



ACCOUNTANT  
IN BANKRUPTCY  
SCOTLAND'S INSOLVENCY SERVICE

# CREDITOR'S GUIDE





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# Creditor's Guide

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# 1. Introduction

This booklet provides general information regarding bankruptcy for people who are owed money (creditors). It is not intended as a full statement of the law on bankruptcy.

The person who owes you money (the debtor) may already be bankrupt or you may be considering making them bankrupt to recover the debt they owe you.

Bankruptcy has serious consequences for debtors. You should be aware that you may not recover the amount you are owed by making someone bankrupt.

Bankruptcy is not the only way to try to recover debt. In Scotland other legal processes, known as diligences, can be used.

Diligences include:

- > Arrestment of the debtor's bank account;
- > Arrestment of the debtor's earnings;
- > Attachment of the debtor's assets; and
- > Inhibition on the debtor's property.

A solicitor can give you advice about these processes. You may also get advice from Citizens Advice Scotland or Money Advice Scotland.

The information in this booklet applies to petitions or applications for bankruptcy that are lodged with the court or the Accountant in Bankruptcy from 1 April 2008. Information for creditors regarding bankruptcies that started before this date can be found in the AiB publication 'AiB 4 – Creditor's Guide'.

The relevant legislation is the Bankruptcy (Scotland) Act 1985, as amended. All bankruptcy related legislation and publications are available from the Accountant in Bankruptcy website at [www.aib.gov.uk](http://www.aib.gov.uk).

## **2. What is bankruptcy?**

In Scotland bankruptcy is sometimes called sequestration.

Bankruptcy is a formal declaration that someone is unable to pay their debts. A creditor can petition a sheriff for an award of bankruptcy or a debtor can apply to the Accountant in Bankruptcy, a Scottish Government official, for their own bankruptcy.

When someone becomes bankrupt, a trustee is always appointed to administer the bankruptcy. Control of the debtor's assets is passed to the trustee. It is the trustee's duty to sell a debtor's assets or property and to collect the money raised. The trustee will also consider whether the debtor can afford to pay a contribution towards their debts.

The trustee will use the money gathered in to:

- > pay the costs of administering the bankruptcy;
- > where a creditor petitioned for bankruptcy, pay the costs incurred in presenting the petition; and
- > pay every creditor as much as possible of what is owed to them (including interest).

The amount available to make any payments will depend on the funds gathered in and there will be cases when those funds are not sufficient to pay the costs of administering the bankruptcy, nor to make any payment to creditors.

## **2.1 Who can be made bankrupt?**

Scottish bankruptcy legislation applies to individuals, partnerships and other unincorporated organisations such as trusts. It does not apply to limited companies and other organisations registered at Companies House.

Subject to certain conditions, a debtor may apply to the Accountant in Bankruptcy for their own bankruptcy or you, as a creditor, can present a petition at a Sheriff Court to make someone bankrupt.

## **2.2 How can I check whether someone is already bankrupt?**

The person who owes you money may already be bankrupt. You may wish to check this before incurring any additional costs and taking action to try to recover the debt they owe you by making them bankrupt.

All bankruptcies are recorded in a public register known as the Register of Insolvencies.

### **Register of Insolvencies**

You can search the Register of Insolvencies (ROI) at [www.aib.gov.uk/ROI](http://www.aib.gov.uk/ROI).

### **3. What do I have to consider before making someone bankrupt?**

Before you make someone bankrupt, you should consider what it will cost you, how long it will take, whether you are likely to get the money you are owed and who you would like to administer the bankruptcy. These topics are dealt with in the following sections:

#### **3.1 How do I go about making someone bankrupt?**

If you want to make someone bankrupt you must first have taken formal steps to pursue your debt. This usually involves going to court to demonstrate that they owe you money.

Once you have taken formal legal steps to try to recover what is owed to you, you can present a petition to ask a sheriff to make the person who owes you money bankrupt.

You should consult a solicitor or Citizens Advice Scotland for advice on how to pursue debt or make someone bankrupt.

#### **3.2 Who administers a bankruptcy?**

Every bankruptcy is administered by a trustee. When you present a petition to make someone bankrupt, you can choose to nominate the Accountant in Bankruptcy or an insolvency practitioner to act as the trustee.

Insolvency practitioners are regulated by statutory rules and must be members of an approved governing body. You cannot nominate an insolvency practitioner unless they agree in writing to accept your nomination. This is done on a form which is available from the Accountant in Bankruptcy or your local sheriff court. An insolvency practitioner may not agree to accept your nomination.

If you do not make a nomination or an insolvency practitioner has not agreed to be nominated, the sheriff will appoint the Accountant in Bankruptcy to act as the trustee.

When the Accountant in Bankruptcy is appointed, the bankruptcy may be administered by her staff or she may pass the case to an insolvency practitioner who works on her behalf.

When an insolvency practitioner agrees to be the trustee and is appointed they may personally administer the bankruptcy or will ask members of their staff to work on the case.

### **3.3 What are the conditions for making someone bankrupt?**

You can ask the sheriff to award bankruptcy against a debtor if:

- > they owe you at least £3,000, including any fees, charges and interest added to the original debt; **or**
- > you apply for a joint petition with other creditors provided the combined debts are at least £3,000; **and**
- > you have sent them a copy of the Scottish Government's Debt Advice and Information Package – you must have sent this at least 3 weeks and not more than 12 weeks before you make your petition; **and**
- > the debtor is apparently insolvent.

When someone is apparently insolvent they appear not to be able to pay their debts. The sheriff will require evidence to support this, usually an expired Charge for Payment or Statutory Demand.

The evidence you provide must show that apparent insolvency was constituted no more than 4 months before the date of your petition.

You may wish to speak to a solicitor about evidence of apparent insolvency, to draft the bankruptcy petition and to represent you in court. You will have to pay a fee to the court in addition to any fee charged by your solicitor. The costs of making someone bankrupt can be added to what is owed to you.

### **3.4 How long does it take to make someone bankrupt?**

This depends on the circumstances of the case. The process will usually take between two and six weeks from the date the petition is presented. The sheriff will grant a warrant citing the debtor to appear at court on a specified day. You must arrange for a sheriff officer to serve the warrant on the debtor at their last known address. At the hearing the sheriff will consider the evidence provided and will ask you or your solicitor to confirm that the debt is correct and still outstanding.

At the hearing the sheriff may:

- > declare the debtor bankrupt; or
- > dismiss your petition if the debt has been paid before the hearing; or
- > postpone the hearing for up to 6 weeks if they think that the debtor will pay what they owe you in the near future; or
- > postpone the hearing to allow a payment programme to be set up under the Debt Arrangement Scheme if they think that the debtor is able to repay you over a reasonable period.

### 3.5 Who pays the costs of making someone bankrupt and the bankruptcy itself?

The costs of presenting the petition for bankruptcy include the court fee and the fees due to the solicitor who presents the petition on your behalf and represents you in court. An additional creditor petition fee is also payable to the AiB. If you are making someone bankrupt, you are known as the petitioning creditor and you are responsible for these costs. You can claim these petitioning costs from the funds gathered into the bankruptcy.

The costs of administering a bankruptcy will be paid first from funds obtained from the sale of the debtor's assets and from contributions the debtor makes from their income. These costs include the fees and outlays of the trustee.

When the Accountant in Bankruptcy is the trustee, costs that cannot be met by selling assets or from contributions will be met from the public purse. **However, the public purse will not make any payment towards the debts owed to creditors.**

When an insolvency practitioner is the trustee, costs that cannot be met by selling assets or from contributions will be met by the trustee. The insolvency practitioner will consider this before agreeing to act as trustee in a bankruptcy.

Creditors will not normally be asked to cover any of the administration costs, other than those incurred in presenting a petition for bankruptcy to court. Where the sale of assets and income from the debtor's contributions produce enough funds to pay all the administration costs, a creditor who petitioned for the bankruptcy may then have any reasonable costs in making the petition reimbursed. Their debt and the debts of other creditors will then be considered equally after this.

If there are not enough funds to pay all the administration costs, you as petitioning creditor will remain solely responsible for any solicitor's costs and outlays that you incurred as petitioning creditor.

### **3.6 Will I get the money I am owed?**

Bankruptcy can take time to administer and can only realise whatever is in the debtor's estate plus any contributions that the debtor is able to make out of their income. Funds are distributed equally amongst all the creditors after paying for the costs of administration, the costs incurred by the creditor who petitioned for the debtor's bankruptcy and the debts due to any preferred creditors such as payments for the remuneration of employees.

Debts may not be paid if:

- > a debtor has few, or no, assets of value;
- > they have a low level of income; or
- > the costs of administering their bankruptcy are high (for example, if there are complex legal issues involved).

### **3.7 How long does bankruptcy last?**

A debtor is normally discharged from their bankruptcy after one year. However, the trustee will continue to deal with any outstanding matters, including the realisation of assets and the collection of contributions until they are satisfied all required administration has been completed. The administration of the bankruptcy includes making payment to creditors if this is appropriate.

## **Deferment of debtor's discharge**

The trustee or any creditor can, in certain circumstances, apply to the sheriff to defer the debtor's discharge for up to 2 years at a time. This might happen, for example, if the debtor has not co-operated with the trustee or the trustee needs more time to administer the bankruptcy.

## **Offer of composition**

The debtor can make an offer of composition to their creditors at any time although they can only make two offers during the life of the bankruptcy. An offer of composition is an agreement where creditors accept payment or part payment of debts owed by the debtor. An offer of composition must offer a dividend of at least 25p in the pound after all the trustee's costs and fees have been paid. Composition must be agreed by a majority in number or at least two-thirds in value of the creditors and be approved by the sheriff. If an offer of composition is approved the debtor is discharged.

## **Recall**

The sheriff can recall an award of bankruptcy if it is considered appropriate to do so.

A debtor can petition the sheriff to recall their bankruptcy if they can show that they should not have been made bankrupt. For example, if they were able to pay their debts but did not. Recall will not be granted unless the debtor pays or offers security for everything that they owe to their creditors, their trustee, and all of the costs of their bankruptcy, including the cost of recall. Creditors and the trustee can object to a recall. The law states that until recall is granted, the trustee must continue with the administration of the bankruptcy.

Creditors can also petition the sheriff for recall of bankruptcy if they have made someone bankrupt in error. Recall effectively

restores the debtor to the position in which they would have been had the bankruptcy not happened. The creditor will be liable for the trustee's fees for the costs of the recall.

## **4. What happens after someone is made bankrupt?**

The trustee will contact the debtor to arrange to interview them and obtain details of what they own and what debts they have. The trustee will then write to all known creditors within 60 days of the award of bankruptcy. If you hear nothing, you should write to tell the trustee that you are a creditor.

Debtors are obliged to co-operate with their trustee and may be committing a criminal offence if they do not. They may also be committing an offence if they withhold relevant information or try to conceal their assets.

The trustee will then administer the debtor's estate to try to gather in funds.

**You cannot pursue the debtor for money they owed you before they were bankrupt.**

### **4.1 How are creditors involved?**

#### **Creditors' Meetings**

Within 60 days of an award of bankruptcy, the trustee will decide whether or not to call a statutory meeting of creditors. If a meeting is held the creditors present can vote to replace the trustee. If the trustee decides not to call a meeting, creditors can request one and the trustee is obliged to call the meeting if not less than a quarter in value of the creditors (based on the total debt owed) request it.

Meetings can be called by creditors at any time. A meeting must be held if called by one tenth in number or one third in value of the creditors. Creditors can issue directions to a trustee at a meeting, but the trustee and other creditors have the right of appeal to the sheriff, if they disagree with directions issued by a meeting of creditors.

### **Commissioners**

At any meeting of creditors commissioners can be elected.

Commissioners can be elected to generally advise and supervise the administration of the bankruptcy including auditing the trustee's accounts. Commissioners can be creditors or their mandated representatives. If no commissioners are elected, the Accountant in Bankruptcy performs this function.

### **Trustees Accounts**

Trustees are required to produce accounts at the end of the first year and periodically thereafter until the end of the bankruptcy. Accounts have to be audited by the Accountant in Bankruptcy or elected commissioners. Creditors will be sent copies of a determination of the trustee's outgoings and remuneration. You can ask to see the accounts and can appeal against the determination.

### **Record keeping**

The trustee must keep a sederunt book which includes copies of court orders, accounts and records of meetings but not general correspondence. During the bankruptcy period you can ask to inspect the sederunt book and the trustee should arrange a suitable time for you to do so.

## **4.2 How is the debtor's estate managed?**

The trustee is responsible for the management and realisation of the debtor's estate. The trustee can sell the debtor's assets, continue trading or close down their business. They can initiate or continue legal proceedings if required.

The trustee will write to insurance companies, banks, registrars, etc. about any policies, money, shares, etc. held in the debtor's name, and arrange for valuations and sale.

### **Property**

The trustee will deal with the debtor's interest in any property. Before taking action on selling a property, the trustee will consider the amount of equity and the rights of other interested parties, such as secured creditors, co-owners and family members. The trustee will take into account the costs involved in selling and the overall financial benefit to the estate. If the trustee thinks that a course of action is particularly contentious, they may seek the creditors' views before undertaking it.

The debtor's bankruptcy does not affect the rights of a secured creditor and if the debtor does not maintain payments the secured creditor can still take action to repossess and sell the debtor's property. In these circumstances, any money left over after the costs of the sale and the debt is repaid will pass to the trustee.

The debtor is not allowed to sell or otherwise dispose of their interest in any property.

### **Contributions**

The trustee will also consider what contribution the debtor is able to make from their income. They will enter into an agreement with the debtor which will normally last for three years from the date of the agreement. The agreement can be varied if the debtor's circumstances change.

### **4.3 What happens to the money gathered in?**

Trustees will consider whether they are able to make any payments to creditors from the funds they gather in. They will invite claims and proof of the debt from all known creditors. Any payments made may not cover the full amount of the debt and can only be made once other costs, such as the trustee's fees and outlays, are met. The petitioning creditor is treated equally with other creditors although the costs of presenting the petition will be paid before other claims.

Claims must be made on a creditor's claim form which can be obtained directly from the Accountant in Bankruptcy or from the website at **[www.aib.gov.uk](http://www.aib.gov.uk)** .

#### **4.3.1 What are dividends?**

Money paid to creditors is called a dividend and is expressed as the number of pence in the pound paid in respect of each creditor's claim. If you have not submitted a claim form and proof of the debt you will not be included in this process.

When the trustee has collected enough money to pay a dividend, they will write to all creditors telling them how much to expect. Each creditor will be sent a Form of Receipt to complete and return to the trustee. When this form is received, the dividend payment will be made.

If any creditor does not return this form they will not receive any dividend due to them. The trustee will lodge the funds with the Accountant in Bankruptcy in a special bank account called a consignment account.

If you wish to claim any money in the consignment account, you must write to the Accountant in Bankruptcy. A charge is made for dealing with consigned money.

#### **4.4 What happens to the debts I am owed?**

Once a debtor is discharged they are no longer liable to repay debts owed prior to their bankruptcy, although there are exceptions to this.

They are still personally responsible for a number of their debts including:

- > student loans;
- > fines, penalties, compensation and forfeiture orders imposed by any sheriff;
- > any liability incurred as a result of fraud or breach of trust;
- > any liability to forfeiture of bail;
- > any obligation to pay aliment; and
- > any periodical payment ordered by the sheriff to an ex-spouse if they are divorced.

Pre-bankruptcy creditors (except for those whose debts listed above) will not be able to take any legal action to recover their debts. However, the debts still exist until the trustee is discharged. The debtor is still responsible for paying any contributions agreed with the trustee to enable the debts to be paid.

Creditors can still take action against anyone else, for example the debtor's spouse, if they have had joint liability for the debt.

Debtors are also responsible for repaying any debts which they have run up after they were made bankrupt, for example, ongoing liabilities for rent, council tax, gas, electricity, telephone.

## **5. What are the consequences of bankruptcy for the debtor?**

Being made bankrupt is a very serious matter. There are a number of consequences for the debtor.

### **Credit rating**

A debtor's credit rating will be affected for many years.

### **Holding Public Office**

People who are bankrupt are not allowed to hold certain public offices. These include being a Local Councillor or Member of Parliament.

### **Obtaining credit**

Debtors can not obtain credit over £500 without disclosing to the lender that they are bankrupt. They can not obtain credit at all without disclosing they are bankrupt if they have already incurred £1,000 of debt after they became bankrupt.

### **Running a business**

Debtors can not start up or be involved in the management of a limited company while they are bankrupt.

### **Bankruptcy Restrictions**

If a debtor has behaved dishonestly or irresponsibly in some way, either before or after the award of bankruptcy, the Accountant in Bankruptcy can apply to the sheriff for a bankruptcy restrictions order. A debtor can avoid going to court by agreeing to a bankruptcy restrictions undertaking. An order or undertaking will last between 2 and 15 years depending on the seriousness of the debtor's behaviour. A restrictions order or undertaking will be recorded in the Register of Insolvencies.

Some reasons why bankruptcy restrictions might be appropriate are if the debtor:

- > incurred debts that they knew they had no reasonable chance of repaying;
- > gave away their assets;
- > lost money through gambling;
- > failed to keep proper business records;
- > failed to supply goods or services that had been paid for; or
- > did not cooperate with their trustee.

## **6. What if I am unhappy with the way the bankruptcy is being handled?**

If you are unhappy with the way the bankruptcy is being handled you should speak to the person dealing with the case.

If the Accountant in Bankruptcy is the trustee and you cannot resolve the issues you have by speaking to her staff or the insolvency practitioner acting on her behalf you should write to her.

If the trustee is a private sector insolvency practitioner and you cannot resolve the issues you have by speaking to them you should contact their governing body. You can also write to the Accountant in Bankruptcy and, where there are commissioners, to them.

Full information on the Accountant in Bankruptcy's complaints procedure can be found on the website at **[www.aib.gov.uk](http://www.aib.gov.uk)**.

## **7. Further information**

### **7.1 Contact details for the Accountant in Bankruptcy**

The Accountant in Bankruptcy  
1 Pennyburn Road  
Kilwinning  
Ayrshire  
KA13 6SA

Telephone: 0300 200 2600

Fax: 0300 200 2601

E-Mail: [aib@aib.gsi.gov.uk](mailto:aib@aib.gsi.gov.uk) (for general help about the  
bankruptcy process)

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

### **7.2 Sources of advice and information**

Some useful contacts for free advice on debt:

#### **Money Advice Scotland**

Telephone: 0141 572 0237

Website: [www.moneyadvicescotland.org.uk](http://www.moneyadvicescotland.org.uk)

E-mail: [Info@moneyadvicescotland.org.uk](mailto:Info@moneyadvicescotland.org.uk)

#### **Citizens Advice Scotland**

Telephone: 0131 550 1000

Website: [www.cas.org.uk](http://www.cas.org.uk)

#### **National Debtline Scotland**

Telephone: 0808 808 4000

Website: <http://www.nationaldebtline.co.uk/scotland/>

#### **Consumer Credit Counselling Service**

Telephone: 0800 138 1111

Website: <http://www.cccs.co.uk/>

#### **Trading Standards Scotland**

Website: [www.scotss.org.uk](http://www.scotss.org.uk)

Local addresses and telephone numbers for these agencies will be found in your phone book.

For help finding an insolvency practitioner, contact:

**Institute of Chartered Accountants of Scotland**

CA House

21 Haymarket Yards

Edinburgh

EH12 5BH

Phone: 0131 347 0100

Website: [www.icas.org.uk](http://www.icas.org.uk)

For help finding a solicitor with special knowledge of bankruptcy, contact:

**Law Society of Scotland**

26 Drumsheugh Gardens

Edinburgh

EH3 7YR

Phone: 0845 113 0018

Website: [www.lawscot.org.uk](http://www.lawscot.org.uk)

E-Mail: [cro@lawscot.org.uk](mailto:cro@lawscot.org.uk)

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Cuiribh fios gu **0300 200 2600** airson seo a chur air dòigh.

Aby otrzymać niniejszy dokument w innej wersji językowej, na kasecie  
lub w wersji z powiększonym drukiem, prosimy o kontakt: **0300 200 2600**

We have written this booklet for general guidance only.  
It is not a detailed or full statement of the law.



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