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28. Freehold and leasehold property

Dealing with an insolvent's freehold or leasehold property, including action to be taken to protect an interest in the property and also steps to be taken where the property is the bankrupt's 'family home'

Annexes

Chapter content

Dealing with leasehold properties (leasehold enfranchisement)
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Frequently asked quesions – Charging orders

These FAQs are to assist official receivers in understanding the subject and should be read in conjunction with the more detailed guidance given below.

What is a charging order?

A charging order is an order of court which has the effect of creating a charge over the debtor's interest in a property. The charge can be enforced at a later date to satisfy the debt.

Why does the trustee get a charging order?

A bankrupt's interest in a property automatically vests in their trustee. However, if the OR as trustee fails to deal with their interest in a family home within three years of the bankruptcy order date (or three years from the date they became aware of the property if after this time), it will automatically re-vest in the former bankrupt. A charging order is a way of 'dealing' with the interest where it has otherwise not been possible to do so.

When will the official receiver as trustee apply for a charging order?

At the two year three month review of a property (see How do the LTADT review a family home at the two year three month review point). A charging order is only obtained when it hasn't been possible to deal with a family home by selling the bankrupt's interest or by appointing an insolvency practitioner.

What if three years from the date of the bankruptcy order or the date the official receiver became aware of the property has already passed before we try to get a charging order?

The bankrupt's interest in the property will re-vest in them and will be lost to the estate. As long as the application to the court for a charging order has been made before 3 years has passed, then it will be valid. This is why the official receiver or LTADT reviews all family homes at 2 years and 3 months.

Are charging orders only requested for family homes?

Yes. In other properties, the trustee's interest does not re-vest after three years so the bankruptcy restriction remains on the property indefinitely. If the property is no longer a family home then then a charging order is not appropriate (see detailed guidance in chapter 28). Don't forget that there can be more than one family home in a case.

How does the LTADT calculate the value of the bankrupt's interest?

Solely owned = value of property - (costs of sale + loans & secured charges)

Jointly owned = value of property – (costs of sale + loans & secured charges + value of joint owner's interest)

Any endowment policy or similar attached to the mortgage must also be taken into account.

What about calculating the potential value of the charging order?

This is more complex. Please see detailed guidance within chapter 28.

How does the LTADT or the official receiver apply for a charging order?

Please refer to How do the LTADT review a family home at the two year three month review period? For more detail on how the official receiver may apply for a charging order see the guidance within the chapter.

Who completes the charging order application?

The charging order unit of the LTADT in Ipswich. The notifications are sent out by the unit. The unit liaises with the local official receiver's office to arrange for an AOR or the OR to attend Court and answer any questions. Once the order has been made, the official receiver's insurance on the property must be cancelled.

How is the charging order registered – registered land?

The charge must be registered at the Land Registry by using the prescribed forms and paying the relevant fee.

How is the charging order registered – unregistered land?

On the making of a charging order against solely owned unregistered land, the official receiver, as trustee, should lodge an application to the Land Charges Department for the entry of the charging order in the Register of Writs and Orders. The registration will last for 5 years and can be renewed.

Where a jointly owned property is unregistered it will not be possible to protect the charging order by registration. This is because the charge is against the bankrupt's beneficial interest in the land, and not the land itself. Instead, a copy of the charging order should be sent to all interested parties (especially any charge-holder holding the deeds) with a request that the official receiver's interest in the unregistered land is noted and acknowledged.

How long does the charging order last?

Indefinitely, it does not matter how long a charge is held before it is released. Once and order of sale is made the time period is 12 years.

Can the amount of the charging order be varied?

No, it is fixed at the date of the order imposing the charge.

When should the charging order be reviewed?

Either every three years for registered land and every five years for unregistered land, when the official receiver should check whether any circumstances have changed. Also whether there is a potential order for sale as this will initiate the 12 year limitation period.

If there is notification from the land registrar that attempts are being made to deal with the property the official receiver should contact all of the parties concerned immediately to ensure that they are reminded of the amount required to satisfy the charging order.

The official receiver should ensure that they take steps to deal with the bankrupt's interest as soon as any change occurs. If the interest protected by the order is more likely to be realisable, the LTADT should consider whether it is appropriate to offer the sale of the interest back to the former bankrupt or seek the appointment of an IP to enforce the charging order.

What happens if another creditor has 'got in there first'?

If a charging order has been obtained by another creditor post-bankruptcy but before the official receiver, then checks should be made to ensure that the charge is valid (i.e. not a pre-bankruptcy debt). If it was for a provable debt, then the official receiver should challenge it. Where the debt is for a post bankruptcy debt, that creditor will rank higher than the official receiver in the order of payment funds.

Frequently asked questions - The family home

These frequently asked questions are to assist official receivers in understanding the subject and should be read in conjunction with the more detailed guidance given in the main body of the chapter.

What is meant by the 'family home'?

The term only has relevance when dealing with a bankruptcy. A property will be a family home where it is a dwelling house, which at the date of the bankruptcy order was the sole or principle residence of;

- the bankrupt,
- the bankrupt's spouse or civil partner, or
- a former spouse or civil partner of the bankrupt.

What is meant by 'dwelling house'?

Dwelling house is defined in the Act as including any building or part of a building which is occupied as a dwelling and any yard, garden or outhouse belonging to the dwelling house and occupied with it.

Could a houseboat or a caravan be the family home, considering the definition of dwelling house?

It is unlikely that a boat could be considered to be the family home, it not being a building. So far as a caravan is concerned, this would depend on the extent to which it was fixed to the ground and connected to mains services.

What else do I need to know about a family home?

1.The bankrupt does not need to be living in the property for it to be a family home.

2. Family home provisions do not apply to a common law couple, even if they have children.

3. It is still a family home if the official receiver fails to send the BHNOT.

4. Company property cannot be a family home.

5. A family home cannot be an antecedent recovery.

6. There can be more than one family home in a case.

What is the consequence of a property being the family home?

Where the property is the family home, any interest held by the bankrupt in the property at the date of the bankruptcy order will re-vest in them after a period of three years unless it is dealt with by the official receiver, as trustee.

And if the property interest re-vests?

Then it would be lost to the estate. Which is likely to be a very bad outcome for the official receiver, leading, probably, to the department having to compensate creditors.

These provisions are not known as the ‘use it or lose it’ provisions for nothing.

The re-vesting will be three years after the bankruptcy order date?

Assuming that the official receiver is aware of the bankrupt’s interest in the family home within three months of the order then the property would re-vest on the third anniversary of the making of the bankruptcy order.

If the official receiver becomes aware of the property interest after that initial three months then it will re-vest on the third anniversary of the date that it came to the attention of the official receiver.

Can that three year period be extended?

Yes it can. This is most likely to be appropriate where the property interest cannot be accessed until after the expiration of the three year period. An example of this would be where the bankrupt has an interest in the former matrimonial home that cannot be realised until a child of the former marriage reaches 18. Another example would be where the property is held on trust for the bankrupt – only devolving some years in the future. It is also possible for the three year period to be extended where the bankrupt withholds necessary information, causing a delay in procedure.

Can the period be extended simply because the official receiver has not had time to deal with the property?

No. Administrative difficulties are not considered to be a valid reason to extend the period. Similarly, the period cannot be extended after it has expired.

Are there any circumstances in which the property interest can re-vest sooner than three years?

There is provision in the Act for early re-vesting of the property interest, but this would only be carried out in tightly constrained circumstances – generally where there is no chance of the property recovering from a position of negative equity.

What do you mean by property 'interest'?

In most cases this will be bankrupt's direct share in a property as at the date of the bankruptcy order, but it may equally be an indirect interest, such as a charging order over the property following matrimonial proceedings, or a right to buy the property.

What if the property is not the family home?

If the property is not the family home (generally, this will be a commercial property or a second property held for investment purposes or holiday home), it will vest in the estate and will remain vested until the property interest is realised.

Given the qualification criteria for the family home, I presume that it is possible for there to be more than one family home in a case?

Yes, for example where the bankrupt lives in one property, their estranged wife lives in another and a former (divorced) wife lives in a third.

But, presumably, a second home or investment property rented out to a third party would not qualify?

That's right. A second home, or holiday home, would not be the principle place of residence, and an investment property rented to someone other than the bankrupt's spouse, civil partner or former spouse of former civil partner would also not qualify (see chapter 29 and chapter 30).

In what ways can the official receiver 'deal' with a property interest such as to prevent it re-vesting?

The Act provides a number of ways that a property interest may be dealt with, but the ones most likely to be engaged by the official receiver, as trustee, would be a

sale of the interest (back) to the bankrupt or a third party introduced by the bankrupt, or to apply for a charging order over the bankruptcy estates interest.

How will interested parties know that a property is the family home?

The official receiver is required to issue a notice to each of (as appropriate) the bankrupt, their spouse, their civil partner, their former spouse or their former civil partner them notifying them that the interest in the property forms part of the bankruptcy estate.

How is the family home valued?

There are several ways to value a property, the official receiver should decide on the most appropriate valuation on a case by case basis.

How is the interest in a family home calculated?

The family home must be valued and any charges deducted from that valuation figure (for example the amount due to a mortgage company). For jointly-owned properties you should first deduct the joint owner's share of any equity.

Would the official receiver deal with all family home interests?

No. Generally speaking, any interest greater than £25,000 should be handled by an insolvency practitioner, subject to local conditions, unless there is a willing purchaser.

What about properties where the interest is less than £25,000?

The official receiver can ask if the bankrupt or any interested parties would like to buy back the official receiver's interest in the family home.

Where the interest is below £1,000 this is not usually offered. However, the official receiver has the discretion to accept offers, if one is proactively made by a third party, for around £1,000 for the interest plus solicitors costs for both sides (see How do I deal with the sale of a family home with offer to purchase?).

How is a property sold back to interested parties?

[Text redacted] currently provide the official receiver with a low cost conveyancing scheme which is [Text redacted] for jointly owned properties. Solely owned properties are not covered by this scheme and solicitors costs will be higher. For information on how to do this (see How do I deal with the sale of a family home with offer to purchase?).

What happens if there is no offer made?

The LTADT will review the case at the 2 year 3 month stage where interested parties will again have the opportunity to buy the interest. See How do the LTADT review a family home at the two year and three month point? and How do I transfer a case to the LTADT?

If no offer is made the case could go to a trustee (if equity is over £25,000) or go to the National Charging Order (NCO) team but this must be done before 2 years and 9 months to allow sufficient time to obtain the charging order.

What happens to properties if no offer is made and there is less than £1,000 of equity at the review stage?

The property is left to automatically re-vest in the bankrupt (see How do the LTADT review a family home at the two year and three month point?). The bankrupt and other interested parties are notified of the re-vesting by BHLET and BHCERT letters.

What is the purpose of these provisions?

There had been concerns that trustees sitting on vesting properties for a prolonged period of time whilst they increased in value, then forcing a sale sometimes 10 or more years after the order was unfair for the bankrupt and their family. The provisions also had the purpose of supporting the concept of bankruptcy being a fresh start and also to reduce the stigma of bankruptcy.

Can a property that comes into the estate after bankruptcy be the family home?

No. A property must form part of the estate as at the date of the making of the order to be considered a family home. An example of where this exclusion would apply would be a property returned to the estate following a successful action to recover a transaction at an undervalue, or a property claimed as after-acquired property.

Frequently asked questions – Jointly owned property

These requently asked questions are to assist official receivers in understanding the subject and should be read in conjunction with the more detailed guidance given within the chapter.

What does jointly owned mean in relation to bankruptcy?

The trustee does not have an interest in the legal estate of the property, their interest is in the proceeds of its sale and any income from the property (also known as ‘beneficial interest’). The legal title does not vest in the trustee, even if both parties are bankrupt. This is because the legal title cannot be severed.

What else do I need to know about beneficial interest?

It is the share in the property to which an individual is entitled. Unlike the legal interest, a person’s beneficial interest in a property can change over time. Working out how the beneficial interest is split between parties can be quite complicated. For example a wife may have raised children in the property and not contributed to its upkeep in a financial sense, such as paying the mortgage or for home improvements, but nevertheless is likely to be entitled to a share of the beneficial interest (see more detailed guidance in the chapter and FAQ Establishing the beneficial interest).

How can the trustee register their interest in the property?

The land registry will not register a bankruptcy restriction against any jointly owned land in which the bankrupt has an interest. To protect the official receiver’s interest in the property a RX1 form (Form J) should be sent to the land registry. The official

receiver must provide evidence that they have sufficient interest in the property in order for it to be registered. For further information see chapter 7.

It is also important for the mortgagee, charge holders and the joint owner to be aware of the insolvency in order to fully protect the official receiver's interest.

What does the RX1 form (Form J) do?

It is entered on the proprietorship register at Land Registry as a warning that the bankrupt's trustee has an interest to anyone having possible dealings with the property. As part of the purchase of a property, a solicitor will usually check the Land Registry information and contact will be made with the official receiver. For further information see chapter 7.

How long does the official receiver have to deal with the property?

If the property is a family home, then three years. If the property is not a family home then there is no time limit. However, the official receiver will not want to 'sit on' a property indefinitely.

What can the official receiver do with a jointly owned property that has equity in it?

Please refer to (How do I deal with the sale of a family home where there is an offer to purchase?).

What about a jointly owned property with no equity in it?

The property can be transferred to the LTADT for review at a later date (see How do the LTADT review the family home at the two year and three month review point?). Offers can also be accepted from a solvent joint owner or a third party subject to certain conditions. Please refer to (How do I deal with the sale of a family home where there is an offer to purchase).

Can I disclaim jointly owned property?

The legal title in a jointly-owned property cannot be disclaimed as the legal title remains vested with the joint owners. The bankrupt's beneficial interest can be disclaimed if it is considered to be onerous.

What is the low cost conveyancing scheme?

The Insolvency Service has entered into an agreement with a firm of solicitors, [Text redacted], to provide a low cost conveyancing scheme for jointly owned domestic property, so that a bankrupt's beneficial interest in a jointly owned property can be transferred to the bankrupt, their spouse, civil partner, partner, relative or friend, without incurring excessive costs.

The low cost conveyancing scheme should only be pursued in the period of two years and three months following the making of the bankruptcy order where a willing purchaser has made an offer which is clearly in the interest of creditors to accept (i.e. where it is anticipated that bankrupt's interest is in excess of £1000). (i.e. where the offer is in the region of £1000 or higher).

What conditions must be met for the low cost conveyancing scheme to apply?

- The property is a domestic property owned jointly by the bankrupt and others; and
- it is unregistered or registered freehold or leasehold property which is currently, or was previously occupied by the bankrupt and his/her spouse or civil partner, former spouse or former civil partner; and
- it is situated in England or Wales,

What if there are tenants in the property?

The joint legal owners remain landlords of the property, even if they are all bankrupt. Guidance on dealing with jointly owned tenanted property is provided in (see chapter 30).

What if the property has been repossessed but not yet sold?

The mortgagee should be notified of the official receiver's interest in any sale proceeds. The official receiver should cancel any insurance obtained on the property (see chapter 14) and tell the charge-holder that it has been cancelled.

What if the property has been sold following repossession?

The official receiver should obtain a copy of the completion statement from the mortgagees and should claim the bankrupt's share of any surplus following sale.

Frequently asked questions - Establishing the beneficial interest

Why might a dispute arise concerning the beneficial interests in a property?

This is most likely to occur in relation to a bankruptcy case where a joint-owner or other third party is claiming a share, or a greater share, in a property which forms part of the bankrupt's estate.

What action should the official take where such a claim is made?

The official receiver should ensure that the claimant recognises that the onus is on him/her to prove that the presumption that beneficial interest follows legal title should be displaced. The chapter contains guidance of the sort of evidence that should be provided.

You mention a presumption that beneficial interest follows legal title. What do you mean?

In it simplest terms, this means that where a bankrupt solely owns a property he/she will hold 100% of the beneficial interest and, where he/she jointly owns a property with another person, each party will hold 50% of the beneficial interest.

What sort of evidence might there be to displace that presumption?

The most compelling piece of evidence will be an express declaration of trust between the parties at the date of the purchase of the property. This is a declaration, usually noted at the Land Registry, as to the shares in which the property is to be held.

Is this conclusive proof of the parties' intentions?

Not necessarily so. It is possible for the intentions to shift over time if, for example, the parties separate (or join) their financial affairs. This is known as a constructive trust (see more detailed guidance within the chapter).

It is rare however that, in the absence of an express trust, it could be considered that a property purchased as a marital or quasi-marital home will be held in shares other than 50/50.

Should the official receiver just accept an express declaration of trust?

No. The official receiver should investigate the veracity of the document, following the guidance in the chapter as it is not unknown for an express trust to be back-dated in an effort to take a bankrupt's interest in a property out of the bankruptcy estate. Even assuming that the document is genuine, it might be challenged as a transaction at an under-value, as appropriate.

What about resulting trusts?

A resulting trust is one where the shares in the property are decided, in the absence of a express trust, based on contributions to the purchase price. So, for example, the party that provided 60% of the purchase price would hold 60% of the beneficial interest.

The principle of a resulting trust cannot normally be applied to a marital or quasi-marital home, but is likely to be relevant when dealing with an investment property (see more detailed guidance within the chapter).

Introduction

28.1 Introduction

This part provides guidance to assist the official receiver when dealing with a freehold or leasehold property including provisions regarding the 'family home'. A freehold or leasehold property will generally be the most valuable asset of an

insolvent, and this chapter contains advice on protecting and realising the insolvent's interest for the benefit of the estate.

General background and initial action

28.2 Key concepts

There are some key terms and concepts associated with freehold and leasehold property.

28.3 Legal title

Legal title in a property (or legal estate) is the interest which is recognised and enforceable in a court of law but carries no beneficial interest (see paragraph 28.4) in the property. It brings with it all legal responsibility for the property including the power to convey (sell/transfer). On the making of a bankruptcy order the legal title to a property solely owned by a bankrupt will vest in the trustee in bankruptcy[1]. Where a company is subject to a winding-up order the legal title will remain vested in a company, unless application is made to vest the title in the liquidator[2]. The legal title to a jointly owned property remains with the joint owners[3].

1. Section 306

2. Section 145(1)

3. Section 283(3)(a)

28.4 Beneficial interest

The beneficial, or equitable, interest is an interest in the proceeds of sale of a property and in the rents and profits which could be earned from the property. The beneficial interest can be dealt with separately to the legal title and/or the beneficial interest of others and will vest in the official receiver, as trustee[1].

The beneficial interest generally mirrors, or follows, the legal interest. For example, a house where the legal title is in joint names generally will have those two individuals owning the beneficial interest jointly, but this is not always the case, and can be affected by a number of factors. It is possible for a person to have a beneficial interest in a property despite not having a legal interest and, conversely, it is possible for a person to have no beneficial interest despite holding the entire legal interest.

1. Re: McCarthy (a bankrupt) [1975] 1 WLR 807

28.5 Equity

In the context of a property “equity” is used to describe the money value of property in excess of any mortgages or claims on the proceeds of sale of the property.

28.6 Freehold

The majority of properties encountered by official receivers will be in bankruptcy cases and will be freehold properties. A freehold property is one where the owner(s) of the property own the building and the land on which the building is located, and the ownership is not time-limited.

28.7 Flying or creeping freeholds

A flying freehold is where one freehold is above another freehold – where, for example, a room in a semi-detached house is above a passageway used to access the neighbour’s back-garden. A creeping freehold is similar, but it describes a situation where the property is below the neighbour’s property. In theory problems can arise with these types of freehold as the structural integrity of the freehold property is reliant on the neighbouring property being kept in good repair, in practice the implication for the official receiver is minimal other than the market value may be less than similar property without a flying freehold.

28.8 Leasehold

A leasehold is effectively the ownership of a right to occupy the property for a specified period of time, usually in return for rent. Leasehold properties are generally flats in the residential context but can also be houses particularly recent builds or in certain areas of the country. The leasehold of a residential property will usually be for a long period, 99 years or more, and require payment of an, often nominal, ground rent. There is little practical difference in dealing with a house which is held on a long lease as opposed to freehold.

A leasehold property of this sort will have its own entry at the Land Registry and can be sold. Leasehold property should not be confused with property that the insolvent occupies under a tenancy agreement.

Where the official receiver is dealing with commercially leased property, the lease should be valued and, if it has a value, it should be marketed and sold, using agents where appropriate. Where the lease has no value, the official receiver, as liquidator or trustee, should consider issuing a disclaimer. For guidance on disclaimers see chapter 42.

28.9 Tyneside flat scheme

This is a development of leasehold mainly used in Tyneside. Under the scheme the lease to each flat is granted with the freehold reversion of the other flat. For example, if there are two flats, the purchase of the lease of the ground floor flat will also include the purchase of the freehold for the upper floor flat and conversely.

This type of arrangement is used in other parts of the country apart from Tyneside and is commonly used with maisonettes. The scheme depends on the flat lease always being transferred with, and to the same person as, the freehold reversion of the other flat. If there is a mortgage, both should be mortgaged to the lender.

28.10 Freehold reversion

Where a property is leasehold there will also be a freehold property which is held subject to the leases. The freeholder has the right to grant a new lease when the existing lease expires; this right is known as the ‘freehold reversion’, and the right can be purchased.

In some cases, the leaseholders have the right to purchase the freehold reversion. This applies to both leasehold flats and leasehold houses.

28.11 Licence to occupy

Licences, in relation to property, allows a person a legal right of occupation of a property they do not own. The licence does not create an interest in the land and if the property is sold the interest under the licence will terminate.

A licence may be irrevocable. Consideration should be given as to whether an irrevocable licence has been given by the insolvent, prior to the insolvency proceedings, to another party who provided funds for the purchase of the property, or otherwise improved the property on the understanding that they would be able to remain in the property.

An irrevocable licence is likely to result in someone having the right to remain in the property, which may affect the value of that property, legal advice may be required.

28.12 Jointly owned or solely owned

Where the property is solely owned by the bankrupt, both the legal title and beneficial interest (see 28.3 and 28.4) will vest in the official receiver as trustee. For a jointly owned property it is only the beneficial interest in the property that vests.

Even if all the joint owners of a property are bankrupt, it will only be their beneficial interests and not the legal title that vests in the official receiver as trustee.

28.13 Joint tenancy or tenants in common

The beneficial interest in a jointly owned property can be held on the basis of a ‘joint-tenancy’ or as ‘tenants in common’. A joint tenancy is where each party owns the whole of the property and on the death of one party the deceased’s share automatically passes to the survivor (often known as the ‘survivorship’ rule). A jointly held legal title is always held as a ‘joint tenancy’. Where the property is held on the basis of tenants in common, each party has a distinct share in the property, the share passes through inheritance.

A jointly owned family home will generally be held on the basis of a joint tenancy. That a property is held on the basis ‘tenants in common’ is often indicative of an unequal share of the beneficial interest. Similarly, an investment property (or similar) will generally be held on the basis of tenants in common. A joint tenancy is capable of being converted into a tenancy in common by service of a relevant notice[1]. A beneficial joint tenancy is automatically converted on the making of a bankruptcy order[2].

1. Law of Property Act 1925, section 36

2. Morgan v Marquis (1853) 9 Exch. 145; Re Dennis (A Bankrupt) [1996] Ch.80

28.14 Mortgages

A mortgage is effectively a pledge given by a borrower to repay monies lent. The borrower pledges to the lender, hence the borrower is known as the mortgagor and the lender the mortgagee. If the monies are not otherwise repaid the mortgagor has pledged the property to the mortgagee for the debt.

Mortgages are secured debts and the amount of secured debt is important to the calculation of an insolvent’s interest in a property. Mortgages may be repayment (where the debt and interest are repaid over the term of the loan) or interest only (where the interest on the loan is paid, with the original loan being repaid in full at the end of the loan term).

Borrowers in an interest only mortgage are often required to have some means to repay the loan at the end of the term. Generally, this is an endowment policy. In respect of some investment properties, the purchaser will intend to repay the mortgage from the capital value of the property.

28.15 Support for Mortgage Interest loans (SMI)

From 05 April 2018 assistance for homeowners who are on income related benefits in paying the interest on their mortgage debt is by way of an SMI Loan. The loan will be repayable with interest when a property is sold or transferred and may need to be taken into account when calculating equity in a property. The scheme is detailed on GOV.UK.

28.16 Charges

A charge against a property is obtained to secure a debt. It may be placed in connection with a mortgage, following judgment being entered against the debtor, or by the trustee in bankruptcy. There are other circumstances charges can arise, e.g. matrimonial charges.

28.17 Registered land and unregistered land

Whether land is registered at the Land Registry or unregistered does not affect the ownership of the land but, clearly, ownership is easier to evidence where the land is registered.

Unregistered land is rare. Since 1990 (and much earlier in some cases) a system of compulsory registration has been in place whenever there are dealings in land which is unregistered.

28.18 Registered land

With registered land there is a public record of ownership, rights, covenants and mortgages, held by the Land Registry. Each piece of registered land is given a unique ‘title number’, which should be used to identify the land (in correspondence, for example) where there is doubt. For more information on the Land Registry and protecting property interests see chapter 7.

28.19 Unregistered land

Owners of unregistered land will normally hold a bundle of deeds which will record ownership, previous sales, mortgages and other dealings in the land. If the land is mortgaged, the mortgagee may hold the deeds. The Land Charges Department maintains a record of restrictive covenants, rights and mortgages relating to unregistered land, but these are registered against the landowner, rather than the land.

Where the official receiver is dealing with unregistered land steps should be taken to take possession of the title deeds.

28.20 Searches of the land registry and register of land charges

Where there is doubt over the ownership or charges position of a property, the official receiver may carry out a search of the land register or register of land charges, as appropriate. Guidance on conducting such searches is contained in chapter 7.

28.21 Initial enquiries in relation to property interests

Details of any property in which the insolvent is, or may have been, in occupation, registered as the owner or hold a financial interest should be obtained at an early stage to assist in establishing the extent of the insolvent's interest. The early acquisition of this information will also assist the official receiver in identifying any properties which may be classed as a family home for the purposes of the Act and will assist in protecting that interest.

The following information should be obtained as soon as possible, in respect of each property where the insolvent has, or may have had, and interest:

- the amounts due under any mortgages or charges in relation to the property
- details of any third parties who have, or may have, an interest in the property
- details of those resident or recently resident in the property
- details of any property adjustment order, often granted in divorce proceedings, in force
- whether the property has been repossessed, or whether there are any repossession proceedings in progress
- issue notices to the Land Registry as required (see chapter 7)

Particular interest should be paid to the possibility that the property (or some part of it) may have been transferred to a spouse, civil partner or other associate.

28.22 Notices to the mortgagees

The official receiver should issue the standard letter to all mortgagees[1]. The official receiver should also issue a standard letter[2] putting the mortgagee on notice of the official receiver's interest in the property.

1. MP2

2. MP3

28.23 Potential antecedent recoveries

The official receiver should investigate any pre-insolvency order disposals of property in which the insolvent has been involved to establish whether any of the transactions may be recoverable. See chapters 31 and 32 for guidance on antecedent recoveries.

The official receiver should also consider the veracity of any charge over the property given voluntarily by the insolvent to a third party.

28.24 Disclaimer of interest in a property

There is no reason why the official receiver cannot disclaim an interest in a family home or any other freehold or leasehold property. That said, such action is likely to be appropriate only in rare cases where the property is onerous giving rise to likely cost beyond the value of the beneficial interest.

A commercial lease, on the other hand, is property that is more likely to be considered for disclaimer.

Disclaimer should only be considered after taking into account the guidance in chapter 42.

28.25 Contaminated land

Where the official receiver becomes aware that property/land of the insolvent is contaminated, reference should be made to archived guidance on Environmental legislation.

28.26 Role of the LTADT

Following the initial stages outlined the official receiver, as trustee, should transfer the case to the LTADT (providing there are no other asset related matters that need to be dealt with by the home office), who will;

- attempt to sell the beneficial interest and (if appropriate) legal title either back to the bankrupt or to a third party introduced to the official receiver by the bankrupt, where the sale is clearly in the interests of the creditors, or
- place the property on a register for review to establish, at a later date, if sale of the interest, or placing a charging order against the property is appropriate

28.27 Council tax

The local authority issues one council tax bill for each dwelling, whether it is rented or owned. Generally speaking, the occupier(s) of the property are liable for payment of the tax.

Where a property is unoccupied, the legal owner is, generally speaking, liable for payment of the council tax. A property is exempt from council tax where the liable person is a trustee in bankruptcy[1] (which will only be the case where the official receiver holds legal title) or the property has been taken into possession by the mortgagees. The exceptions apply even if the property is furnished, and will still apply if the trustee is liable with some other person.

In a company case, the company will remain liable for the council tax where it is the owner or occupier of the property.

1. Council Tax (Exempt Dwellings) Order 1992, article 3 (Class Q Exemption)

28.28 Priority of charges

Charges against land/property generally have priority in the order that they are created, unless they are both legal charges, in which case priority is determined by the date of registration at the Land Registry, unless there is an agreement to the contrary between lenders and one party has acted to its own detriment in relation to that agreement[1].

A legal charge created before an equitable charge, but registered after it will have priority. For a definition of legal charge and equitable charge see chapter 43. Where legal charges have the same date of registration, it is the date of the interim order that determines priority, providing that the charging order is made final prior to the date of the insolvency.

The registration of charging orders by a creditor after a bankruptcy order is covered in chapter 12.

1. Lancashire Mortgage Co Ltd v Scottish & Newcastle [2007] EWCA 684

28.29 Marshalling

Marshalling, or marshalling of securities, is the term to describe the equitable remedy available to secured creditors where they have security over the same assets of a debtor. Without going into detail, it describes the process of sharing the assets between the secured creditors.

It is unlikely that an asset value would have been diminished in value to the estate as a consequence marshalling being applied.

28.30 Repossession of a property

A secured creditor generally has the power under the terms of their charge to seek repossession of a property regardless of the making of an insolvency order against the debtor.

Where a property is sold and there is a shortfall on the mortgage debt (and/or other secured creditors), the shortfall will be a debt in the insolvency proceedings[1] subject to any deed of acknowledgment, or similar (see paragraph 28.32).

1. Section 382(1)(b)

28.31 Appointment of Law of Property Act receiver

A receiver may be appointed by the chargeholder in relation to the property, and that receiver may have power of sale. Official receivers are most likely to encounter an LPA receiver when dealing with a company, or a tenanted property.

28.32 Re-mortgages, re-scheduling of debt and deeds of acknowledgement

A re-mortgage is simply the process of exchanging one mortgagee for another, though there may be further borrowing as part of the re-mortgage.

In coming to an arrangement with a mortgagee (to deal with arrears, for example), a bankrupt may obtain a re-mortgage, after the date of the bankruptcy order. Providing that the effect of the re-mortgage is not to increase borrowing, and does not affect the bankrupt's ability to make payments under an IPA/IPO (which is unlikely as the mortgage payments are likely to reduce), then the official receiver need not become involved in this process. The re-mortgage will create a new post order debt with the original loan being repaid.

Without re-mortgaging a mortgagee or other secured chargeholder may request the bankrupt to sign a document acknowledging the level of debt or responsibility for any shortfall. Such a document is generally known as a deed of acknowledgement. This might be in connection with an arrears repayment plan or a sale/transfer of the legal or beneficial interest in the property. The deed of acknowledgment will create a new debt on which recovery action might be based post bankruptcy. The underlying debt is still a bankruptcy debt and any unsecured part may still be claimed in the bankruptcy.

It is not for the official receiver to influence the bankrupt about how to proceed in this matter. The bankrupt should simply be advised to seek independent legal advice.

28.33 Re-mortgages and assets associated with the mortgage debt

Where there are assets other than the property associated with the mortgage debt (an endowment policy, for example) and a re-mortgage is being considered by the bankrupt, the official receiver should ensure that all parties are aware of the official receiver's interest, as trustee, in the policy.

28.34 Islamic home purchase plans

Loans which are interest based do not comply with the tenets of Islamic law, Sharia'a, under which, in principle, all forms of interest are forbidden. Traditional mortgages are therefore not available for those following Sharia'a. As a result, certain specialist and some high street financial institutions have developed Sharia'a compliant financial products to assist in the purchase of a property, as follows:

- Ijara home purchase plans

An ijara is a leasing agreement where the financial institution will purchase the property and become the legal owner. The ijara-wa-iqtina is a variation on this scheme allowing the lessee to buy the property at the end of the term, usually for pre-agreed price, paying in instalments over the term of the lease.

The property would not vest in the official receiver, belonging as it does to the financial institution. The agreement to purchase the property would be a contract capable of vesting in a trustee, as would the lease agreement. Unless it is close to the date at which the bankrupt can opt to purchase the property, it is unlikely to be worth taking the option. Forfeiture or disclaimer of the lease might defeat any interest the trustee has in the property which would mean that the trustee would be unable to benefit from any right of purchase.

- Musharaka investment partnership

Musharaka is an investment partnership, and the musharaka home purchase plan is a variety of ijara, except that the property is transferred to the customer in stages as payment stages are met.

The effect in bankruptcy would be the same as with an ijara in all substantial effect.

- Murabaha credit plan

Murabaha is a form of credit where the financial institution purchases the property and sells it to the customer on a deferred basis. The property is purchased by the financial institution at market value and then sold back to the customer at a higher

price than was paid for it. The resale price is paid by equal instalments over an agreed period with the bank securing the payments by means of a charge on the property.

Where the bankrupt is involved in such an arrangement, the property (or property interest) would vest in the bankruptcy estate in the usual way, with the bank being a secured creditor in the proceedings for the balance of the purchase price.

28.35 Housing grants

It is possible for a homeowner to apply for a grant to make repairs to their property, for example, to adapt it to assist with a disability. Such grants are usually administered by the local housing authorities and, generally speaking, not repayable, so there should be no issue with the grant affecting the trustees's interest in the property, for example by the creation of a charge.

Where the official receiver is asked to agree to a grant being given to a bankrupt, the official receiver should not object provided that any statutory charge against the property that will be imposed is recognised as not affecting the official receiver's priority interest in the property.

28.36 Solar panels

Some homeowners have solar panels installed on their properties. Typically, this is carried out in one of two ways:

- panels purchased outright – in this case the homeowner will receive the benefit of free electricity whilst generated and also a payment, known as a 'feed-in tariff', from an energy company for surplus electricity
- panels leased – in this case the homeowner still receives the benefits of the free electricity, but the feed-in tariff goes to the owner of the panels. The lease agreement is typically for 25 years and the panels are installed free of charge. Lenders require that the lease contract and installation meet certain minimum conditions before they will agree to an installation

Where at the date of the bankruptcy order the bankrupt owns the panels and the agreement with the energy supplier is in the bankrupt's sole name the contract for the feed-in tariff will form part of the bankrupt's estate, meaning that the payments will be due to the estate. The official receiver, as trustee, should inform the bankrupt and the energy company of this position.

Where the bankrupt owns the panels and the property is jointly owned, it will be the benefit of the agreement (and not the agreement itself) which forms part of the estate. In this case, the official receiver, as trustee, should look to the joint-owner to remit the bankrupt's share of the feed-in tariff to the estate. In either case, and to

avoid the official receiver, as trustee, having to collect these payments over a prolonged period, the official receiver should consider assigning the interest in the agreement (back) to the bankrupt, or to a third party, particularly as there is an argument that the interest in the agreement would re-vest in the bankrupt where the panels are on the family home.

Where the bankrupt leases solar panels, the lease (or the benefit under it) would form part of the bankrupt's estate. Since most lease agreements do not provide for any payment, there is unlikely to be any benefit to the estate in the agreement.

28.37 Dealing with a property outside England and Wales

Where the official receiver has sufficient evidence to suggest that the bankrupt/company has an interest in land or property outside of England and Wales, the official receiver should obtain as much information as possible regarding the property/land from the bankrupt or director. Local assistance (probably legal assistance) should be instructed where realisation of the property is required. The Law Society provides a "find a solicitor" facility via their website, www.lawsociety.org.uk, can be used to assist in locating solicitors in other countries.

Valuing properties abroad can be difficult. The bankrupt or a third party may be invited to make an offer to purchase the official receiver's interest but where the official receiver is reasonably satisfied that there will be no value in the property, taking into consideration the costs of sale and recoginition, if required, the property interest should be disclaimed. For guidance on disclaimers see chapter 42.

28.38 Timeshares

Timeshares have been in existence since the mid 1960s and are used by individuals as a way of obtaining a stake in a property without purchasing the entire property. Commonly timeshare is a system whereby residential units are shared on a weekly basis, with concurrent ownership. All owners contribute to the expense and maintenance of the timeshare property, which can be undertaken either by the owners themselves or by sub-contractors employed by them.

The chief benefit of timeshare is that the individual will be able to have access to a property they would not be able to afford to buy outright. It is likely that the timeshare owner will have purchased either a period of time within an annual timespan, or specific dates within the year, which can be used by the owner or swapped with other owners for different weeks or different resorts.

The Timeshare Consumers Association can offer advice on dealing with a timeshare interest but generally these have a very poor resale value (estimated as low as 15%

of the price originally paid) and the bankrupt / company are likely to have significant arrears in service charges.

If the value of the timeshare is not worth realising then the official receiver should disclaim (see chapter 42). The service charges may be onerous (sometimes equal to or greater than the value of the timeshare interest).

Protection of the official receiver's interest in a property

28.39 General

In all cases where the insolvent has an interest in a property the official receiver should take action, at the earliest possible opportunity to protect that interest for the benefit of the insolvent estate.

28.40 Inspecting and securing commercial premises

Reference should be made to chapter 11 concerning the action to be taken to secure commercial property. The official receiver should remember that they are likely to have a duty of care to visitors and trespassers.

28.41 Insurance

The official receiver should obtain insurance (including public liability insurance) where required. Guidance on insurance is available in chapter 14.

In essence, insurance will be required where the insolvent is the legal owner of the property, there is no (or insufficient) existing cover, and/or where the insolvent is owner and/or occupier and there is a particular risk of damage to people or property near the building.

Where the property has no value to the estate the official receiver may limit the insurance to public liability (as required), but should inform the mortgagees of the lack (or inadequacy) of buildings insurance.

28.42 Cancellation of insurance

The official receiver should ensure that the insurance is cancelled in any of the following circumstances:

- immediately upon annulment
- if an insolvency practitioner is appointed trustee
- where the property re-vests with the bankrupt (see paragraphs 28.51 and 28.69)
- where the official receiver as trustee obtains a charging order
- where the property (or the bankrupt's beneficial interest) is sold
- where there a disclaimer is issued; or
- on repossession

28.43 Protecting the interest at the Land Registry

The process for protecting the property at the Land Registry is covered in detail in chapter 7. The official receiver should ensure that guidance is followed in all bankruptcy cases. It is generally not necessary to register a winding up order.

28.44 Protection of unregistered land

Clearly, where land is unregistered it will not be possible to effect protection at the Land Registry by obtaining a restriction.

Where the property is solely owned, the official receiver should arrange for a first registration of the unregistered land, following the guidance in chapter 7.

In all cases (jointly and solely owned), the official receiver should ensure that the order has been registered with the Land Charges Department and that any third party with an interest in the property is on notice of the official receiver's interest in the bankrupt's share in the property. Other than having notice placed with the deeds, this is the only effective method of protection.

28.45 Protection of jointly owned unregistered land

When dealing with a jointly-owned unregistered property, or where there is likely to be a delay in applying for registration of a solely owned property, the official receiver should, where possible, attempt to gain control of the title deeds where the property is unencumbered or the deeds are otherwise not in the control of the mortgagees.

Where the title deeds are under the control of the mortgagee, the official receiver should ensure that the mortgagee in control of the deeds places notice with the deeds of the official receiver's interest in the property.

28.46 Notification to bankrupt and other interested parties when dealing with family home

Where the official receiver is dealing with the family home (see paragraph 28.51) the official receiver should ensure that the bankrupt and any interested parties are put on notice that the interest has vested in the trustee.

28.47 Notice to mortgagees

The official receiver should ensure that the mortgagees have been issued with the standard letter putting them on notice of the official receiver's interest in the property and obtain acknowledgement of that notice[1].

This notice also requests the mortgagee(s) to inform the official receiver of any attempted dealings in the property.

1. MP3

28.48 Protection of repossessed property

Where a property has been repossessed it is still necessary to register the appropriate restrictions at the Land Registry to ensure that the official receiver's interest in the property is protected and, particularly, that any surplus is not passed to a joint owner.

The official receiver has discretion not to seek such protection where a sale has been agreed and the protection may hinder that sale. The solicitor should be asked to provide an undertaking to remit the bankrupt's share of the sale proceeds.

In all cases of repossessed property, the official receiver should issue the standard letter[1] to the mortgagees to put them on notice of the official receiver's interest in the bankrupt's share of surplus sale proceeds.

1. MP3

28.49 Protection of rental income

Guidance on tenanted properties that are owned either by a company or a bankrupt is provided in chapters 29 (solely owned) and 30 (jointly owned).

28.50 Charging order against an interest in a property in favour of bankrupt

Where the bankrupt's interest in a property is held as a charge granted in matrimonial proceedings the property may also be qualifying family home. If the official receiver is unable to realise the charge due to its terms, it will normally be appropriate to seek to extend the period in which the official receiver can deal with the interest. (see paragraph 28.65)

The family home (bankruptcy only)

28.51 The family home or 'use it or lose it' provisions

Provisions introduced on 1 April 2004[1] require a trustee to deal with an interest in a qualifying property within a period of three years from, usually, the date of the bankruptcy order, or lose the right to do so. If the trustee doesn't deal with the interest the property re-vests in the bankrupt. The provisions were introduced to give certainty at an early stage to the fate of the bankrupt's family home.

1. Section 283A

28.52 Properties to which the provisions apply (a 'qualifying property')

An interest in a property, which is a "dwelling house", which at the date of the bankruptcy order was the sole or principle residence of:

- the bankrupt
- the bankrupt's spouse or civil partner, or
- a former spouse or civil partner of the bankrupt
- will be considered to be a qualifying property ("the family home")

A "dwelling house" is defined as any building or part of a building which is occupied as a dwelling and any yard, garden or outhouse belonging to the dwelling house and occupied with it[1].

1. Section 385(1)

28.53 "Spouse or civil partner"

Marriage[1] and civil partnership[2] are legal processes. A ‘spouse’ (husband or wife) is an individual’s partner in marriage. A ‘civil partner’ can only refer to a man or a woman who is the individual’s partner in that arrangement (and they must be of the same gender). Both a marriage and a civil partnership can only be dissolved by the courts, rendering each partner a former spouse or civil partner.

None of these definitions would include a cohabitant/partner, or former cohabitant/partner, even if there are children of the relationship living with or cared for by the cohabitant/partner. There is no concept in law of a “common-law” husband or wife.

1. Marriage Act 1949 (as amended) 2. Civil Partnership Act 2004

28.54 Caravan, houseboat or mobile home as a dwelling house

Whilst a ‘touring’ caravan and, possibly but less likely, a houseboat could be considered to be a ‘house’ or home[1], neither would fall under the definition of ‘dwelling house’ for the purposes of the Act as neither are a ‘building’, particularly as they are mobile.

A caravan could be a dwelling house if the wheels are removed and/or it is fixed to a permanent base or stabilising struts and if it is connected to mains services (e.g. electric/water) and cannot easily be detached. This would generally be called a ‘static’ caravan.

A mobile home could be a dwelling house if it occupies an area which is owned or let for the specific purpose of providing permanent occupation and has a significant degree of immobility. Generally, mobile homes are transported on lorries, rather than towed as a caravan.

The official receiver should take each case on its own merits and, where there is doubt, should err on the side of the property being the family home to avoid the risk of the interest being lost to creditors on the expiration of the three year period.

1. R v Rent Officer of the Nottinghamshire Registration Area ex parte Allen [1986] 52 P&CR 41

28.55 Definition of the bankrupt’s ‘interest’

The bankrupt’s interest in the family home may be in the legal estate (the bankrupt is sole or joint owner of the property) or a beneficial interest (see paragraphs 28.3 and 28.4). A beneficial interest would include holding a matrimonial charge over the property (see paragraph 28.73).

28.56 Bankrupt may have more than one family home

The bankrupt may have more than one family home where, for example, the bankrupt lives in one property, the bankrupt's estranged spouse lives in another property, and a former spouse lives in a third. If the bankrupt has an interest in any of these properties, they would each re-vest in the bankrupt unless the official receiver takes steps to deal with the property (see below).

Similarly, the bankrupt or (former) spouse/civil partner may have more than one residence (for example one in the city for work and another in the country for weekends and holidays) – in which case, the bankrupt would have to elect which property was the principal residence and therefore qualified as the family home.

28.57 Effect of the family home provisions

The bankrupt's interest in the family home will vest in the official receiver on the making of the bankruptcy order[1]. Unless dealt with by the trustee (see paragraph 28.61) the property will re-vest in the bankrupt

- three years from the date of the bankruptcy order; or
- earlier if the trustee sends notice to the bankrupt that the trustee considers the continued vesting is of no benefit to creditors, or re-vesting would facilitate a more efficient administration of the estate, but
- if the bankrupt does not inform the official receiver (or any insolvency practitioner acting as trustee) of the bankrupt's interest within three months of the date of the bankruptcy order, then the family home will not re-vest until the expiry of three years after the date that official receiver or other trustee becomes aware of the bankrupt's interest in the property (unless the early re-vesting in point above, applies)[2]

The interest in the property will re-vest (where appropriate) without conveyance, assignment or transfer[3].

1. The provisions applied to all cases where the petition was presented on or after 1 April 2004. Transitional provisions applied the provisions to all properties in cases where orders were made under the Insolvency Act 1986 prior to 1 April 2004 which remained vested in the trustee. Transitional provision properties revested on 1 April 2007. The provisions do not apply to orders made under the Bankruptcy Act 1914 (Pannell v Official Receiver [2008] EWHC 736(Ch)

2. Section 285A(5)

3. Section 283A(4)(b)

28.58 Provisions only apply to property which vests at the commencement of bankruptcy

The provisions relating to the family home do not apply to property vested in third parties at the commencement of the bankruptcy. So, for example, where property is recovered for the estate following proceedings related to an antecedent recovery, that property cannot be the family home[1].

1. Stonham v Ramrattan [2011] 1 WLR 1617

28.59 Three-year period and non-surrender cases

The legislation provides that the three-year period after which the property re-vests in the bankrupt commences, in the absence of a notification of such from the bankrupt, when the trustee becomes aware of the bankrupt's interest[1]. The official receiver should therefore treat a case as though the three years has begun from the earliest notification of the bankrupt's interest in the property, whether or not that notification came from the bankrupt.

1. Section 285A

28.60 Notice to be issued to interested parties

When a property has been identified as a qualifying family home, the official receiver, as trustee must send a notice[1] to the bankrupt and, as appropriate, the bankrupt's spouse/civil partner or former spouse/civil partner. The Land Registry title number should be included on the notice where it is known[2].

The official receiver should send the notice as soon as reasonably practicable after becoming aware that a property is the family home, and not later than 14 days before the expiry of the three-year period[3].

1. Rule 10.167; Form BHNOT

2. Rule 10.167(2)

3. Rule 10.167(3)

28.61 Dealing with the interest in a family home

The bankrupt's interest in the family home will re-vest in the bankrupt unless the interest is dealt with by one of the following events occurring[1]:

- the trustee realises the interest (the interest is sold)
- the trustee applies for a charging order
- the trustee applies for an order for sale in respect of the property

- the trustee applies for an order for possession
- the trustee agrees with the bankrupt that the bankrupt shall incur a specified liability to the estate in consideration of which the interest will cease to form part of the estate

It has been held that the realisation of the bankrupt's interest in the family home can only mean to turn the interest into money at that time, and not later[2]. This would mean that a sale (assignment) of the bankrupt's interest for future consideration would not stop the property re-vesting in the bankrupt at the end of the relevant term note[3].

It is not necessary for the trustee to realise the property. It will be sufficient where the property is realised, for example, by the mortgagee in possession[4].

1. Section 283A(3)

2. Doyle v James [2010] BPIR 1063

3. Lewis v Metropolitan Property Realisations [2009] EWCA Civ 448

4. Re a debtor (No.29 of 1986) [1997] BPIR 183

28.62 Low value homes

There are certain restrictions on how the trustee, may deal with a low value family home[1]. This is currently a property where the bankrupt's interest has a value of £1,000 or less[2].

The intention of these legislative provisions is to recognise that the benefit to creditors in dealing with a low value home is often outweighed by the suffering imposed on the bankrupt and family by the loss of the home.

1. Section 313A

2. Insolvency Proceedings (Monetary Limits) Order 1986 (as amended)

28.63 Restrictions on dealing with a low value home

The court will dismiss any application by the trustee for an order for sale or possession of the property, or an application for a charge against the bankrupt's interest[1] where the value of the interest is £1,000 or less.

1. Section 313A(2)

28.64 Application for order dismissed

Where any application for an order for sale or possession of the property, or an application for a charge against the bankrupt's interest in the property, is dismissed; the interest will automatically re-vest in the bankrupt unless the court orders otherwise[1].

1. Section 283A(4)

28.65 Extending the three year period for re-vesting of the bankrupt's interest

The court may substitute a longer period than three years after which the bankrupt's interest in the family home will re-vest in the bankrupt[1]. An application for the period to be extended may be appropriate in the following circumstances:

- the interest in the property is subject to matrimonial court order and cannot be realised until defined events occur. For example, if the former spouse re-marries, or the youngest child of the relationship finishes full-time education
- the interest in the property is held on trust for the bankrupt
- the bankrupt has the right to 'buy-back' the property following a 'sale and leaseback' of the property (see paragraph 28.182)
- the official receiver has been unable to deal with the property interest due to non-surrender/non-cooperation of the bankrupt

Any application to court should seek to set the period at six months after the expiration of the date that the official receiver becomes aware that the property interest has become available.

The official receiver should not apply for an extension where the delay has been due to the official receiver failing to deal with the property. It is unlikely the court would look favorably on such an application.

1. Section 283A(6)

28.66 Interest in the form of a charge (low value homes)

Where the bankrupt's interest in a family home is in the form of a charge to protect a future interest in the property (usually this will be in relation to matrimonial proceedings), the future interest will generally relate to the value of the property at a certain point in time, for example, the youngest child's 18th birthday.

In such cases the interest in the property is a deferred interest and even where the value of the charged property is below £1,000 at the date of the bankruptcy order, the official receiver should not consider this to be a low value home (see paragraph

28.62), as the relevant date for calculating the value will be the date that it is able to be realised, by which time it may be worth over £1,000.

28.67 Application to substitute the period after expiration of three years

It is unlikely that an application to substitute the period can be made after the three year period set in the Act has expired. As a matter of policy, such an application should not be considered unless the official receiver believes that there are exceptional circumstances why such an application should be made.

28.68 Early re-vesting of the bankrupt's interest

The trustee may arrange for the bankrupt's interest in the family home to be re-vested in the bankrupt earlier than the normal three year period[1]. Re-vesting in a shorter period is achieve by issuing notice to the bankrupt[2] the trustee considers that the continued vesting of the property in the estate is of no benefit to creditors and/or early re-vesting would facilitate a more efficient administration of the bankrupt's estate.

The property would then re-vest one month from the date of the notice[3].

1. Section 283A(7)

2. Rule 10.170(1); Form BHREV

3. Rule 10.170(2)

28.69 Circumstances in which a property might be re-vested early.

The official receiver may wish to consider early re-vesting of a property in the following circumstances:

- where the property is in negative equity and the official receiver considers there is no reasonable prospect of a surplus becoming available from the property within the three year period, or
- the property has a negative equity of is otherwise a low value home (equity of less than £1,000) and the official receiver considers there is no reasonable prospect of a surplus in excess of £5,000 becoming available from the property within the three year period

- where the property is a solely owned shared ownership property held on an assured tenancy basis which has been claimed under section 308A and the tenancy is subsequently found to have a value of less than £1,000
- where the interest in the property would otherwise be considered suitable for disclaimer, for example where the interest is subject to legal proceedings and the rights of the bankrupt and a third party may be more suitably resolved by the court

28.70 Action following revesting

Where a property re-vests the official receiver must make application, within five days, to the Land Registry, where the property is on registered land, to amend the register of proprietorship[1]. The application should be accompanied by evidence of the bankruptcy and the trustee's appointment (unless previously notified to the Chief Land Registrar) and by a certificate stating that the property interest has re-vested[2].

The official receiver must also inform[3]

- the bankrupt
- any (former) spouse/civil partner for whom the property is their principle residence, and
- any other person claiming an interest in the family home or under any liability in respect of it that application has been made to the Land Registry

Where the property is unregistered, the official receiver must issue the bankrupt with a certificate of re-vesting[4].

The official receiver should ensure that any insurance effected by the official receiver is cancelled once the property re-vests with the bankrupt. The property re-vests one month from the date of the notice[5].

1. Rule 10.168(3); Form RX3 (solely-owned); Form RX4 (jointly-owned)

2. Form BHLET

3. Rule 10168(4) and (5); BHLET

4. Rule 10.169; BHCERT

5. Rule 10.170(1) and (2)

28.71 Re-vested property cannot be claimed as after-acquired property

A property interest that has re-vested in a bankrupt under the provisions relating to the family home cannot be claimed as after-acquired property[1].

1. Section 307(2)(aa)

28.72 Endowment policies

Any endowment policy (or similar) taken out with a view to repaying the mortgage on the family home is a separate asset to the property interest. Guidance on dealing with endowment policies can be found in chapter 33.

Matrimonial or civil partnership proceedings (bankruptcy only)

28.73 Property adjustment order

Where a couple are involved in proceedings for divorce or the dissolution of a civil partnership, the court can make various orders with regard to future financial provision “ancillary relief” The court has the power to make an order transferring the interest of one party to the other party as part of matrimonial or civil partnership divorce proceedings: a property adjustment order.

28.74 Property adjustment order not effected at date of bankruptcy order

Where a property adjustment order is made before the date of the bankruptcy order the transfer of the property does not have to have been effected for the interest in the property to have passed. For example, the order may provide that the transfer takes effect 14 days after pronouncement and the bankruptcy order is made in the interim period[1].

The official receiver should still consider whether the property adjustment order was a transaction at an undervalue (see chapter 31).

1. Mountney v Treharne [2002] EWCA Civ 1174

28.75 Consent orders

A consent order is where the parties to the proceedings agree terms for the financial settlement and other matters. A property adjustment order may be just one element of a consent order. The official receiver should be mindful that a transfer of property under a property adjustment order by consent is more likely to constitute a

transaction at an undervalue than a property adjustment order following contested proceedings.

A consent order generally takes effect at decree absolute, but the wording of the order can provide that it takes effect at another date.

28.76 Initial action when proceedings in progress

When the official receiver becomes aware ancillary relief proceedings are still in progress and, in particular, that an application for a property adjustment order has been made, the official receiver should immediately contact the court in which the proceedings are ongoing. The court should be informed of the bankruptcy proceedings and should make application for an adjournment or stay of the proceedings, as required, to give the bankruptcy court opportunity to consider the interests of the bankruptcy creditors.

The official receiver should also give notice of the bankruptcy proceedings to the bankrupt's spouse or civil partner and any solicitors acting for the bankrupt's spouse or civil partner, where known, to ensure that the parties are aware of the bankruptcy and the trustee's interest in the property.

28.77 Order made against bankrupt's spouse or civil partner prior to bankruptcy order

An order against the bankrupt's spouse or civil partner made prior to the making of the bankruptcy order requiring the transfer of the property on the bankrupt will be effective and the property will bee part of the bankruptcy estate, available when the order is given effect.

28.78 Effect of property adjustment order made after bankruptcy order

If a property adjustment order is made after the bankrupt's estate has vested in the trustee it will be negated if it requires the bankrupt to settle or transfer any property which forms part of the estate. This is because the bankrupt will, at that stage, no longer be entitled to the property (the interest having vested in the trustee) and, therefore, the bankrupt will be unable to transfer the property, or any part of it, in accordance with the property adjustment order. Any requests for the official receiver, as trustee, to transfer the property should be resisted as the relevant law applies

only to parties in the marriage/civil partnership. The court cannot make a property adjustment order against a trustee in bankruptcy[1].

1. Re Holliday (a bankrupt) [1981] Ch 405

28.79 Order made against bankrupt's spouse/civil partner after bankruptcy order

A property adjustment order made after the date of the bankruptcy order against the bankrupt's spouse or civil partner requiring settlement or transfer of property on/to the bankrupt will be effective notwithstanding the bankruptcy. The property should be claimed as after acquired property. After acquired property must be claimed within 42 days from the date the official receiver, as trustee, becomes aware of its existence (see chapter 36).

28.80 Secured maintenance order

A secured maintenance order is an order made by the court in ancillary relief proceedings giving the spouse/civil partner security against the property of the other party. The enforcement of such an order should be resisted where it is made against a bankrupt after bankruptcy or after the presentation of the petition.

28.81 Taking into account an application for a property adjustment order

After taking the initial steps to deal with the application for a property adjustment order the official receiver will have to consider the effect of the application on the property of the bankrupt, making representations to the court as appropriate. The official receiver should be particularly concerned to see that any proposed order does not diminish the assets available to creditors and should also take into account the effect of any proposed order on the ability of the bankrupt to make or continue to make payments under an IPA/IPO (see chapter 35).

Valuation of the property and establishing the insolvent's interest in the property (including equitable accounting)

28.82 Introduction

Whether or not the insolvent is shown as an owner of the property, they may have an interest in the property depending on their actions and intentions in relation to the property. The following gives guidance on valuing the property in which the insolvent has, or appears to have, an interest and on establishing the extent of the insolvent's interest in the property.

Certain of the concepts explained will occur only in respect of residential properties in bankruptcy cases and the guidance has that in mind.

28.83 Establishing the insolvent's interest in the property

The ultimate purpose of establishing the insolvent's interest in the property is to establish how the property may be dealt with. The first stage in this process will generally be the valuation of the property itself.

28.84 Verifying information provided by the director/bankrupt

The initial valuation of the property will be provided by the director/bankrupt in the statement of affairs or PIQ. The official receiver should carry out a separate valuation unless the director / bankrupt's estimate is based on a professional valuation carried out within the previous six months.

28.85 Methods by which the value of a property can be established

The value of a property may be established/verified in a number of ways. The official receiver should decide which method is most appropriate on a case-by-case basis.

28.86 Local knowledge to assist in establishing a valuation

The official receiver's local knowledge may be of assistance in verifying a valuation obtained by one of the other available sources but is unlikely to be sufficient in its own right.

28.87 Professional valuation provided by insolvent

An estate agent or surveyor's report obtained by the director/bankrupt will provide the most accurate valuation, given that the estate agent/surveyor is likely to have visited the property and will have knowledge of the current market condition in that particular area.

Where there are doubts, the official receiver should seek verification that the valuation provided by the director/bankrupt is genuine – contacting the valuer where necessary. Similarly, the official receiver should check that the valuation was not conducted on the basis of a 'quick sale', as such valuations are typically lower. Any valuation that is more than six months old should be verified by one of the other methods outlined below.

28.88 Valuation information from mortgagee

Mortgagees often hold information relating to the value of a property, but this will usually date from the time the property was purchased, or the date it was remortgaged. Any valuation supplied by a mortgagee that is more than six months old should be verified by one of the other methods outlined below.

The historical valuation that a mortgagee can provide will be useful in obtaining an internet valuation.

28.89 Internet valuations – residential properties

Internet valuations work on the basis that the valuation is arrived at by extrapolation of a known historical valuation (usually the purchase price). The calculation can, therefore, be thrown out if there have been significant changes to the property since the last known valuation (an extension, for example).

When using internet valuation sites to establish the value of the property, the official receiver should note that not all sites will give a reliable valuation of the property. The official receiver should try to obtain an average of two internet valuations. A combination of the following sites may be used.

Acadata is an index-based calculator and will provide a valuation based on postcode. The site tracks the price from the last purchase price / date of purchase. If this information is not available Nethouseprices might be used to give an indication of recent sale prices (the sign-up pages can be skipped). Other useful sites might be

Rightmove, Zoopla and Mouseprice. Where a personal log-in is required staff may use their IS email address.

The official receiver will need to exercise judgment on whether or not to accept the average internet valuation where the property has been significantly altered (for good or ill) since the last known valuation. In cases of doubt, and in the absence of an acceptable valuation provided by the insolvent consideration should be given to obtaining a drive-by valuation of the property, with details of the alterations to the property being notified to the agents conducting the valuation.

28.90 Internet valuations – commercial property

The effectiveness of an internet valuation of commercial property is likely to be low and, in such cases, the official receiver should consider arranging for agent's to value the property instead.

28.91 Use of a drive-by valuation

Due to cost implications, drive-by valuations should be used only rarely, for example, where there is no available professional valuation, there is no reliable internet valuations or where the property is a commercial property.

A drive-by valuation is a valuation carried out by the valuer assessing a property from the street. It can be more accurate than an internet valuation, as it is based on the knowledge and skill of the valuer. A drive-by valuation is subject to the same limitations as an internet valuation, in that the valuer will not be aware of the exact condition of the property or may not be able to see any extensions to the property from the street.

Where a drive-by valuation is considered necessary, it may be obtained using a local agent for both residential and commercial property.

28.92 Dispute over valuation

Where there is a dispute over the valuation of a property, the disputing party should be asked to obtain their own valuation at their own expense. Estate agents will often provide a free valuation service.

28.93 Charges affecting the value of the insolvent's interest in the property

Once the value of the property has been ascertained, it will be necessary to establish if there are any secured debts, such as a mortgage or other charges against the property.

Details of charges may be obtained from the bankrupt/director, Land Registry, Land Charges Department or from other charge-holders

The outstanding balance on the debt(s) secured by the charge should be deducted from the likely sale price. The difference between the value of the property and the amount outstanding under the secured loans is known as the equity in the property.

28.94 Equity in the property and the insolvent's interest therein

Any beneficial interest in the property will be an interest in the equity of the property. The level of an insolvent's beneficial interest in the property can be affected by a number of factors.

28.95 Starting position

Unless there is an express declaration of trust providing otherwise[1] (see paragraph 28.105) the presumption is that beneficial interest will follow legal title.

Therefore, the starting point for the official receiver when considering beneficial interests in a jointly owned property is that the beneficial interest is equally divided between the joint owners. Where there are two joint legal owners the beneficial interest of each in the property is 50% of the equity. Where the property is solely owned the beneficial interest is 100% of the equity. Unless evidence is produced to the contrary the official receiver should always proceed on that basis[2].

See paragraphs 28.96 to 28.101 for information on how charges may be adjusted affecting the value of beneficial interests. See paragraphs 28.102 to 28.118 for information on how the relative shares of beneficial interests may be adjusted.

1. Pettitt v Pettitt [1970] AC 777

2. Jones v Kernott [2011] UKSC 53

28.96 Equity of exoneration

In common law the court of equity is a court of fairness. If it is proven that the loan/expenditure on which a charge was created was used purely for the benefit of one of the joint owners (A), for example to finance a business venture, and the other joint owner (B) derived no direct benefit from it, then B may be entitled to have the

secured debt discharged (so far as is possible) out of A's share of the equity. A worked example of equity of exoneration in effect can be found at Annex A.

28.97 The application of equity of exoneration in a bankruptcy case

If a non-bankrupt joint owner of a property wishes to rely on exoneration to establish a greater share in the equity of the property then the trustee should request evidence to show the extent to which the monies/expenditure secured by the charge were incurred solely for the benefit of the bankrupt and that the non-bankrupt joint owner did not derive any consequential benefit.

Where the non-bankrupt joint owner has no independent income and the household relies on the business income of the bankrupt for financial support, it is unlikely that the principle of exoneration would apply[1].

1. Re Pittortou (a bankrupt) [1985] 1 WLR 58

28.98 Circumstances where exoneration does NOT apply

The official receiver should not agree that a debt under a charge can be discharged first from the bankrupt's interest under the principle of exoneration in the following circumstances:

- the non-bankrupt joint owner intended to make a gift to the bankrupt[1]; or
- the money raised was to pay debts of the bankrupt incurred to maintain the lifestyle of both parties[2]; or
- the money raised was used to discharge the debts of the non-bankrupt owner[3]; or
- the money was used for the benefit of the non-bankrupt owner, either wholly or jointly with the bankrupt. This will include money used to pay their general household and living expenses[4]

1. Clinton v Hooper (1791) 29 ER 490

2. Paget v Paget [1898] 1 Ch 470

3. Lewis v Nangle (1752) 28 ER 275

4. Re Pittortou (a bankrupt) [1985] 1 WLR 58

28.99 Effect of official receiver agreeing that exoneration does apply

Any agreement by the trustee that the principle of equity of exoneration applies does not affect the joint-owner's responsibility to the chargeholder to discharge the debt.

28.100 Setting aside of a Charge

A party to a charged debt may have grounds to have their legal liability set aside in certain circumstances:

- on the grounds of fraud fraudulent misrepresentation or forgery of that person's signature[1]
- on the grounds of duress, at the time the charge was executed the person was subject to violence, threat of violence or actual or threatened imprisonment[2]
- on the grounds of undue influence; taking advantage of a position of power or trust over another. Before a presumption of undue influence can arise it is necessary to show that the disadvantaged party placed trust and confidence in the party taking advantage, and that the transaction is not readily explainable by reference to their relationship[3]. If that is so, there are certain relationships where the presumption of undue influence is irrebuttable, such as parent/child[4] or solicitor/client[5]. If the parties were husband, wife or civil partners, then the presumption will arise, but it is rebuttable. In that case, it will be for the person who benefitted from the arrangement to show that it was free from undue influence[6]
- on the grounds of non-registration (company only, see chapter 32)

This is a dispute the wronged party will have with the chargeholder and may require determination by the court. Depending on the situation, the setting aside may be to the benefit or detriment of the insolvent estate, depending on whether the insolvent committed the wrongful act, or is the victim.

1. Kings North Trust Ltd v Bell [1986] 1 WLR 119

2. Barton v Armstrong [1976] AC 104

3. Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44

4. Bullock v Lloyds Bank Ltd [1955] Ch 317

5. Willis v Barron [1902] AC 271

6. Barclays Bank plc v O'Brien [1994] 1 AC 180

28.101 Undue influence – position of mortgagee

Where a loan is entered into between a lender and a husband, wife or civil partners, any undue influence will not affect the enforceability of the mortgage provided the

lender was unaware, or has no reason to suspect, that there was undue influence, and the lender believed that the transaction was to the benefit of the husband, wife or civil partners[1].

If the spouse/civil partner merely guaranteed the loan made to the other spouse/civil partner, the security will be rendered invalid if the lender did not take steps to ensure that the spouse/civil partner gave an informed and true consent to the guarantee[2].

1. CIBC Mortgages v Pitt [1993] 3 WLR 802

2. Barclays Bank plc v O'Brien [1994] 1 AC 180

28.102 Establishing the shares in which equity is held

If there is a common intention between the parties as to the shares in which the property is to be held, such that the presumption of equal shares can be displaced then that common intention should be followed, but such a change should be scrutinised by the official receiver as a possible transaction at an undervalue (see chapter 31).

Where the presumption can be displaced, but it is not possible for the parties to agree the proportion in which the shares were to be held, it is necessary to investigate the whole course of dealings in the property to reach a fair division of the shares. Each case will turn on its own facts and, whilst financial contributions to the property will clearly be an important factor, there will be other factors that might be relevant[1] (see paragraph 28.113).

1. Jones v Kernott [2011] UKSC 53; Oxley v Hiscocks [2004] 3 WLR 715

28.103 Dispute over the insolvent's beneficial interest in a property

Most of the legal principles in determining beneficial interest have arisen to decide matters where unmarried couples have separated. Where couples have been married and subsequently separate the court has the power to make a property adjustment order[1]. The legal principles in determining beneficial interest are equally applicable to deciding property shares in bankruptcy – whether the parties are married or not.

The official receiver may be asked to consider the division of a beneficial interest where a third party believes they are entitled to a (greater) share in the property, or where the official receiver believes that the trustee has a claim to a (greater) share of a property jointly owned by the bankrupt or owned by a third party.

The court has held:

‘once the court was satisfied that it was the parties’ common intention that the beneficial interest was to be shared in some proportion or other, the court might have to give effect to that common intention by determining what in all the circumstances was a fair share.’[2].

‘In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result, unless the facts are very unusual[3].

1. Matrimonial Causes Act 1973

2. Gissing v Gissing [1971] AC 886

3. Stack v Dowden [2007] 2 AC 432

28.104 Creation of trust

Case law[1] suggests that when a party is claiming a beneficial interest that party will rely on the equitable doctrines of trust law. These are discussed below.

1. Stack v Dowden [2007] 2 AC 432; Jones v Kernott [2011] UKSC 53

28.105 Express declaration of trust

An express declaration of trust clearly sets out the parties intentions. The Land Registry has since April 1988 provided for a box on the TR1 form for the transferees to declare how the beneficial interest in a property is to be held and where this is available this should avoid any uncertainty in the parties’ intentions at the time the property was purchased.

The fact that the beneficial interest is determined by an express declaration at the date of acquisition does not mean that it cannot alter thereafter.

28.106 Verifying substance of an express trust

The trustee should take steps to satisfy themselves of the veracity of any trust deed. These enquiries should seek to establish if the deed was created following advice from a solicitor and, if so, the solicitor and witnesses should be contacted to confirm that the deed was created on the date purported. The official receiver should, in particular, ask the witnesses to confirm that they saw the signatures being appended to the deed on the date stated.

If the trust deed was prepared by a solicitor or other professional who confirms the facts then this is likely to be conclusive evidence of the veracity of the deed.

28.107 Resulting trust

In general the application of a resulting trust is now limited and a beneficial interest will not arise unless there is also an intention to create a trust as between the parties.

The basic principle in relation to resulting trusts is that where the legal estate is conveyed into the name of one person but another party has contributed to some or all of the purchase price, there will be a rebuttable presumption that party making the payment will own part or all of the beneficial ownership of the property[1].

For a resulting trust to exist the party claiming a beneficial interest must have made a direct financial contribution to the purchase price of the property. It is considered that there is no requirement that there was also a common intention between the parties as to the existence or extent of the resultant beneficial interest. The larger percentage of the purchase a party pays the greater the resulting trust and thus the beneficial interest will be.

1. Pettitt v Pettitt [1970] AC 777

28.108 Constructive trust

This is an implied trust that has been ‘constructed’. A constructive trust will arise where there has been no express declaration of trust (or there was an express declaration but the position changed over time) and is an equitable remedy. Therefore the actions, conduct and intentions of the parties need to be considered. For a constructive trust to exist there must be a common intention that a trust is to be created, and second, that there has been some material alteration in the claimant’s position which it would be inequitable to deny. Where there was an express trust and a party claims that the intentions have changed, possibly creating a constructive trust, the burden will be on that person to provide the evidence to prove the claim. The intention of the parties can be constructed from their conduct (see paragraph 28.113).

28.109 Protective Trusts

A protective trust usually occurs where property is left in a will and the person making the will has concerns about the irresponsibility of the beneficiary. It will be held on trust until some “divesting act” happens. One such “divesting act” is bankruptcy, following which the trust will become a discretionary trust allowing the

trustees to vest the property or not. Where the person is in bankruptcy the trustees will invariably decide not to vest the property.

28.110 Beneficial interest, trusts and jointly owned property

It has been held that there cannot be a resulting trust in relation to a jointly-owned matrimonial or quasi-matrimonial home. This is because there is a presumption that, in the absence of evidence of a contrary intention, where a property is purchased jointly as a home the couple have made an emotional and economic commitment to a joint enterprise. Consequently, where a domestic property is conveyed into the joint names of the cohabitants (whether in a relationship or not) the starting point is that the legal and beneficial interests are joint and equal[1].

1. Stack v Dowden [2007] 2 AC 432; . Jones v Kernott [2011] UKSC 53; Aspden v Elvy [2012] EWHC 1387 (Ch)

28.111 Claim of contrary intention to beneficial interest following legal title

Where there is a claim that the parties held a contrary intention as to how the beneficial interest would be split so as to override the principle that it will follow legal title (see paragraph 28.95), it will be for the party claiming that the position is different to make representations to the trustee and to provide the evidence to substantiate the claim[1].

In a solely-owned property, a party whose name is not on the proprietorship register particularly has the burden of establishing an interest in the property – through contributions, for example[2].

1. Stack v Dowden [2007] 2 AC 432

2. Gissing v Gissing [1971] AC 886; Lowton v Coombes [1999] Ch 373

28.112 Evidence of a contrary or change of common intention

In establishing whether there was any intention to hold the beneficial interests in the property in shares other than in the same proportions as the legal title, it is necessary to establish if there is evidence of an actual common agreement, arrangement or understanding between the parties, possibly based on evidence of discussions between them, however imperfectly remembered or imprecise the terms. Such an agreement can be inferred from the parties' conduct (changing the nature of

the legal title, becoming party to a mortgage on the property or, even, simply discussions) in relation to the property, but cannot be attributed in the absence of any agreement or discussion[1].

Further, it would be wrong for the parties to intend, at one and the same time, for the beneficial interest to be shared equally should they separate on amicable terms but to be shared unequally were they to split on acrimonious terms, or if one were to be made bankrupt[2].

The fact that one party apparently acts in a manner contrary to an agreement will not change the agreement unless the change is communicated to the other party[3].

1. Lloyds Bank plc v Rosset [1991] 1 AC 107; Jones v Kernott [2011] UKSC 53

2. Stack v Dowden [2007] 2 AC 432

3. Jones v Kernott [2011] UKSC 53

28.113 Factors to take into account in deciding contrary intention and adjusted shares.

The court has held that, in deciding the shares in which a property is to be held, each case will turn on its own facts. Matters to be taken into account include:

- creation of a trust (see paragraph 28.105)
- advice or discussions at the time of transfer which shed light on the parties' intentions
- reasons why the home was acquired in joint names or in a sole name
- reasons why (if so) it was intended that the property would pass to the survivor should the other party die (jointly owned only)
- the purpose for which the property was purchased
- the nature of the parties' relationship
- whether the parties' had children for whom they both had a responsibility to provide a home
- how the purchase was financed initially
- how the monthly mortgage repayments were made and by whom
- how the parties arranged their finances, whether separately, together or a bit of both
- how they discharged the outgoings on the property and other household expenses
- any capital improvements to the property and who financed them/made loan repayments. These should be significant. Repairs and decoration, unless significant should not be taken into account[1]
- consideration of life events e.g. separation of the parties
- liquidation of other joint assets after purchase of property

The court has held that, even taking all this into account, cases in which the joint legal owners intended that their beneficial interests would be different from their legal interests would be very unusual[2].

1. Harnett v Harnett [1973] 3 WLR 1

2. Kernott [2011] UKSC 53

28.114 Contributions to the property leading to a beneficial interest

It will be difficult for the non legal owner of a property to rebut the presumption of beneficial interest following ownership unless they have made some financial contribution to the property.

Fulfilment of domestic duties alone will not be sufficient to demonstrate a beneficial interest[1]. Funding substantial improvements to the property will usually be sufficient[2], and the amount of the interest will generally relate to the financial value of the improvement[3]. There is similar provision in the legislation relating to civil partnerships[4].

The discount available under a council right to buy scheme may be considered to be a financial contribution to the property for the purposes of proving a beneficial interest[5].

1. Burns v Burns [1984] Ch 317

2. Harnett v Harnett [1973] 3 WLR 1

3. Griffiths v Griffiths [1974] 1 WLR 1350

4. Civil Partnership Act 2004

5. Ashe v Mumford [2001] BPIR 1

28.115 Equitable accounting

In some cases, there is a further principle to be applied in establishing the bankrupt's beneficial interest, which is the principle of equitable accounting. This principle is to do with establishing how the parties' financial contributions in the property affect their beneficial interest and is applicable following one party leaving the house and in connection with the subsequent sale or other disposal of the property. Equitable accounting occurs only to work out contributions made to a property after a couple no longer cohabit, the transactions when the couple are together do not count.

The starting point for the calculations will be to establish the proportions in which it was intended that the property be held (see above). The equitable accounting principles would seek to establish if those proportions should be changed.

28.116 Principles of equitable accounting

Equitable accounting can only apply to an increase in the equity value that arises directly from a reduction in the mortgage balance and/or structural improvements to the property. It does not apply where any increase in the equity is due to a rising property market.

- Mortgage repayments

A party making a greater contribution to the mortgage capital repayments (but not interest payments) may be entitled to a greater share of the sale proceeds of the property[1]. Generally, the person making the mortgage repayments will be entitled to one-half of the reduction in the outstanding mortgage loan, subject to an offset for occupation rent.

- Occupation rent

Where one party remains in occupation of the property, that party may be required to account to the other for 'rent' for having had exclusive use of the property. This is known as occupation rent. Occupation rent and mortgage interest repayments are often off-set[2]. Where the person in occupation cannot control the date of the sale, it may not be possible to charge occupation rent[3]. Similarly, it may not be possible to charge occupation rent where the property was needed by minors[4].

- Renovations and improvements

Where a property has been renovated and improved, the party who has made the renovations/improvements may be awarded with a greater share of the proceeds to reflect the resulting increase in the value of the property[5], but this principle would not apply to improvements made whilst both parties were still in occupation[6]. Generally, the person funding the improvements will be entitled to one-half of the increase in value of the property resulting from the improvements.

1. Leake v Bruzzi [1974] 1 WLR 1528

2. Trustees of Land and Appointment of Trustees Act 1996, sections 12 to 15; Re Pavlou (a bankrupt) [1993] 1 WLR 1046; Re Gorman (a bankrupt) [1990] 1 WLR 616; Re Byford (deceased) [2003] EWHC 1267 (Ch); French v Barcham [2008] EWHC 1505 (Ch)

3. Stack v Dowden [2007] 2 AC 432

4. Trusts of Land and Appointment of Trustees Act 1996

5. Re Pavlou (a bankrupt) [1993] 1 WLR 1046

6. Clarke v Harlowe [2005] EWHC 3062 (Ch)

28.117 Changes in beneficial interest division and equitable accounting

Where a change in beneficial interest occurs and moves from the usual split starting point of 50:50 this change could be considered as having satisfied any call for equitable accounting to be considered.

28.118 Summary of guidance relating to division of beneficial interest

A summary of the guidance as regards the division of beneficial interest is as follows:

- beneficial interest will follow legal interest unless the contrary can be proved
- it will be difficult to prove the contrary where the property was purchased as a domestic home for the purchasers unless there is evidence an agreement to this effect
- if there is an intention to share the beneficial interest in different proportions to the legal interest then this should be followed
- the intention can be changed by events, such as the division (or joining) of financial affairs
- if there is evidence of an intention to share the beneficial interest in different proportions to the legal interest, but the proportions are in dispute then the whole of the dealings in the property should be taken into account to decide the shares

28.119 Investment properties

It is unlikely that the legal principles in relation to family homes set out above would apply to properties purchased as, or used as, investment properties. In such a case, it would be necessary to look to the shares in which the property were purchased, in the absence of any express agreement in which the property was to be held.

Realisation of the insolvent's interest

28.120 Introduction

It is rare for a company to own (rather than lease) property, but the general principles set out below may also be followed where the official receiver is dealing with company property. In the main the official receiver will be seeking to realise an

interest in residential properties in bankruptcy cases and the guidance has that in mind. Most properties owned by the bankrupt will be the family home, for which there are special provisions.

28.121 Basic process

The basic process for the realisation of the bankrupt's interest in a property is that (subject to a minimum property value – see paragraph 28.62) a letter[1] is sent to the bankrupt and/or any joint owner to establish if any party wants to make an offer for the bankrupt's interest

If no such offer is received, the property interest will be passed to the LTADT to review unless the bankrupt's interest is significant (more than £25,000) in which case the appointment of an insolvency practitioner should be sought. It is not anticipated that the official receiver will seek an order for the possession of a bankrupt's property, though, as trustee, the official receiver has the power to do so.

1. MP1

28.122 Heading letters "Subject to Contract"

All correspondence entered into regarding a sale or potential sale of the official receiver's interest in a property must be clearly stated to be "SUBJECT TO CONTRACT"

28.123 Inviting offers to purchase the insolvent's interest in the property

Consideration should be given by the official receiver to sending a letter note 1 to the bankrupt and any joint owner inviting an offer to purchase the bankrupt's interest in the property. If the case is in the initial stages, and the property is identified as a family home, any letter inviting an offer to purchase the official receiver's interest should only be sent where the insolvent's interest in the property exceeds £1,000. There is no standard procedure or letter for companies, but the official receiver may offer to dispose of a property interest to a party connected to the company if the official receiver believes that this will be in the interests of creditors.

28.124 Offers to purchase interest in low value home should not be invited

Where the official receiver is dealing with a low value home, the standard letter inviting offers to purchase the bankrupt's interest should not be sent. Instead, the

official receiver should consider early re-vesting the property (see paragraph 28.69) or the property should be transferred to the LTADT for later review.

28.125 Content of standard letter to bankrupts

The standard letter to bankrupts makes it clear to the bankrupt and/or joint owner that if a sale of the interest is not conducted, and if no other arrangements are made to transfer the interest then the trustee, may take action to deal with the interest at any point during the period that the property vests in the trustee. The letter asks the bankrupt/joint owner to acknowledge receipt, which acknowledgment should be recorded in the case notes on ISCIS. A failure to return the form should not delay discharge.

28.126 Valuation of property

In order to assess whether any offer to purchase the insolvent's interest in the property is fair and in the interests of creditors to accept, the official receiver will need to establish the level of the insolvent's interest in the property (see section above).

The official receiver should not include mortgage early redemption fees or council right to buy charges in the calculation of a bankrupt's interest in a property for the purpose of inviting offers.

Any future general property value fluctuations should not be taken into consideration in respect of the calculation of the insolvent's interest in a property.

28.127 Sale to be in the interests of creditors

Before accepting any offer, the official receiver should be satisfied that the offer represents a good deal for the creditors, based on the current value of the property interest to the estate,

It has been held that a bankrupt's creditors had an interest in an order for sale being made regarding a property notwithstanding that the entirety of the bankrupt's share in the net proceeds of sale might be swallowed up in defraying the expenses of the bankruptcy and it was in the interests of the creditors that the expenses of the bankruptcy be discharged as far as possible out of the bankrupt's assets[1].

1. Thornhill v Atherton [2008] BPIR 691; Trustee of the estate of Bowe (a bankrupt) v Bowe [1998] 2 FLR 439

28.128 Competing offers for the interest

Where there are competing offers for the insolvent's interest in the property, the official receiver should go with the offer that will provide the best return for creditors, which may be an offer for a lower amount, but payable immediately (see also paragraph 28.61). Where the competing offers are equal, the official receiver, as liquidator or trustee, should, as a matter of policy, favour any offer that originates from, or is on behalf of, an occupier of the property.

28.129 Unsolicited offer received for bankrupt's interest in a low value home

The official receiver may receive an unsoliticed offer to purchase the bankrupt's interest in the property, from the bankrupt or a third party. The official receiver should give consideration to the offer received, accepting it if it is in the interests of the creditors to do so.

28.130 Acceptance of the offer

Assuming that it is in order to accept the offer to purchase the insolvent's interest, the official receiver should ensure that the proposed purchaser undertakes to provide a sum equivalent to the necessary conveyancing costs before instructing solicitors. The sum to be paid in consideration should also be agreed, all letters or emails being clearly marked "subject to contract", before instructing solicitors. The official receiver should make it clear to the proposed purchaser that, if the transaction is aborted due to the purchaser's failure to complete the purchase, the purchaser will remain liable for the official receiver's costs in respect of the aborted sale.

28.131 Additional requirements for solely owned property

In addition to the conditions set out above, the official receiver should be satisfied that arrangements have been made by the bankrupt or other proposed transferee to deal with the outstanding charges on the property – for which they will become liable as the legal owner.

28.132 Limited period of acceptance of offer

When accepting an offer to purchase the insolvent's interest in a property, the official receiver should make it clear that the agreement is for a limited period (normally, a period of three months from acceptance is appropriate). The official receiver is at liberty to review the position in the event of any delay exceeding this period which

will allow the official receiver to restart the negotiation (seeking a new valuation as appropriate) in the event of local volatility in the property market, or similar.

28.133 Case to be dealt with at local office

Where there is a willing purchaser who has made an offer that is in the interest of the creditors to accept, therefore, the realisation of the property is not likely to be protracted, the property should be dealt with by the local OR Command.

28.134 Insolvent's interest has attracted no willing purchaser – transfer to LTADT

Where the insolvent's interest in a property is below £1,000, and the property is a family home, the official receiver should consider revesting the property (see paragraph 28.69). Where the interest value is over £1,000 (but see also paragraph 28.69) but less than £25,000 the property should be transferred to LTADT for review at the two year, three month stage.. The fact that the case is on the investigation register need not prevent the property being transferred to the LTADT as there is the facility on ISCIS for the administrative and investigatory aspects of the case to be separated.

28.135 Insolvent's interest is over £25,000 but has attracted no willing purchaser – appointment of IP

In cases where the insolvent's interest is greater than £25,000 and there is no willing purchaser for the interest, the official receiver should seek the appointment of an insolvency practitioner as liquidator or trustee. The figure of £25,000 is given as a guide, and may vary depending on local conditions and the stance of local insolvency practitioners. In some cases a lower figure may be sufficient to attract an insolvency practitioner or, conversely, a higher amount may be required. It might also be appropriate to seek the appointment of a liquidator or trustee where there is a willing purchaser but there are other complex assets in the case, or if the level of the insolvent's interest in the property is in dispute and there are insufficient funds to seek legal advice.

28.136 Appointment of solicitors to deal with transfer of interest – jointly owned bankruptcy property

Where, in respect of a jointly owned property, an offer has been received that is in the interest of creditors to accept, and the conditions outlined in paragraph 28.127 have been met, the solicitors appointed under the terms of the property conveyancing scheme should be instructed to deal with the transfer provided:

- the property is a domestic property owned jointly by the bankrupt and others; and
- it is unregistered or registered freehold or leasehold property which is currently, or was previously occupied by the bankrupt and their spouse or civil partner, former spouse or former civil partner; and
- it is situated in England or Wales, The solicitors should be employed even if some, or all, of the following conditions apply
- the joint owner is also bankrupt
- the property is subject to mortgage(s) including mortgages coupled with a collateral endowment or pension policy or other form of collateral security
- the property is affected by matrimonial/civil partnership proceedings; or
- the property was purchased by sitting tenants from a local authority under the provisions of the Housing Act 1985

The standard form of instruction[1] should be used. Generally, the solicitors work to the expectation that the transaction will be completed within five months of the instruction. If there is a need for the transaction to be completed sooner than that, this should be pointed out in the form of instruction, along with the reasons. The solicitor will then inform the official receiver if completion within the shorter period is realistic.

1. MP6

28.137 Appointment of solicitors to deal with transfer of interest – solely owned or company property

Where the property is solely-owned or owned by a company in liquidation, the official receiver may instruct the solicitors under the property conveyancing scheme.

28.138 Appointment of solicitors where the standard form of instruction does not apply

The official receiver may instruct any solicitor to deal with a conveyance (rather than appointing under the property conveyancing scheme:

- where the property is in the sole name of the bankrupt
- where the property is not used for solely domestic purposes
- where planning permission for a non-domestic purpose has been applied for or granted
- where the property is subject to an uncompleted conveyancing transaction at the date of the bankruptcy order
- where the property is subject to a third party claim (other than in matrimonial/civil partnership proceedings made before the date of instruction; or
- where the property is a freehold reversion (see paragraph 28.181)
- where the purchaser is unable to provide the costs up-front
- where the official receiver is giving assistance to the sale by the mortgagee
- where the bankrupt and co-owner are selling the legal estate to a third party who is not the co-owner (see paragraph 28.142)
- where the bankrupt as sole-owner of the property is selling the legal estate to a third party (see paragraph 28.143)
- where there is some defect in title at the Land Registry affecting the property

The solicitors appointed under the property conveyancing scheme have indicated that they will be prepared to act on the official receiver's behalf in the sale of an interest in a solely owned property and the fee they charge for this work is likely to be constant. The solicitors may also be prepared to act in the sale of a company property.

28.139 Costs of appointed solicitors

The amount required by the solicitors engaged under the property conveyancing scheme is [Text redacted]. If these solicitors are appointed outside of the property conveyancing scheme then the costs are likely to be higher – [Text redacted].

If the solicitor is not being appointed under the property conveyancing scheme, it will be necessary to agree the costs prior to instruction.

The official receiver should seek to have the costs paid directly to the solicitors appointed by the proposed purchaser or their solicitors, so that the monies do not have to be handled by the official receiver.

The costs should be provided for by the purchaser, but may come from the sale proceeds (see paragraph 28.143). There should be a net benefit from the sale to the insolvent estate.

28.140 After-acquired property following transfer

Under the terms of the legislation it is possible for the trustee to claim a property interest that has been transferred (back) to a bankrupt by the official receiver if the transfer takes place before discharge[1].

It is considered to be inequitable for the official receiver to make such a claim. Once the property interest has been transferred, there is an understanding that the bankrupt is entitled to enjoy unhindered ownership of the property without the official receiver making a subsequent claim over it.

The exception to this is where it comes to the official receiver's attention that the transfer was funded by undeclared assets or undeclared income, or where the valuation was shown to be inaccurate. The property may then be claimed as after-acquired property.

1. Section 307

28.141 Sale of property instigated by bankrupt

The official receiver will encounter situations where a property sale has been instigated by the bankrupt, often having started prior to the order. The bankrupt may have various reasons for doing this – to limit a shortfall (particularly if the case is a surplus case), or through some personal need to move. The sale will usually be to an unconnected party with the bankrupt intending to leave the property (a 'common-or-garden' conveyance).

The action the official receiver should take will depend on whether the property is jointly-owned, or solely owned.

28.142 Sale of jointly-owned property

Where the bankrupt or joint-owner have instigated the sale, the official receiver need not become formally involved in the sale as the legal title remains with the joint-owners and they retain the power to convey the property.

The official receiver may give permission for the sale to proceed in the following terms:

- the sale is at market value

- no costs of sale will fall to the official receiver as trustee of the estate, particularly those of an abortive sale
- the consent of the charge holders has been obtained
- a copy completion statement is supplied to the official receiver, free of charge, upon the sale completing
- should there be any surplus of sale proceeds over and above that required to redeem the outstanding charges, the official receiver is notified immediately and the bankrupt's share of the surplus is forwarded to the official receiver

28.143 Sale of solely-owned property

Where the bankrupt, as sole-owner of a property, has instigated the sale, the sale will not be able to complete without the official receiver being joined in the sale in order to transfer the legal title (the title having vested in the trustee). Assuming that involvement in the sale is appropriate, it will be necessary for the official receiver to appoint solicitors to handle this process, depending on costs the official receiver can continue to instruct solicitors appointed by the bankrupt.

The costs of the conveyance can be met from the sale proceeds if there will be a demonstrable benefit to the estate. Otherwise the costs of appointing solicitors should be provided by the bankrupt or another third party, and the solicitor should not be instructed until those monies have been received.

28.144 Potential problems in the sale of solely-owned properties

In sales of property it is necessary for the vendor to give vacant possession of the property on completion. In the case of a solely-owned property the official receiver will be vendor. The difficulty for the official receiver is guaranteeing vacant possession. If vacant possession is then not given by the occupier (the bankrupt) on completion of the sale, the purchaser may then take action against the official receiver to enforce possession.

Solicitors instructed by the official receiver should be asked to take steps to minimise this risk such as:

- making it clear in the contract that the official receiver does not give vacant possession upon completion
- ensuring that the bankrupt signs the contract (this means that the bankrupt confirms contractually that the property is empty of chattels and people and that no-one else has the right to occupy, with the bankrupt then being in breach of contract if that is not the case)

- insisting that contracts are exchanged and completed simultaneously (which ensures that nothing happens between exchange and completion and gives the purchaser the opportunity to establish on the day of completion that the property is, in fact, empty before exchange
- advising that the purchaser must make their own enquiries as to whether the property is vacant

28.145 Official receiver to consider benefit to estate before agreeing to be joined in sale

As the steps outlined above will not necessarily entirely remove the risk of difficulties in the sale of a solely-owned property, the official receiver should be satisfied that there is a demonstrable benefit to the estate to justify being joined in the sale and taking on the risk. Such benefit might be to avoid repossession (and the associated costs) and therefore maintain an equity position in the property, or to limit the shortfall where there are other distributable assets in the case.

If there is no demonstrable benefit, matters may be allowed to take their course. In all likelihood this will result in the repossession of the property.

28.146 Property repossessed by mortgagee

Where the property has been repossessed by the mortgagee but has not yet been sold, the mortgagee should be put on notice of the official receiver's interest in any surplus sale proceeds, using the standard letter[1].

When the mortgagee obtains possession the official receiver should cancel any insurance the official receiver has obtained on the property and inform the charge-holder that the insurance has been cancelled.

Where the property has been taken into possession and sold, the official receiver should obtain a copy of the completion statement from the mortgagees and should claim the insolvent's share of any surplus following sale.

1. MP3

28.147 Sale by mortgagee

The mortgagee in possession has a duty to take reasonable care to ensure that the price at which the property is sold is the best price which could be achieved[1]. It is possible for the official receiver, as liquidator or trustee to apply to court to stop the sale of a property by a mortgagee, but this should not be considered unless there is compelling evidence that the sale is being conducted significantly under market value.

If the official receiver is requested by a secured creditor (or a receiver appointed by a secured creditor) to transfer or convey a property, the official receiver should charge the appropriate remuneration on a time and rate basis[2] and instruct solicitors to act in the sale. The official receiver should ensure that the chargeholder gives a written indemnity (and, if possible, a cash deposit) to cover all the expenses in connection with the sale.

1. Skipton Building Society v Bratley [2000] 3 WLR 1031; Barclays Bank plc v Kingston [2006] EWHC 533 QB

2. Insolvency Regulations 1994, regulation 35

28.148 Order for sale

The trustee has the power to apply to court for the sale of the insolvent's property[1]. It is not anticipated that the official receiver will make such applications but an application for possession and sale may be the most appropriate way to deal with the property interest.

1. Section 335A; schedule 4; schedule 5; Trusts of Land and Appointment of Trustees Act 1996

28.149 Considerations for the court when an application for sale of the family home is made

The court, when considering an application for the sale of the bankrupt's family home[1], will have regard to:

- the interests of the bankrupt's creditors
- the conduct of the spouse, civil partner, former spouse or former civil partner
- the needs and financial resources of the spouse, civil partner, former spouse or former civil partner
- the needs of any children; and
- all the circumstances of the case other than the needs of the bankrupt

In the year following the bankruptcy the court will be unlikely to make an order of possession and sale having regard to the needs of the family. After one year has passed the court assumes that, unless there are exceptional circumstances, the interests of the bankrupt's creditors outweigh all other considerations, and the order will be given. The rights of the creditors are also considered paramount to any matrimonial or civil partnership proceedings home rights[2], and to the rights of occupation of the bankrupt note[3].

1. Section 335A

2. section 336; Re Ruiz [2011] EWCA Civ 1646

3. section 337

28.150 Exceptional circumstances which might prevail over the interests of the creditors

The courts have largely taken a narrow view over what might constitute an exceptional circumstance such that the rights of the bankrupt and family outweigh the rights of the creditors beyond one year.

Family hardship caused by the bankruptcy is not considered an exceptional circumstance. The hardship suffered by a spouse and children of a bankrupt when the family home is taken is deemed distressing on the parties concerned, but not exceptional[1]. Exceptional circumstances have been found to be present where there is illness[2], including mental illness[3]. The need for the bankrupt's wife to care for her terminally ill husband has also been held by the court to be an exceptional circumstance[4]. Exceptional circumstances were also found where a bankrupt's spouse is disabled and in poor health. The court may make an order postponing the sale of the property until an ill/disabled person has died or chosen to leave the property[5]. In a case concerning a property in which a disabled child was resident, the court delayed the sale for a period of three years[6]. Recent case law has emphasised that it is for the family, not the trustee, to show "exceptional circumstances" which must be supported by verifiable evidence[7].

1. Re Citro (a bankrupt) [1991] Ch 142

2. Judd v Brown (2000) P&CR 491

3. Re Raval [1998] BPIR 389

4. Re Bremner [1999] BPIR 185

5. Claughton v Charalambous [1998] BPIR 558

6. Brittain v Haghighat [2010] EWCA Civ 1521

7. Pickard and another (Joint Trustees in Bankruptcy of Constable) v Constable [2017] EWHC 2475 (Ch)

28.151 Considerations under the Human Rights Act

The court has held that the protections afforded under the Act mean that the power of the trustee to seek an order for sale of a property are not at odds with the protection of family rights available under the Human Rights Act[1], unless there is a (very) late application for an order for sale, in which case the court will consider the merits of the application[2].

1. Ford v Alexander [2012] EWHC 266 (Ch)

2. Official Receiver for Northern Ireland v O'Brien [2012] NICh 12 BPIR 826

28.152 Matrimonial or civil partnership 'home rights'

The term 'home rights' relates to legislative provisions[1] providing that, where one spouse or civil partner has no 'legal' right (as owner, for example) to occupy the property, but is nevertheless in occupation, they have the right not to be evicted from the property except by order of court.

Such home rights may also apply to the children of the bankrupt, in certain circumstances. Co-habitants who are not spouses or civil partners generally do not have these rights unless there is an occupation order in force.

Any home rights are binding on the trustee and such rights apply to all property which the bankrupt's spouse/civil partner was entitled to occupy the day before the petition was presented. The home rights give the spouse/civil partner and/or children an effective charge over the bankrupt's interest and an order of court will be required to evict them prior to any sale.

Home rights are only likely to cause difficulty where the official receiver is dealing with the forced sale of a bankrupt's property.

1. Family Law Act 1996 sections 30 to 63

28.153 Council tax liability where property taken into possession by official receiver

Where a property is unoccupied, it is generally the legal owner of the property that is liable for the council tax. A property is however exempt from the council tax provisions where the liable person is a trustee in bankruptcy in possession[1]. These exemptions apply even where the trustee is jointly liable with another, but do not apply to a liquidator in possession, with the liability remaining with the company.

1. Council Tax (Exempt Dwellings) Order 1992, article 3

28.154 Conveyance of property

A contract for the sale or other disposition of property must be in writing and signed by both parties[1].

1. Law of Property (Miscellaneous Provisions) Act 1989, section 2

28.155 Conveyance of a company property

As liquidator, the official receiver has the power to convey company property[1]. Where the company has a company seal, it may be used when executing the conveyance, assuming it has been recovered. Where there is no seal the official receiver is still able to execute a conveyance if it is delivered as a deed[2]. Guidance on the completion of conveyance by deed is produced by the Land Registry[3] and available on GOV.UK.

1. schedule 4, paragraph 6

2. Companies Act 2006, section 46(1)

3. Practice guide 8: execution of deeds

28.156 Conveyance where bankrupt as joint owner absent

Occasionally, if the whereabouts of a bankrupt are unknown and the joint-owner wishes to sell the property, they may request that the official receiver ‘stand in the shoes’ of the absent bankrupt for the purposes of the conveyance. The legislation provides that the court can make an order to facilitate this[1]. The joint beneficial owner, as trustee for sale, has the power to appoint a replacement trustee in court, instead of applying for such an order.

The official receiver should not proceed with such a conveyance without legal advice, the costs of which should be provided by the joint-owner. The official receiver should also ensure that the bankrupt’s beneficial interest in the property is accounted for in the prospective sale.

1. Trustee Act 1925, section 36 and section 41

28.157 Cancellation of insurance on completion of sale

On completion of the conveyance the official receiver should cancel any insurance the official receiver has obtained on the property should be cancelled within 5 working days of completion.

28.158 Corporation tax and capital gains tax

Corporation tax is payable in relation to any profit derived from the sale of company property. It is payable as an expense of the liquidation whether the property is sold by the liquidator, secured creditor or receiver[1].

In bankruptcy where a property that is not the family home is sold, there may be a liability for capital gains tax. Generally, this will apply where the trustee is selling a bankrupt's commercial property, investment property or second/holiday home, but it is equally payable as an expense of the estate if the property is sold by the trustee, secured creditor or receiver[2]. A liability for capital gains tax is calculated as a percentage of the profit achieved on the sale. Further information is available on GOV.UK[3].

1. Rule 7.108(4)(p)

2. rule 10.149(q); Re McMeekin (a bankrupt) [1974] STC 429

3. "Tax when you sell property".

Dealing with leasehold properties (leasehold enfranchisement)

28.159 Overview

Qualifying tenants have a right of first refusal on relevant disposals by landlords[1]. What follows is an overview of the relevant provisions in order to bring them to the attention of the official receiver but legal or professional advice should be obtained when consideration is given to making a "relevant disposal".

This guidance does not apply to assured or assured shorthold tenancies. Guidance on dealing with tenanted properties where the property is let under an assured tenancy or an assured shorthold tenancy can be found in chapters 29 (solely-owned) and 30 (jointly-owned).

The provisions will most likely impact on the official receiver who holds the freehold reversion of a block of residential flats.

1. Landlord and Tenant Act 1987, part 1

28.160 Applicable premises

The provisions apply in relation to premises consisting of the whole or part of a building which contains two or more flats (see paragraph 28.161) held by qualifying

tenants (see paragraph 28.162) who hold more than 50% of the total number of flats contained in the premises[1].

The provisions do not apply where more than 50% of the internal floor area of the premises is occupied, or is intended to be occupied, otherwise than for residential purposes[2].

1. Landlord and Tenant Act 1987, section 1(2)

2. Landlord and Tenant Act 1987, section 1(3)

28.161 Definition of a flat

For the purposes of these provisions, a ‘flat’ is defined as a separate set of premises, whether or not on the same floor, which forms part of a building, is divided horizontally from some other part of that building and is constructed or adapted for use for the purposes of a dwelling[1].

1. Landlord and Tenant Act 1987, section 60(1)

28.162 Qualifying tenant

The provisions apply where the tenant is a company or individual holding a tenancy (including a sub-tenancy or statutory tenancy), but not a protected short-hold tenant, business tenant, service tenant, an assured tenant, a tenant in relation to their employment or an assured agricultural tenancy. There are further qualifications expressed in the legislation[1].

1. Landlord and Tenant Act 1987, section 3

28.163 Relevant disposal

A relevant disposal is a disposal by a landlord of any estate or interest (legal or equitable) in any applicable premises (see paragraph 28.160) whether by the creation or the transfer of a estate or interest[1]. Certain disposals are excluded from this definition.

1. Landlord and Tenant Act 1987, sections 3 and 4

28.164 Excluded disposals

Certain disposals are excluded from the provisions described, and it would not therefore be necessary to give the tenants the right of first refusal. In all cases, the official receiver should carefully consider the specific criteria set out in the legislation[1] before deciding that a disposal is excluded.

The main exclusions, which are most likely to be relied upon by the official receiver, are:

- a disposal by one corporate body to another, which has been an associated company for at least two years. A corporate body includes limited companies, limited liability partnerships, and friendly, industrial and provident societies
- a disposal consisting of the transfer of an estate or interest in land held on trust for any person where the disposal is made in connection with the appointment of a new trustee or discharge of any trustee
- a disposal being the transfer by two or more persons who are members of the same family either to fewer of their number, or to a different combination of members of the family (but one that includes at least one of the transferors)
- a disposal consisting of the surrender of a tenancy in pursuance of any covenant, condition or agreement contained in it
- a disposal to the Crown

It will be noted from the above that a disposal to a joint owner is not one of the excluded disposals, unless under the conditions outlined at the third bullet point above.

The vesting of property in the trustee or (the less likely vesting of a property in a liquidator) is not considered to be a relevant disposal for the purposes of this provisions.

1. Landlord and Tenant Act 1987, section 4(2)

28.165 Disclaimer

It is strongly arguable that a disclaimer is not a ‘relevant disposal’ of an interest in a property. Upon disclaimer of a solely-owned freehold property, the legal estate, in the absence of a vesting order, reverts to the Crown. A disposal to the Crown is excluded from the definition of relevant disposals. Where the property is jointly-owned by the insolvent, the official receiver may only disclaim the beneficial interest in the property and there is therefore no disposal of the legal title as it remains with the joint owners.

28.166 Applicable landlords

The provisions apply to all landlords of applicable premises except where the landlord / lessor:

- is not the immediate landlord of the tenant or where the landlord would not be entitled to the premises in the case of a statutory tenancy[1]. This is the only provision likely to apply to the official receiver

- occupies, as their primary residence, a flat in a building not purpose built as a block of flats and has resided there for at least 12 months[2]
- is one of certain public bodies and housing associations[3]

1. Landlord and Tenant Act 1987 section 2(1)

2. Landlord and Tenant Act 1987 section 58(2)

3. Landlord and Tenant Act 1987 section 58(1)

28.167 Notice to the tenants

Assuming that all the conditions outlined above are met, it will be necessary for the official receiver wishing to make a relevant disposal of the property to instruct solicitors to prepare and serve an ‘offer notice’ giving the tenants first refusal. The offer notice must comply with the requirements of the legislation. Primarily these requirements are for the landlord to describe the property and the terms of the offer (including the requested consideration), and to give a deadline in which to respond[1] . Although not obliged to use the service, agents WH Breading and Son Ltd (see paragraph 28.181) offer a national service to dispose of a freehold reversions, complying with all aspects of the legislation.

1. Landlord and Tenant Act 1987 sections 5A to 5E

28.168 Official receiver unable to serve all tenants

Where the official receiver is unable to serve the offer notice on all the tenants, the official receiver will be considered to have met this obligation if:

- the official receiver has served notice on not less than 90% of the qualifying tenants[1], or
- where the qualifying tenants number less than ten, the official receiver has served notice on all but one of them[2]

1. Landlord and Tenant Act 1987 section 5(5)(a)

2. Landlord and Tenant Act 1987 section 5(5)(b)

28.169 Response to offer notice

The requisite majority of the qualifying tenants may serve notice on the landlord that they accept the offer to sell the insolvent’s interest in the property to them (referred to as an ‘acceptance notice’). The tenants are then required to nominate a person (the ‘nominated person’) to acquire the interest within the period specified in the offer notice. The interest can be disposed of only to that nominated person[1].

The tenants must be allowed at least two months, from the date of the notice, in which to accept the offer to dispose of the property to them, and a further period of at least two months within which to nominate a person to acquire the property. The time limit will run from the date of the last notice to be served[2].

1. Landlord and Tenant Act 1987 sections 6 and 8

2. Landlord and Tenant Act 1987 sections 5(4), 5A and 6

28.170 No response received to offer notice

If an acceptance notice is not received within the specified period the insolvent's interest may be sold to any other party, or otherwise disposed of, within 12 months following the expiry of that notice.

Any sale may only be for a consideration of at least the amount shown in the offer notice and on the terms corresponding to those specified in the offer notice. If a lower consideration is to be accepted, then it will be necessary to recommence the procedure by serving new notices on the tenants to include details of the revised consideration/terms[1].

1. Landlord and Tenant Act 1987 section 7

28.171 Notice of withdrawal

At any time after the acceptance notice and before a binding contract has been entered into, the tenants, via the nominated person may serve a 'notice of withdrawal'. Similarly, the official receiver, as landlord, may serve a notice of withdrawal[1].

Where the nominated person serves the notice of withdrawal, the effect is the same as if no offer of acceptance had been made, except that the official receiver would have 12 months from the date of the service of the withdrawal notice in which to dispose of the interest.

Where the official receiver serves a notice of withdrawal, the official receiver is not entitled to dispose of the interest during the 12 months beginning with the date of the withdrawal notice.

1. Landlord and Tenant Act 1987 section 9A and 9B

28.172 Costs on withdrawal

Where a notice of withdrawal is served within four weeks of the appointment of the nominated person, there will be no liability to pay the other party's costs.

If the notice is served after that initial four week period, the party serving it shall be liable for the other party's costs from the end of the four week period to the service of the notice of withdrawal[1].

1. Landlord and Tenant Act 1987 sections 9A and 9B

28.173 Enquiry notices and purchase notices served upon the official receiver

The official receiver may be dealing with a property that has been purchased by the insolvent in circumstances where the person from whom the insolvent purchased the property did not fulfil the obligations to the tenants.

In such a case, the tenants may serve an enquiry notice on the official receiver, the purpose of which is to establish details of that earlier transaction. The official receiver should reply to such a notice within one month of receipt with such details of the transaction as are known[1].

Following the enquiry notice, the tenants may enforce their right to take advantage of the contract of purchase as if the tenants were the original purchaser. Where there was no contractual disposal, the tenants may serve a 'purchase notice' requiring disposal of the property to a person or persons nominated by a requisite majority of the tenants on the same terms as the insolvent acquired the property[2].

1. Landlord and Tenant Act 1987 section 11A

2. Landlord and Tenant Act 1987 sections 12A and 12B

28.174 Action where tenants attempt to force right to purchase

Where the official receiver receives notice that the tenants are seeking to enforce their right to purchase it is likely that legal advice will be required if the property has a value to the estate.

28.175 Power of tenants to seek information from landlord

In addition to the power of tenants to seek information relating to a previous sale of a property, they also have the power to enquire into a landlord's intentions and, perhaps, force the landlord to sell the freehold or grant a new lease[1].

Where the insolvent's interest is in a property which is wholly or mainly residential and contains two or more flats, a qualifying tenant (which is essentially a tenant of a residential property with a long lease) has the power to serve notices on the official receiver requiring that certain actions are carried out.

1. Leasehold Reform, Housing and Urban Development Act 1993, sections 3, 5 and 7

28.176 Type of action that can be requested by tenant

Tenants have the power to request the following from the official receiver, as landlord, by notice[1]:

- information about the insolvent's interest in the property, including sight of documents relating to the lease
- to exercise their right to purchase the insolvent's freehold interest (known as the 'right of (collective) enfranchisement')
- to acquire a new lease

The official receiver, as landlord, is required to respond to requests for information about the insolvent's interest in the property within 28 days. Requests to exercise a right of enfranchisement or acquire a new lease must be responded to within two months (or longer if allowed in the notice)

1. Leasehold Reform, Housing and Urban Development Act 1993, sections 11, 13 and 42

28.177 Action where notice served and official receiver not dealing with property

Where a notice has been served by a tenant and someone other than the official receiver is dealing with the property (for example, a receiver has been appointed, or an insolvency practitioner is trustee or liquidator), the official receiver should request that the tenant serve the notice on the person with responsibility for the property.

Where the notice was served on the official receiver prior to handover of the estate, the attention of the insolvency practitioner should be specifically drawn to it in the handover record[1].

1. IPROH

28.178 Action where notice served requesting information

Where the official receiver receives a notice requesting information, wherever possible, the information should be provided within the applicable time limit. Where the official receiver becomes aware that such a notice was served upon the insolvent, steps should be taken to respond within the time period remaining, but certainly within the same time scale starting from the date the official receiver became aware of the notice.

28.179 Action where notice received requesting enfranchisement or requesting a new lease

Where the official receiver receives a notice requesting enfranchisement (often known as the 'initial notice') or, a notice requesting a new lease, it will be necessary for the official receiver to consider whether a right to enfranchisement or a right to a new lease exists. If so, the official receiver will have to deal with the transfer of the freehold to the tenants or the grant of the lease, including negotiating the consideration.

Given the technical nature of the legislation in this regard, it is very likely that it will be appropriate for the official receiver to seek legal advice, requesting that the tenants provide the costs.

28.180 Further guidance

Further guidance on the aspects of leasehold property can be found on the LEASE website. LEASE is governed by a board appointed by the Secretary of State for the Ministry of Housing, Communities & Local Government.

28.181 Sale of freehold reversion – service provider

WH Breading and Son Ltd offer a national service to dispose of a freehold reversion. The official receiver is not obliged to use their services but the firm will:

- check the payment of ground rents and, where appropriate, issue invoices to recover amounts due
- arrange sufficient insurance cover
- determine a value for the freehold and issue the appropriate notices to leaseholders
- negotiate the sale
- instruct solicitors

- deal with all enquiries from leaseholders, etc.

For instruction, WH Breading and Son Ltd require a copy of the land register extract with, if possible, one of the leases.

Sale and rent back schemes

28.182 Introduction

Sale and rent back schemes (sometimes called sale and lease-back schemes) are commercially operated schemes designed to allow a homeowner to sell their property but remain living in it by entering into a rental agreement with the purchaser. The benefit to the homeowner is that there may be a release of equity from the property and/or a lowering of the monthly accommodation expenses (where the rent charged is lower than the mortgage) without having to leave the property.

The similar public sector Mortgage to Rent scheme part of the Mortgage Rescue Scheme was discontinued in March 2014.

28.183 Regulation of the sector

Due to concerns about the unregulated nature of the sale and rent back sector, and concerns about the way the schemes were marketed and operated, the Financial Services Authority (FSA) has regulated the sector since 1 July 2009.

Regulation requires the firm offering the sale and rent back scheme to be authorised to do so by the FSA. Among the rules relating to authorisation, the firm has to ensure that the valuer of the property owes a duty of care to the homeowner, resulting in a ‘fair’ valuation. The firm also has to ensure that they help provide security of tenure.In particular, giving a tenancy of at lease five years, with no unfair eviction ‘triggers’.

28.184 Challenging a sale and rent back agreement

It is possible that a sale and rent back agreement may be challenged as a transaction at an undervalue (see chapter 31) or, less likely, a transaction defrauding creditors, particularly if the property was transferred to the sale and rent back company under market value and with no discernible benefit to the bankrupt (such as a notably lower monthly accommodation cost). It is probable that any agreement

entered into after regulation of the sector (1 July 2009) will have provided for a sale at market value.

The circumstances of the sale may be relevant if the official receiver considers the bankrupt's conduct to merit a bankruptcy restriction order (see Enforcement Investigation Guide, chapter 69, part 6).

28.185 Enquiries to be made regarding a sale and rent back agreement

Where the bankrupt enters into a sale and rent back agreement a check should be made that the firm who arranged the scheme was authorised by the FSA to do so. This can be achieved by searching the register on the FSA website. Assuming that the scheme was arranged by an authorised person, and subject to the following, there are unlikely to be any further concerns.

The official receiver should, however, obtain a copy of the valuation carried out prior to the sale of the property and, where there is doubt over the accuracy, check the valuation. This will assist in establishing if there might have been a transaction at an undervalue.

28.186 'Buy-back' clauses in the sale and rent back agreement

A sale and rent-back agreement will often include an option allowing the homeowner to re-purchase the property at a pre-agreed date for a fixed price. It is not unusual that the conditions of this 'buy-back' clause are such as to make exercising the right unattractive. That said, the right would be an asset in the bankruptcy estate and, where the agreement is not overturned, the right to re-purchase should be passed to the LTADT for possible exercising and consequent realisation of the property.

28.187 'Buy-back' clauses and the family home

A 'buy-back' clause in the family home is subject to the re-vesting provisions requiring that such property interests are dealt with within a three year period.

Where the clause is not exercisable until after the expiration of that period, the official receiver will need to apply to court for extension of that period (see paragraph 28.65).

28.188 Concerns to be reported to Trading Standards

Where the official receiver has concerns about the circumstances in which a bankrupt has entered into a sale and rent back scheme the details may be reported to the local Trading Standards department.

Reviewing and dealing with a property at review stage, including the obtaining of a charging order

28.189 Introduction

This guidance which follows is aimed at property which is a family home. Depending on local priorities, the general principles outlined in (but not necessarily the timescales described) may equally be applied to properties that are not the family home. The official receiver should not seek a charging order over a property that is not the family home.

28.190 Reviewing the property

Where it was not possible to deal with the bankrupt's interest in a property at the initial stages, and the property has been passed to the LTADT, it will be necessary, where the property is a family home for the official receiver to review the property in good time to ensure that the property interest is not lost due to the re-vesting of the bankrupt's interest. The review should include a review of the need for any insurance obtained by the official receiver on the property.

28.191 When to review the property

The official receiver must review the property two years and three months after:

- the date of the bankruptcy order, or
- the date that the official receiver, as trustee, first had knowledge of the bankrupt's interest in a family home (where there was a late notification)

unless:

- the mortgagee has realised their security in the property

- the bankrupt's interest in the property has been otherwise realised by the official receiver, or
- the bankrupt's interest in the property has ceased to vest in the official receiver, as trustee

28.192 Calculating the bankrupt's interest in the property

In order to assist in calculating the bankrupt's interest in the property, the official receiver should obtain:

- a valuation of the property
- statements from the chargeholders showing the current outstanding balance on the account, and
- details of any third party interest in the property

From this information, the official receiver should be able to establish the amount of the bankrupt's interest in the property. Any endowment policy (or similar) attached to the mortgage must also be taken into account when calculating the interest.

The guidance above in "Valuation of the property and establishing the insolvent's interest in the property" and "Realisation of the insolvent's interest" should be followed.

28.193 Applying for a charging order: a matter of last resort

A charging order should only be sought in relation to a bankrupt's qualifying family home and as a matter of last resort, and not until the avenues outlined above for dealing with the property have been attempted.

In summary, this means that the official receiver should only apply for a charging order where, for whatever reason, it is not possible to realise the bankrupt's interest in the property. This is likely to be in the following circumstances:

- the interest cannot be sold back to the bankrupt and is insufficient to attract the appointment of an insolvency practitioner, but is still above the prescribed minimum value of £1,000, taking into account any secured loans, charges, third party interests and anticipated costs of sale (see also paragraph 28.196); or
- the sale of the interest in the property might be prejudicial to the situation of others with an interest in the property, such an interest may be the result of co-ownership or occupation; and the associated litigation, and unpredictable costs, may deter sale

28.194 Power of official receiver to obtain a charging order

The process of obtaining a charging order is available to the trustee, under the provisions of the Act[1] and the Rules[2]. These provisions provide a way in which the trustee can 'deal' with the bankrupt's interest in the family home (by obtaining a charge in relation to that interest) where it has otherwise not been possible to do so within the three year period allowed.

The legislation provides that such a charge takes effect as if it were an equitable charge created by the debtor, enforceable by the same courts and in the same manner.

1. Section 313

2. Rule 10.167

28.195 Not possible to get charge if no longer family home

The wording of the legislation[1] provides that a qualifying family home must still be occupied as a family home at the date that the application for the charging order is made, and that the interest in the family home is comprised in the bankrupt's estate.

If the property has been vacated by the qualifying person (see paragraph 28.52) the official receiver will not therefore be able to obtain a charge, though the three year period to deal with the property still applies. In such a case, the official receiver should seek to have the period to deal with the property extended (see paragraph 28.65).

1. section 313(1)

28.196 When a charging order should be sought

Assuming that the case has reached the two years and three months point, the bankrupt's interest in the property is worth at least £5,000 (see paragraph 28.106) and it is not possible to attract an insolvency practitioner as trustee, or to sell the interest 'back' to the bankrupt, the official receiver should seek a charging order.

If the valuation at that date shows that the bankrupt's interest is below £5,000 the guidance as regards re-vesting should be followed (see paragraph 28.69).

28.197 Charging order - timing of application and hearing as regards re-vesting of the bankrupt's interest

It is necessary that the charging order application is made to the court within the three year period in order to prevent the property interest re-vesting. It is not necessary for the hearing of the charging order application to take place, or for the notices of the hearing to be served within the three year period, as once the application is made this effectively 'stops the clock'.

Since it is operational policy that, where necessary, the charging order process should be instigated soon after the date two years and three months after the bankruptcy order, it is anticipated that all stages of the charging order process will be competed before the expiration of the period allowed to deal with the family home.

28.198 Notice to bankrupt of charging order application

Assuming all possible avenues for dealing with the property interest have been tried and exhausted, the official receiver should proceed with the application for a charging order. This first stage is to issue a letter[1] to put the bankrupt on notice that a charging order application is to be made, and provides advice on the nature and effect of the charging order. This letter also advises the bankrupt of the 'charged value' in the property calculated by the official receiver.

The official receiver should wait for a period of seven days after sending this letter before applying to court for the charging order.

1. COLB

28.199 Format of charging order application to court

Any application for a charging order made by the official receiver against land in England and Wales should include the information required by the Rules[1]. The standard application does not include the reasons why the application is being sought and, where this information is sought by the Court it should, where possible, be supplied verbally at the hearing. This may include the provision of a reason as to why the bankrupt's interest in the family home has not been realised.

The application must include the amount of the bankrupt's interest over which the official receiver is seeking the charge (known as the 'charged value').

1. rule 10.171

28.200 Charged value of the property

The charged value of the property is, in essence, the amount of the bankrupt's interest which has vested in the official receiver, as trustee, and over which a charge is therefore sought. This information is required for the charging order application

The intention of the provisions in this regard is that any increase in the bankrupt's interest in the property over time should be to the benefit of the bankrupt.

28.201 Inability to change charged value once charging order obtained

The charged value, as set out in the charging order application, is fixed at the date of the order imposing the charge[1]. It is unlikely that this can be circumvented by an application under the general power of the court to review an order[2], although this may be possible, and appropriate, where the official receiver is seeking to reduce a charged value obtained in error.

1. Charging Orders Act 1979

2. Section 375

28.202 Calculate whether the amount due to creditors and costs is greater than bankrupt's interest

It will be necessary to calculate whether the bankrupt's interest in the property is greater than the amount due to creditors and costs. The calculation to establish the amount of the unsecured creditors and costs is as follows:

Unsecured creditors total (£)	
Plus (+)	Interest at (currently) 8%[1] to the date of the application
Plus (+)	Official receiver's costs including fees and distribution costs
Plus (+)	Petition costs

Equals (=)	Total creditors and costs (£a)

This figure should be compared with the amount of the bankrupt's interest to establish whether or not the bankrupt's interest is greater than the total unsecured creditors and costs. It will not be necessary to undertake this calculation if one figure is clearly higher than the other.

If the bankrupt's interest is greater than the unsecured creditors and costs, the advice at paragraph 28.204 be followed to arrive at the charged value. Otherwise, the calculation in paragraph 28.205 should be used for the charged value.

1. Judgments Act 1838, section 17

28.203 Calculation of bankrupt's interest or 'charged value' in the property

The Rules [1]provide how the charged value is to be calculated. Legal advice has been obtained on the order of deduction, as follows:

Value of property (£x)	
Minus (-)	Costs of sale (currently estimated at 3% of £x)
Minus (-)	Loans or other charges secured on property including those obtained post-bankruptcy for post-bankruptcy debts
Minus (-)	Value of third party interests
Equals (=)	Value of bankrupt's interest at the date of the charging order (£y) – to which interest and costs should be added to calculate total due under charge

This calculation should form part of the application for the charging order, to which should be added a calculation for interest and charges. There is a different calculation to be used where the bankrupt's interest is greater than the unsecured creditors and costs (see paragraph 28.205).

1. Rule 10.171

28.204 Interest to be added to 'charged value'

To arrive at the final amount due under the charge, interest and charges need to be added to the 'charged value'. The interest is only calculated when the charge is

realised; nevertheless the application for the charging order should include details as follows:

Value of bankrupt's interest at the date of the charging order (£y)	
Plus (+)	Simple interest on that amount at the rate of (currently) 8% per annum[1].
Plus (+)	The costs of making the application (such as Land Registry fees, court application fee, travel costs for attending the hearing)

1. Judgments Act 1838 section 17

28.205 Calculation of bankrupt's interest or 'charged value' in the property: value of charge more than unsecured liabilities.

The legislation provides that the charging order should be limited to the amount of the unsecured debts, plus interest and charges[1]. The calculation for the 'charged interest' where the amount of the bankrupt's interest exceeds the unsecured liabilities) is as follows:

£x being the amount owing to unsecured creditors at the date of the application	
Plus (+)	All other amounts which are payable otherwise than to the bankrupt out of the estate (such as the bankruptcy expenses and statutory interest)
Plus (+)	Simple interest on that amount at the rate of (currently) 8% per annum[2].
Plus (+)	The costs of making the application (such as Land Registry fees, court application fee, travel costs for attending the hearing)
Equals (=)	The charged interest (£z)

1. section 313(2)

2. Judgments Act 1838 section 17

28.206 Allowance for sale costs

The calculations to establish the charged interest in the property requires the inclusion of a figure representing the estimated cost of realising the property[1]. Indications are that in matrimonial and similar proceedings, courts allow 3% of the property value for the costs of sale. That figure should be used in making the application, where required. It is open to the court to apply a different figure if it deems it appropriate.

1. Rule 10.171

28.207 Filing of the application for a charging order

The application for the charging order should be filed at court together with sufficient additional copies (to be sealed and returned by the court) for each of the parties on whom the application is to be served and a copy for the official receiver's (electronic) file. The court will notify the official receiver of the hearing date.

28.208 Service of a charging order application

The sealed copy of the charging order application should be served on the following, using the standard covering letter[1].

- any spouse or former spouse or civil partner or former civil partner of the bankrupt having or claiming to have an interest in the property
- any other person appearing to have an interest in the property; and
- such other persons as the court may direct

A certificate of service[2] should be completed and filed at court for every party who has been served the application.

1. CONA

2. COACERT

28.209 Time limit

The notice of the application for a charging order should be served a minimum of 14 days before the hearing[1].

1. Rule 12.9

28.210 Certificate of service

A certificate of service[1] should be completed for every party who has been served with the application for the charging order. Once the certificate of service has been completed, a copy should be filed at court.

1. Court form N215

28.211 Attendance at hearing of application for charging order

In the vast majority of cases, it will be a representative of the official receiver that is attached to the court (rather than the LTADT) who will have to attend the hearing of the application for the charging order. Once the application has been issued and served by the LTADT, the local official receiver should be notified of the hearing date and asked to access the relevant papers in the ISCIS fileplan.

28.212 Action to take where court questions reason for charging order

Where a judge enquires into the decision to pursue a charging order over an order for sale the explanation provided verbally at the hearing should include the following:

- proceedings for the possession and sale of a family home are costly in as much as they likely to be defended. In cases in which the OR is seeking a low value charging order there are insufficient funds, or the prospect of funds, in the bankruptcy estate to warrant such action to be in the creditors' best interests
- the vesting property interest has previously been offered for sale to persons connected with the property, who have declined to act on the matter or are unable to do so (to the official receiver's satisfaction)
- therefore, obtaining a charging order is the only remaining way of securing the trustee's interest in the property

Where the official receiver is seeking a charging order in a case with significant equity, which should be rare, such that a possession and sale might be economic, there are usually other reasons for not doing so specific to the case and these will be addressed on an individual basis in the report or briefing note.

If it is considered that the facts of the application merit such an explanation, and one is not provided, then the official receiver should raise this with the National Charging Order team at the LTADT.

28.213 Registration of the charging order

The attainment of the charging order is, on its own, insufficient to protect the creditors' interest in the property, as some form of registration is necessary to give notice to potential purchasers that the charge must be dealt with. In effect this will ensure that a party is unable to deal with the property without first discharging the debt to the bankruptcy estate secured by the charge.

28.214 Registration of charging orders in relation to registered land

Registration of the charge at the Land Registry is achieved by submission of form RX1 for a jointly owned property or form AN1 for a solely owned property.

The fee for the registration depends on the charged value. Details of registration fees can be found on GOV.UK

28.215 Removing the bankruptcy restriction

The official receiver should make application to the Land Registry, on form RX4 (jointly-owned) or RX3 (solely-owned) for the withdrawal of the bankruptcy restriction. The RX4 or RX3 should be accompanied by a certified copy of the charging order and certified copies of the bankruptcy order and evidence of the trustee's appointment. There is no fee for such applications.

Additionally, If the official receiver had previously placed a caution on the property, this should be withdrawn when the charge is registered. This is achieved by submission of form WCT. There is a fee for the withdrawal of a caution.

28.216 Cancellation of insurance

After obtaining the charging order the official receiver should ensure that any insurance (including public liability insurance) over the bankrupt's interest in the property is cancelled.

28.217 Registration of charging orders in relation to unregistered land (solely owned)

On the making of a charging order against solely owned unregistered land, the official receiver should lodge an application to the Land Charges Department for the entry of the charging order in the Register of Writs and Orders[1]. This is achieved by submission of form K4.

This registration will last for five years, but should be renewed for successive periods of five years note using form K7, as appropriate.

The fee for each of these forms is £1 per name against which the charge is to be registered.

In addition to registering the charge in this way, the official receiver should write to any mortgagee or chargeholder who has possession of the deeds asking that the deeds be endorsed with details of the charging order.

1. Land Charges Act 1972 section 6

28.218 Registration of charging orders in relation to unregistered land (jointly owned)

Where a jointly owned property is unregistered it will not be possible to protect the charging order by registration[1]. This is because the charge is against the bankrupt's beneficial interest in the land, and not the land itself.

Instead, a copy of the charging order should be sent to all interested parties (especially any chargeholder holding the deeds) with a request that the official receiver's interest in the unregistered land is noted and acknowledged.

1. Perry v Phoenix Assurance plc [1988] 3 All ER 60

28.219 Charging orders and limitation

Legislation provides that no action can be taken to recover a sum of money after the expiration of 12 years from the date at which the right to receive the money accrued[1].

The court has considered the effect of this provision as regards charging orders obtained under the Act and has held that the 'right to receive' the money does not accrue until there is an order for the sale of the property[2]. It is therefore irrelevant how much time passes after the charge is obtained before it is realised; the twelve year period begins with an order for sale of the property (which may, of course, be obtained by one of the other chargeholders).

It is reasonable to assume that the principle that monies must be recovered within 12 years of an order for sale would apply to properties sold voluntarily.

1. Limitation Act 1980 section 20

2. Gotham v Doodes [2007] 1 WLR 86

28.220 Dealing with notice received from Land Registry of attempts to deal with property

Whenever the official receiver receives notice from the Land Registry that attempts are being made to deal with a property subject to a charging order, the official receiver should, as a matter of urgency, contact all parties concerned to ensure that they are informed (or reminded) of the amount required to satisfy the charging order. The official receiver should ensure that in all cases where a charging order has been obtained steps are taken to deal with the bankrupt's interest as soon as any change (such as an imminent sale or repossession) occurs.

The official receiver should be particularly concerned to establish if:

- another chargeholder has obtained an order for sale, or
- the legal owners of the property (the former bankrupt and/or joint owners) have sold the property

as these events would trigger the commencement of the 12 year period to recover the monies under the charge.

28.221 Reviewing unregistered property after charge placed

Where a property is unregistered, the official receiver will not be afforded the luxury of being notified in advance of any dealings in the property, as with a registered property.

The official receiver should therefore review an unregistered property at least once every five years to verify that there have been no dealings in relation to it.

28.222 Applications to vary or discharge the charging order

Any person interested (that is having a proprietary interest) in any property to which a charging order relates is able, at any time, to apply for an order discharging or varying the charging order[1]. Any such application should be resisted by the official receiver in as much as it seeks to discharge the charging order without any commensurate payment into the estate, or similar. The court does not have the power to vary the charged value[2].

1. Charging Orders Act 1979 section 3(5)

2. Section 313(5)

28.223 Creditor obtaining a charging order post bankruptcy prior to the official receiver obtaining a charging order

Where a post-bankruptcy creditor obtains a charge over the official receiver's unprotected interest in a jointly owned property before the official receiver has placed a charge, that creditor will rank higher than the official receiver in the order of payment of funds from the realisation of the property.

In these circumstances, when establishing the value of the interest to be charged, that value would be net of the bankrupt's interest in the property at the date that the charging order is sought – that is, net of the amount due to the new (earlier) chargeholder.

If the new charge relates to a provable debt, it should be challenged under the provisions of the Act[1] which prohibit a creditor taking action against the property of a bankrupt.

1. Section 285(3)

Shared ownership property

28.224 Shared ownership housing

Shared ownership housing schemes are Government backed and assist qualifying individuals to purchase their own home. With a shared ownership property a long lease is purchased from a housing association (using a commercial mortgage if needed) usually for 99 years. The purchaser pays a premium for the lease which represents usually between 25 per cent and 75 per cent of the full value of the property, with the housing association owning the remaining share. The purchaser pays a sub-market rent for the remaining value. These are also known as part buy, part rent schemes.

28.225 Freehold title

Where a property is held on a shared ownership basis the freehold title will be held by the housing association.

28.226 Rights and responsibilities under a shared ownership scheme

An individual's rights and responsibilities in relation to a shared ownership property are detailed in the lease, as are those of the housing association as landlord.

28.227 Shared ownership housing – staircasing

After the purchase of the initial share in the property it is possible for an individual to buy further shares in the property under the terms of the lease, until the whole value of the property is owned. This is known as staircasing. The cost of the further share purchase will depend on how much the property is worth at the time the share is purchased.

Once 100% of the lease is owned the leasehold and freehold titles will be merged and the individual will own the property..

28.228 Shared ownership lease – assured tenancy

Even though the leases granted under shared ownership scheme are long leases it has been held[1] that they fall within the definition of an assured tenancy provided they are not excluded from being an assured tenancy by legislation.[2]

1. Richardson v Midland Heart Ltd [2008] L.& T.R.31]

2. Housing Act 1988, section 1; schedule 1

28.229 Assured tenancies – excluded from bankrupt's estate

Assured tenancies are excluded from a bankrupt's estate[1]. Where a shared ownership property has equity, the value of the bankrupt's interest in this equity will be lost to the bankrupt's estate unless the interest is claimed by the official receiver as trustee

1. Section 283(3A)(a)

28.230 Assessment of tenancy agreement

Before claiming the bankrupt's interest in the assured tenancy for the benefit of the bankrupt's estate the official receiver, as trustee, will need to carry out an assessment of the tenancy. The terms of the tenancy agreement need to be considered to confirm that the tenancy is an assured tenancy, by considering if any of the exclusions listed in the legislation apply.

28.231 Tenancy is excluded and is not an assured tenancy

If any of the exclusions in the legislation apply, the tenancy will not be an assured tenancy, but will be a common law tenancy. The terms of a common law tenancy agreement are still valid but such a tenancy is not governed by the Housing Act 1988. A common law tenancy will vest automatically in the official receiver as trustee, and consequently, there will be no requirement to claim the bankrupt's interest in the tenancy.

28.232 Claiming assured tenancy for the benefit of the bankrupt's estate

The bankrupt's interest in the assured tenancy can be claimed for the benefit of the estate by the official receiver, as trustee, where it is considered there is equity in the property which can be realised..

Written notice[1] must be served on the bankrupt in writing within 42 days beginning with the day on which the property or tenancy came to the knowledge of the trustee.[2]

Where a failure on the part of the bankrupt has, in some way, been a cause of the trustee's failure to serve the notice in time, the court may allow the service of the notice out of time.

Shared ownership training is available on the Insolvency Academy On-line Learning and Training Packages.

1. Section 308A

2. Section 309

28.233 Effect of claiming assured tenancy

Once the bankrupt has been served with the written notice the interest (jointly owned) or assured tenancy (solely owned) vests in the trustee as part of the bankrupt's estate and the trustee's title has relation back to the commencement of the bankruptcy i.e. the date of the bankruptcy order.

28.234 Disclaimer of assured tenancy claimed by trustee

Where the trustee claims an assured tenancy that is subsequently considered to be onerous, the official receiver will not be able to disclaim the property without permission of the court.

28.235 Bankrupt's interest in shared ownership property less than £1,000

Where the bankrupt's interest in the assured tenancy has a value of less than £1,000 (the amount on which the OR can obtain a charging order) and therefore has no value to the bankrupt's estate, the interest in the assured tenancy should not be claimed.

Where no claim is made for the assured tenancy and the tenancy is onerous, it will not be necessary to disclaim it as the tenancy will not vest in the official receiver as trustee.

28.236 Bankrupt's interest in shared ownership property greater than £1,000

Where the bankrupt's interest in the assured tenancy is greater than £1,000 consideration should be given to claiming the interest in the assured tenancy for the benefit of the bankrupt's estate.

28.237 Solely owned assured tenancy: claiming the bankrupt's interest

Where the official receiver as trustee claims a solely owned assured tenancy for the estate, the lease will vest in the official receiver. This will mean that the official receiver is liable to pay the rent due to the housing association under the terms of the lease as the official receiver will be an assignee of the lease by operation of law.

The official receiver can expect the bankrupt to maintain the rental payments to secure occupation of the property (see below) but the official receiver may become liable to pay the rent if the bankrupt defaults in making the rental payments to the housing association.

28.238 Solely owned assured tenancy: official receiver will be landlord

It is unclear whether the lease will cease to be an assured tenancy when the official receiver becomes an assignee on the lease. Whether or not the lease remains an assured tenancy or by default becomes a common law tenancy agreement, it is likely that by allowing the bankrupt to continue making the rental payments to the housing association the official receiver will be creating a sub tenancy on the property and consequently the official receiver will become the landlord of the bankrupt with all the usual obligations that are attached.

Sub letting of the property is usually against the terms of the lease agreement. It is likely the terms of the lease exist to prevent the leaseholder from profiting from renting the property which would go against the aims of the shared ownership housing initiative. It is considered that housing associations will not object to the granting of a sub-lease, taking into account the purpose of the insolvency legislation and the aims of the housing association to provide social housing.

28.239 Solely owned assured tenancy: whole picture to be considered

Before claiming the bankrupt's interest in the assured tenancy the official receiver should consider the whole picture, having regard to the bankrupt's capital value in the tenancy and the rent which is due to the housing association, which potentially may become payable as a bankruptcy expense, as a personal liability of the official receiver as trustee. Consideration will also need to be given to any costs likely to be incurred in respect of landlord responsibilities.

The greater the % of the capital value the bankrupt owns on the property the lower the rent payable to the housing association will be. The lower the rent is the lower the financial risk will be to the official receiver.

Many shared ownership properties have been owned for a considerable period of time and may have accrued a significant value worth realising, despite the fact that the bankrupt may not hold a significant proportion of the capital value. In such instances the official receiver may be able to find a local insolvency practitioner who specialises in this area and is prepared to take on such cases.

28.240 Solely owned assured tenancy: assessment of risk

Whilst there is a risk that, in claiming the lease, the official receiver will become liable for the rent payable to the housing association under the terms of the lease, the occupant (usually the bankrupt) is likely to be paying the rent to the housing association and the monthly mortgage repayments as the property is the bankrupt's family home. There is therefore likely to be a desire by the bankrupt to keep the home and to avoid repossession proceedings by either the housing association under the terms of the lease or the mortgage company under the terms of the mortgage deed.

This will afford the official receiver some protection. In effect this is no different to any family home being dealt with by the official receiver where the bankrupt will often continue to pay the mortgage and any ground rent or service charge due, in an attempt to secure their home. In the shared ownership scenario the bankrupt is likely to have a greater incentive to carry on paying the rent and the mortgage as the combined amount payable as a consequence of the shared ownership scheme is likely to be lower than that payable under a normal mortgage. It is considered that it is unlikely that the bankrupt will default on the rental payments to the housing association and therefore the official receiver's risk of becoming liable for the rent is considered to be minimal.

28.241 Solely owned assured tenancy: bankrupt continues to pay rent to housing association

Where the bankrupt continues to meet the rental payments (and any mortgage payments due) it is likely that the bankrupt will be able to remain living in the property and the official receiver can seek to deal with the interest in the property in normal way.

28.242 Solely owned assured tenancy: early application for a charging order

To remove any risk of liability to the official receiver, where the bankrupt's interest is greater than £1,000 but there is no willing purchaser who has made an offer to purchase the interest and no insolvency practitioner is prepared to accept an appointment as trustee, the official receiver should consider making an application to the court for a charging order as soon as possible after claiming the assured tenancy. Once the interest is converted into a charge the bankrupt's interest will cease to be part of the estate and will (re)vest in the bankrupt. On-going liability in respect of rent to the housing association and in respect of any landlord's duties will cease from the date of the charging order.

28.243 Jointly owned assured tenancy: claiming the bankrupt's beneficial interest

The position is simpler in the case of jointly owned shared ownership assured tenancy. The effect of the trustee giving notice will be to vest only the bankrupt's beneficial interest in the trustee. The joint tenancy would continue to be held by the legal owners (the bankrupt and the joint owner) on a trust of land[1]. Therefore where the official receiver as trustee claims the bankrupt's beneficial interest the official receiver will not become the joint leaseholder with the solvent owner and the trustee will not become liable for the rent on the property as with a solely owned assured tenancy. This is the case even if both joint owners are bankrupt.

1. Trusts of Land and Appointment of Trustees Act 1996

28.244 Action to take following issue of notice claiming the assured tenancy

Once the notice has been served on the bankrupt and the assured tenancy has vested in the official receiver as trustee, the official receiver should take such action as is necessary to protect and realise the property including, where appropriate, the issue of letters to third parties such as the mortgage company. Where appropriate, the official receiver should seek to insure the property.

Essentially, once the assured tenancy forms part of the estate, the official receiver should deal with it as any other family home forming part of the estate. From this point in the process, there are no special procedures for dealing with the asset, and the information and guidance given elsewhere in this chapter should be followed.

28.245 Shared ownership and ISCIS

When entering a shared ownership property onto ISCIS it is important to record the assured tenancy as accurately as possible. The current screen used to record leasehold property does not allow users to record all the required information and therefore it is important to record the additional information on the relevant assets notes tab.

It is important to record the percentage of the value of the assured tenancy that is held by the bankrupt and any joint owner and the percentage held by the housing association. Any mortgage in respect of the assured tenancy will have been taken out by the bankrupt and any joint owner and should not be deducted from the housing association's percentage share of ownership.

Leased commercial property

28.246 Scope of this Part

This Part provides advice to assist in dealing with a commercial lease held by the insolvent. Such a lease is typically for a period of no more than 25 years and, generally, a monthly rent is paid.

Residential leasehold property would generally be characterised as being for an initial period of 99 years or more, with any rent being a ‘peppercorn’ (token) rent. Such properties can effectively be dealt with by the official receiver as freeholder, following the guidance elsewhere in this chapter.

The official receiver, after disposing of a commercial lease, either by assignment or formal surrender, or disclaimer, should arrange for the cancellation of any insurance. Where the lease is ended by the landlord taking action to obtain forfeiture the official receiver should cancel any insurance obtained by the estate within 5 working days.

28.247 Valuation of a commercial lease

The following factors should be taken into account when deciding whether a commercial lease has any value:

- Whether any premium was paid for the lease and, if so, how much.
- Whether it is a full repairing lease (where the tenant is responsible for all repairs) and what state of repair the building is in.
- The period of the lease remaining.
- When the next rent review is due.
- The level of any rent arrears.
- Whether the insolvent has made any improvements to the building.

It is likely that the official receiver will need professional assistance in valuing commercial leases. Such a valuation can generally be provided by the official receiver’s usual agents.

28.248 Realisation of a lease

Where the lease has value to the estate, taking into account the need to ensure that funds are available to discharge the liability for rent and any other expenses which will accrue as an expense in the insolvency, the official receiver should consider assigning the lease (subject to conditions therein).

It is likely to be necessary for the official receiver, as liquidator/trustee, to engage agents to market the lease. unless there is a willing purchaser introduced by the insolvent.

28.249 Liability for rent and expenses

Any action taken by the official receiver, as liquidator or trustee, to sell an interest in a lease may give rise to a liability for rent and other expenses relating to the property from the commencement of insolvency, as an expense of the insolvency, whether or not the sale completes[1]. Therefore the potential liability for rent and other dues must be taken into account when deciding if it is beneficial to the estate to sell the interest in such property.

1. Re Downer Enterprises Limited [1974] 1 WLR 1460; ABC Coupler and Engineering Co Limited [1970] 1 WLR 702

28.250 Assignment of a lease – comply with terms of lease

Before seeking to dispose of a lease, the official receiver should comply with the terms of the lease in its disposal. In particular, the official receiver should check the lease to confirm the following:

- That it does not contain a clause prohibiting an assignment.
- Whether any clause restricts the parties to whom the lease may be transferred.
- Whether the consent of the landlord to an assignment needs to be obtained.
- Whether a forfeiture clause exists so as to terminate the lease.

28.251 Acceptance of offer to be marked ‘subject to contract’

Where the official receiver accepts an offer to purchase the lease, any written acceptance (including e-mails) issued should be clearly marked ‘subject to contract’. Similarly, written communications offering an assignment should be marked ‘subject to contract’.

28.252 Landlord’s consent to the assignment

As outlined above, the official receiver should always comply with the terms of the lease in its disposal. The official receiver should obtain the necessary consent of the landlord before solicitors are instructed regarding the assignment.

28.253 Landlord refuses to consent to assignment

The landlord may be unwilling to grant consent where there is a proposed change of usage of the property, the landlord does not consider that the proposed assignee will be able to pay the rent or meet other obligations in the lease, or if he/she will be seriously disadvantaged by the assignment[1].

The landlord may not unreasonably withhold consent to the assignment or disposal of a lease[2] and must respond to a request for consent within a reasonable time[3]. These provisions apply to most leases, except certain agricultural and mining leases[4]. The landlord may seek to levy a charge to cover the administrative costs of providing consent. These costs (if any) should be established early in discussions.

Where a lease has a saleable value and the landlord will not consent, the official receiver should seek legal advice.

1. Norfolk Capital Group Limited v Kitway Limited [1976] 3 WLR 796; Bickel and others v Duke of Westminster [1977] QB 517

2. Landlord and Tenant Act 1927 section 19

3. Landlord and Tenant Act 1927 section 1(6)

4. Landlord and Tenant Act 1927 section 19(4)

28.254 Covenants to be included in the conveyance

Where a lease was originally granted before 1 January 1996[1], or where the insolvent is NOT the original lessee, the official receiver, through solicitors, should ensure that the purchaser convenants: ‘that (the purchaser), and all successors in title, will pay the rent and observe the other covenants under the lease and will keep the official receiver/the insolvency estate indemnified against any liability arising from a breach of those covenants.’

If the insolvent is a company and was the party to whom the lease was originally granted, the official receiver’s solicitors should also obtain from the landlord a written release for the company from any liability for breaches of the terms or covenants of the lease and, failing this, should obtain indemnity insurance in case a claim is made against the estate for future rent.

1. Landlord and Tenant (Covenants) Act 1995

28.255 ‘Informal’ surrender of a lease

A lease or tenancy may be surrendered by operation of law where the actions of both parties to the lease or tenancy make it clear that they intend the lease or tenancy to come to an end. Alternatively it may be relinquished by exchange of letters (sometimes referred to by the official receiver as an ‘informal surrender’ although in legal terms this is incorrect). Neither of these two options should be adopted by the official receiver, even with legal advice, because of the difficulties that can arise if all relevant matters (not just the liability for future rent) are not resolved prior to the ending of the lease or tenancy.

Instead, the official receiver should issue a disclaimer even when the landlord is prepared to accept possession by way of an informal surrender of premises. A disclaimer will result in a ‘clean-break’ of the estate’s interest in the property and will avoid any future problems in relation to contingent liabilities.

28.256 ‘Formal’ surrender of a lease - general

A ‘formal’ surrender of a lease is achieved by the parties to the lease negotiating terms to end the lease. Such a surrender may be beneficial to a landlord where it would put the landlord in the position to issue a fresh lease.

Normally, a disclaimer would be the appropriate way to bring to an end an interest in a lease that cannot be sold or assigned, but a formal surrender may be beneficial to the estate where:

- The landlord is willing to pay a consideration (and costs) for the surrender of the lease; or
- There is benefit to the estate in negotiating a reduction in the liabilities claimed by the landlord against the estate (this is likely to be appropriate only in surplus cases).

28.257 Surrender of a lease – matters to consider

A surrender of a lease should be by deed, signed by the official receiver, as liquidator or trustee, and also by the landlord.

The official receiver should engage solicitors to negotiate the terms of the surrender and to draft the deed, ensuring that sufficient funds are made available by the landlord to pay the solicitors’ costs.

28.258 Surrender of a lease – matters to consider where company has sub-let the property

Where the company or bankrupt has sub-let a leased property (and is therefore a landlord as well as a tenant), the surrender may be a disposal for which the tenant has a right of first refusal.

28.259 Forfeiture of lease

Forfeiture of a lease may occur where the terms of the lease have not been complied with, resulting in the loss or compulsory transfer of the lease to another.

The landlord's right to forfeit will be written into the lease, which may entitle the landlord to end the lease upon breach of a covenant or terms of the lease by the tenant. A lease may give the landlord a right of re-entry or forfeiture where the tenant/lessee has failed to pay charges which are properly due under the lease, or on the making of an insolvency order[1].

1. Roe d Hunter v Galliers (1787) 2 Term Rep 133

28.260 Procedure for forfeiture

To exercise the right of forfeiture following failure to pay charges, the landlord must meet all the legal requirements and obtain a court order. A court order will only be granted if the tenant/lessee has admitted they are liable to pay the amount, or it is determined by the court, a tribunal or by arbitration that the amount is due.

Before serving notice for forfeiture for rent arrears, the landlord may have to serve a formal demand or commence action for Commercial Rent Arrears Recovery ('CRAR' - previously known as levying distress) see chapter 12.

For breach of any other covenant, the landlord must serve notice specifying the breach, requiring it to be remedied if possible and requiring compensation. Only if the lessee/tenant fails to comply with that notice within a reasonable time can the landlord enforce his/her right of re-entry.

28.261 Relief from forfeiture

Where the official receiver is aware that the landlord has served notice to re-enter the property or forfeit the lease, and the lease is of value to the estate, they should consider applying to court for relief from forfeiture[1], which is available within one year of the insolvency order.

If the sole reason for forfeiture is non-payment of rent, the court will usually require that the arrears are paid before granting relief.

Relief from forfeiture is not available for certain types of occupation including furnished residential dwellings, public houses and agricultural land.

1. Law of Property Act 1925, section 146

28.262 Landlord taking action to forfeit after winding-up order – leave of court required

Leave of court will be necessary before a landlord can enforce the right to forfeiture[1], notifying the official receiver, as liquidator, of the proceedings. Where the official receiver is aware of the identity of any mortgagees, the official receiver should advise them of the proceedings, as a matter of courtesy.

Provided that the lease is of no value to the liquidation estate, the official receiver should not object to the application for leave, but should attend the hearing(s). This is important because monetary judgment may be entered against the company – in which case the official receiver should seek an undertaking that the order will not be enforced against the company without leave of court.

1. Section 130(2)

28.263 Landlord taking action to forfeit after bankruptcy order

If a landlord wishes to take action to forfeit a lease after the bankruptcy order, leave of court will usually be required. This is because forfeiture is deemed to be a remedy to determine the lease and not to enforce payment of the rent[1].

Leave of court is also required to enforce re-entry where the tenant has made a claim to acquire the freehold[2], or is participating in a claim to exercise a right of collective enfranchisement, or to acquire a new lease[3].

Provided that the lease is of no value to the bankruptcy estate, the official receiver should not object to the application for leave.

1. Section 285(1); Ezekiel v Orakpo [1977] QB 260

2. Leasehold Reform Act 1967

3. Leasehold Reform, Housing and Urban Development Act 1993