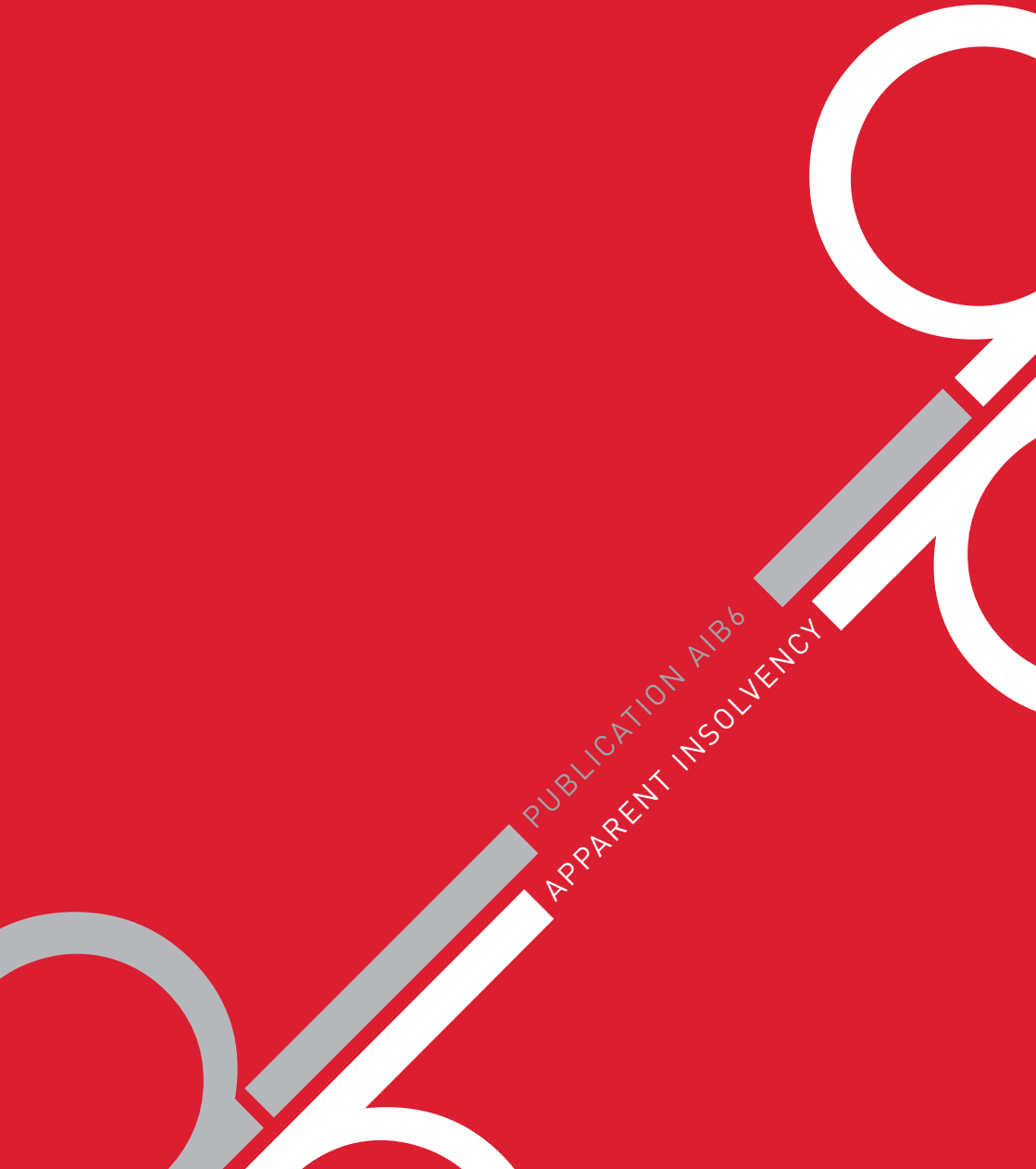


ACCOUNTANT
IN BANKRUPTCY
SCOTLAND'S INSOLVENCY SERVICE



PUBLICATION AIB6
APPARENT INSOLVENCY



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APPARENT INSOLVENCY

Certain conditions are needed for someone to be sequestrated (made bankrupt) in Scotland. They must be 'apparently insolvent' whether they are making themselves bankrupt or being sequestrated by someone else.

You will find the full legal meaning of apparent insolvency in section 7 of the Bankruptcy (Scotland) Act 1985.

However, the most common forms of apparent insolvency are shown below.

- A creditor has been to court, got a decree, and has had a charge for payment served on the debtor and the 14 days allowed for them to pay have passed without them making a payment.
- A creditor has served a statutory demand on the debtor telling them to pay the debt within 21 days **and** they have **not** paid the debt **or** sent the creditor a letter by recorded delivery denying that the debt is due for payment.
- A local or public authority has a summary warrant against the debtor to recover rates or taxes and some of their goods have been attached (or someone has tried to attach them) to the order, and 14 days have passed.

The debtor will also be apparently insolvent if any of the following apply.

- A creditor has a decree of adjudication from the Court of Session transferring the debtor's house or other property which can be inherited to them.
- A receiving order has been made against the debtor in a court in England, or Wales.
- The debtor is made bankrupt in England, Wales or Northern Ireland.

- The debtor has given written notice to his creditors that he has stopped paying their debts in the ordinary course of business. This only allows creditors to petition for sequestration. The debtor cannot petition just for these reasons.
- The debtor has signed a trust deed. This allows a qualified creditor to petition for sequestration. **But**, the debtor can only petition if the trust deed fails to become protected because their creditors object.
- A debt payment programme the debtor was party to has been revoked under the Debt Arrangement and Attachment (Scotland) Act 2002 and a debt being paid under the programme is constituted by decree or document of debt as defined in section 10 (attachment) of that Act.

Apparent insolvency also covers partnerships and unincorporated organisations (see section 7 of the Bankruptcy (Scotland) Act 1985).

EXPLANATION OF TERMS

Apparent insolvency

A legal term that means the debtor is unable to pay their debts and that at least one of their creditors has taken legal action against them.

Charge for payment

The formal demand for payment following a decree. A Sheriff Officer usually serves it on the debtor who has 14 days to pay the debt.

Creditor

Any person, business or organisation the debtor owes money to.

Debt Arrangement Scheme

A free debt management tool introduced by the Scottish Executive accessed through an Approved money adviser (see www.moneyscotland.gov.uk). It assists people with two or more debts who want to pay what they owe by giving them more time, free from the threat of enforcement (diligence) or bankruptcy.

Debtor

Any person who owes money. In this booklet it means someone who is insolvent and is aiming to have their estate sequestrated.

Decree

A formal order of court which says the debtor must pay money to a creditor. This order can follow court action such as:

- small claim (up to £750);
- summary cause (£750 to £1500); or
- ordinary action (more than £1500).

Decree of adjudication

Adjudication is an action in the Court of Session (Scotland's Supreme Civil Court) where property the debtor owns which can be inherited, usually a house or similar, is transferred to a creditor to pay a debt.

Estate

This is literally everything of value the debtor owns, including any rights they may have to receive money or goods from anyone else.

Interim trustee

Someone appointed by the court to handle the debtor's estate until a permanent trustee is appointed.

Permanent trustee

Someone appointed by the court to:

- take possession of the debtor's estate;
- sell any property the debtor owns; and
- pay the debtor's creditors as much as possible of what they are owed.

Petition

A formal application to the court.

Protected trust deed

A trust deed which transfers all the debtor's estate to a trustee and is not objected to by most of their creditors or by creditors to whom the debtor owes at least one-third of their debts. It is binding on **all** the creditors, that is, 'protected'. None of the creditors may then apply to have the debtor sequestered.

Qualified creditor or creditors

A creditor to whom the debtor owes at least £1500 (or a number of creditors the debtor owes at least £1500 in total).

Receiving order

An order of the court in England or Wales placing the debtor's assets under the control of an Official Receiver.

Sequestration

The Scottish legal term for bankruptcy. Bankruptcy is a formal court process which transfers the debtor's property to a trustee.

Sequestration for rent

A court process which the debtor's landlord can raise for rent not paid. (This is **not** the same as bankruptcy or formal sequestration.)

Statutory demand

A formal demand by a creditor giving the debtor 21 days to repay a debt. The demand must be on the proper form and be served by a Sheriff Officer.

Summary Warrant

An order granted by the court to local or public authorities giving the creditor authority to recover amounts of money the debtor owes. This procedure is generally used to recover unpaid rates, taxes, community charge and so on.

Trust deed

A voluntary alternative to sequestration. The debtor can transfer all or part of the estate to a trustee to handle for the benefit of their creditors.

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