



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 1

### BANKRUPTCY

#### *Bankruptcy restrictions orders and undertakings*

## 2 Bankruptcy restrictions orders and undertakings

(1) After section 56 of the 1985 Act, insert—

#### *“Bankruptcy restrictions orders and undertakings*

##### **56A Bankruptcy restrictions order**

- (1) Where sequestration of a living debtor’s estate is awarded, an order (known as a “bankruptcy restrictions order”) in respect of the debtor may be made by the sheriff.
- (2) An order may be made only on the application of the Accountant in Bankruptcy.

##### **56B Grounds for making order**

- (1) The sheriff shall grant an application for a bankruptcy restrictions order if he thinks it appropriate having regard to the conduct of the debtor (whether before or after the date of sequestration).
- (2) The sheriff shall, in particular, take into account any of the following kinds of behaviour on the part of the debtor—
  - (a) failing to keep records which account for a loss of property by the debtor, or by a business carried on by him, where the loss occurred in the period beginning 2 years before the date of presentation of the

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- petition for sequestration or, as the case may be, the date the debtor application was made and ending with the date of the application for a bankruptcy restrictions order;
- (b) failing to produce records of that kind on demand by—
    - (i) the Accountant in Bankruptcy;
    - (ii) the interim trustee; or
    - (iii) the trustee;
  - (c) making a gratuitous alienation or any other alienation for no consideration or for no adequate consideration which a creditor has, under any rule of law, right to challenge;
  - (d) creating an unfair preference or any other preference which a creditor has, under any rule of law, right to challenge;
  - (e) making an excessive pension contribution;
  - (f) failing to supply goods or services which were wholly or partly paid for which gave rise to a claim submitted by a creditor under section 22 or 48 of this Act;
  - (g) trading at a time before the date of sequestration when the debtor knew or ought to have known that he was to be unable to meet his debts;
  - (h) incurring, before the date of sequestration, a debt which the debtor had no reasonable expectation of being able to pay;
  - (j) failing to account satisfactorily to—
    - (i) the sheriff;
    - (ii) the Accountant in Bankruptcy;
    - (iii) the interim trustee; or
    - (iv) the trustee,
 for a loss of property or for an insufficiency of property to meet his debts;
  - (k) carrying on any gambling, speculation or extravagance which may have materially contributed to or increased the extent of his debts or which took place between the date of presentation of the petition for sequestration or, as the case may be, the date the debtor application was made and the date on which sequestration is awarded;
  - (l) neglect of business affairs of a kind which may have materially contributed to or increased the extent of his debts;
  - (m) fraud or breach of trust;
  - (n) failing to co-operate with—
    - (i) the Accountant in Bankruptcy;
    - (ii) the interim trustee; or
    - (iii) the trustee.
- (3) The sheriff shall also, in particular, consider whether the debtor—
- (a) has previously been sequestrated; and
  - (b) remained undischarged from that sequestration at any time during the period of 5 years ending with the date of the sequestration to which the application relates.
- (4) For the purposes of subsection (2) above—

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“excessive pension contribution” shall be construed in accordance with section 36A of this Act; and

“gratuitous alienation” means an alienation challengeable under section 34(1) of this Act.

### **56C Application of section 67(9)**

- (1) Where the sheriff thinks it appropriate, the sheriff may specify in the bankruptcy restrictions order that subsection (9) of section 67 of this Act shall apply to the debtor during the period he is subject to the order as if he were a debtor within the meaning of subsection (10)(a) of that section.
- (2) For the purposes of subsection (1) above, section 67(10) of this Act shall have effect as if, for paragraph (c) of that subsection, there were substituted—
  - “(c) the relevant information about the status of the debtor is the information that—
    - (i) he is subject to a bankruptcy restrictions order; or
    - (ii) where his estate has been sequestrated and he has not been discharged, that fact.”.

### **56D Timing of application for order**

- (1) An application for a bankruptcy restrictions order must be made, subject to subsection (2) below, within the period beginning with the date of sequestration and ending with the date on which the debtor’s discharge becomes effective.
- (2) An application may be made after the end of the period referred to in subsection (1) above only with the permission of the sheriff.

### **56E Duration of order and application for annulment**

- (1) A bankruptcy restrictions order—
  - (a) shall come into force when it is made; and
  - (b) shall cease to have effect at the end of the date specified in the order.
- (2) The date specified in a bankruptcy restrictions order under subsection (1)(b) above must not be—
  - (a) before the end of the period of 2 years beginning with the date on which the order is made; or
  - (b) after the end of the period of 15 years beginning with that date.
- (3) On an application by the debtor the sheriff may—
  - (a) annul a bankruptcy restrictions order; or
  - (b) vary such an order, including providing for such an order to cease to have effect at the end of a date earlier than the date specified in the order under subsection (1)(b) above.

### **56F Interim bankruptcy restrictions order**

- (1) This section applies at any time between—

- (a) the making of an application for a bankruptcy restrictions order; and
  - (b) the determination of the application.
- (2) The sheriff may make an interim bankruptcy restrictions order if he thinks that—
  - (a) there are prima facie grounds to suggest that the application for the bankruptcy restrictions order will be successful; and
  - (b) it is in the public interest to make an interim order.
- (3) An interim order may be made only on the application of the Accountant in Bankruptcy.
- (4) An interim order—
  - (a) shall have the same effect as a bankruptcy restrictions order; and
  - (b) shall come into force when it is made.
- (5) An interim order shall cease to have effect—
  - (a) on the determination of the application for the bankruptcy restrictions order;
  - (b) on the acceptance of a bankruptcy restrictions undertaking made by the debtor; or
  - (c) if the sheriff discharges the interim order on the application of the Accountant in Bankruptcy or of the debtor.
- (6) Where a bankruptcy restrictions order is made in respect of a debtor who is subject to an interim order, section 56E(2) of this Act shall have effect in relation to the bankruptcy restrictions order as if the reference to the date on which the order is made were a reference to the date on which the interim order was made.

### **56G Bankruptcy restrictions undertaking**

- (1) A living debtor who is not subject to a bankruptcy restrictions order may offer an undertaking (known as a “bankruptcy restrictions undertaking”) to the Accountant in Bankruptcy.
- (2) In determining whether to accept a bankruptcy restrictions undertaking, the Accountant in Bankruptcy shall have regard to the matters specified in section 56B(2) and (3) of this Act.
- (3) A bankruptcy restrictions undertaking—
  - (a) shall take effect on being accepted by the Accountant in Bankruptcy; and
  - (b) shall cease to have effect at the end of the date specified in the undertaking.
- (4) The date specified under subsection (3)(b) above must not be—
  - (a) before the end of the period of 2 years beginning with the date on which the undertaking is accepted; or
  - (b) after the end of the period of 15 years beginning with that date.
- (5) On an application by the debtor the sheriff may—
  - (a) annul a bankruptcy restrictions undertaking; or

- (b) vary such an undertaking, including providing for a bankruptcy restrictions undertaking to cease to have effect at the end of a date earlier than the date specified in the undertaking under subsection (3) (b) above.

#### **56H Bankruptcy restrictions undertakings: application of section 67(9)**

- (1) A debtor may, with the agreement of the Accountant in Bankruptcy, specify in a bankruptcy restrictions undertaking that subsection (9) of section 67 of this Act shall apply to the debtor during the period the undertaking has effect as if he were a debtor within the meaning of subsection (10)(a) of that section.
- (2) For the purposes of subsection (1) above, section 67(10) of this Act shall have effect as if, for paragraph (c) of that subsection, there were substituted—
  - “(c) the relevant information about the status of the debtor is the information that—
    - (i) he is subject to a bankruptcy restrictions undertaking;  
or
    - (ii) where his estate has been sequestrated and he has not been discharged, that fact.”.

#### **56J Effect of recall of sequestration**

- (1) Where an award of sequestration of a debtor’s estate is recalled under section 17(1) of this Act—
  - (a) the sheriff may annul any bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking which is in force in respect of the debtor;
  - (b) no new bankruptcy restrictions order or interim order may be made in respect of the debtor; and
  - (c) no new bankruptcy restrictions undertaking by the debtor may be accepted.
- (2) Where the sheriff refuses to annul a bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking under subsection (1)(a) above the debtor may, no later than 28 days after the date on which the award of sequestration is recalled, appeal to the sheriff principal against such a refusal.
- (3) The decision of the sheriff principal on an appeal under subsection (2) above is final.

#### **56K Effect of discharge on approval of offer of composition**

- (1) This section applies where a certificate of discharge is granted under paragraph 11(1) of Schedule 4 to this Act discharging a debtor.
- (2) Subject to sections 56E(3)(a), 56F(5)(c) and 56G(5)(a) of this Act, the debtor shall remain subject to any bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking which is in force in respect of him.

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- (3) The sheriff may make a bankruptcy restrictions order in relation to the debtor on an application made before the discharge.
  - (4) The Accountant in Bankruptcy may accept a bankruptcy restrictions undertaking offered before the discharge.
  - (5) No application for a bankruptcy restrictions order or interim order may be made in respect of the debtor.”.
- (2) In section 1A(1)(b) of that Act (duty of the Accountant in Bankruptcy to maintain register of insolvencies), after sub-paragraph (ii) insert—
- “(ia) bankruptcy restrictions orders, interim bankruptcy restrictions orders and bankruptcy restrictions undertakings;”.