

BANKRUPTCY AND DEBT ADVICE (SCOTLAND) ACT 2014

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Functions of sheriff and Accountant in Bankruptcy in sequestration

52. These sections make provision for certain miscellaneous bankruptcy notes, currently presented to the sheriff court, to be presented to and decided on by AiB instead. Regulations on the procedure for applications to and decisions by AiB have been made in the Bankruptcy (Applications and Decisions) (Scotland) Regulations 2014¹.

Section 25 – Application by trustee for direction on matters in sequestration

53. This section amends section 3(6) and inserts new section 3A of the 1985 Act in order to provide for trustees (except for AiB) to be able to apply directly to AiB for directions. If a decision cannot be made, or matters are more complex than anticipated or for any other reason, section 3A(3) also provides for AiB to be able to refer the matter to the sheriff for the sheriff's directions. As with the sheriff's directions, this can be on the handling of the bankruptcy generally and not only on a point of law. The trustee, debtor, creditor or anyone having an interest would have the right to be heard at the hearing before the sheriff.
54. Subsection 3A(4) provides that the trustee may apply to AiB for a review of a direction under this section. An application for a review must be made within 14 days of the decision being made and section 3A(7) confirms that a right of onward appeal to the sheriff remains, once AiB has reviewed its decision.

Section 26 – Recall of sequestration by sheriff

55. This section amends sections 16 ('Petitions for recall of sequestration') and 17 (to be re-titled, 'Recall of sequestration by sheriff') of the 1985 Act in order to modify the process for the recall of bankruptcy. Where the only ground for recall is that the debtor can pay the debtor's debt in full, except following a petition by a creditor where the debtor is claiming that the debtor was not apparently insolvent at the date of sequestration, application must be made to AiB and not the sheriff—see the new sections inserted by section 27 of the Act. Provision is also made so recall by the sheriff of bankruptcy awards can in most cases be sought at any time (section 26(1)(b) of the Act). It will also no longer be possible to obtain recall from the sheriff by giving sufficient security. Where appropriate, the final order will be withheld until all funds have been distributed to creditors.

Section 27 – Recall of sequestration by Accountant in Bankruptcy

56. This section inserts 7 new sections after section 17 of the 1985 Act:

¹ S.S.I. 2014/226, amended by regulation 3 of and Schedule 2 to S.S.I. 2015/80.

These notes relate to the Bankruptcy and Debt Advice (Scotland) Act 2014 (asp 11) which received Royal Assent on 29 April 2014

- section 17A ('Application to Accountant in Bankruptcy for recall of sequestration')
 - section 17B ('Application under section 17A: further procedure')
 - section 17C ('Determination of outlays and remuneration')
 - section 17D ('Recall of sequestration by Accountant in Bankruptcy')
 - section 17E ('Recall where Accountant in Bankruptcy the trustee')
 - section 17F ('Reference to sheriff')
 - section 17G ('Recall of sequestration by Accountant in Bankruptcy: review and appeal')
57. The new section 17A enables AiB to deal with applications for recall on the ground of payment of debts in full (after the date of sequestration), which are generally straightforward and non-contentious.
58. Section 17B sets out further procedure and requirements for such an application. The basis for a grant of recall by AiB in these circumstances should include payment of the remuneration of, and outlays reasonably incurred by, the interim trustee and/or trustee. Payment of all other costs, including the expenses of the creditor, should also be made before recall can be granted. The new section 17B, therefore, stipulates that the following conditions should be met before an award of recall of sequestration will be granted:
- within 21 days of service of the notice of application, the trustee (if not AiB, nor the applicant for recall) will be required to submit to AiB a current statement on the debtor's affairs;
 - the trustee will be required to submit to AiB a statement stating whether in the trustee's opinion the debtor can pay the debtor's debts in full, including the payment of any remuneration, outlays and expenses;
 - the trustee will be required to notify all known creditors of the application before the end of a 7 day period beginning with the day on which the application for recall was made;
 - the trustee will be required to submit any claim for payment of outlays (reasonably incurred) and remuneration along with the statement;
 - where the trustee is the applicant for recall, the statement on the debtor's affairs, together with the statement as to whether the debtor can pay the debts in full, should be submitted with the application; and
 - if any claims are made by a creditor during the 14 day period the trustee should submit an updated statement to AiB.
59. Section 17C provides for the determination of outlays and remuneration where AiB receives an application for recall under section 17A, or where the amount of outlays and remuneration in the statement submitted by the trustee under section 17B has not been agreed. AiB must issue a determination fixing the amount of outlays and the remuneration payable to the trustee within 28 days, beginning with the expiry of the 7 day period in section 17B(8) for the submission of extra claims, and may determine the expenses reasonably incurred by a petitioning or concurrent creditor.
60. Section 17D makes provision for AiB to be able to grant recall. This must be on the basis that all the debts have been paid and that all other payments have been made including payment of outlays, remuneration and expenses. The effect of recall granted by AiB is the same as that provided for in section 17(4) and (5) of the 1985 Act. If an application has been made but the trustee has not confirmed that there has been payment of all the

sums due within the relevant period (8 weeks after the statement on the debtor's affairs was submitted, or as extended) the sequestration will continue.

61. Section 17E makes provision for applications to be made to AiB for recall in cases where AiB is the trustee and the grounds for recall are that the debts have been paid in full. AiB has broadly similar functions to other trustees in relation to ascertaining whether or not there are sufficient funds and ensuring that payment is made.
62. Section 17E(2) creates a requirement for AiB to notify the debtor and known creditors that AiB considers recall should be granted.
63. Section 17E(5) requires AiB to make a determination of the fees and outlays which should be calculated in accordance with section 69A of the 1985 Act. That determination must be before granting recall.
64. Section 17E(6)(a) specifies that AiB must be satisfied that the debtor can pay the debtor's debts in full before granting an award of recall. The other tests are in subsection (6)(b) and (c), requiring debts to be paid in full within 8 weeks and requiring AiB to be satisfied that it is appropriate to grant a recall.
65. Section 17F enables AiB to refer the application to a sheriff for consideration in cases where the AiB considers it appropriate at any time until recall is granted. The sheriff may dispose of such a referral in accordance with section 17 of the 1985 Act as if AiB had petitioned for it under section 16.
66. Section 17G provides that the debtor, a creditor, the trustee or any person with an interest may apply to AiB for a review of the grant of or refusal to grant recall or the determination of the expenses of a creditor petitioning for sequestration. An application for a review must be made within 14 days of the decision being made.
67. Section 17G(5) makes provision to enable determinations made by AiB in relation to recall, including decisions whether to grant or refuse an order for recall, to be appealed to the sheriff, including once AiB has reviewed its decision. Appeals must be made within 14 days of the date of the review decision. The debtor, trustee and any creditor or other person having an interest may appeal.
68. Section 17G(7) purports to give powers to the sheriff to remit a case to AiB. This provision was included in the Bill for the Act at introduction but, as a result of amendments made to the Bill, is no longer required. Pending repeal of the provision, it does not have any substantive effect.
69. The sheriff retains the general power to consider recall in all other cases.

Section 28 – Appointment of replacement trustee

70. This section provides that the existing section 25 of the 1985 Act should be replaced by 3 new sections, a new section 25 ('Appointment of replacement trustee'), section 25A ('Applications to Accountant in Bankruptcy: procedure') and section 25B ('Applications and appeals to sheriff: procedure').
71. The new section 25 provides that, on the election of a replacement trustee, the original trustee should immediately make a report of the proceedings at the statutory meeting to AiB instead of to the sheriff. If AiB was the original trustee, the report is made to the sheriff. If there are no objections, which must state the grounds for objection, then AiB is required to declare the elected person appointed.
72. Section 25A provides that any person who wishes to object to the election of the replacement trustee under this procedure should submit their objections to AiB, at which point AiB is to make clear to the other parties that they have the right to make written representations, and then to make a decision. The trustee, the objector or any other interested person may apply to AiB for a review of its decision. An application for a review must be made within 14 days of AiB making and notifying the decision. Section

25A(8) confirms that the right of onward appeal to the sheriff remains, once AiB has reviewed its decision, within 14 days of the review decision.

73. Section 25B places similar duties on the sheriff as at present under section 25, i.e. it sets out the procedure for hearing objections. This section only applies where a person is appealing a decision by AiB, under the new subsection 25A(8) or where AiB itself has an objection under the new subsection 25(3)(b). The sheriff must give the parties an opportunity to be heard.
74. **Section 28(2)** of the Act amends section 28 of the 1985 Act (resignation and death of trustee) to substitute the current application to the sheriff where there is no election of a new trustee following the resignation or death of the trustee, with an application to AiB. An application by an eligible person to be appointed trustee can be made to AiB within 14 days, failing which AiB will become trustee. This section is not relevant where AiB was originally trustee as the role will not fall vacant for these reasons.

Section 29 – Replacement of trustee acting in more than one sequestration

75. This section provides that the existing section 28A of the 1985 Act should be replaced by two new sections, a new section 28A ('Replacement of trustee acting in more than one sequestration') and section 28B ('Determination etc. under section 28A: review'). This section is not relevant where AiB is the trustee as the role will not fall vacant.
76. Section 28A removes the requirement to petition the Court of Session for removal of the trustee from office and instead enables AiB to appoint someone to be trustee directly. Such an appointment may be made on the application of any person having an interest, or where AiB so proposes. Interested persons must be notified and given the opportunity to make representations. Subsection 28A(12) places a duty on AiB to notify its decision to the former trustee, the debtor, any creditor known to AiB and each sheriff who awarded sequestration or to whom the sequestration was transferred.
77. The new section 28B provides that those listed in section 28A(12)(a) and (b) and (13)(a) (i.e. the former trustee, the debtor, every creditor known to the trustee) will be able to ask AiB to review its decision within 14 days of making and notifying the decision and, if they are not satisfied with the result of AiB's review, to appeal the result by a single petition to the Court of Session, if the appeal relates to two or more sequestrations that were awarded in different sheriffdoms or, otherwise, to the sheriff with jurisdiction.

Section 30 – Removal of trustee and trustee not acting

78. This section amends section 29 of the 1985 Act in order to provide for AiB to be able to deal with the removal of a trustee. AiB will look at the application to remove the trustee and will make the necessary order required under revised section 29(1)(b) of the 1985 Act and, if subsequently required, revised section 29(3).
79. New subsection (3A) of the 1985 Act provides that the trustee, the commissioners or any creditor may apply to AiB for a review of any decision of AiB to raise an order to remove a trustee from office. An application for a review must be made within 14 days of the decision being made. New subsection (3C)(a) and (b) of the 1985 Act provides that AiB must on receipt of an application for review take into account any representations made by an interested person within 21 days of the application being made. Thereafter AiB must confirm, amend or revoke their decision within 28 days of the application being made. New subsection (4) of the 1985 Act confirms that the right of onward appeal to the sheriff remains, once AiB has reviewed its decision. AiB can also refer a case to the sheriff for direction before making any order or declaration or undertaking any review. An application for review of a decision cannot be made if the matter has been referred to the sheriff for direction.

Section 31 – Removal of commissioner

80. **Section 31** amends section 30 of the 1985 Act and prescribes the process by which a commissioner may be removed from office on an order of the sheriff. New section 30(5) of the 1985 Act provides that the trustee, the Accountant in Bankruptcy or a person representing not less than one quarter in value of the creditors may apply to the sheriff for the removal of a commissioner. Section 30(6) of the 1985 Act provides that the sheriff must ensure the application for removal is served on the relevant commissioner, intimated to every creditor who has given a mandate to the commissioner, and that the commissioner has the opportunity to make representations, before making a decision on whether to remove the commissioner from office under subsection (4)(c). The provision for the trustee, the Accountant in Bankruptcy, the commissioner or any creditor to appeal against the sheriff's decision is contained in new section 30(8) of the 1985 Act. An appeal must be lodged within 14 days after the date of the sheriff's decision.

Section 32 – Contractual powers of trustee

81. This section amends section 42 ('Contractual powers of trustee') of the 1985 Act in order to provide that applications to request a longer period in which to adopt or refuse a contract entered into by the debtor should be submitted to AiB for a decision instead of the sheriff (unless AiB is the trustee), with recourse to the sheriff on appeal. AiB can also refer a case to the sheriff for direction before making any order or declaration. An application for review of a decision cannot be made if the matter has been referred to the sheriff for direction.

Section 33 – Bankruptcy restrictions order

82. This section replaces the existing section 56A of the 1985 Act with a new section ('Bankruptcy restrictions order') in order to give AiB the power, upon conclusion of an investigation, to make certain bankruptcy restrictions orders. These are for a period of between 2 and 5 years beginning with the date on which the order is made. An application for a bankruptcy restriction order for a period of 5 years or more must be heard by a sheriff. Bankruptcy restrictions orders impose certain restrictions on a debtor where there has been a level of misconduct by the debtor either before or after the date of bankruptcy, as described in section 56B of the 1985 Act. The restrictions remain in force after the date of discharge from bankruptcy, and can last for periods varying between 2 and 15 years, depending upon the severity of the misconduct. The new section 56A(3) (4) will enable representations to be made by the debtor to AiB in the case where the AiB proposes to make a bankruptcy restrictions order.
83. In the case of a bankruptcy restrictions order made by the AiB, new section 56E(3) of the 1985 Act provides that if the debtor wishes to object to a bankruptcy restrictions order, they should apply to AiB to annul its decision. Section 56E(6) confirms that in those circumstances there is a right of onward appeal to the sheriff, once AiB has taken its decision. New section 56E(7) of the 1985 Act allows a sheriff to make an order providing that a debtor is unable to make another annulment application under subsection (3) for a period specified in the order.

Section 34 – Conversion of a protected trust deed into sequestration

84. This section amends sections 59A to 59C of the 1985 Act, in order to transfer, from the sheriff courts to AiB, powers in relation to orders to convert protected trust deeds² into sequestrations at the instance of Member State liquidators as are required to be made

² **Protected trust deed** - A trust deed is a form of insolvency by which a debtor transfers estate to a trustee to be realised for the benefit of creditors. A trust deed may be protected as long as a majority in number or a third in value of creditors do not object to its terms. Once protected, the terms of the trust deed becoming binding on all the creditors.

under those sections³. ‘Member State liquidator’ for these purposes includes trustees in bankruptcy or the equivalent in personal insolvency in other EU Member States.

Section 35 – Power to cure defects in procedure

85. This section modifies section 63 of the 1985 Act, in order to allow applications to AiB to cure certain, but not all, defects which could previously be remedied under section 63 of the 1985 Act by the sheriff. Section 63A(4) specifies that the process involves notifying any interested parties and giving them the opportunity to make representations. The sheriff’s power is restricted accordingly, save in relation to documents lodged with or issued by, or time limits in relation to proceedings before the sheriff. An order of AiB is subject to review and under section 63B(4) thereafter to appeal to the sheriff, which will be final. The defects which can be remedied are as follows:-

- any clerical or incidental error in a document required by or under the Act;
- to waive a failure to comply with a time limit specified in or made under the 1985 Act, where there is no specific provision in or made under the Act about how failure to adhere to the timescale should be dealt with.

Section 36 – Regulations: applications to Accountant in Bankruptcy etc.

86. This section inserts a new section 71C (‘Regulations: applications to Accountant in Bankruptcy etc.’) after section 71B in the 1985 Act in order to provide, for the Scottish Ministers, a power to make, by regulations, provision in relation to the procedure to be followed in relation to an application to or decision by AiB (insofar as this is not provided for in the 1985 Act). Regulations made under this section will make provision for such matters as the format and content of documents required for an application, including for instance the form of the debtor application and the statement of undertakings to be provided by the debtor or the discharge report to be provided by the trustee (certain specific powers in the 1985 Act have also been repealed)⁴. This partly also replaces, for applications to AiB, the powers of the Court of Session to make rules of court for the disposal of cases before the sheriff.

Section 37 – Valuation of debts depending on contingency

87. This section amends paragraph 3 of Schedule 1 to the 1985 Act to enable creditors to apply to AiB, instead of the sheriff, to place a value on a contingent debt in order that the creditor may be able to claim that value in the sequestration. Paragraph 3(6) makes provision for appeal to the sheriff. AiB can also seek direction from the sheriff. A decision cannot be appealed if the matter has been referred to the sheriff for direction.

³ Note that existing section 59C(2A) of the 1985 Act applies the Act generally for orders converting trust deeds as it applies to the determination of a debtor application, with the member State liquidator as concurring creditor.

⁴ Regulations under this power have been made in the [Bankruptcy \(Applications and Decisions\) \(Scotland\) Regulations 2014 \(S.S.I. 2014/226\)](#), and in [S.S.I. 2014/290](#), [S.S.I. 2014/296](#) and [S.S.I. 2014/225](#) amended by the [Common Financial Tool etc. \(Scotland\) Amendment Regulations 2015](#) and [S.S.I. 2015/80](#).