The Coronavirus (Scotland) (No 2) Act 2020—impact on restructuring and insolvency

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Restructuring and Insolvency analysis: Written by Steven Wood, practice support specialist (insolvency) at ICAS.

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This analysis focuses on the impact of the Coronavirus (Scotland) (No 2) Act 2020 (the No 2 Act) on restructuring and insolvency practice in Scotland during its period of operation.

What is the Coronavirus (Scotland) (No 2) Act 2020?

The Coronavirus (Scotland) Act 2020 (CSA 2020) came into force on 7 April 2020 with a view to responding to the emergency caused by the coronavirus (COVID-19) pandemic.

A previous article was published looking at the impact of that legislation on restructuring and insolvency practice in Scotland during its period of operation.

The No 2 Act represents further temporary legislation, building on CSA 2020, which includes some additional bankruptcy-related measures.

When did it come into force and how long will it be in operation?

The No 2 Act came into force on 27 May 2020, following an expedited procedure.

As with CSA 2020, s 9 of the No 2 Act provides for its main provisions to expire on 30 September 2020, unless the Scottish Parliament passes regulations providing for its effect to continue until 31 March 2021. If the Scottish Parliament does pass such regulations, it may then pass regulations allowing one further, final extension, until 30 September 2021, at which point any remaining provisions in the No 2 Act will expire.

The Scottish Ministers also have the power, by regulations, to suspend any of the main provisions of the No 2 Act to revive the effect of any suspended part and to cause any of the main provisions of the No 2 Act to expire earlier than the schedule set out. This power allows any provision which is no longer, in the view of the Scottish Ministers, appropriate or proportionate, to be removed entirely or to be suspended if it may become necessary to use again.

What changes does the No 2 Act introduce?

Broadly, the No 2 Act introduces the following:

- measures to ensure that business and public services can continue to operate well
- changes to some obligations and duties on public services
- changes to protect certain student tenants
- support for carers and power to reduce non-domestic rates
- changes to criminal procedure to ensure that essential justice business can continue

What are the measures that will specifically impact the restructuring and insolvency profession?

The provisions in relation to bankruptcy are set out in Part 5 of Schedule 1 to the No 2 Act and are summarised below.

Qualified creditors minimum debt level

The minimum debt level that must be owed to creditors before they can petition for an individual's sequestration is increased. Section 7(1) of the Bankruptcy (Scotland) Act 2016 (the 2016 Act) is amended to increase that level from £3,000 to £10,000.

This is clearly a further step to make it harder for creditors to make individuals (and sole traders) bankrupt during the coronavirus crisis. The requirement for the change may be open to some debate at a time when a temporary extension of moratoriums on diligence has already been enacted as part of CSA 2020.

Minimal Asset Process (MAP) application fee

The application fee of £90 for debtor bankruptcy applications eligible for the MAP process is temporarily waived for those whose sole income comes from certain benefits such as universal credit, pension credits or child-tax credits.

For all others the application fee is reduced from £90 to £50.

Full bankruptcy application fee

The application fee of £200 for debtor bankruptcy applications that are not eligible for the MAP process is temporarily waived for those whose sole income comes from certain benefits such as universal credit, pension credits or child-tax credits.

For all others the application fee is reduced from £200 to £150. The small-scale nature of this reduction may mean it has limited impact for those looking to access bankruptcy.

Increase in MAP debt ceiling

The debt ceiling for individuals to qualify for MAP bankruptcy is raised from £17,000 to £25,000. It is also clarified that student loan debt is removed from that calculation.

Student loans are expressly barred from being treated as a debt or liability in sequestrations in accordance with section 15 of the Education (Student Loans) (Scotland) Regulations 2007 and section 12 of the Education (Student Loans for Tuition Fees) (Scotland) Regulations 2006.

Funds received from student loans are also barred from being treated as income for the purpose of a DCO or from vesting in the trustee. The loans consequently sit completely out with the sequestration process and it makes sense to exclude them from the calculation for the maximum debt threshold level in MAP cases.

The increase represents the first adjustment to the debt ceiling since the introduction of MAP in 2015. However, an almost 50% increase may be considered as taking the debt level beyond that which may ideally benefit from the more comprehensive investigation provided by a full administration bankruptcy. The government considers the reduction in protection afforded to creditors to be acceptable given the current circumstances.

DCO proposals

Where the petitioner for bankruptcy is a creditor, or a trustee acting under a trust deed, the trustee is required to assess the debtor's income and expenditure using the Common Financial Tool and provide a proposal for a Debtor Contribution Order (DCO) to the AiB not later than six weeks after the award

The six week period specified at section 90(2) of the 2016 Act has been increased to 12 weeks for cases where the date of the award of sequestration falls on or after 27 May 2020.

This is a welcome change. Notwithstanding the current crisis, the six-week period has often proven to be insufficient in a significant number of creditor petition cases due, most often, to debtor non-cooperation.

Electronic communications

The No 2 Act makes temporary modifications to section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010, as that section applies to documents which are authorised or required by or under the 2016 Act.

This has the effect of permitting electronic communications to be used for all forms and circulars involved in the bankruptcy administrative process. The intention is to allow trustees to operate more effectively in these challenging times.

However, in order to communicate electronically, the trustee must do so in a way that the recipient has indicated to the trustee that the recipient is willing to receive a document. The recipient's willingness may be:

- specific to the document in question or generally applicable to documents of that kind
- expressed specifically to the sender or generally (for example on a website)
- inferred from the recipient having previously been willing to receive documents from the sender in that way and not having indicated unwillingness to do so again

It is also clarified that the uploading of a document to an electronic storage system (ie a website) from which the recipient can download the document may constitute electronic transmission of the document.

Where a document is sent via electronic means, it is taken to have been received 48 hours after it is sent unless the contrary is shown.

The intention of these changes is welcome and the provision which allows willingness to be expressed generally may be useful in allowing reliance on general email addresses appearing on websites for commercial creditors.

However, it is noted that the changes allow for presumed consent 'inferred from the recipient having previously been willing to receive documents from the sender in that way and not having indicated unwillingness to do so again'.

Insolvency practitioners familiar with corporate insolvency procedures will be aware that this is drawn from similar rules that allow them to rely on presumed consent due to dealings of the company prior to insolvency.

However, the term 'sender' is not defined by the No 2 Act and an equivalent provision would logically have referred to 'the debtor who is the subject of the insolvency proceedings'.

Clarification has been sought from the AiB in relation to this matter in order to establish whether this is a drafting error as it would clearly be helpful if presumed consent could be relied upon as a result of the debtor's dealings prior to insolvency.

It is finally worth noting that this provision only applies to cases being administered under the 2016 Act. Any communications in legacy cases from the Bankruptcy (Scotland) Act 1985 will need to continue being sent by post.

Electronic signatures

Regulation 3 of the Bankruptcy (Scotland) Regulations 2016 is modified to allow the forms set out in Schedule 1 of those Regulations to be signed with an electronic signature.

The meaning of 'electronic signature' is to be construed in accordance with section 7(2) of the Electronic Communications Act 2000 but includes a version of an electronic signature which is reproduced on a paper document.

Virtual creditor meetings

Paragraph 13 of Schedule 6 to the 2016 Act is amended to allow meetings of creditors to take place using electronic means. Meetings can now be held:

> 'by such electronic means as would, in the opinion of the person calling the meeting, be most convenient to allow the majority of the creditors to participate in the meeting without being together in the same place.'

In practice creditor meetings are very rare in sequestrations, with statutory meetings of creditors under section 44 of the 2016 Act optional unless requisitioned by at least 25% in value of the debtor's creditors. This change is therefore unlikely to be of significant practical benefit, but it will be useful for those rare occasions when a meeting is necessary.

There are no transitional or saving provisions in relation to this amendment. Therefore, it is unclear whether the provision applies only to meetings due to be held before the expiry of the legislation, or whether it will allow for situations where the notice has been issued prior to that date, but the meeting held after.

Register of Inhibitions

Paragraph 3 of Schedule 4 to the No 2 Act makes provision for registration or recording in the Register of Inhibitions to proceed on the basis of electronic submission of documents and copies of documents to the Keeper of the Registers.

'Electronic signature' is to be construed in accordance with section 7(2) of the Electronic Communications Act 2000, but includes a version of an electronic signature which is reproduced on a paper document.

The document must be transmitted by a means (and in a form) which is specified on the Keeper's website as being acceptable for those purposes.

From the perspective of insolvency practitioners this is welcome news. In accordance with section 26 of the 2016 Act, the court order granting warrant to cite (in creditor petition cases) or AiB granted award (in debtor petition cases) must be sent for recording in the Register of Inhibitions.

The effect of that registration is essentially to prevent a debtor from transferring ownership of any of the debtor's heritable property without the knowledge of the trustee.

The inhibition expires at the end of the period of three years beginning with the date of bankruptcy as defined by section 22(7) of the 2016 Act.

Unless discharged, the trustee may, before the end of the period of three years and before the expiry of every subsequent period of three years, renew the record in the register by sending a memorandum in the prescribed form to the Keeper of the Register.

Unfortunately, the closure of the Register of Inhibitions to paper submissions due to the coronavirus crisis has meant that it has not been possible to register all new inhibitions or any renewals. That change has now been remedied by allowing submissions via electronic means for all documents capable of being registered. The exact process has yet to be confirmed by the Keeper.

However, the change is not retrospective and therefore does not assist renewals missed during the period of shutdown. Trustees will therefore need to be extra vigilant in cases where the inhibition has not been renewed, and there remains heritable property vested in the trustee, to ensure that steps are taken to adequately protect the estate.

Trustees with serious concerns in this regard may consider making up notice of title to the property. However, in doing so the trustee will incur additional costs and be exposed to the possibility of incurring personal liability for any burdens falling on the property.

Statutory declarations

Following representations from ICAS, Paragraph 9 of Schedule 4 to the No 2 Act allows Oaths to be administered without physical presence.

Both Companies House and the AiB have been accepting statutory documents which were not signed or administered physically. However, that acceptance did not clarify their legal validity—simply that documents would not be rejected for filing purposes.

The new legislation clarifies the position and removes the requirement for a solicitor, advocate or notary public to be physically in the same place as another when that person:

- Signs or subscribes a document
- Takes an oath
- Makes an affirmation or declaration