

Draft Order laid before the Scottish Parliament under section 25(2)(b)(i) of the Public Services Reform (Scotland) Act 2010, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2017 No.

REGULATORY REFORM

INSOLVENCY

COMPANIES

BANKRUPTCY

**The Public Services Reform (Corporate Insolvency and
Bankruptcy) (Scotland) Order 2017**

Made - - - - 2017

Coming into force

in accordance with article 1(2) 1st August 2017

in accordance with article 1(3)(a) 1st October 2017

*otherwise in accordance with article
1(3)(b)*

The Scottish Ministers make the following Order in exercise of the powers conferred by section 17(1) and (9) of the Public Services Reform (Scotland) Act 2010^(a) and all other powers enabling them to do so.

The Scottish Ministers consider that the conditions in section 18(2) of that Act are satisfied.

The Scottish Ministers have consulted in accordance with section 26 of that Act.

The Scottish Ministers have laid a draft of this Order and an explanatory document before the Scottish Parliament in accordance with section 25(2)(b) of that Act.

^(a) 2010 asp 8. The effect of sections 14 to 30 and schedule 5 and 6 of the Act has been extended by virtue of section 134(4) and S.S.I. 2015/234.

In accordance with section 25(2)(c) of that Act, a draft of this Order has been approved by resolution of the Scottish Parliament(a).

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017.

(2) Subject to paragraph (3), this Order comes into force on 1st August 2017.

(3) Articles 2 to 5 come into force—

(a) on 1st October 2017 insofar as they enable the making of—

(i) rules under section 411 of the 1986 Act; or

(ii) any other subordinate legislation under the 1986 Act; and

(b) insofar as not already in force, on the day appointed for the coming into force, for all remaining purposes, of section 122 of the Small Business, Enterprise and Employment Act 2015(b) in Scotland.

(4) In this Order—

(a) “the 1986 Act” means the Insolvency Act 1986(c); and

(b) “the 2016 Act” means the Bankruptcy (Scotland) Act 2016(d).

Amendment of section 70 of the 1986 Act: interpretation for Chapter 2 of Part 3 (receivers in Scotland)

2. In section 70(1) of the 1986 Act—

(a) repeal the definition “prescribed”; and

(b) insert in the appropriate place according to alphabetical order—

““prescribed fee” means the fee prescribed by regulations made under this Chapter by the Secretary of State;”.

Amendment of section 101 of the 1986 Act: liquidation committee (creditors’ voluntary winding up)

3. In section 101 of the 1986 Act(e) repeal subsection (4).

Amendment of section 142 of the 1986 Act: liquidation committee (winding up by the court)

4. In section 142 of the 1986 Act(f)—

(a) after subsection (3) insert—

“(3A) A “liquidation committee” is a committee having such functions as are conferred on it by or under this Act.”; and

(b) repeal subsection (6).

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- (a) Section 25(2)(c) has been modified by paragraph 5 of schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).
- (b) 2015 c.26 (“the 2015 Act”). Sections 122 to 126 (position of creditors) and schedule 9 (abolition of requirements to hold meetings; opted-out creditors) came into force on 26th May 2015 for purposes in respect of enabling regulations, rules or orders or preparing and issuing guidance (see S.I. 2015/1329). Those provisions otherwise came into force in England and Wales (but not Scotland) on 6th April 2017 (S.I. 2016/1020, as amended by S.I. 2017/363).
- (c) 1986 c.45.
- (d) 2016 asp 21.
- (e) Section 101 is prospectively amended by paragraph 25 of schedule 9 of the 2015 Act.
- (f) Section 142 is prospectively amended by paragraph 37 of schedule 9 of the 2015 Act.

Amendment of section 246A of the 1986 Act: remote attendance at meetings

5. In section 246A of the 1986 Act(a)—

- (a) repeal subsection (2); and
- (b) in subsection (10)(a) after “administrator,” insert “receiver (appointed under section 51)”.

New section 173A of the 2016 Act: effect of protected status on essential supplies

6. After section 173 of the 2016 Act insert—

“173A Effect of protected status on essential supplies

(1) An insolvency-related term of a contract for the supply of essential goods or services to a debtor ceases to have effect if—

- (a) a trust deed granted by the debtor is granted protected status, and
- (b) the supply is for the purpose of a business which is or has been carried on by or on behalf of the debtor.

(2) An insolvency-related term of a contract does not cease to have effect by virtue of subsection (1) to the extent that—

- (a) it provides for the contract or the supply to terminate, or any other thing to take place, because the individual becomes subject to an insolvency procedure other than a trust deed,
- (b) it entitles a supplier to terminate the contract or the supply, or do any other thing, because the individual becomes subject to an insolvency procedure other than a trust deed, or
- (c) it entitles a supplier to terminate the contract or the supply because of an event that occurs, or may occur, after a trust deed granted by the debtor is granted protected status.

(3) Where an insolvency-related term of a contract ceases to have effect under this section the supplier may—

- (a) terminate the contract, if the condition in subsection (4) is met,
- (b) terminate the supply, if the condition in subsection (7) is met.

(4) The condition in this subsection is that—

- (a) the trustee under the trust deed consents to the termination of the contract,
- (b) on application by the supplier the court grants permission for the termination of the contract, or
- (c) any charges in respect of the supply that are incurred after the date of protection of the trust deed are not paid within the period of 28 days beginning with the day on which payment is due.

(5) An application by the supplier under subsection (4)(b) is to be made to the sheriff who, had a petition for sequestration of the estate been presented at the date the trust deed was granted, would have had jurisdiction to hear that petition in terms of section 15(1) or (3).

(6) The court may grant permission under subsection (4)(b) only if satisfied that the continuation of the contract would cause the supplier hardship.

(a) Section 246A was inserted by S.I. 2010/18 and is prospectively amended by paragraph 54 of schedule 9 of the 2015 Act.

- (7) The condition in this subsection is that—
- (a) the supplier gives written notice to the trustee under the trust deed that the supply will be terminated unless the trustee personally guarantees the payment of any charges in respect of the continuation of the supply after the date of protection of the trust deed, and
 - (b) the trustee does not give that guarantee within the period of 14 days beginning with the day the notice is received.
- (8) For the purposes of securing that the interests of suppliers are protected, where—
- (a) an insolvency-related term of a contract (the “original term”) ceases to have effect by virtue of subsection (1), and
 - (b) a subsequent trust deed granted by the debtor is granted protected status,
- the contract is treated for the purposes of subsections (1) to (7) as if, immediately before the subsequent trust deed granted by the debtor is granted protected status, it included an insolvency-related term identical to the original term.
- (9) A contract for the supply of essential goods or services is a contract for a supply mentioned in section 222(4).
- (10) An insolvency-related term of a contract for the supply of essential goods or services to a debtor is a provision of the contract under which—
- (a) the contract or the supply would terminate, or any other thing would take place, because a trust deed granted by the debtor is granted protected status,
 - (b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because a trust deed granted by the debtor is granted protected status, or
 - (c) the supplier would be entitled to terminate the contract or the supply because of an event that occurred before a trust deed granted by the debtor is granted protected status.
- (11) Subsection (1) does not have effect in relation to a contract entered into before 1st August 2017.”.

Amendment of section 222 of the 2016 Act: supplies by utilities

7.—(1) Section 222 of the 2016 Act is amended as follows.

(2) In subsection (4)—

(a) after paragraph (a) insert—

“(aa) a supply of gas by a person within paragraph 1 of schedule 2A of the Gas Act 1986 (supply by landlords etc.);”;

(b) after paragraph (b) insert—

“(ba) a supply of electricity by a class of person within Class A (small suppliers) or Class B (resale) of schedule 4 of the Electricity (Class Exemptions from the Requirement for a Licence) Order 2001 (S.I. 2001/3270);”;

(c) after paragraph (c), repeal “and”, and insert—

“(ca) a supply of water by a water services provider within the meaning of the Water Services etc. (Scotland) Act 2005(a),

(cb) a supply of water by a person who has an interest in the premises to which the supply is given;”;

(a) 2005 asp 3.

- (d) after paragraph (d) insert—
- “(e) a supply of communications services by a person who carries on a business which includes giving such supplies, and
 - (f) a supply of goods or services mentioned in subsection (5A) by a person who carries on a business which includes giving such supplies, where the supply is for the purpose of enabling or facilitating anything to be done by electronic means.”.
- (3) After subsection (5) insert—
- “(5A) The goods and services referred to in subsection (4)(f) are—
- (a) point of sale terminals,
 - (b) computer hardware and software,
 - (c) information, advice and technical assistance in connection with the use of information technology,
 - (d) data storage and processing,
 - (e) website hosting.”.

Amendment of savings in the Public Services Reform (Insolvency) (Scotland) Order 2016

8.—(1) The Public Services Reform (Insolvency) (Scotland) Order 2016(a) is amended as follows.

(2) In article 15(1) for “4 to 6 and 7(2) to 13” substitute “4 and 8 to 10”.

(3) After article 15 insert—

- “**16.**—(1) This article applies where, before the day mentioned in article 1(4)—
- (a) there is a members’ or creditors’ voluntary winding up continuing for more than one year;
 - (b) the liquidator in that winding up has an obligation under—
 - (i) section 93 or 105 of the Act to summon a general meeting of the company, either at the end of the first year from the commencement of the winding up, or at the end of any succeeding year; or
 - (ii) section 105 of the Act to summon a meeting of the creditors, either at the end of the first year from the commencement of the winding up, or at the end of any succeeding year; and
 - (c) that obligation has not been fulfilled or the meeting has not taken place.
- (2) Where this article applies, subject to article 1(3), the Act continues to have effect on and after the day mentioned in article 1(4) as if the amendments made by articles 5, 6 and 7(2) and (3) had not been made in relation to the liquidator’s obligations to—
- (a) summon the particular meeting;
 - (b) lay before that meeting an account of the liquidator’s acts and dealings, and of the conduct of the winding up, in the preceding year.”.

Name

Authorised to sign by the Scottish Ministers

St Andrew’s House,
Edinburgh
Date

(a) S.S.I. 2016/141.

EXPLANATORY NOTE

(This note is not part of the Order)

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

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

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

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

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

Article 7 amends section 222 of the 2016 Act to give further protection to the essential supplies of businesses carried on in relation to insolvent estates. Section 222 prohibits a supplier of utilities (such as gas, electricity, water and communication services) from compelling payment of charges incurred before the commencement of an insolvency event by threatening to terminate the supply of the utilities on the grounds of non-payment. The supplier is required to continue to provide the utilities if a request is made by the trustee of the insolvent estate for the continued supply. The supplier is, however, entitled to make it a condition of the supply that the office-holder provides a personal guarantee for the payment in respect of any supply made during the insolvency. The supplier is not entitled to make it a condition of the continued supply that any outstanding charges incurred before the insolvency are paid. Section 222 is confined to a limited list of suppliers including statutory undertakers and similar bodies. The amendments made by article 7 extend that to a wider list of private suppliers of gas, electricity, water or communication services including the supply of utilities from a landlord to tenant. They also add the supply of goods or services for

the purpose of enabling or facilitating anything done by electronic means. Primarily these include goods or services relating to information technology, other than those to which section 222 already applies by virtue of being a communication service, including the supply of point of sale terminals, computer hardware and software and other items identified under new subsection (5A) of section 222.

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

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