupt, by a sheriff or the AiB, their estate is removed from their control and set aside for the benefit of their creditors. Bankruptcy has the effect of permanently removing from the debtor any liability to pay the debts accumulated up to the date of their bankruptcy, with certain exceptions including student loans.

8. A trustee, either the AiB or an insolvency practitioner, will be appointed or nominated to administer the bankrupt's estate. A bankrupt will be able to keep some things that are essential for everyday living, however they may be required to make some payment from their income. Where a debtor has sufficient surplus income, after their living costs have been taken into consideration, the trustee and the debtor usually reach an agreement for a contribution to be payable for a period of 36 months. If the debtor's financial circumstances change during this time, then the trustee may reassess the contribution payable.

9. It is the duty of the trustee to ingather funds, sell the debtor's non-essential assets or property and to use the money to:

- pay the costs of managing the bankruptcy; and
- pay creditors as much as possible of what the debtor owes them.

10. At the end of a bankruptcy where funds have been ingathered, the trustee will distribute these funds in order of priority laid out in section 51 of the 1985 Act. This allows for the fees and outlays of the trustee and the expenses of the petitioning creditor to be paid prior to the payment of any dividend to creditors, subject to sufficient funds being available.

11. In cases where the AiB is trustee and there are insufficient funds, the costs of administering the bankrupt's estate will fall to the public purse.

Accountant in Bankruptcy Functions

12. Under the 1985 Act, the AiB acts as trustee, where nominated, or in cases where an insolvency practitioner has not been appointed. The AiB is deemed to be trustee in all cases awarded through Low Income Low Assets criteria under section 5A of the 1985 Act ("LILA"). As trustee, the AiB administers cases, determines debtor's assets, assesses whether a contribution from income can be sought and realises any assets for the benefit of creditors. In practice, the AiB contracts work out to insolvency practitioners who administer the cases on behalf of the AiB. However, the AiB is still the trustee in these cases.

13. The AiB also has a duty to supervise of the performance of trustees in bankruptcies and protected trust deeds for the benefit of creditors. She does this by auditing the trustees' accounts and reviewing case files, as appropriate.

14. It is also the responsibility of the AiB to investigate and apply for Bankruptcy Restriction Orders or Undertakings if the trustee believes, for example, that the debtor purposely obtained credit lacking the ability to repay it, or hid assets from their trustee or

disposed of assets. If such a restriction was applied, the debtor would be unable to undertake certain jobs, obtain credit over £500 without divulging the bankruptcy etc.

Statistics

15. The numbers of debtors applying to be made bankrupt has been high in the past few years, partly due to the introduction of the LILA route into bankruptcy in April 2008. The total number of bankruptcy awards peaked at 14,777 in 2008/2009. Applications have been declining and are expected to continue to fall. There were around 12,681 debtor applications received in 2008-09, falling to 9,650 applications in 2011-12, representing a 24% fall between these years.

Table 1	2010/2011	2009/2010	2008/2009
Awards of bankruptcy via:			
Debtor applications	8,830	10,854	11,421
Creditor Petitions	2,278	2,543	2,914
Trustee Petitions	335	413	442
Total	11,443	13,810	14,777

Total number of cases where Accountant in Bankruptcy is trustee	10,018	12,454	13,285
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% of cases where Accountant in Bankruptcy trustee	87.5%	90.2%	89.9%
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Total number of awards made via LILA route	6,086	8,397	9,417
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Where Accountant in Bankruptcy is trustee % awarded via LILA route	60.8%	67.4%	70.9%
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16. The majority of debtor applications resulting in an award are made via the LILA route. Table 1 shows that in 2010/2011 6,086 awards were made via this route. This represents 60.8% of the cases where the AiB is trustee.

Specific Provisions

17. Regulation 3 provides for the fees payable to the AiB for the functions carried out where the AiB is the interim trustee and/or trustee in a bankruptcy. The rates are set out in Part 1 of the Table of Fees in Schedule 1. These fees are not payable in advance and are applied to a bankrupt's estate (where funds are available) to cover the administration of the estate.

18. The AiB can incur additional costs where she has to use third party suppliers. For example where she has to publish a notice or value a property. Regulation 4 gives examples of the types of outlays reasonably incurred by the AiB. It allows for other outlays, reasonable incurred, which are not listed.

19. Regulation 5 allows for the fees and outlays payable to the Accountant to be paid from the debtor's estate at certain times throughout the lifetime of the bankruptcy, such as at the annual accounting period.
20. Regulation 6 provides for the fees payable to the AiB for the other functions carried out by the AiB, such as the duty to supervise trustees in bankruptcy or protected trust deeds. The fees are set out in Part 2 of the Table of Fees.
21. Regulation 7 clarifies these "Part 2" fees are also payable by the AiB in the case of those estates which she administers as interim trustee or trustee.
22. Regulation 8 specifies the manner in which the payment is due for the AiB to undertake certain functions detailed in Part 2 of the Table of Fees. Paragraph (a) provides fees due in advance on making an application for the specified services, e.g. the debtor application fee must be paid in full at the time the AiB receives the application. The fee for supervising a protected trust deed is due when the trust deed is registered as protected in the Register of Insolvencies and each year thereafter on the anniversary of that date. The fees due for other functions are payable when the AiB carries out the service.
23. Regulation 9 confirms that the debtor application fee is payable by the debtor irrespective of whether or not the AiB awards the bankruptcy.
24. Regulation 10 makes express provision to confirm that where the AiB supervises a trustee, the trustee is liable to pay the fee irrespective of whether there will be funds in the estate to cover those costs, though this cost can normally be recovered through the fees charged for administering the trust deed or bankruptcy. Trustees take into account the risk that fees will not be recovered in acting in relation to bankruptcies or trust deed arrangements.
25. Under regulation 11 the AiB has no discretion to waive, either in whole or part, any fees listed in Part 2 of the Table of Fees.
26. Where a protected trust deed fails as a result of the debtor not complying, or where they are unable to comply, to the trust deed conditions, the trustee can apply for their discharge. Under these circumstances, regulation 12 allows for the up-front supervision fee, where paid, to be refunded to the trustee for the year in which the trust deed failed. Where the AiB makes an application to the sheriff seeking a Bankruptcy Restriction Order against a debtor and the sheriff finds that the AiB did not have sufficient grounds for make such an application, under regulation 13 the fee charged would have to be refunded.
27. Regulation 14 is a minor consequential amendment of the debtor application form (Form 9) prescribed in the Bankruptcy (Scotland) Regulations 2008 by substituting at question 29 (payment process) in the form, the new fee of £200 for the old fee of £100 to reflect the fee change.
28. Regulation 15 makes transitional arrangements so the fees do not apply in respect of a trust deed which becomes protected before the 1 July 2012. In these cases the 1993 Regulations continue to apply.

Changes to Schedule 1, Table of Fees

29. The current fee structure was developed in the early 1990s and has stayed essentially the same, with the occasional additional fee as a consequence of new statutory functions. This has meant in some cases different rates being charged at various periods in the lifetime of a bankruptcy case. As a result of the new modelling, the methodology for charging administrative services has been revised to do away with historic anomalies. This has resulted in making the fees more accurately reflect the actual costs to the case. This fits with the AiB and Scottish Government policy to be self-funding.

Part 1 – fees where AiB is trustee or interim trustee

30. Items 1 and 2 in Part 1 of the Table of Fees refer to the hourly administration rate that can be charged. In order to ensure recoveries to the public purse remain consistent with prior years, the revised hourly administration rate charged, where the AiB is interim trustee or trustee, will be £100 per hour. On average, the basic administration of an average sequestration is approximately £1,400. It is not expected that this average cost will change. This is due to the new way the time allocated for administration of the cases will be reported.

31. Where assets, including heritable assets, are sold or contributions are ingathered, items 3 and 4 in Part 1 of the Table of Fees refer to the percentage amount of these funds that can be charged to cover the cost of that work undertaken by the AiB. Previously the AiB did not charge a fee for ingathering a contribution, but instead applied the time to the case. This sometimes resulted in a disproportionate amount of time being used in respect of the amount ingathered. As a result of the revised methodology of charging and due to increasing administration and banking costs, this new rate has been applied. This is consistent with the industry standard charging practice by other trustees where the AiB is not administering the cases.

32. Where there are sufficient funds available after payment of any outlays and costs, item 5 refers to the percentage amount of the dividend funds that can be charged to cover the cost of that work undertaken by the AiB. This new charging structure is simpler as it is applied to the dividend funds and not in respect of each creditor. Therefore, creditors will pay a proportionate amount based on the dividend they receive and where small amounts are being returned to a creditor, this will now not be taken up by the fee.

Part 2 – fees for other functions of AiB

33. Item 2(a) in Part 2 of the Table of Fees provides for a creditor in a creditor petition for bankruptcy¹ to pay a fee to the AiB for administration of the creditor petition. This fee is reducing to £100 and can be reclaimed by the creditor at the end of the sequestration process if there are funds in the estate. It also now prescribes a fee for administration of petitions made by a trustee under a trust deed or a petition by the executor of an estate. Historically, the public purse has covered these costs.

34. In England and Wales, creditors who petition for the bankruptcy of a debtor, are expected to pay an application fee (£150) and a deposit (£700) to cover the initial costs of the administration process. This administration deposit, along with the application fee, is only recoverable where there are funds in the debtor's estate. The practice of requiring the

¹ Or a trustee under a protected trust deed or an executor of a deceased debtor moving for bankruptcy.

creditor to make a deposit encourages creditors to consider whether bankruptcy is the most appropriate route to recover monies due to them.

35. Therefore, item 2(b) introduces a creditor fee equivalent to such a deposit of £200 payable by the creditor only when the bankruptcy is awarded and the AiB is appointed trustee. It is anticipated that AiB will invoice the creditor for this fee, who can recover it as normal following the order of distribution where there are funds in the estate.

36. The AiB currently charge a trustee £250 for supervision of a protected trust deed. This is normally paid in two instalments, £125 on the first anniversary of the date protected then another £125 on the second anniversary. Item 17(b) amends this supervision fee to £100 charged annually from the date the trustee deed is protected and ending on the date of the discharge of the trustee. Under regulation 12, it is not charged in any year where the protected trust deed fails.

37. Item 21 increases the fee for the determination of a debtor application to £200. The debtor application fee has remained the same since its introduction in 2008. However, falling numbers and changes to the requirement to provide evidence, introduced in 2010 as part of the application process, has led the average cost of a debtor application to increase from £138 in 2008-09 to an expected £275 in 2011-12.

38. Some debtor applications cost less to administer and determine than others, depending on the evidence provided by the debtor with their application. For example, a debtor with proof of apparent insolvency will normally cost less to determine than a debtor whose eligibility under the LILA criteria may require additional checking plus follow-up processes. It is not currently possible to distinguish between the fees for the different routes used and the fee is based on a projected number of applications using the different routes and the average costs of these routes.

Consultation

39. There has been no formal consultation on the reforms in this instrument. A Business and Regulatory Impact Assessment has however been prepared and is available from the AiB website.

40. The changes are predominately as a result of AiB revising the methodology of charging administrative functions. The changes have been discussed with the AiB's Board which includes representatives from the money advice and insolvency sectors. The Board agreed with the principles behind the methodology of determining these fees. They also acknowledge the AiB's aim to be self-sufficient and agree that the fees charged have to reflect the work undertaken.

Impact Assessments

41. An equality impact assessment has been completed on the draft SSI and is attached. There are no equality impact issues. The fees are charged to all irrespective of their age, race, gender, disability or sexual orientation. The majority of the fees will only be charged where there are sufficient funds available in the bankrupt's estate to pay the costs.

Financial Effect

42. These fees are levied to recover part of the operational administration costs incurred by the AiB. Any shortfall would otherwise be subsidized by the public purse as part of the overall AiB budget from the Scottish Government.

43. There are no financial implications for the Scottish Government. By increasing the fees allowed to be charged by the AiB for undertaking her statutory functions, this minimises any financial implications for the Scottish Government.

44. In 2012-13 the Scottish Government and the AiB intend to continue their work on the AiB fee structure; to ensure it is equitable to both debtors and creditors, sustainable and appropriately reflects the work which AiB carries out in ensuring access to fair and just processes of debt relief and debt management for the people of Scotland. The work in this area which has been carried out to date ensures the AiB can continue normal operations with a reduction in resource funding received from the Scottish Government of 37.5% based on 2011-12 figures. For 2012-13, the AiB's budget allocation from the Scottish Government has been set at £2 million, based on the ability to recover projected costs using statutory fees.

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