



ACCOUNTANT  
IN BANKRUPTCY  
SCOTLAND'S INSOLVENCY SERVICE

PUBLICATION AIB13  
INTRODUCTION  
TO SEQUESTRATION



## CONTENTS

We hope you find this booklet helpful in providing a brief guide to sequestration, and the role of the Accountant in Bankruptcy.

In our specialised area of work, we find it difficult to avoid the use of legal and technical terms. We try to explain them as they occur. As each term appears for the first time it is in bold and you will find a definition, in alphabetical order, in the glossary of terms on pages 22 to 28. The glossary also includes other terms relevant to bankruptcy not used in the booklet.

You can get more copies of this booklet, or copies of other booklets we produce, by phoning our helpline on **0845 762 6171**. (You can also find them on the Publications page of our website: <http://www.aib.gov.uk>)

This publication is available on request in community language versions and alternative formats. Please contact **0845 612 6460** for this to be arranged.



Debts and diligence	4
Bankruptcy and insolvency	8
Sequestration	9
The sequestration process	13
Trust deeds	14
The register of insolvencies	16
Our organisation	17
Publications	20
Glossary of terms	22
Appendix 1 – Historical notes	29
Appendix 2 – More about trust deeds	34
Appendix 3 – The Agency Scheme	37
Suggested further reading	38
Contacts	39

## DEBTS AND DILIGENCE

### Debt

Most people experience debt but it is only an unfortunate minority who become bankrupt.

Debt is commonplace. Indeed it is almost impossible to exist in a modern society without having debts. Some of the debts are:

- owing money to a bank or building society for a mortgage;
- an overdraft at the bank.

Other debts may be:

- council tax;
- electricity and gas bills; or
- telephone bills.

As this list shows it is not even necessary to consciously obtain credit in order to be in debt.

Debts cause no particular problem so long as they are paid immediately, or by instalments as repayments fall due.

Debts do become a real difficulty for people unable to meet their obligations to repay. This can happen if there is:

- sudden unemployment;
- reduction in regular overtime;
- illness;
- divorce or separation; or
- a result of having borrowed more than can be repaid.

It is rare for people to deliberately get into debt with little or no intent to repay. In the end, people who are unable or unwilling to pay their debts may find themselves sequestrated and that is where we come in.

**Diligence** and **sequestration** are legal processes for the recovery of unpaid or overdue debts. There are 2 main categories of debt:

- secured; and
- unsecured.

A secured debt is where the debtor pledges particular items of property, usually buildings or land, and grants the lender the right to take possession of the property in the event that the debt is not repaid. The legal document giving effect to that obligation is called a **Standard Security**. The most common form of secured debt you will encounter is the mortgage over a house.

All other debts are unsecured.

## Diligence

Ever since money was invented there have been people who have borrowed, some of whom have failed to pay back at the agreed time. With the development of commerce the borrowing of money and the obtaining of goods and services on credit became more formalised. So too did the means of enforcing repayment in the event of default by the person obtaining the loan or incurring the credit, that is, the **debtor**.

Early forms of enforcement probably involved blunt or even sharp instruments but now we have sound legal processes for the recovery of overdue debts. These processes are collectively known as diligence and any person owed money by another, that is, a creditor, is entitled to do diligence against the debtor in order to recover their debt.

Until 1880, diligence included the imprisonment of debtors until they paid their debts. The current statute regulating the process of diligence is the Debtors (Scotland) Act 1987.

Before a creditor can do diligence against a debtor they must prove that the debt is owing and overdue. There are 3 ways to do this:

- **decree for payment;**
- **statutory demand;** and
- **summary warrant.**

### **Decree for Payment**

The most common means of proving a debt is for the creditor to apply to the **Sheriff Court** for a decree. The debtor must be formally informed of an application for decree and of course has the right to pay the debt or to appear in court and argue that they do not owe the money or that it is not presently due. If they do neither, the court will grant the decree.

The court may, if requested, allow the debtor more time to pay. If the court grants the decree without a time to pay order or if such an order lapses because the debtor fails to meet even the reduced payments required, then the creditor is able to serve on the debtor a **charge for payment**. A charge for payment is a formal demand for payment to be made within 14 days.

### **Statutory demand**

The second method is for the creditor to issue a statutory demand to the debtor. This is a formal demand issued under oath, requiring repayment within 21 days. (Do not confuse this term with the much more common final demand, as, for example, with an outstanding gas or telephone bill.) A statutory demand must be signed before a Notary Public.

If the demand is not answered, the debt is proved. The demand form, however, has a denial slip and if the debtor returns this then the debt is not proved and the creditor must go to court to prove the debt.



## Summary warrant

This way of proving a debt is only available to local authorities and central government departments for arrears of rates and taxes. They apply to the court for a summary warrant.

## Forms of diligence

No matter how the debt is proved, a creditor having done so is now free to do further diligence against the debtor. There are various forms of diligence but those most likely to be encountered are:

- arrestment of funds in a bank, etc. or
- arrestment of earnings; or
- attachment.

Creditors may succeed in recovering their debts by these means. If not, they may then decide to sequestrate as a last resort.

On the other hand, the creditor may decide not to attempt diligence but instead proceed immediately to sequestrate the debtor.

## BANKRUPTCY AND INSOLVENCY

There is often a degree of confusion over the terms insolvency, bankruptcy, and sequestration, especially as the same words are sometimes used interchangeably but at other times have specific meanings. The following definitions may be helpful.

Bankruptcy is the state of being legally and publicly declared to be unable to meet debts when they are due. It can apply to:

- an individual;
- a partnership;
- a corporate body, for example, a limited company; or
- an unincorporated body such as a club or association.

**Insolvency** is commonly used to describe the process of sequestration as it applies to corporate bodies. So we talk about personal bankruptcy and corporate insolvency. The terms are in reality quite similar. In relation to personal bankruptcy the word 'insolvency' has several more specific meanings, the most important of which from the point of view of this booklet is **apparent insolvency**.

**Apparent Insolvency** is the normal pre-condition for the process of sequestration. It is a purely technical state that can arise from a temporary or permanent inability to pay debts. It can also result from an unwillingness to admit a debt or a simple failure to pay debts. This means a person can be made apparently insolvent and because of that be made legally bankrupt, that is, sequestrated.

Apparent insolvency also has a very precise statutory meaning and a person is apparently insolvent if any of the following conditions apply:

- a charge for payment has been served and the 14 days notice has expired without payment being made;

- a government department or local authority has been to court to get a summary warrant against you for the recovery of rates, council tax, other taxes, **and** some of your goods have been attached (or someone has attempted to attach them) **and** 14 days have passed; or
- a statutory demand has been served and the 21 days notice has expired but the debt has not been paid nor has the denial slip been returned.

(There are other forms of apparent insolvency but these are the ones you are most likely to encounter.)

**Sequestration** is the process where someone who is insolvent has their estate removed from their control to be realised for the benefit of the creditors.

## SEQUESTRATION

### Assets

Strictly speaking, it is not the insolvent person who is sequestrated. The insolvent person is declared bankrupt. It is estate (property) that is sequestrated or removed from their control and set aside for the benefit of creditors. An estate is someone's assets or property. A debtor's estate consists of 5 basic types of property:

- **heritable property:** this is land and buildings and is sometimes referred to as immovable property. (Heritable property may be subject to secured loans.)
- **moveable property:** goods and other tangible assets including cash, money in banks or building societies, stocks, shares, and other forms of investment.
- **debts:** money owing to the debtor, for example, trade debts or money lent by the debtor to other people.
- **rights:** to receive money or goods at some time in the future.
- **income:** from employment, pensions, benefits, and so on.

## Petitions

Sequestration requires the presentation of a **petition** to the Sheriff of the district in which the debtor lives or has a place of business, or to the **Court of Session**. There are 3 types of petition:

- **by creditors:** a petition for sequestration can be made by any qualified creditor or creditors. A qualified creditor is one whose debt is £1500 or more but two or more creditors may petition jointly if between them they are owed £1500 or more. A petition can only be presented if the debtor is apparently insolvent.
- **by debtor:** sequestration can also be granted on a debtor's own petition if they are apparently insolvent. Debtors can make themselves bankrupt in order to gain protection from creditors who will no longer be able to pursue or do diligence against them.
- **by a trustee in a trust deed:** this only applies in a protected trust deed when a debtor does not co-operate fully with the trustee or if the trustee thinks that the creditors' best interests will be served by a sequestration.

Sequestration has the effect of permanently removing from the debtor any liability to pay any of the debts accumulated up to the date of sequestration. Once **discharged** from bankruptcy (usually after 3 years) they can benefit from a fresh start entirely free of debt, although there are exceptions, for example, security still held, court fines.

**Conditions for sequestration:** A petitioning debtor must:

- be apparently insolvent;
- not have been sequestrated during the previous 5 years;
- and must have debts of £1500 or more.



A debtor who does not satisfy the first of these conditions can still petition for their own sequestration if a qualifying creditor is prepared to formally agree to it.

The process of sequestration is exactly the same whether the petition is by a creditor or debtor.

**Effects of sequestration:** Sequestration stops all existing and future diligence in relation to the debts existing at the date of sequestration. It also vests (legally transfers) the whole of the debtor's estate into the hands of the **permanent trustee** whose duty it is to manage and realise that estate for the benefit of the creditors. The process fixes the amount of the debts at the date of sequestration and equalises the rights of all the creditors. That, at least, is the theory but some creditors are more equal than others and so money recovered in a bankruptcy is paid out in the following order.

- **Secured creditors:** these include mortgage lenders, who have an absolute priority for their debt but only to the extent it can be satisfied from the proceeds of sale of the secured subjects. Any unsatisfied balance ranks as an ordinary claim in the sequestration (see ordinary creditors).
- **Sequestration expenses:** the first charge on the debtor's unsecured estate is the costs for administering the sequestration (the trustee's remuneration and outlays, followed by the legal costs of the petitioning creditor(s)).
- **Preferred creditors:** next in line come the preferred creditors. These are :
  - HM Revenue and Customs;
  - The Contributions Agency; and
  - Any employees of the debtor for unpaid wages.

For cases where the petition for sequestration was presented after 15 September 2003 the preference for the first 2 categories was abolished.

- **Ordinary creditors:** the secured creditors and the cost of the sequestration are paid first. Then the preferred creditors get their money. All the other creditors (ordinary creditors) rank equally (the technical term is parri-passu) and they are paid in proportion to what they are owed.
- **Postponed creditors: There are 3 classes of postponed debts. These are:**
  - A loan made to a debtor, in consideration of a share of the profits in his business, which is postponed under Section 3 of the Partnership Act 1890 to the claims of other creditors;
  - A loan made to a debtor by the debtor's spouse or civil partner;
  - A creditor's right to anything vesting in the permanent trustee by virtue of a successful challenge to a gratuitous alienation.

## THE SEQUESTRATION PROCESS

This can be described in 10 stages:

- 1 Establishment of the debtor's apparent insolvency. As we said earlier, this is normally the result of a creditor having used certain forms of diligence against the debtor.
- 2 Qualified creditor (or creditors) or the debtor presents a petition to the Sheriff Court.
- 3 When a creditor makes a petition, the court grants an order called a Warrant to Cite. This gives a date when the debtor is called to appear in court to explain, if possible, why sequestration should not be awarded. If the debtor cannot give a good reason or fails to appear, sequestration is awarded at once. When a debtor makes a petition, sequestration is awarded on the date the petition is presented to the court.
- 4 When the court awards sequestration, it will at the same time appoint an insolvency practitioner as interim trustee. The interim trustee's task is to find out the state of the debtor's assets and liabilities, to take any steps necessary to safeguard the estate, and to investigate the debtor's financial affairs. It is also the interim trustee's duty to publish the debtor's sequestration in the Edinburgh Gazette.
- 5 The interim trustee then calls a meeting of creditors (**statutory meeting**). (If the Accountant in Bankruptcy is interim trustee, discretion can be used on whether or not to call a statutory meeting.)
- 6 The statutory meeting may elect an insolvency practitioner to be the permanent trustee and commissioners to supervise the process.

- 7 If there is no statutory meeting or if the meeting declines to elect a permanent trustee, the interim trustee reports to the Sheriff who appoints the interim trustee as permanent trustee.
- 8 The permanent trustee is confirmed in office by obtaining a formal document from the Sheriff, called an Act and Warrant. He can then gather and realise the debtor's estate. This process may not take very long if the debtor has no or few assets but in some cases it may take many years. Some live sequestrations are over 10 years old.
- 9 A debtor is usually entitled to be discharged from bankruptcy 3 years after the date of sequestration regardless of how long it takes to realise the estate.
- 10 The permanent trustee is only discharged when their work is completed, that is, when all debts and expenses have been fully paid or when there is no further estate to manage.

## TRUST DEEDS

Sequestration is not the only way of dealing with debt problems. For some a solution might lie in a voluntary trust deed. A trust deed is a formal, legally binding document that transfers part or all of an insolvent person's property to a trustee to manage for the benefit of the creditors. It is a private arrangement between debtor and creditors.

The benefit of a trust deed for the debtor is that it avoids the greater expense, formality and stigma of formal bankruptcy. There are no penalties or investigations of offences, and fewer disqualifications. However, any creditor who objects to the trust deed can still petition for the debtor's sequestration unless the trust deed is recorded in the Register of Insolvencies as a **protected trust deed (PTD)**.

To become protected, a trust deed must meet certain requirements:

- the trustee must be a qualified insolvency practitioner;
- the trust deed must convey all those assets that would **vest** in the permanent trustee if the granter had been sequestrated; and
- it must be properly advertised in the Edinburgh Gazette and the trustee must notify all known creditors.

A trust deed automatically becomes protected if it meets all these conditions unless a majority in number or one-third in value of the creditors object in writing within 5 weeks of its advertisement in the Edinburgh Gazette.

A trust deed is binding on all creditors when it becomes protected.

Trustees under trust deeds must produce accounts of their transactions with the estate. The creditors must agree the trustee's remuneration and outlays before he can be discharged at the conclusion of the trust deed. The Accountant in Bankruptcy will audit the trustee's accounts and fix remuneration:

- if there is any dispute;

or at the request of:

- the trustee;
- the debtor; or
- any creditor.

This is the only role the Accountant has in the administration of protected trust deeds other than the registration of them in the Register of Insolvencies.

## THE REGISTER OF INSOLVENCIES AND THE DAS REGISTER

The Accountant maintains the Register of Insolvencies. This contains details of all sequestrations awarded in Scottish Courts and all protected trust deeds.

The Register of Insolvencies is a public register. Anybody can either call at the office to consult the register or request a search for particular entries. (There may be a charge for this depending on who makes the request for the search.)

Searches are useful where someone wants to make sure that an individual has not been sequestrated. Solicitors commonly have to give clients this assurance. Also creditors can make sure that a person they are thinking of sequestrating is not already sequestrated. The Procurator Fiscal requires certified extracts from the register in connection with offences under the Bankruptcy (Scotland) Act.

Since 1 July 1999, the Accountant in Bankruptcy has also been responsible for the recording of corporate insolvency, that is, receivership and liquidation of companies registered in Scotland.

Since 30 November 2004, the Accountant also maintains the Debt Arrangement Scheme (DAS) register having been appointed DAS administrator by virtue of section 8 of the Debt Arrangement and Attachment (Scotland) Act 2002. The register and more information about the scheme are at [www.moneyscotland.gov.uk](http://www.moneyscotland.gov.uk).

## OUR ORGANISATION

The Accountant in Bankruptcy is an executive agency of the Scottish Executive Justice Department. The Accountant is the chief executive of the agency which operates independently and impartially whilst remaining directly accountable to the Scottish Ministers.

The Permanent Secretary, who is the permanent head of the Scottish Executive, is the Principal Accountable Officer. The Permanent Secretary appoints the Head of the Scottish Executive Justice Department who has responsibility for the Scottish Courts Group. The principal responsibility of the Head of the Courts Group is the running of the Scottish Courts – the **Sheriff Courts**, the **Court of Session**, and the **High Court of Justiciary** – although the actual administration of the courts is delegated to another executive agency, the Scottish Courts Service.

The Justice Department Courts Group is also responsible for overseeing and resourcing (that is providing the accommodation and finances) of a number of other independent non-Scottish Executive bodies (collectively known as Justice Department Courts Group Minor Departments). These include the Scottish Land Court, the Scottish Law Commission, and others.

The Head of Scottish Executive Justice Department, in consultation as necessary with the Permanent Secretary, has the following responsibilities in respect of Accountant in Bankruptcy:

- to advise the Scottish Ministers in the exercise of their responsibilities in relation to Accountant in Bankruptcy;
- to exercise duties and responsibilities as the Departmental Accountable Officer for the relevant departmental budget;

- to ensure that the evidence and professional advice from Accountant in Bankruptcy is used to inform policy formulation and development;
- to recommend the appointment of the Agency Accountable Officer; and
- to act on behalf of the Permanent Secretary as a focal point within the Scottish Executive for ensuring that services are available to support and facilitate the work of AIB in meeting the Agency's objectives and targets.

Our office is in 1 Pennyburn Road, Kilwinning. The Accountant is responsible for administering the process of personal bankruptcy (sequestration) and recording corporate insolvencies in Scotland, and acting as DAS administrator for the Debt Arrangement Scheme. Our aim is to provide a professional and helpful service to everybody involved in these processes.

We are all civil servants within the Scottish Executive and participate in Scottish Executive training, staff development, discipline, promotion opportunities, and so on.

Although day-to-day responsibility for implementing and interpreting government policy on personal insolvency rests with the Accountant and Courts Group, the responsibility for policy changes and for amendments to primary legislation lies with the Civil Law Division of the Scottish Executive.

## The Accountant's functions

These include responsibility for supervising the whole process of sequestrations in Scotland. The supervisory work includes:

- maintaining the Register of Insolvencies;
- recording statutory documents and ensuring statutory time limits are observed;
- ensuring that the trustee's accounts are properly audited and copies lodged as required in sequestrations where commissioners are acting;
- ensuring in other cases the proper lodging of accounts, the auditing of them, and fixing the amount of the trustee's remuneration;
- giving advice and directions to the trustee about the management of the sequestrated estate; and
- investigating complaints about trustees and commissioners in sequestrations (but not in trust deeds or corporate insolvency);
- approval of applications and applications for variations for a debt payment programme (DPP), approval of money advisers and payment distributors, maintenance of the DAS register, all under the Debt Arrangement Scheme (see [www.moneyScotland.gov.uk](http://www.moneyScotland.gov.uk)).

The Accountant is automatically appointed as interim and permanent trustee in all sequestrations, except where the petitioner nominates an interim trustee or where the statutory meeting of creditors elects a permanent trustee.

The Accountant is responsible, through the Head of the Courts Group, for the implementation and administration of the government's policy in respect of personal bankruptcy in Scotland.

The Accountant readily provides public guidance on the sequestration process to anybody who requests it. Our aim is to help people to understand the procedures, what the process of sequestration involves, its implications, and how to go about it. We cannot advise people on whether sequestration is correct for them.

As part of our service, we are happy to give advice to anybody through our publications, advisory booklets, helpline (telephone and e-mail), and website.

## PUBLICATIONS

We publish many helpful booklets. Copies are available, free of charge, by contacting us by telephone or by e-mailing [info@aib.gov.uk](mailto:info@aib.gov.uk). Information can also be downloaded from our web site: [www.aib.gov.uk](http://www.aib.gov.uk).

## List of current publications

Annual Report of the Accountant in Bankruptcy

The Accountant's Notes for Guidance (on our website).  
These Notes lay down procedures, interpret bankruptcy legislation, and provide policy guidance on issues not authoritatively determined by the courts.

Information booklets

AiB1 Debtor's guide

AiB2 Filling in the debtor's applications forms

AiB3 Completing the statement of assets and liabilities

AiB4 Creditor's guide

AiB5 Petitions

AiB6 Apparent insolvency

AiB7 Trust deeds

AiB8 Sequestration: debtor rights

AiB9 Sequestration: creditor rights

AiB10 Statutory meeting of creditors

AiB11 Register of insolvencies, including:

AiB12a Search request form (sequestrations)

AiB12b Search request form (companies)

AiB13 Introduction to sequestration

AiB14 Recall of sequestration

AiB15 Corporate insolvency: advice on liquidations and receiverships

## GLOSSARY OF TERMS

<b>Absolute insolvency</b>	<p>The debtor's condition if debts exceed the total value of assets. It is not as precise as it may seem because it may not be possible to determine the value of the assets until they are actually sold or realised.</p> <p>It is possible for an 'absolutely insolvent' person to still meet their debts or instalments on debts when they are due for payment (for example, when a couple's mortgage far exceeds the value of their assets, they may be quite able to meet the monthly payments out of their current income).</p>
<b>Act and Warrant</b>	<p>A document issued by the court formally vesting a debtor's estate in a permanent trustee.</p>
<b>Apparent insolvency</b>	<p>A formal state of insolvency resulting from certain forms of diligence being done against a debtor.</p>
<b>Award (of sequestration)</b>	<p>The court order declaring a person to be bankrupt and sequestering their estate.</p>
<b>Charge for payment</b>	<p>The document giving formal period of notice following a Decree, usually served by a Sheriff Officer, which requires the debtor to comply with the order within a specified time.</p>
<b>Commissioner</b>	<p>A creditor or their representative elected by the statutory meeting of creditors to represent the general body of creditors and to supervise the permanent trustee on its behalf.</p>
<b>Consignation</b>	<p>A form of deposit-receipt where money is lodged in a bank account pending orders of the court or claim by someone entitled to it.</p>

<b>Court of Session</b>	The highest civil court in Scotland.
<b>Creditor</b>	Any person, business, or organisation the debtor owes money.
<b>Debt Arrangement Scheme</b>	A free debt management tool introduced by the Scottish Executive accessed through an Approved money adviser (see <a href="http://www.moneyscotland.gov.uk">www.moneyscotland.gov.uk</a> ). 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.
<b>Debtor</b>	Literally anyone who owes money, but in this context it means a person who is insolvent and who is the subject of a petition for an award of sequestration or a person who has signed a trust deed.
<b>Decree for payment</b>	The formal order of the court which requires a debtor to pay a sum of money to a creditor.
<b>Diligence</b>	Various forms of legal process taken by creditors to enforce repayment of overdue debts.
<b>Discharge</b>	The formal termination of a legal office or state, e.g. interim and permanent trustees may apply to be formally discharged once their functions are completed. A debtor is also discharged from bankruptcy, usually 3 years after the date of their sequestration.
<b>Dividend</b>	The proportion of their debt made to a preferred or ordinary creditor in a sequestration, expressed as pence in the £.

## GLOSSARY OF TERMS - CONTINUED

<b>Edinburgh Gazette</b>	An official newsletter published twice weekly for the government by the Stationery Office in which various official announcements are recorded. Awards and certain other actions in the sequestration process are required to be published in the Gazette. Trust deeds are also advertised.
<b>Estate</b>	A legal term which simply means all property and rights belonging to a person.
<b>First Order</b>	(see Warrant to Cite.)
<b>Gratuitous alienation</b>	A transfer of property by a debtor to another person for free or for less than it is worth. The permanent trustee can challenge any alienations which took place in the 5 years before the date of sequestration.
<b>Heritable Property</b>	Property in the form of land, houses, and buildings, so called because it passed under the former law to the heir on the owner's death.
<b>High Court of Justiciary</b>	The highest criminal court of Scotland.
<b>Insolvency practitioner</b>	A person (usually, but not necessarily, a chartered accountant) licensed and authorised to act as a trustee in sequestrations or trust deeds and also as liquidator, administrator, or receiver of a limited company.
<b>Interim trustee</b>	A trustee appointed by the court to safeguard a sequestrated estate pending the election or appointment of a permanent trustee.
<b>Interlocutor</b>	An order or decision of the court, usually in response to a Note or Application.

<b>Moveable property</b>	All property not classed as heritable. Moveable property (property that has a physical existence) such as furniture, vehicles and animals can be handled or moved. Moveable property which has a legal but no actual physical existence, such as debts and company shares, is classed as incorporeal property.
<b>Note (to Court)</b>	An incidental application or report to the court in an existing process, for example, a sequestration process.
<b>Permanent trustee</b>	A trustee appointed by the court or elected by the creditors to take possession of the debtor's estate and to manage and realise it for the benefit of the creditors.
<b>Petition</b>	The legal term for a formal application to the court (sometimes referred to in the Sheriff Court as an Initial Writ).
<b>Practical insolvency</b>	<p>Insolvency can simply mean an inability to pay debts or instalments on debts as they become due. This is more precisely defined as simple or practical insolvency. A debtor can be practically insolvent without any formal legal steps being taken, and even though they could, given time, realise sufficient assets to pay all the debts.</p> <p>Although debtors may have no cash, they may have assets, the value of which equals or exceeds the amount of their debts. If such a debtor was to borrow money against their assets, for example, by increasing their mortgage or by selling some of their assets for cash, they might then be able to meet their current obligations and would no longer be practically insolvent.</p>

## GLOSSARY OF TERMS - CONTINUED

<b>Protected trust deed</b>	A form of voluntary trust deed for creditors introduced by the Bankruptcy (Scotland) Act 1985 where, if a sufficient number of the creditors do not object to a trust deed, it becomes binding on all the creditors, that is, 'protected'. None of the creditors can then seek to have the debtor declared bankrupt for the debts covered by the trust deed.
<b>Qualified creditor</b>	A creditor the debtor owes at least £1500 (or a number of creditors the debtor owes at least £1500 in total).
<b>Receiving order</b>	An order of the court in England or Wales placing the person's assets under the control of an official receiver, pending formal bankruptcy proceedings.
<b>Register of Insolvencies</b>	A public register in which are recorded details of all sequestrations awarded by Scottish Courts. It also contains details of protected trust deeds and details of companies in receivership or liquidation since 1 July 1999.
<b>Sederunt Book</b>	The official and permanent record of the sequestration process maintained by the permanent trustee.
<b>Sequestration</b>	The Scottish legal term for bankruptcy. Bankruptcy is a formal court process which involves the transfer of the debtor's property to a trustee.
<b>Sheriff Court</b>	<p>There are 6 Sheriffdoms in Scotland, each presided over by a Sheriff Principal. Each Sheriffdom consists of a number of Sheriff Court Districts, there being 49 in total. In each district there is a Sheriff Court where one or more Sheriffs sit.</p> <p>The Sheriff Court deals with civil cases and less serious criminal matters. Decisions in the Sheriff Court can be appealed to the Sheriff Principal or to the Court of Session.</p>

<b>Standard Security</b>	The legal instrument by which a secured debt is created.
<b>Statutory demand</b>	A formal demand issued under oath and requiring payment within 3 weeks. Failure to pay or to deny the debt makes the debtor apparently insolvent and liable to sequestration.
<b>Statutory meeting</b>	The first meeting of creditors called by the interim trustee to elect a permanent trustee and commissioners.
<b>Summary warrant</b>	Granted by the court on application by a government department or local authority, in respect of unpaid taxes, rates, community charge, or council tax. Once a summary warrant has been granted, the creditor may immediately arrest the debtor's salary or wages.
<b>Trust</b>	The vesting of certain funds, rights or interests in property in another person or persons (trustee(s)) to be applied or administered for the benefit of others (beneficiaries) in accordance with the terms of the trust.
<b>Trustee</b>	A person in whom assets are vested to manage in the interests of the beneficiaries of the trust. A sequestration is a form of trust in which the beneficiaries are the creditors of the person whose estate has been sequestrated. A trust deed works in a similar way.
<b>Unfair preference</b>	A payment or obligation granted by a debtor to a particular creditor which is designed to defeat or prejudice the interests of other creditors.

<b>Vesting</b>	A legal term meaning 'becoming the property of a person'. A debtor's sequestrated estates are 'vested in', that is, they become the property of the permanent trustee.
<b>Voluntary trust deed for creditors</b>	An alternative to sequestration, entered into voluntarily, by which a debtor transfers their estate to a trustee (in this case chosen by the debtor rather than appointed by the court), who will administer it for the benefit of the creditors.
<b>Warrant to Cite</b>	A court order authorising the petitioning creditor to cite the debtor to appear in court on a stated date to show that grounds for sequestration no longer exist. If the debtor fails to appear or fails to show that they should not be sequestrated, sequestration will be awarded effective from the date the order was granted (see Award).

## APPENDIX 1: HISTORICAL NOTES

### Development of the Sequestration Process

The concept of bankruptcy has been around in Scots Law for a very long time. We know that insolvent persons would habitually seek sanctuary within the precincts of Holyrood Abbey to escape imprisonment at the hands of their creditors. Such persons were known as 'notour bankrupt'.

(This term remained in use until 1986 when it was replaced by the term 'apparent insolvency' introduced by the Bankruptcy (Scotland) Act 1985.)

#### 1621-1696

The earliest recorded statute dealing with bankruptcy was the Bankruptcy Act of 1621. This Act dealt specifically with gratuitous alienations by debtors. This was followed, albeit not for 75 years, by the Bankruptcy Act of 1696 which was concerned with fraudulent preferences by debtors. These two Acts remained in force until 1986.

#### 1707

Union of the Scottish and English Parliaments. Scotland retains its own distinct legal system.

The process of sequestration as we would recognise it today came into being in the Bills of Exchange Act of 1772.

#### 1772

The preamble to the 1772 Act began: 'the personal estates of such debtors as become insolvent are generally carried off by the diligences of arrestment and poinding, executed by a few creditors, who, from the nearness of their residence to, and connection with such debtors, get the earliest notice of the insolvency, to the great prejudice of creditors more remote and unconnected and to the disappointment of that equality which ought to take place in the distribution of the estates of insolvent debtors among their creditors'.

### **1783**

The 1772 Act introduced the process of sequestration as a means of equalising the rights of creditors. However, the process only applied to the moveable estate of the debtor. Shortly after, the Bankruptcy Act of 1783 extended the law to apply to all estate of the debtor, that is, including heritable property, but interestingly, the application of the law was restricted to merchants and manufacturers. The gentry and the land-owning classes were exempt!

### **1856**

It was not until the Bankruptcy Act of 1856 that all restrictions on who could be sequestrated were finally removed. This was followed by the Bankruptcy (Scotland) Act 1913.

### **1913**

The 1913 Act was little more than a consolidation act and really the law had not changed in any material way since 1856 when social and economic conditions were very different from what they are today.

### **1985**

The current statute, the Bankruptcy (Scotland) Act 1985, resulted from a report by the Scottish Law Commission which was published in 1981. The 1985 Act introduced a number of fundamental changes to the process of sequestration. The most significant of these was the introduction of public funding to underwrite the costs of the process in cases where there were insufficient funds or realisable assets in the debtor's estate to cover the costs of the sequestration.

Sequestration requires there to be a trustee to whom the debtor's estate is transferred. The trustee's duty is to manage and realise the debtor's estate, to obtain contributions from the debtor's earnings, if possible, as well

as to ensure that the debtor makes a 'fair surrender' of their financial affairs and to investigate any wrongdoings on the part of the debtor.

Few trustees were prepared to act unless they could be reasonably assured that there would be enough money to cover their professional fees and to meet the necessary expenses of the process. The result of that was a growing number of cases where the court had awarded sequestration on a creditor's petition but nothing happened because no trustee was willing to act. There were also an unknown number of debtors who desired but could not obtain the protection of sequestration, again because they could not find a willing trustee.

Another difficulty was where sequestration could not be completed according to the statute and the debtor could never obtain a discharge from their debts, so he could not obtain a fresh start.

This was resolved by the introduction of public funding to underwrite the costs of the trustee, that is any shortfall between the costs of the process and the funds in the sequestrated estate was to be met from the public purse.

Public funding was only to be available in cases where the permanent trustee was appointed by the Sheriff and not if the creditors elected them. Before the 1985 Act the annual number of sequestrations had never exceeded 300. It was not thought that this amount of cases would increase. The assumption was that about 10% would result in a call on public funds.

The total cost to the public purse was not expected to exceed £10,000 each year. In the event the total number of sequestrations awarded annually increased until it reached almost 12,000 in 1993 at which time the cost to public funds was in excess of £26 million! (For an explanation of how this was possible, see Appendix 2.)

## 1993

The Bankruptcy (Scotland) Act 1993 changed all that. The 1993 Act was an 'amending Act', and served purely to amend the 1985 Act which remains the principle statute. There were a number of changes made by the 1993 Act but the two most important were:

- restrictions on petitioning rights to prevent what were regarded as inappropriate petitions.
- a change to the way public funding was to be provided.

So, instead of underwriting the costs of private sector trustees, in any case where there were insufficient funds to meet the costs of the process the Accountant in Bankruptcy would act as a 'public trustee'.

### The Accountant in Bankruptcy

The office was created by the Bankruptcy (Scotland) Act 1856 which provided for 'the appointment of an officer of the Court of Session to be described as the Accountant in Bankruptcy'.

Originally, the supervision of the process of sequestration, the actings of the trustee and the approval of their remuneration, was entirely in the hands of the court itself. This did not work terribly well and the Payment of Creditors (Scotland) Act of 1793 introduced commissioners to the process for the first time. Commissioners are representatives of the general body of creditors and it is their responsibility to supervise the trustee, to give him advice, to give approval to their actions, to audit their accounts and authorise remuneration.

Until the 1985 Act, the election of commissioners was essential and the process could not continue without them. The role of the Accountant was purely supervisory and their principal duty was to ensure that trustees and commissioners performed their duties under the statute.

In 1889 the office of Accountant in Bankruptcy was joint with the Accountant of the Court of Session (another court officer whose function was, and is, to supervise 'curators boni' and other judicial factors). The separate office of Accountant in Bankruptcy was re-created by the 1985 Act but the office was still to be held by the Accountant of Court. The 2 offices were totally separated by the 1993 Act with the Accountant of Court remaining as an officer of the Court of Session while the Accountant in Bankruptcy became an independent minor department of the Scottish Courts Administration.

Under the 1985 Act, the work of the Accountant in Bankruptcy was considerably expanded. It was no longer essential for commissioners to be elected and indeed in publicly funded cases it was incompetent. In any case in which commissioners were not or could not be elected, their functions fell to the Accountant to perform. In addition the Accountant acted as the paymaster for publicly funded cases.

This development of the role of the Accountant in Bankruptcy was continued in the 1993 Act, which came into force on 1 April 1993, in terms of which the Accountant now acts as interim and permanent trustee in all sequestrations except those where an insolvency practitioner accepts a nomination to act.

When the Accountant is appointed as interim and/or permanent trustee, she has the option of administering the sequestration using her own staff (Case Management Branch) or of appointing an agent to do the work in their name. Appendix 3 to this booklet gives a brief explanation of the Agency Scheme.

## APPENDIX 2: MORE ABOUT TRUST DEEDS

A voluntary trust deed is a formal document by which an insolvent person voluntarily transfers all or some of their property to a trustee to manage for the benefit of the creditors. Trust deeds have been in use for a very long time, indeed their use was encouraged and regulated by the Bills of Exchange Act 1772 (see Appendix 1).

A quite famous trust deed was that granted by Sir Walter Scott in which he pledged all his future royalties to his creditors to prevent them seeking his sequestration.

In essence a trust deed is a private arrangement between a debtor and their creditors managed by an independent third party, that is the trustee. The trust deed may convey all or only part of the debtor's estate to the trustee and it may include conditions regarding the discharge of the debts and of the trustee. Trust deeds historically however suffered from several drawbacks, the most significant of which was that they were only binding on those creditors who expressly acceded. Any non-acceding creditor could therefore overturn a trust deed.

To overcome this difficulty and to encourage the use of trust deeds as a means of dealing with the problems of insolvency without the need for the judicial process of sequestration, the concept of the protected trust deed was introduced by the 1985 Act. Under the new arrangements, providing a majority of the creditors agreed to the trust deed, any non-acceding creditor could not overturn it. Protected trust deeds were not a great success, however, and after a very poor beginning they fell into virtual disuse. There were a number of reasons for this including the difficulty of obtaining consents from a sufficient number of creditors who generally tended to be apathetic. Although the introduction of protected trust deeds turned out to be almost a non-event, trust deeds as a whole remained very popular.

It has always been a common law power of a trustee under a trust deed to petition for the sequestration of the debtor if they believe that to be in the best interests of the creditors (for example, to take advantage of the greater statutory powers available to a trustee in sequestration). It was not too long before a certain insolvency practitioner spotted 3 key factors:

- the signing of a trust deed was enough to make a debtor apparent insolvent;
- a trustee under a trust deed had no limitations on their right to petition for the sequestration of the debtor; and
- the trustee could have himself appointed as interim and permanent trustee in the sequestration and the Accountant in Bankruptcy would be bound to underwrite the costs.

The insolvency practitioner made all these critical connections and the ultimate result was an increase in the number of sequestrations from less than 300 in 1985, to nearly 12,000 in 1993, at an ever-increasing cost to the public purse.

It is possible that none of this would have happened if trustees' petitioning rights had been left on a common law basis that is to say, a petitioning creditor would have had to satisfy the court that it was in the interests of the creditors to award sequestration. The 1985 Act statutory provision did not contain or imply any such restriction and the court, when faced with a correctly presented petition, had no option but to grant it.

There was no question that this so-called trust deed route to sequestration was perfectly legal. However, there is equally no doubt that it was not intended as a means of debtors obtaining access to sequestration (and in the process greatly enriching a small number of insolvency practitioners) and it was quite contrary to the aims of Parliament. But the Government stayed with it until it

became clear that the consequences and the costs of maintaining the policy were no longer supportable.

The 1993 Act did 2 things in relation to trust deeds:

- It put limitations on the right of a trustee to petition for sequestration by restricting it to those circumstances where either the debtor fails to abide by the terms of the deed or where the trustee can satisfy the court that an award of sequestration would be in the better interests of the creditors (in other words, returning to the pre-1985 common law position).
- It legislated that a trust deed, on condition that it transfers all of the debtor's assets to the trustee, now becomes a protected trust deed automatically upon notice of it being served on all the creditors unless a majority in number or one third in value object to it. Protected status is now therefore presumed rather than merely possible.

## APPENDIX 3: THE AGENCY SCHEME

When the Accountant is appointed as interim and/or permanent trustee, she has the option of using her own staff, that is, Case Management Branch, or of having the work done by agents in the private sector. If this second method is chosen, work is assigned to agents under a formal Contract for Agency Services.

Any qualified insolvency practitioner can apply to take part in the Contract known as the Agency Scheme. For the purposes of the scheme the country is divided into 8 areas and practitioners may register to undertake work in only one of these areas. Within each area practitioners are allocated cases on a strict rota basis so that the available work is shared equally between all practitioners registered in the area.

There are arrangements to allow the allocation of 'related' cases to the same agent (where husband and wife are both sequestrated or cases involving business partnerships and individual partners). When this happens, the agent has their place in the rota adjusted so that they receive no more cases in total than any other participant. As well as being bound by the terms of the Contract, agents must also observe the Accountant's Supplementary Notes for Agents.

Agents receive a fixed price for carrying out the basic statutory minimum administration. There are 2 rates of payment, a higher rate for creditor petition cases and a lower rate for debtor petition cases. In addition, agents are paid according to a tariff for any necessary additional work and of course are entitled to be reimbursed for any outlays and expenses.

Agents are required to produce accounts of their intromissions in the same way as trustees. These are audited by the Registration and Supervision Branch of this office which is generally responsible for supervising agents and for giving them any necessary advice and directions.

In most respects the process of supervising agents is little different from supervising trustees in cases where there are no commissioners. However, one very important distinction is made. A private sector trustee is ultimately responsible for their own actions and can be sued in respect of any failure to properly exercise their statutory and common law duties. In an agency case it is the Accountant who is ultimately liable (even if she may have a right of relief against the agent for breach of contract).

### FURTHER READING

- 'Bankruptcy' by Professor W W McBryde.
- The Bankruptcy (Scotland) Act 1985 (as amended).
- The Accountant in Bankruptcy's Notes for the Guidance of Interim & Permanent Trustees and Supplementary Notes for Agents (on CD-ROM).
- Annual Reports of the Accountant in Bankruptcy.
- Information leaflets published by the Accountant.
- The Report of the Scottish Law Commission on Bankruptcy and Related Aspects of Insolvency & Liquidation.
- The Law of Scotland (11th Edition) – Gloag & Henderson.
- Glossary of Scottish Legal Terms, Latin Maxims and European Community Legal Terms – Butterworths.

## CONTACTS

Accountant in Bankruptcy

1 Pennyburn Road

Kilwinning

Ayrshire

KA13 6SA

Phone: 0845 612 6460

Fax numbers: 0845 612 6470 (office fax)

Helpline: 0845 762 6171

E-mail helplines:

[AiB@aib.gsi.gov.uk](mailto:AiB@aib.gsi.gov.uk) (to write to the Accountant)

[helpline@aib.gsi.gov.uk](mailto:helpline@aib.gsi.gov.uk) (for general help about sequestration)

[info@aib.gsi.gov.uk](mailto:info@aib.gsi.gov.uk) (for queries about the Notes for Guidance)

Website: [www.aib.gsi.gov.uk](http://www.aib.gsi.gov.uk)

We will be happy to help you by:

- telling you how sequestration works and what its consequences are; and
- helping you to fill in forms.

It is best to use our helpline (calls are all charged at the local rate) but you can also write or fax.

Remember, we can only tell you how to go about sequestration. We cannot tell you whether sequestration is the best way of dealing with your debts and neither can the Sheriff Court.







अनुरोध करने पर यह प्रकाशन सामुदायिक भाषा संस्करणों एवं  
वैकल्पिक स्वरूपों में उपलब्ध है। ऐसी व्यवस्था करने के लिए कृपया  
0845 612 6460 पर संपर्क करें।

یہ اشاعت درخواست کرنے پر معاشرتی زبان کے نسخوں اور متبادل شکلوں میں دستیاب ہے۔ برائے مہربانی اس کے انتظام کے لئے  
پر رابطہ کریں۔ 0845 612 6460

এই প্রকাশনাটি অনুরোধসাপেক্ষে জনগোষ্ঠীর ভাষায় লিখিত  
সংস্করণে এবং বিকল্প ফরম্যাটে পাওয়া যায়। অনুগ্রহ এই  
ব্যবস্থা করার জন্য 0845 612 6460 নম্বরে যোগাযোগ করুন।

此出版物有社區語言版本和其他格式，  
請致電 0845 612 6460 索取。

هذه النشرة متوفرة عند الطلب بإصدارات بلغات الجاليات وبالصيغ البديلة.  
الرجاء الاتصال بالرقم الهاتفي 0845 612 6460 لترتيب هذا.

ਇਹ ਪ੍ਰਕਾਸ਼ਨ ਭਾਈਚਾਰਕ ਭਾਸ਼ਾ ਰੂਪਾਂ ਅਤੇ ਬਦਲਵੇਂ ਫਾਰਮੈਟਾਂ ਵਿਚ ਬਿਨਤੀ  
'ਤੇ ਉਪਲਬਧ ਹਨ। ਇਸਦਾ ਪ੍ਰਬੰਧ ਕਰਾਉਣ ਲਈ ਕਿਰਪਾ ਕਰਕੇ  
0845 612 6460 'ਤੇ ਸੰਪਰਕ ਕਰੋ।

# OTHER PUBLICATIONS

## Annual Report

### Notes for Guidance

- AiB1** Debtor's guide
- AiB2** Filling in the debtor's application forms
- AiB3** Completing the statement of assets and liabilities
- AiB4** Creditor's guide
- AiB5** Petitions
- AiB6** Apparent insolvency
- AiB7** Trust deeds
- AiB8** Sequestration: debtor rights
- AiB9** Sequestration: creditor rights
- AiB10** Statutory meeting of creditors
- AiB11** Register of insolvencies, including:
  - AiB12a** Search request form (sequestrations)
  - AiB12b** Search request form (companies)
- AiB13** **Introduction to sequestration**
- AiB14** Recall of sequestration
- AiB15** Corporate insolvency: advice on liquidations and receiverships

KILWINNING 1 PENNYBURN ROAD  
AYRSHIRE KA13 6SA  
T 0845 612 6460 F 0845 612 6470 HELPLINE 0845 762 6171  
AIB.GOV.UK GSI.GOV.UK WWW.AIB.GOV.UK

