

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 1 – Bankruptcy

Bankruptcy restrictions orders and undertakings

Section 2 – Bankruptcy restrictions orders and undertakings

8. Section 2(1) of this Act inserts new sections 56A to 56K into the 1985 Act which introduce bankruptcy restrictions orders (BROs) and bankruptcy restrictions undertakings (BRUs). Currently all undischarged bankrupts are subject to a number of restrictions and disqualifications for the period up to discharge. BROs and BRUs are a way of imposing particular restrictions on debtors for a particular period after discharge depending on the debtor's conduct in relation to the bankruptcy.

New section 56A – Bankruptcy restrictions order

9. Section 56A provides that an application for a BRO can be made only if the debtor is a natural person. The BRO and BRU regime does not apply to partnerships and limited partnerships. The application can be made only by the Accountant in Bankruptcy (the "AiB") and is made to a sheriff.

New section 56B – Grounds for making order

10. Section 56B details the kinds of conduct the sheriff has to take account of when deciding whether to grant an application for a BRO. The conduct of the debtor both before and after the date of sequestration can be taken into account. The sheriff is to take into account factors including possible gratuitous alienations and unfair preferences. In addition to taking account of gratuitous alienations and unfair preferences within the meaning of those terms as defined in the 1985 Act, the sheriff can consider any alienation or preference which is challengeable under common law.

New section 56C – Application of [section 67\(9\)](#)

11. Section 56C provides the sheriff with the power to apply section 67(9) of the 1985 Act to the debtor during the time the BRO is in force. Section 67(9) states that a debtor, who has obtained credit in excess of £500 in a single transaction without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU made in England and Wales, will have committed an offence. This offence will also apply to any debtor who, over a number of transactions, obtains any amount of credit above a maximum level of £1,000. The effect of section 56C is to permit the

sheriff to apply these restrictions to a debtor subject to a BRO made in Scotland under section 56B.

New section 56D – Timing of application for order

12. Section 56D details the time limits within which an application for a BRO can be made. The application must be made after the date of sequestration and before the date of the debtor's discharge from bankruptcy. Any applications submitted after the date of the debtor's discharge will be allowed only with the sheriff's permission.

New section 56E – Duration of order and application for annulment

13. Section 56E provides details of the start and end dates of any BRO. Subsection (2) states that the minimum time a BRO can run is 2 years and the maximum time is 15 years from the date of the order. Subsection (3) provides that the sheriff may annul or vary a BRO if the debtor applies for it. No provision is made for the grounds on which a sheriff may annul or vary a BRO, it is left to the sheriff to consider whether such action is appropriate in all the circumstances.

New section 56F – Interim bankruptcy restrictions order

14. Subsections (1) to (3) of section 56F provide for the application for and the making of interim BROs.
15. Interim BROs can be made by the sheriff at any time between the making of an application for a full BRO and the decision on the application for the full BRO. The sheriff would have to be satisfied that, based on the case presented by the AiB, the full BRO application is likely to be successful and that making an interim order is in the public interest.
16. Subsections (4) to (6) provide for the effect and duration of an interim order. An interim order has effect as if it was a full BRO and restrictions will apply on the making of the interim BRO. Where an interim order is followed by a full BRO, the duration of the full order set out under section 56E starts from the date the interim order was made.

New section 56G – Bankruptcy restrictions undertaking

17. Section 56G provides for bankruptcy restrictions undertakings (BRUs). A BRU is an agreement between the debtor and the AiB whereby the debtor is bound by specified restrictions without the need for an application to the sheriff. BRUs can last for the same length of time as BROs and have the same force and effect.

New section 56H – Bankruptcy restrictions undertakings: application of section 67(9)

18. Section 56H provides for section 67(9) of the 1985 Act to apply to a debtor who is subject to a BRU if the debtor has specified in the undertaking that it is to apply and the AiB has approved the undertaking on those terms. Section 67(9) states that a debtor, who has obtained credit in excess of £500 in a single transaction without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU made in England and Wales, will have committed an offence. This offence will also apply to any debtor who, over a number of transactions, obtains any amount of credit above a maximum level of £1,000. The effect of section 56H is to apply these restrictions to a debtor subject to a BRU entered into in Scotland under section 56G.

New section 56J– Effect of recall of sequestration

19. Section 56J addresses what will happen to a BRO or BRU that is in force when a debtor's sequestration is recalled. The sheriff has discretion to recall any BRU or BRO in place. If the sheriff does not recall the BRO or BRU, the debtor has 28 days to appeal.

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

After a sequestration has been recalled, no new BRO or BRU can be made even if, in the case of a BRO, an application had been made and was pending before the sheriff.

New section 56K – Effect of discharge on approval of offer of composition

20. Section 56K provides for the continuation of a BRO or BRU if a debtor obtains a discharge by way of an offer of composition.
21. Section 2(2) of this Act amends section 1A(1)(b) of the 1985 Act with the effect that the AiB is placed under a duty to include BRUs and BROs in the register of insolvencies.