



Pension Schemes Act 1993

1993 CHAPTER 48

PART VII

INSOLVENCY OF EMPLOYERS

CHAPTER I

INDEPENDENT TRUSTEES

119 Requirement for independent trustee where employer becomes insolvent etc

- (1) This section applies in relation to an occupational pension scheme which is constituted by trust deed—
 - (a) if a person (“the practitioner”) commences to act as an insolvency practitioner in relation to a company which, or an individual who, is the employer of persons in the description or category of employment to which the scheme relates; or
 - (b) if the official receiver becomes—
 - (i) the liquidator or provisional liquidator of a company which is the employer of any such persons, or
 - (ii) the receiver and the manager, or the trustee, of the estate of a bankrupt who is the employer of any such persons.
- (2) If and so long as this section applies to a scheme, subject to subsection (5), it shall be the duty of the practitioner or official receiver—
 - (a) to satisfy himself that at all times at least one of the trustees of the scheme is an independent person; and
 - (b) if at any time he is not so satisfied, to appoint under this paragraph, or to secure the appointment of, an independent person as a trustee of the scheme.
- (3) For the purposes of subsection (2) a person is “independent” only if—
 - (a) he has no interest in the assets of the employer or of the scheme, otherwise than as trustee of the scheme;

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- (b) he is neither connected with, nor an associate of—
- (i) the employer;
 - (ii) any person for the time being acting as an insolvency practitioner in relation to the employer; or
 - (iii) the official receiver, acting in any of the capacities mentioned in subsection (1)(b) in relation to the employer; and
- (c) he satisfies such other requirements as may be prescribed;
- and any reference in this section or sections 120 to 122 to an “independent trustee” shall be construed accordingly.
- (4) Sections 249 and 435 of the Insolvency Act 1986 (connected and associated persons) shall apply for the purposes of paragraph (b) of subsection (3) as they apply for the purposes of that Act; and section 74 of the Bankruptcy (Scotland) Act 1985 (associated persons) shall apply for the purposes of that paragraph as it applies for the purposes of that Act of 1985.
- (5) Where, apart from this subsection, the duties imposed by subsection (2) in relation to a scheme would fall to be discharged at the same time by two or more persons acting in different capacities, those duties shall be discharged—
- (a) if the employer is a company, by the person or persons acting as the company’s liquidator, provisional liquidator or administrator; or
 - (b) if the employer is an individual, by the person or persons acting as his trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his estate.
- (6) Where this section applies in relation to a scheme, it shall cease to do so—
- (a) if some person other than the employer mentioned in subsection (1) becomes the employer of persons in the description or category of employment to which the scheme relates; or
 - (b) if at any time neither the practitioner nor the official receiver is acting in relation to the employer.
- (7) Nothing in subsection (6) affects the application of this section in relation to the scheme on any subsequent occasion when the conditions specified in subsection (1) (a) or (b) are satisfied in relation to it.
- (8) In this section—
- “acting as an insolvency practitioner” and “official receiver” shall be construed in accordance with sections 388 and 399 of the Insolvency Act 1986;
- “bankrupt” has the meaning given by section 381 of the Insolvency Act 1986;
- “company” means a company within the meaning given by section 735(1) of the Companies Act 1985 or a company which may be wound up under Part V of the Insolvency Act 1986 (unregistered companies);
- “interim trustee” and “permanent trustee” have the same meanings as they have in the Bankruptcy (Scotland) Act 1985.
- (9) References in this section to an individual include, except where the context otherwise requires, references to a partnership and to any debtor within the meaning of the Bankruptcy (Scotland) Act 1985.

120 Members' powers to apply to court to enforce duty under s. 119

- (1) If—
- (a) section 119 applies in relation to a scheme; but
 - (b) the practitioner or official receiver neglects or refuses to discharge any duty imposed on him by subsection (2) of that section in relation to the scheme,
- any member of the scheme may apply to the appropriate court for an order requiring him to discharge his duties under that subsection.
- (2) In subsection (1) “the appropriate court” means—
- (a) if the employer in question is a company—
 - (i) where a winding-up order has been made or a provisional liquidator appointed, the court which made the order or appointed the liquidator;
 - (ii) in any other case, any court having jurisdiction to wind up the company; and
 - (b) in any other case—
 - (i) in England and Wales, the court (as defined in section 385 of the Insolvency Act 1986); or
 - (ii) in Scotland, where a sequestration has been awarded or, by virtue of the proviso to section 13(1) of the Bankruptcy (Scotland) Act 1985 (petition presented by creditor or trustee acting under trust deed) an interim trustee has been appointed, the court which made the award or appointment and, if no such award or appointment has been made, any court having jurisdiction under section 9 of that Act.
- (3) In this section “interim trustee” and “company” have the same meanings as in section 119.

121 Further provisions as to appointment and powers of independent trustees

- (1) If, immediately before the appointment of an independent trustee under subsection (2) (b) of section 119, there is no trustee of the scheme other than the employer, the employer shall cease to be a trustee upon the appointment of the independent trustee.
- (2) If and so long as section 119 applies in relation to a scheme—
- (a) any power vested in the trustees or managers of the scheme and exercisable at their discretion shall be exercisable only by the independent trustee; and
 - (b) any power—
 - (i) which the scheme confers on the employer (otherwise than as trustee or manager of the scheme), and
 - (ii) which is exercisable by him at his discretion but only as trustee of the power,shall be exercisable only by the independent trustee;
- but if, in either case, there is more than one independent trustee, the power shall also be exercisable with the consent of at least half of those trustees by any person who could exercise it apart from this subsection.
- (3) If and so long as section 119 applies in relation to a scheme, no independent trustee of the scheme shall be removed from being a trustee by virtue only of any provision of the scheme.

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- (4) If a trustee appointed under subsection (2)(b) of section 119 ceases to be an independent trustee, then—
- (a) he shall immediately give written notice of that fact to the practitioner or official receiver by whom the duties under that provision fall to be discharged; and
 - (b) subject to subsection (5), he shall cease to be a trustee of the scheme.
- (5) If, in a case where subsection (4) applies, there is no other trustee of the scheme than the former independent trustee, he shall not cease by virtue of that subsection to be a trustee until such time as another trustee is appointed.
- (6) A trustee appointed under subsection (2)(b) of section 119 shall be entitled to be paid out of the scheme's resources his reasonable fees for acting in that capacity and any expenses reasonably incurred by him in doing so, and to be so paid in priority to all other claims falling to be met out of the scheme's resources.

122 Duty of insolvency practitioner or official receiver to give information to scheme trustees

- (1) Notwithstanding anything in section 155 of the Insolvency Act 1986 (court orders for inspection etc.), if and so long as section 119 applies in relation to a scheme, it shall be the duty of the practitioner or official receiver to provide the trustees of the scheme, as soon as practicable after the receipt of a request, with any information which the trustees may reasonably require for the purposes of the scheme.
- (2) Any expenses incurred by the practitioner or official receiver in complying with a request under subsection (1) shall be recoverable by him as part of the expenses incurred by him in discharge of his duties.
- (3) The practitioner or official receiver shall not be required under subsection (1) to take any action which involves expenses that cannot be so recovered, unless the trustees of the scheme undertake to meet them.

CHAPTER II

PAYMENT BY SECRETARY OF STATE OF UNPAID SCHEME CONTRIBUTIONS

123 Interpretation of Chapter II

- (1) For the purposes of this Chapter, an employer shall be taken to be insolvent if, but only if, in England and Wales—
 - (a) he has been adjudged bankrupt or has made a composition or arrangement with his creditors;
 - (b) he has died and his estate falls to be administered in accordance with an order under section 421 of the Insolvency Act 1986; or
 - (c) where the employer is a company—
 - (i) a winding-up order or an administration order is made or a resolution for voluntary winding up is passed with respect to it,
 - (ii) a receiver or manager of its undertaking is duly appointed,

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- (iii) possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge, or
 - (iv) a voluntary arrangement proposed for the purpose of Part I of the Insolvency Act 1986 is approved under that Part.
- (2) For the purposes of this Chapter, an employer shall be taken to be insolvent if, but only if, in Scotland—
 - (a) sequestration of his estate is awarded or he executes a trust deed for his creditors or enters into a composition contract;
 - (b) he has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section to divide his insolvent estate among his creditors; or
 - (c) where the employer is a company—
 - (i) a winding-up order or an administration order is made or a resolution for voluntary winding up is passed with respect to it,
 - (ii) a receiver of its undertaking is duly appointed, or
 - (iii) a voluntary arrangement proposed for the purpose of Part I of the Insolvency Act 1986 is approved under that Part.
- (3) In this Chapter—
 - “contract of employment”, “employee”, “employer” and “employment” and other expressions which are defined in the Employment Protection (Consolidation) Act 1978 have the same meaning as in that Act;
 - “holiday pay” means—
 - (a) pay in respect of holiday actually taken; or
 - (b) any accrued holiday pay which under the employee’s contract of employment would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday;
 - “occupational pension scheme” means any scheme or arrangement which provides or is capable of providing, in relation to employees in any description of employment, benefits, in the form of pensions or otherwise, payable to or in respect of any such employees on the termination of their employment or on their death or retirement.
- (4) For the purposes of this Chapter, the definition of “personal pension scheme” in section 1 has effect with the substitution for the words “employed earners” of the word “employees”.
- (5) Any reference in this Chapter to the resources of a scheme is a reference to the funds out of which the benefits provided by the scheme are from time to time payable.

124 Duty of Secretary of State to pay unpaid contributions to schemes

- (1) If, on an application made to him in writing by the persons competent to act in respect of an occupational pension scheme or a personal pension scheme, the Secretary of State is satisfied—
 - (a) that an employer has become insolvent; and
 - (b) that at the time he did so there remained unpaid relevant contributions falling to be paid by him to the scheme,

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then, subject to the provisions of this section and section 125, the Secretary of State shall pay into the resources of the scheme the sum which in his opinion is payable in respect of the unpaid relevant contributions.

- (2) In this section and section 125 “relevant contributions” means contributions falling to be paid by an employer to an occupational pension scheme or a personal pension scheme, either on his own account or on behalf of an employee; and for the purposes of this section a contribution shall not be treated as falling to be paid on behalf of an employee unless a sum equal to that amount has been deducted from the pay of the employee by way of a contribution from him.
- (3) The sum payable under this section in respect of unpaid contributions of an employer on his own account to an occupational pension scheme or a personal pension scheme shall be the least of the following amounts—
 - (a) the balance of relevant contributions remaining unpaid on the date when he became insolvent and payable by the employer on his own account to the scheme in respect of the 12 months immediately preceding that date;
 - (b) the amount certified by an actuary to be necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits provided by the scheme to or in respect of the employees of the employer;
 - (c) an amount equal to 10 per cent. of the total amount of remuneration paid or payable to those employees in respect of the 12 months immediately preceding the date on which the employer became insolvent.
- (4) For the purposes of subsection (3)(c), “remuneration” includes holiday pay, statutory sick pay, statutory maternity pay under Part V of the Social Security Act 1986 or Part XII of the Social Security Contributions and Benefits Act 1992, maternity pay under Part III of the Employment Protection (Consolidation) Act 1978 and any such payment as is referred to in section 122(4) of that Act (guarantee payments etc.).
- (5) Any sum payable under this section in respect of unpaid contributions on behalf of an employee shall not exceed the amount deducted from the pay of the employee in respect of the employee’s contributions to the scheme during the 12 months immediately preceding the date on which the employer became insolvent.

125 Certification of amounts payable under s. 124 by insolvency officers

- (1) This section applies where one of the officers mentioned in subsection (2) (“the relevant officer”) has been or is required to be appointed in connection with an employer’s insolvency.
- (2) The officers referred to in subsection (1) are—
 - (a) a trustee in bankruptcy;
 - (b) a liquidator;
 - (c) an administrator;
 - (d) a receiver or manager; or
 - (e) a trustee under a composition or arrangement between the employer and his creditors or under a trust deed for his creditors executed by the employer;

and in this subsection “trustee”, in relation to a composition or arrangement, includes the supervisor of a voluntary arrangement proposed for the purposes of and approved under Part I or VIII of the Insolvency Act 1986.

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- (3) Subject to subsection (5), where this section applies the Secretary of State shall not make any payment under section 124 in respect of unpaid relevant contributions until he has received a statement from the relevant officer of the amount of relevant contributions which appear to have been unpaid on the date on which the employer became insolvent and to remain unpaid; and the relevant officer shall on request by the Secretary of State provide him as soon as reasonably practicable with such a statement.
- (4) Subject to subsection (5), an amount shall be taken to be payable, paid or deducted as mentioned in subsection (3)(a) or (c) or (5) of section 124 only if it is so certified by the relevant officer.
- (5) If the Secretary of State is satisfied—
 - (a) that he does not require a statement under subsection (3) in order to determine the amount of relevant contributions that was unpaid on the date on which the employer became insolvent and remains unpaid, or
 - (b) that he does not require a certificate under subsection (4) in order to determine the amounts payable, paid or deducted as mentioned in subsection (3)(a) or (c) or (5) of section 124,he may make a payment under that section in respect of the contributions in question without having received such a statement or, as the case may be, such a certificate.

126 Complaint to industrial tribunal

- (1) Any persons who are competent to act in respect of an occupational pension scheme or a personal pension scheme and who have applied for a payment to be made under section 124 into the resources of the scheme may present a complaint to an industrial tribunal that—
 - (a) the Secretary of State has failed to make any such payment; or
 - (b) any such payment made by him is less than the amount which should have been paid.
- (2) Such a complaint must be presented within the period of three months beginning with the date on which the decision of the Secretary of State on that application was communicated to the persons presenting it or, if that is not reasonably practicable, within such further period as is reasonable.
- (3) Where an industrial tribunal finds that the Secretary of State ought to make a payment under section 124, it shall make a declaration to that effect and shall also declare the amount of any such payment which it finds that the Secretary of State ought to make.

127 Transfer to Secretary of State of rights and remedies

- (1) Where in pursuance of section 124 the Secretary of State makes any payment into the resources of an occupational pension scheme or a personal pension scheme in respect of any contributions to the scheme, any rights and remedies in respect of those contributions belonging to the persons competent to act in respect of the scheme shall, on the making of the payment, become rights and remedies of the Secretary of State.
- (2) Where the Secretary of State makes any such payment as is mentioned in subsection (1) and the sum (or any part of the sum) falling to be paid by the employer on account of the contributions in respect of which the payment is made constitutes—

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- (a) a preferential debt within the meaning of the Insolvency Act 1986 for the purposes of any provision of that Act (including any such provision as applied by an order made under that Act) or any provision of the Companies Act 1985; or
- (b) a preferred debt within the meaning of the Bankruptcy (Scotland) Act 1985 for the purposes of any provision of that Act (including any such provision as applied by section 11A of the Judicial Factors (Scotland) Act 1889),

then, without prejudice to the generality of subsection (1), there shall be included among the rights and remedies which become rights and remedies of the Secretary of State in accordance with that subsection any right arising under any such provision by reason of the status of that sum (or that part of it) as a preferential or preferred debt.

- (3) In computing for the purposes of any provision referred to in subsection (2)(a) or (b) the aggregate amount payable in priority to other creditors of the employer in respect of—
 - (a) any claim of the Secretary of State to be so paid by virtue of subsection (2); and
 - (b) any claim by the persons competent to act in respect of the scheme,any claim falling within paragraph (a) shall be treated as if it were a claim of those persons; but the Secretary of State shall be entitled, as against those persons, to be so paid in respect of any such claim of his (up to the full amount of the claim) before any payment is made to them in respect of any claim falling within paragraph (b).

CHAPTER III

PRIORITY IN BANKRUPTCY

128 Priority in bankruptcy etc

Schedule 4 shall have effect for the purposes of paragraph 8 of Schedule 6 to the Insolvency Act 1986 and paragraph 4 of Schedule 3 to the Bankruptcy (Scotland) Act 1985 (by virtue of which sums to which Schedule 4 to this Act applies are preferential or, as the case may be, preferred debts in cases of insolvency).