
EXPLANATORY NOTE

(This note is not part of the Order)

This Order is made under section 17 of the Public Services Reform (Scotland) Act 2010. It amends the Insolvency Act 1986 (“the 1986 Act”), the Bankruptcy (Scotland) Act 2016 (“the 2016 Act”) and the Public Services Reform (Insolvency) (Scotland) Order 2016. It comes into force as provided for in article 1(2) and (3).

Article 2 repeals the definition of “prescribed” in section 70(1) of the Act and inserts a definition of “prescribed fee”. The references to “prescribed fee” in Chapter 2 of Part 3 (receivers in Scotland) of the 1986 Act will fall to be interpreted in accordance with the new definition of prescribed fee. Reference to “prescribed fee” can be found in sections 53(5) and section 54(4) of the 1986 Act. Other references to “prescribed” in that Chapter will fall to be interpreted in accordance with the definition of “prescribed” in section 251 of the 1986 Act (“prescribed” means prescribed by rules under section 411 of the 1986 Act). This amendment allows the Scottish Ministers to make provision on receivership in Scotland which is currently made by regulations instead by rules under section 411 of the 1986 Act.

Articles 3 and 4 amend sections 101 and 142 of the 1986 Act (as prospectively amended by the Small Business, Enterprise and Employment Act 2015 (“the 2015 Act”)) on liquidation committees in winding up. The amendments for such committees in Scotland break the link with personal insolvency arrangements in those sections (which provide that a liquidation committee in Scotland may have such powers and duties of commissioners in a sequestration as may be conferred or imposed on such committees by rules under section 411 of the 1986 Act) to provide instead simply for liquidation committees in Scotland to have, in addition to functions conferred by the 1986 Act, such other functions as may be conferred in the rules, in line with the position for such committees in England and Wales (see sections 101 and 141 of the 1986 Act as prospectively amended by the 2015 Act).

Article 5 repeals section 246A(2) of the 1986 Act removing the restriction to the effect that section 246A (remote attendance at meetings – prospectively amended by the 2015 Act) does not apply where (a) a company is being wound up in Scotland or (b) a receiver is appointed under section 51 in Chapter 2 of Part 3 of the 1986 Act.

Article 6 inserts new section 173A into the 2016 Act which causes certain “insolvency-related terms” in contracts to cease to have effect. It prevents a supplier from terminating a supply or contract, altering the terms of the contract, or compelling higher payments for the supply, where a trust deed granted by a debtor obtaining essential goods and services for business purposes is granted protected status. The insolvency-related terms cease to have effect only in a contract for the supply of those utility and IT supplies listed under section 222 of the 2016 Act. Furthermore, the insolvency-related terms may continue to be relied upon when a debtor is sequestrated, enabling a supplier to terminate a contract in those circumstances. A supplier may, however, terminate the contract or the supply if a condition outlined in subsection (4) or (7) of section 173A is met. Section 173A only applies to contracts entered into after it comes into force on 1st August 2017.

Article 7 amends section 222 of the 2016 Act to give further protection to the essential supplies of businesses carried on in relation to insolvent estates. Section 222 prohibits a supplier of utilities (such as gas, electricity, water and communication services) from compelling payment of charges incurred before the commencement of an insolvency event by threatening to terminate the supply of the utilities on the grounds of non-payment. The supplier is required to continue to provide the utilities if a request is made by the trustee of the insolvent estate for the continued supply. The supplier

is, however, entitled to make it a condition of the supply that the office-holder provides a personal guarantee for the payment in respect of any supply made during the insolvency. The supplier is not entitled to make it a condition of the continued supply that any outstanding charges incurred before the insolvency are paid. Section 222 is confined to a limited list of suppliers including statutory undertakers and similar bodies. The amendments made by article 7 extend that to a wider list of private suppliers of gas, electricity, water or communication services including the supply of utilities from a landlord to tenant. They also add the supply of goods or services for the purpose of enabling or facilitating anything done by electronic means. Primarily these include goods or services relating to information technology, other than those to which section 222 already applies by virtue of being a communication service, including the supply of point of sale terminals, computer hardware and software and other items identified under new subsection (5A) of section 222.

Article 8 amends the Public Services Reform (Insolvency) (Scotland) Order 2016 to make changes to the saving provision provided for in article 15 of that Order, in particular related to the planned replacement of the Insolvency (Scotland) Rules 1986 (as amended). Article 8(3) provides for particular annual ‘progress’ meetings to be held under section 93 and 105 of the 1986 Act where the liquidator’s obligation to summon those particular meetings in any winding-up has arisen before the coming into force of the relevant amendments made by that Order (i.e. articles 5(2) and 6(2) of that Order repealing those sections). This does not however save obligations which otherwise may have arisen in relation to holding future annual ‘progress’ meetings in the same winding-up.