



Bankruptcy (Scotland) Act 1985

1985 CHAPTER 66

Petitions for sequestration

5 Sequestration of the estate of living or deceased debtor

- (1) The estate of a debtor may be sequestrated in accordance with the provisions of this Act.
- (2) The sequestration of the estate of a living debtor shall be on the petition of—
 - (a) the debtor, with the concurrence of a qualified creditor or qualified creditors;
 - (b) a qualified creditor or qualified creditors, if the debtor is apparently insolvent; or
 - (c) the trustee acting under a voluntary trust deed granted by or on behalf of the debtor whereby his estate is conveyed to the trustee for the benefit of his creditors generally (in this Act referred to as a " trust deed ").
- (3) The sequestration of the estate of a deceased debtor shall be on the petition of—
 - (a) an executor or a person entitled to be appointed as executor on the estate ;
 - (b) a qualified creditor or qualified creditors of the deceased debtor; or
 - (c) the trustee acting under a trust deed.
- (4) In this Act " qualified creditor " means a creditor who, at the date of the presentation of the petition, is a creditor of the debtor in respect of liquid or illiquid debts (other than contingent or future debts), whether secured or unsecured, which amount (or of one such debt which amounts) to not less than £750 or such sum as may be prescribed; and " qualified creditors " means creditors who at the said date are creditors of the debtor in respect of such debts as aforesaid amounting in aggregate to not less than £750 or such sum as may be prescribed.
- (5) Paragraphs 1(1) and (3), 2(1)(a) and (2) and 6 of Schedule 1 to this Act shall apply in order to ascertain the amount of the debt or debts for the purposes of subsection (4) above as they apply in order to ascertain the amount which a creditor is entitled to claim, but as if for any reference to the date of sequestration there were substituted a reference to the date of presentation of the petition.

- (6) The petitioner shall send a copy of any petition presented under this section to the Accountant in Bankruptcy.
- (7) Where, after a petition for sequestration has been presented but before the sequestration has been awarded, the debtor dies then—
- (a) if the petitioner was the debtor, the petition shall fall;
 - (b) if the petitioner is a creditor, the proceedings shall continue in accordance with this Act so far as circumstances will permit.
- (8) Where, after a petition for sequestration has been presented under this section but before the sequestration has been awarded, a creditor who—
- (a) is the petitioner or concurs in a petition by the debtor; or
 - (b) has lodged answers to the petition,
- withdraws or dies, there may be sisted in the place of—
- (i) the creditor mentioned in paragraph (a) above, any creditor who was a qualified creditor at the date when the petition was presented and who remains so qualified at the date of the sist;
 - (ii) the creditor mentioned in paragraph (b) above, any other creditor.

6 Sequestration of other estates

- (1) Subject to subsection (2) below, the estate belonging to or held for or jointly by the members of any of the following entities may be sequestrated—
- (a) a trust in respect of debts incurred by it;
 - (b) a partnership, including a dissolved partnership;
 - (c) a body corporate or an unincorporated body ;
 - (d) a limited partnership (including a dissolved partnership) within the meaning of the Limited Partnerships Act 1907.
- (2) It shall not be competent to sequestrate the estate of any of the following entities—
- (a) a company registered under the Companies Act 1985 or under the former Companies Acts (within the meaning of that Act); or
 - (b) an entity in respect of which an enactment provides, expressly or by implication, that sequestration is incompetent.
- (3) The sequestration of a trust estate in respect of debts incurred by the trust shall be on the petition of—
- (a) a majority of the trustees, with the concurrence of a qualified creditor or qualified creditors ; or
 - (b) a qualified creditor or qualified creditors, if the trustees as such are apparently insolvent.
- (4) The sequestration of the estate of a partnership shall be on the petition of—
- (a) the partnership, with the concurrence of a qualified creditor or qualified creditors ; or
 - (b) a qualified creditor or qualified creditors, if the partnership is apparently insolvent.
- (5) A petition under subsection (4)(b) above may be combined with a petition for the sequestration of the estate of any of the partners as an individual where that individual is apparently insolvent.

- (6) The sequestration of the estate of a body corporate or of an unincorporated body shall be on the petition of—
 - (a) a person authorised to act on behalf of the body, with the concurrence of a qualified creditor or qualified creditors; or
 - (b) a qualified creditor or qualified creditors, if the body is apparently insolvent.
- (7) The application of this Act to the sequestration of the estate of a limited partnership shall be subject to such modifications as may be prescribed.
- (8) Subsections (6) and (8) of section 5 of this Act shall apply for the purposes of this section as they apply for the purposes of that section.

7 Meaning of apparent insolvency

- (1) A debtor's apparent insolvency shall be constituted (or, where he is already apparently insolvent, constituted anew) whenever—
 - (a) his estate is sequestrated, or he is adjudged bankrupt in England or Wales or Northern Ireland ; or
 - (b) he gives written notice to his creditors that he has ceased to pay his debts in the ordinary course of business ; or
 - (c) any of the following circumstances occurs—
 - (i) he grants a trust deed ;
 - (ii) following the service on him of a duly executed charge for payment of a debt, the days of charge expire without payment;
 - (iii) following a poinding or seizure of any of his moveable property in pursuance of a summary warrant for the recovery of rates or taxes, 14 days elapse without payment;
 - (iv) a decree of adjudication of any part of his estate is granted, either for payment or in security ;
 - (v) his effects are sold under a sequestration for rent due by him ; or
 - (vi) a receiving order is made against him in England or Wales,unless it is shown that at the time when any such circumstance occurred, the debtor was able and willing to pay his debts as they became due ; or
 - (d) a creditor of the debtor, in respect of a liquid debt which amounts (or liquid debts which in aggregate amount) to not less than £750 or such sum as may be prescribed, has served on the debtor, by personal service by an officer of court, a demand in the prescribed form requiring him either to pay the debt (or debts) or to find security for its (or their) payment, and within 3 weeks after the date of service of the demand the debtor has not—
 - (i) complied with the demand ; or
 - (ii) intimated to the creditor, by recorded delivery, that he denies that there is a debt or that the sum claimed by the creditor as the debt is immediately payable.
- (2) A debtor's apparent insolvency shall continue, if constituted under—
 - (a) subsection (1)(a) above, until his discharge; or
 - (b) subsection (1)(b), (c) or (d) above, until he becomes able to pay his debts and pays them as they become due.
- (3) The apparent insolvency of—

- (a) a partnership shall be constituted either in accordance with the foregoing provisions of this section or if any of the partners is apparently insolvent for a debt of the partnership;
 - (b) an unincorporated body shall be constituted if a person representing the body is apparently insolvent, or a person holding property of the body in a fiduciary capacity is apparently insolvent, for a debt of the body.
- (4) Notwithstanding subsection (2) of section 6 of this Act, the apparent insolvency of an entity such as is mentioned in paragraph (a) or (b) of that subsection may be constituted (or as the case may be constituted anew) under subsection (1) above; and any reference in the foregoing provisions of this section to a debtor shall, except where the context otherwise requires, be construed as including a reference to such an entity.

8 Further provisions relating to presentation of petitions

- (1) Subject to subsection (2) below, a petition for the sequestration of a debtor's estate (other than a deceased debtor's estate) may be presented—
- (a) at any time by the debtor or by a trustee acting under a trust deed; but
 - (b) by a qualified creditor or qualified creditors, only if the apparent insolvency founded on in the petition was constituted within 4 months before the petition is presented.
- (2) A petition for the sequestration of the estate of a limited partnership may be presented within such time as may be prescribed.
- (3) A petition for the sequestration of the estate of a deceased debtor may be presented—
- (a) at any time by an executor or a person entitled to be appointed as executor on the estate or a trustee acting under a trust deed ;
 - (b) by a qualified creditor or qualified creditors of the deceased debtor—
 - (i) in a case where the apparent insolvency of the debtor was constituted within 4 months before his death, at any time ;
 - (ii) in any other case (whether or not apparent insolvency has been constituted), not earlier than 6 months after the debtor's death.
- (4) If an executor does not petition for sequestration of the deceased debtor's estate or for the appointment of a judicial factor to administer the estate within a reasonable period after he knew or ought to have known that the estate was absolutely insolvent and likely to remain so, any intromission by him with the estate after the expiry of that period shall be deemed to be an intromission without a title.
- (5) The presentation of, or the concurring in, a petition for sequestration shall bar the effect of any enactment or rule of law relating to the limitation of actions in any part of the United Kingdom.
- (6) Where before sequestration is awarded it becomes apparent that a petitioning or concurring creditor was ineligible so to petition or concur he shall withdraw, or as the case may be withdraw from, the petition but another creditor may be sisted in his place.

9 Jurisdiction

- (1) The Court of Session shall have jurisdiction in respect of the sequestration of the estate of a living debtor or of a deceased debtor if the debtor had an established place of business in Scotland, or was habitually resident there, at the relevant time.

- (2) The Court of Session shall have jurisdiction in respect of the sequestration of the estate of any entity which may be sequestrated by virtue of section 6 of this Act, if the entity—
 - (a) had an established place of business in Scotland at the relevant time; or
 - (b) was constituted or formed under Scots law, and at any time carried on business in Scotland.
- (3) Notwithstanding that the partner of a firm, whether alive or deceased, does not fall within subsection (1) above, the Court of Session shall have jurisdiction in respect of the sequestration of his estate if a petition has been presented for the sequestration of the estate of the firm of which he is, or was at the relevant time before his decease, a partner and the process of that sequestration is still current.
- (4) The provisions of this section shall apply to the sheriff as they apply to the Court of Session but as if for the word " Scotland " wherever it occurs there were substituted the words " the sheriffdom " and in subsection (3) after the word " presented " there were inserted the words " in the sheriffdom ".
- (5) In this section " the relevant time " means at any time in the year immediately preceding the date of presentation of the petition or the date of death, as the case may be.

10 Concurrent proceedings for sequestration or analogous remedy

- (1) If, in the course of sequestration proceedings, the petitioner for sequestration, the debtor or a creditor concurring in the petition (the petition in such proceedings being hereafter in this section referred to as the " instant petition ") is, or becomes, aware that—
 - (a) another petition for sequestration of the debtor's estate is before a court or such sequestration has been awarded; or
 - (b) a petition for the appointment of a judicial factor on the debtor's estate is before a court or such a judicial factor has been appointed ; or
 - (c) a petition is before a court for the winding up of the debtor under Part XX of the Companies Act 1985 or the debtor has been wound up under the said Part XX; or
 - (d) an application for an analogous remedy in respect of the debtor's estate is proceeding or such an analogous remedy is in force, he shall as soon as possible bring that fact to the notice of the court to which the instant petition was presented.
- (2) If a petitioner (not being the debtor) or a creditor concurring in the petition fails to comply with subsection (1) above, he may be made liable for the expenses of presenting the petition for sequestration; and, if the debtor fails to comply with subsection (1) above, he shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.
- (3) Where in the course of sequestration proceedings any of the circumstances mentioned in paragraph (a), (b) or (c) of subsection (1) above exists then—
 - (a) the court to which the instant petition was presented may, on its own motion or at the instance of the debtor or any creditor or other person having an interest, allow that petition to proceed or may sist or dismiss it; or
 - (b) without prejudice to paragraph (a) above, the Court of Session may, on its own motion or on application by the debtor or any creditor or other person having

an interest, direct the sheriff before whom the instant petition is pending, or the court before which the other petition is pending, to sist or dismiss the instant petition or, as the case may be, the other petition, or may order the petitions to be heard together.

- (4) Where in respect of the same estate—
- (a) a petition for sequestration is pending before a court; and
 - (b) an application for an analogous remedy is proceeding or an analogous remedy is in force,

the court, on its own motion or at the instance of the debtor or any creditor or other person having an interest, may allow the petition for sequestration to proceed or may sist or dismiss it.

- (5) In this section " analogous remedy " means a bankruptcy order under the Bankruptcy Act 1914 or under the Insolvency Act 1985 or an administration order under section 112 of the County Courts Act 1984 in England and Wales or under any enactment having the like effect in Northern Ireland or a remedy analogous to either of the aforesaid remedies, or to sequestration, in any other country.

11 Creditor's oath

- (1) Every creditor, being a petitioner for sequestration, a creditor who concurs in a petition by a debtor or a qualified creditor who becomes sisted under subsection (8)(i) of section 5 of this Act or under that subsection as applied by section 6(8) of this Act, shall produce an oath in the prescribed form made by him or on his behalf.
- (2) The oath may be made—
- (a) in the United Kingdom, before any person entitled to administer an oath there ;
 - (b) outwith the United Kingdom, before a British diplomatic or consular officer or any person authorised to administer an oath or affirmation under the law of the place where the oath is made.
- (3) The identity of the person making the oath and the identity of the person before whom the oath is made and their authority to make and to administer the oath respectively shall be presumed to be correctly stated, and any seal or signature on the oath shall be presumed to be authentic, unless the contrary is established.
- (4) If the oath contains any error or has omitted any fact, the court to which the petition for sequestration was presented may, at any time before sequestration is awarded, allow another oath to be produced rectifying the original oath; and this section shall apply to the making of that other oath as it applies to the making of the original oath.
- (5) Every creditor must produce along with the oath an account or voucher (according to the nature of the debt) which constitutes prima facie evidence of the debt; and a petitioning creditor shall in addition produce such evidence as is available to him to show the apparent insolvency of the debtor.