This guidance is tailored specifically for official receivers. It is discretionary and not designed for use by third parties. This version was the most up to date guidance available to official receivers as at 10 March 2020.

29. Solely owned tenanted property

Dealing with an insolvent's solely-owned property where the property has or had tenants

Annexes

Annex A – PowerPoint presentation of training provided by Technical Section in relation to tenanted properties

Annex B – Welsh solely owned tenanted properties transfer protocol

Chapter content

Mortgagees
Appointment of insolvency practitioner
Sale of the legal and beneficial interest
Eviction
Unusual circumstances

Form and letters available on ISCIS (formerly annexed to this chapter)

Note: To access the templates on ISCIS please use 'annex' as your search term in document production and include word documents in the search.

ORTPQ - Tenanted Property Questionnaire

Annex D – sole – letter to bankrupt

Annex E – sole – letter to tenant

Annex F – sole – letter to mortgagee

Annex G1 – sole – letter to insurance based deposit scheme

Annex G2 – sole – letter to custodial scheme deposit holder

Annex H1 – sole – letter of enquiry to letting agent

Annex H2 – sole – letter retaining or releasing letting agent

Annex J1 – sole – disclaimer letter to bankrupt

Annex J2 – sole – disclaimer letter to tenant

Not available on ISCIS

Annex H3 – solely owned – letter of instruction to OR’s agent

Abbreviations

AST – Assured shorthold tenancy agreement

IPA/O – Income payments agreement/order

HMO – House of multiple occupancy

BRO – Bankruptcy restriction order

Introduction

29.1 General

This chapter brings together advice and information relating to solely owned property of which the bankrupt is a landlord. The chapter does not intend to cover every possible scenario but does provide information relating to those situations that the official receiver is most likely to encounter. Unless stated otherwise, the tenancies discussed in this chapter are assured shorthold tenancies (see paragraph 29.16).

For solely owned tenanted properties in Wales please see paragraph 29.86.

This chapter deals with bankruptcy cases only, and does not specifically refer to company cases, although the guidance within will generally apply to such cases. See the section on unusual circumstances for some further information on company cases.

Guidance on dealing with commercial property owned by the bankrupt, or a company, is dealt with in chapter 28.

Guidance on dealing with the bankrupt's interest in property used as their own residence is given in chapter 28.

General information regarding tenanted properties

29.2 Introduction

This section deals specifically with properties let on an assured shorthold tenancy (AST), including those which have become statutory periodic ASTs (see paragraphs 29.16 to 29.18). Where reference is made to a tenancy, this should be assumed to be an AST unless otherwise stated. This section provides details of the information that should be obtained by the official receiver as trustee to enable a decision to be made on how to best deal with the property. Where the bankrupt is the landlord under a long lease rather than a tenancy, reference should be made to chapter 28 for guidance on how to deal with the property.

To assist in locating information in this section, it is broken down as follows:

- general information (paragraphs 29.3 – 29.11)
- types of tenancies (paragraphs 29.12 – 29.21)
- official receiver's duty of care (paragraphs 29.22 – 29.23)
- Rent Deposit Schemes – (paragraphs 29.24 -29.31)

29.3 Property letting is not a trade

The holding of property as a long term investment, including the renting out of that property, is treated as an investment business by HM Revenue and Customs rather than a trading business. In an investment business the property is held to either produce income in the form of rent, long-term capital growth or a combination of both. In a property trading business property, is acquired with the intention of being developed and sold for a quick profit, and the properties held are treated as stock. Where property is rented out, and the underlying intention is to hold them for the long-term, then it is generally accepted by HM Revenue and Customs that the business is one of investment rather than trade (see paragraphs from 29.112 for information on the tax treatment of rented property).

The resulting income or gain from an investment business is taxed differently to that of a trading business.

29.4 Property cannot be claimed as exempt

As the property used in the business is an 'investment' rather than a 'tool of the trade', it vests in the trustee of the bankruptcy estate and the exempt property provisions are not applicable[1]. Any other items used for the purposes of the business (for example, furniture in furnished rented property) cannot be claimed by the bankrupt as exempt property[1], as they are not required to meet a basic domestic need of the bankrupt or their family.

It can also be argued that the property is not 'necessary to the bankrupt for use personally', much in the same way as a business that provides equipment for hire. See chapter 24 for further information.

1. Section 283(2)

29.5 Tenancies held by bankrupt as landlord not excluded from the bankrupt's estate

Certain types of tenancy agreements are excluded from the bankrupt's estate by legislation[1]. These exemptions include the majority of tenancies that the official receiver is likely to encounter such as assured tenancies and secure tenancies (as

used by local councils and housing associations), and assured shorthold tenancies (as used by most private landlords), see chapter 24 for a full list.

The Insolvency Service has received advice that this exclusion is limited to where the tenancy is held by the bankrupt as a tenant, and not granted as a landlord. Chapter 28 provides guidance on dealing with tenancies where the bankrupt is the tenant.

1. Section 283(3A) and Section 308A

29.6 Official receiver as landlord

As a result of the commencement of The Insolvency (England and Wales) Rules 2016 on 6 April 2017 the official receiver trustee with immediate effect from the making of the bankruptcy order unless the Court appoints another person[1]. As a result of this the official receiver immediately becomes landlord when a bankrupt is acting as a landlord of their solely owned residential tenanted property. The official receiver is therefore obliged to act immediately to take the appropriate steps to deal with such tenancies.

1. Section 291A

29.7 Difference between jointly and solely owned tenanted property

Unlike solely owned tenanted property where the official receiver will immediately become trustee and landlord upon the making of the bankruptcy order the legal title of jointly owned property remains vested in the joint owners (even if all joint owners are subject to bankruptcy orders). This is because the legal title cannot be severed. In turn this means that the official receiver will not become landlord when they become trustee. The joint legal owners will remain as the landlords, retaining all legal rights and responsibilities under the tenancy agreement. The only interest that will vest in the official receiver as trustee is the bankrupt's beneficial interest in the property as the beneficial interest itself will not be severed (see paragraph 29.33 for a definition of beneficial interest and legal title).

29.8 Tenanted property is not usually a family home

It is important to remember that a tenanted property is not normally a family home for the purposes of section 283A (see chapter 28) and as such, it will not re-vest in the bankrupt after 3 years. It will remain in the bankruptcy estate until it is dealt with (.

Tenanted property encountered by the official receiver will normally fall into one of the four categories below:

a) Property purchased as an investment property with the help of a buy-to-let mortgage (see paragraph 29.46),

b) Property purchased as a home with the help of a residential mortgage, with the bankrupt having later obtained the consent of the mortgagee to let the property out (consent to let) (see paragraph 29.46),

c) Property purchased as a home with the help of a residential mortgage, with the bankrupt having later let the property out without the permission of the mortgagee (unauthorised tenancy) (see paragraphs 29.47), or

d) Property purchased as a home with the help of a residential mortgage, with the bankrupt having later taken on a 'lodger' whilst remaining in occupation (see paragraph 29.9).

In situations a. to c. the notice offering the bankrupt the option to purchase back the interest[1] which would normally be sent by the official receiver as trustee, should not be sent. Nor should the BHNOT notice to the bankrupt and other interested parties informing them that the property falls under section 283A[2]. The exception to this would be where the tenant is a former spouse, civil partner, ex spouse or ex civil partner (see paragraph 29.10). The bankrupt should not be led to believe that they may be able to purchase the property back from the official receiver. See guidance from paragraph 29.119 for information on when it may be possible to sell back a solely owned tenanted property.

1. Form MP1

2. Form BHNOT

29.9 Bankrupt residing in property with a lodger

In paragraph 29.8 category d. when a 'lodger' is living with the bankrupt in their home, the notice offering the bankrupt the option to purchase back the interest[1] should be sent by the official receiver as trustee and where the bankrupt's interest in the property is greater than £1000, as the property is still the family home of the bankrupt (see chapter 28). See paragraph 29.19 on occupation of property under licence.

1. Form MP1

29.10 When tenanted property may be considered to be a family home

When ascertaining the details of any tenancy agreement, the official receiver should give consideration to the relationship of the tenant to the bankrupt. Where the tenant is the bankrupt's spouse, civil partner, ex-spouse or ex-civil partner, and the property is the sole or principal residence of that person, then the property may be considered to be a family home[1]. Where the bankrupt's interest in the property is greater than £1000 it may be appropriate to send the notice offering to purchase back the interest in the family home to the bankrupt (see chapter 28).

1. Section 283A

29.11 Interaction with income payment agreement/order (IPA/IPO)

All income receivable on an investment property forms part of the legal and beneficial interest that will vest in the official receiver if they become trustee of the bankrupt's estate. Investment income which forms part of the estate cannot be treated as the bankrupt's income for IPA/IPO purposes as it will vest in the trustee and should therefore be collected by the official receiver upon appointment as trustee. All rent and other income from an investment property should be collected in full by the official receiver and should not affect any IPA/IPO calculation. See chapter 35 for guidance on IPA/O's.

For information on how to deal with rent received from a lodger occupying a room in the bankrupt's property under licence see paragraph 29.18.

29.12 Main types of tenancy agreements

There are four main types of residential tenancies (see chapter 24) used by private landlords. Any of these tenancies can be either a fixed term tenancy (for an agreed set period e.g. six months), or a periodic tenancy (for an indefinite rolling period e.g. monthly or weekly).

- the protected tenancy
- the assured tenancy
- the assured shorthold tenancy (AST) (see paragraph 29.16) and
- the secure tenancy

In addition, the official receiver may encounter business tenancies when a property is rented to a business or company using the premises for commercial/non-residential purposes. Local authorities, housing authorities, registered providers of

social housing and housing action trusts can use different types of tenancies, see chapter 24.

As the majority of tenancies encountered by the official receiver will be AST's, the advice in this chapter is applicable to those tenancies.

29.13 Informal tenancy

A tenancy can be created by the conduct of the parties; there does not need to be a written agreement for it to be legally binding. Once a person is given possession of land or property, usually evidenced by possession of the keys, and the owner accepts rent payments, a tenancy comes into existence legally[1]. By default, residential tenancies created in this way are usually assured shorthold tenancies (see paragraph 29.16 below).

1. Re Bowes, ex p Jackson (1880) 14 ChD 725 at 739

29.14 Default tenancies

All residential tenancies created since 28 February 1997 are ASTs unless the landlord gave specific notice that it is an assured tenancy[1] (see chapter 24). There are certain exceptions to this[2], but these mainly relate to when notice is served, the continuation of previous secure or assured tenancies, local authority/housing association tenancies and assured agricultural occupancies.

1. Housing Act 1988 19A

2. Housing Act 1988 schedule 2A

29.15 Common Law tenancies

Common law tenancies fall outside the scope of the Housing Acts[1, 2, 3]. Such tenancies will be rarely encountered by the official receiver. In the case of a common law residential tenancy, the tenant's rights and obligations are mainly dependent on the terms agreed between the parties (written into the agreement) and therefore they are contractual or "non-statutory contractual tenancies" as opposed to those being regulated by statute.

Any residential tenancy which is excluded from being an assured tenancy by the Housing Act 1988, including where the rent equates to an annual rate in excess of £100,000, is a common law tenancy[4].

Common law tenancies do not afford tenants the same protection regarding security of tenure and statutory continuation as assured tenancies do (including assured shorthold tenancies).

1. Housing Act 1988

2. Housing Act 1996

3. Housing Act 2004

4. Housing Act 1988 Schedule 1 paragraph 2(1)

29.16 Assured shorthold tenancy

Shorthold tenancies granted after 15 January 1989 and before 28 February 1997 are only enforceable by the landlord if the correct notice was served at the start[1]. Under assured shorthold tenancy agreements, the landlord cannot recover possession until six months from the start of the tenancy but after that time, the landlord can recover possession even if the tenant has not breached the terms of the agreement. Possession can be gained fairly easily with two months notice[2], see later guidance on bringing a tenancy to an end.

1. Housing Act 1988 section 20

2. Housing Act 1988 section 21(1)b

29.17 Statutory periodic tenancy

A statutory periodic tenancy is a tenancy that is created when any of the main four types of tenancies referred to in paragraph 29.12 come to an end[1].

A periodic tenancy is created by agreement, a statutory one is created automatically. The tenancy will generally continue on the same terms as the former tenancy and for the period for which the rent is normally payable[2]. For example, if an assured shorthold tenancy comes to an end on 31 January, and the rent was normally payable monthly, if the tenant is allowed to continue living in the property without a new tenancy agreement, it will automatically become a statutory periodic assured shorthold tenancy automatically renewing on a monthly basis.

In a case that went to appeal, a flat was let on an assured shorthold tenancy that had been renewed. The term of the last agreement had been for one year less one day, and the rent was expressed as a yearly figure, payable quarterly in advance. The landlord served notice to quit at the end of the year, giving a quarter’s notice. When possession proceedings were brought, the district judge held that the tenancy was an annual tenancy and that the notice was premature. On appeal it was decided that the tenancy was actually for a quarterly period as determined by the last payment of rent the tenant had been obliged to make[3].

1. Housing Act 1988 section 5

2. Housing Act 1988 section 5(3)

3. Church Commissioners for England v Meya [2006] EWCA Civ 821

29.18 Occupation of property under licence

A licence is not a type of tenancy agreement (which is a property right), instead it is a contractual right to occupy space for a period of time. A licence does not give the tenant any legal interest in the land; it is simply the permission to occupy the land for an agreed term and will usually come about when there is no right to exclusive possession. When someone lets a room in their house out to a lodger, this is under licence rather than a tenancy. The main difference between a tenancy and a licence is that as a tenancy gives the tenant an interest in the land, that interest is binding on any subsequent purchaser of the property. With a licence, if the landlord sells the property, then the tenant no longer has any right to occupy, as their agreement was with the landlord and not attached to the land[1].

A licence does not vest in the official receiver unless it is capable of being assigned[2]. As the arrangement between the bankrupt home owner and a lodger cannot be assigned, any rent paid under the licence does not vest in the official receiver as trustee. The official receiver should assess the rent received from that lodger as income, available for inclusion in any calculation for an IPA/IPO entered into before discharge, or in any variation of the amount to be collected under an existing IPA/IPO.

1. Ashburn Ansalt v WJ Arnold & Co [1988] 2 WLR 706

2. Rothschild V Bell (a bankrupt) [1999] BPIR 300, CA (Civ Div)

29.19 Tenancy requires there to be exclusive possession

The general rule as to whether an arrangement is a tenancy or a licence is whether the occupier has a right of exclusive occupation, that is, whether he or she can keep other people, including the landlord (unless the landlord is exercising rights to enter under the terms of the tenancy), out of defined premises. There can be no tenancy without the granting of exclusive possession. This means that a tenancy can only be granted over whole lockable premises rather than just a room in a home which the landlord has promised not to enter. The ability to secure the premises is an essential factor in defining exclusive possession.

29.20 Types of agreements to allow to continue

The types of agreements most usually granted by a bankrupt will be either assured shorthold tenancies. When either of these are encountered the official receiver should usually allow the agreement to continue for the benefit of the estate but before a decision can be taken, further enquiries are needed to establish the terms of the tenancy or licence, see paragraphs 29.35 to 29.65.

29.21 Tenanted property abroad

When the official receiver encounters a tenancy where the property is overseas, enquiries should be made with the bankrupt and any co owners, as well as undertaking any appropriate internet searches, to try to establish the value of the property. The law that governs the tenancy will be that of the country in which the property is located and specialist advice may need to be sought.

29.22 Duty of care to visitors and trespassers

A duty of care is owed between an occupier of premises and their lawful visitors[1] and an occupier also owes a limited duty of care to trespassers[2]. The question of who is an occupier depends upon the particular facts of each case but generally it would be the person who is in actual occupation for the time being, or who has possession or physical control of the premises. Accordingly, it will normally be the tenant that has the duty of care, although where a tenant has left the premises, which are otherwise unoccupied, the official receiver, as trustee and landlord, is likely to be considered to be the occupier of the premises.

The official receiver should establish whether or not public liability insurance is held by the bankrupt, as landlord, and should ensure that such insurance is put in place where none is in existence, see paragraphs 29.38 and 29.39.

1. Occupiers Liability Act 1957 section 2

2. Occupiers Liability Act 1984 section 1

29.23 Duty of care in relation to defective premises

In all cases where the insolvent is a landlord there is likely to be a duty of care in relation to defective premises[1]. The landlord owes to all persons who might reasonably be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

Legislation provides that a duty of care is owed by a landlord to visitors, and possibly trespassers, where the premises are let under a tenancy agreement which places

the landlord under an obligation to the tenant for the maintenance or repair of the premises or where the landlord has the right to enter the premises and carry out such repairs. The duty arises when there has been a breach of that obligation to repair (or failure to exercise the right of repair) which has led to the defect in the premises which caused an injury to, or damage to the property of, the tenant or visitor or any other person who might reasonably be expected to be affected by defects in the premises. This duty only applies if the landlord knew, or in the circumstances ought to have known, of the relevant defects. The duty cannot be excluded and the official receiver as liquidator or trustee may become subject to it. See chapter 11 for more information.

The official receiver should ensure public liability insurance is held by the bankrupt and, if not, it should be obtained as a matter of urgency on all tenanted properties, see paragraph 29.38 and chapter 26 for further information.

1. Defective Premises Act 1972 section 4

29.24 Rent deposits

It is a common requirement of a tenancy agreement that the tenant pays a security deposit to the landlord. The security deposit is a refundable charge and is usually charged at one months rent. At the end of the rental period the deposit will be refunded, providing that the tenant has not damaged the property.

29.25 Tenancy Deposit Scheme

Where the tenancy agreement has been entered into after 6 April 2007, the landlord must protect the deposit within a tenancy deposit scheme. This applies to all assured shorthold tenancy agreements where the annual rent does not exceed £25,000[1]. The deposit must be protected within fourteen days of the landlord receiving it.

If the landlord resides in the same property as the tenant, the tenancy cannot be an assured shorthold tenancy and so any deposit taken in these situations does not need to be placed in a tenancy deposit scheme (see paragraph 29.18 on licences).

1. Housing Act 2004 section 213

29.26 Disputes over return of deposit

Tenants have a responsibility to make sure that the property is in as good a condition when they move out as it was when they moved into the property, subject to normal/fair wear and tear. When the tenancy comes to an end, the landlord is entitled to check the condition and contents of the property and, if all is well, the full amount of the deposit should be returned to the tenant. Where damage, other than

usual wear and tear, has occurred, the landlord may be entitled to withhold all or part of the deposit to restore the property to the original position.

If an agreement about how much of the deposit should be returned cannot be reached between the landlord and the tenant, tenancy deposit schemes offer a free service to help resolve disputes.

29.27 Types of deposit schemes

There are two types of tenancy deposit schemes available:

- a custodial scheme where the deposit is protected in an account which can be accessed by both the landlord and tenant although withdrawals cannot be made without the agreement of both parties. There is only one custodial scheme provider, The Deposit Protection Service, see paragraph 29.28.
- insurance based schemes, where the landlord, directly or through agents, retains the deposit and takes out an insurance policy to provide security to the tenant in respect of that deposit. There are two providers of an insurance based scheme, Mydeposits (see paragraph 29.30) and the Tenancy Deposit Scheme (see paragraph 29.31)

29.28 The Deposit Protection Service

The Deposit Protection Service offers the only type of custodial scheme. It is funded entirely from the interest earned on the deposits held. When completing the ORTPQ - Tenanted Property Questionnaire, see paragraph 29.36) with the bankrupt, it is important to establish all relevant details about the deposit. The bankrupt should be able to provide the name of the scheme in which the deposit is held and, if it is held with The Deposit Protection Service, the deposit ID should also be requested from the bankrupt for correspondence purposes. A request should not be made by the official receiver for the provisions of the bankrupt's password as this would have security implications. See paragraph 29.55 for details of the letter to be sent by the official receiver.

29.29 Contacting the Deposit Protection Service

The contact details for the Deposit Protection Service are:

The Pavilions

Bridgwater Road

Bristol

BS99 6AA

Telephone: 0844 4727000

Additionally the website operates both a Virtual Customer Service Agent and an Online Enquiry Form to deal with any enquiries. The frequently asked questions on the website may also provide the official receiver with additional useful information.

29.30 Mydeposits

Mydeposits is one of two insurance based schemes available. When completing the ORTPQ - Tenanted Property Questionnaire (see paragraph 29.36) with the bankrupt, it is important to establish all relevant details about the deposit. The bankrupt should be able to provide the name of the scheme and, if it is held with Mydeposits, the property's rental postcode, tenant's surname and month the deposit was provided. This will enable the official receiver to check if the deposit is covered by the scheme online. A membership number should also be requested from the bankrupt for correspondence. A request should not be made by the official receiver for the bankrupt's password as this would have security implications. See Mydeposits for more details of the scheme and paragraph 29.55 for details of the letter to be sent.

Contact details are:

Mydeposits

Ground Floor, Kingmaker House

Station Road

New Barnet

Hertfordshire

EN5 1NZ

Telephone: 0844 9800290

Fax: 08456 343403

Email: customerservices@mydeposits.co.uk

29.31 The Tenancy Deposit Scheme

The Tenancy Deposit Scheme is the second of the two insurance based schemes available. When completing the initial questionnaire (see paragraph 29.36) with the bankrupt, it is important to establish all relevant details about the deposit. The bankrupt should be able to provide the name of the scheme and, if it is held with The Tenancy Deposit Scheme, a tenancy UID code is all that is needed to check if the deposit is covered by the scheme online. A membership number should also be requested from the bankrupt for correspondence purposes. A request should not be

made by the official receiver for the bankrupt's password as this would have security implications. See The Dispute Service for more details of the scheme and paragraph 29.55 for details of the letter to be sent.

Contact details are:

TDS Limited

PO Box 1255

Hemel Hempstead

HP1 9GN

Telephone: 0845 2267837

Fax: 01442 253193

Email: deposits@tds.gb.com

Official Receiver's initial enquiries and actions as landlord

29.32 Introduction

Upon the making of the bankruptcy order, the official receiver automatically becomes landlord of any solely owned tenanted property, as a solely owned property vests in a trustee from the date of order (see paragraph 29.34 for further details). There are exceptions to this if, for example the property is held on trust. This and the following sections deals with the official receiver's initial enquiries, how to deal with a tenanted property and their role as the landlord, and covers both the rights and obligations that the official receiver will assume whilst acting as landlord of a property let under an assured shorthold tenancy (AST).

Following the initial enquiries into the tenanted property, the official receiver should have sufficient information to decide how to deal with the tenanted property. If an insolvency practitioner is to be appointed, or the reversionary interest and tenancy agreement are to be disclaimed, or the tenancy agreement is to be ended in some other way, see guidance from paragraph 29.119.

29.33 Definitions

The following terms are used in the remainder of this chapter and should be interpreted as follows:

- a beneficial interest is an interest in the proceeds of sale of a property and in the rents and profits which are or could be earned from the property until the sale. It amounts to an equitable, as opposed to a legal, interest in the property. Beneficial interests often arise as a result of contributions to the purchase of, or payments for improvements made to, the property and can arise whether or not the person is the legal owner of the property (see chapter 28)
- the legal estate is the title to the property itself which vests in its owner
- the reversion of a property is the landlord's interest in a property whilst a tenancy agreement is in place. Whilst a tenancy agreement has been granted over a property owned by someone, the tenant holds an interest or property right. The landlord has a reversionary interest - the right to regain possession of that property when it reverts to them at the end of the tenancy agreement
- a covenant is a type of legal promise or term of contract to either do or not do something, which is often contained within the terms of a lease or tenancy agreement

29.34 Vesting of legal estate in official receiver as trustee

If the tenanted property is solely owned by the bankrupt, then the official receiver, as trustee immediately upon the making of the bankruptcy order, has two interests in the property:

- they are the legal owner of the property (which brings with it all legal responsibility for the property with the power to convey etc.). The value of the property is affected by the existence of a tenant (and other things). For the duration of the tenancy agreement, the legal owner's interest is in the freehold or leasehold 'reversion', that is on the expiry of the tenancy agreement, the legal owner may again exercise full rights of ownership over the property, (including occupation), and
- the tenancy agreement which is a contract between the bankrupt and the tenant, vests in the trustee (as it follows the reversionary interest) and the official receiver, as trustee, therefore holds all responsibility and entitlements, as landlord, under the agreement

29.35 Importance of establishing type and validity of tenancy

It is important that early in the proceedings the official receiver takes steps to establish the type of tenancy agreement granted by the bankrupt on the property and whether or not it is currently valid. As the official receiver becomes landlord automatically on the making of the bankruptcy order their obligations need to be

established immediately. See paragraph 29.12 for information on the different types of tenancies. As soon as the official receiver becomes aware of a tenanted property, they should ascertain details of the tenancy and obtain a copy of the tenancy agreement, if one exists. As the majority of tenancy agreements likely to be encountered by the official receiver will be ASTs, this chapter deals specifically with ASTs.

29.36 Initial enquiries – creditor's petition cases

When dealing with creditor petition cases, a tenanted property is most likely to be discovered if contact is made with the bankrupt by telephone, face to face, at the interview or on an inspection. As soon as a tenanted property is discovered, then the examiner or case support officer should complete the ORTPQ - Tenanted Property Questionnaire whilst speaking to the bankrupt. As much information as possible should be established, to enable enquiry letters to be sent to all relevant parties as soon as possible. Where the bankrupt cannot provide the information, they should be encouraged to call back within the next 24 hours with the information needed. If the bankrupt cannot provide all the information needed within 24 hours, then a copy of the questionnaire may be sent out and the bankrupt asked to return it with any other information requested within seven days.

29.37 Initial contact – adjudicator cases

In an adjudicator case it is likely that the bankrupt will highlight a tenanted property at the initial contact stage when asked whether there are any assets in jeopardy or whether there are any matters requiring immediate attention. Also a tenanted property should be listed in the bankruptcy application completed for the Adjudicator's Office and therefore discovered when the examiner reviews the application as part of the initial enquiries.

Immediately on discovering a tenanted property the examiner should attempt to complete the ORTPQ - Tenanted Property Questionnaire with the bankrupt over the telephone. As much information as possible should be obtained to enable enquiry letters to be sent to all relevant parties as soon as possible. Where the bankrupt cannot provide the information they should be encouraged to call back within the next 24 hours with the information needed. If the bankrupt cannot provide all the information needed within 24 hours, then a copy of the questionnaire may be sent out and the bankrupt asked to return it with the other information requested in time for the interview.

29.38 Current insurance

Enquiries must be made in all cases and as regard all properties to obtain details of any insurance policies in force and, wherever possible, possession should be taken of the relevant policy documents and any current certificates relating to those policies. The bankrupt may have specific ‘landlord insurance’ which includes public liability insurance along with buildings insurance and, if the property is furnished, contents insurance. See chapter 14 for guidance on continuing existing insurance policies. Any policy documents recovered should immediately be handed to the office cashier to record in the valuables register and place in the office safe for safe keeping.

29.39 Insurance cover required

If adequate insurance is not in place on a tenanted property, i.e. landlord’s insurance including public liability insurance and building insurance, this should be attended to immediately. Reference should be made to chapter 14 for advice on how to obtain cover under the Willis Insolvency Open Cover Insurance Facility. Generally speaking, provided that the property is still used for residential purposes and certain limits are not exceeded, then the case will be suitable for the premium bordereau for smaller non-trading cases (see chapter 14 for details of the exclusions to this). If a case is eligible for this cover, then the official receiver is required to add the case to the office bordereau form (Annex 2 to the Willis Insolvency Manual). In order for an asset to be covered by Willis, it must be put on the office bordereau as soon as the official receiver becomes aware of its existence. Only where a case does not fall into these criteria is it necessary to telephone Willis to agree individual insurance cover. Generally speaking, this will relate to property rented out to a business for commercial purposes.

29.40 Cancelling insurance cover

The official receiver’s insurance must be cancelled when the property is:

- sold or otherwise disposed of
- an LPA receiver is appointed
- an insolvency practitioner is appointed; or
- disclaimed

The official receiver should follow the guidance in chapter 14 when cancelling insurance.

29.41 Initial letters to be sent

Following completion of the questionnaire, letters should be sent to the following people as soon as their details are known:

a) the bankrupt (see paragraph 29.42)

b) the tenant (see paragraph 29.43)

c) the mortgagee and any other chargeholder (see paragraph 29.44)

d) the letting agent (if applicable) (see paragraph 29.50) and

e) the deposit scheme holder (see paragraph 29.55)

29.42 Letter to the bankrupt

A letter should be sent to the bankrupt[1] following the initial contact or initial enquiries enclosing copies of the letters sent to the tenant and letting agent if appropriate. The letter states that the property(ies) vest in the official receiver and that the official receiver is the landlord and is entitled to collect the rent. It informs the bankrupt that they should no longer attempt to contact the tenant or deal with the property, including not attempting to evict the tenant, propose a new tenancy agreement or collect the rent. It also tells the bankrupt to forward to the official receiver any rent received from the tenant following the making of the bankruptcy order. It also confirms that the mortgage debt will not be paid and that any shortfall on the mortgage loan will be a debt in the bankruptcy

1. ISCIS letter Annex D –sole – letter to bankrupt

29.43 Letter to tenant

The official receiver should send a letter to the tenant[1] to establish the current position of the tenancy. The letter confirms that the official receiver is now landlord (see paragraph 29.68) and asks for the tenant to confirm details regarding the payment of rent, whether there are any arrears and for a copy of the tenancy agreement if the bankrupt has not already provided a copy.

The letter also seeks to reassure the tenant that if the bankrupt held any security deposit at the date of the bankruptcy order, then it will be secured by the official receiver.

1. ISCIS letter Annex E – sole – letter to tenant

29.44 Letter to mortgagee and other chargeholders

Any mortgagee of tenanted property should be sent notice[1] in order to protect the official receiver's interest in respect of the charged asset (the property) and to make early enquiries into the value of the asset. The notice for a tenanted property differs to the standard mortgagee enquiry letter[2] as it asks for a response within seven days on the most urgent queries. The official receiver needs to know urgently whether or not the mortgagee;

- has consented to the property being let
- wishes to appoint a receiver of rents, and
- wishes to, or has already taken, any possession proceedings

This information will assist the official receiver in deciding whether or not to consult creditors and apply for an urgent Secretary of State appointment of an insolvency practitioner as trustee, see paragraphs 29.63. If the mortgagee intends to appoint a receiver, or take possession quickly, then it is unlikely that it would be a suitable case for the appointment of an insolvency practitioner based on that particular property alone.

The official receiver will also need to decide whether to obtain insurance as a matter of urgency.

1. ISCIS letter Annex F – sole – letter to mortgagee

2. Form MP2

29.45 Rent collected will not be used to pay mortgage

It is important to let the mortgagee know at an early stage that if the official receiver does collect rent from the tenant, this will not be used in paying the mortgage debt. This information is contained in the notice to mortgagee.

It is important that the mortgagee understands this position as such information may well assist the mortgagee in deciding whether or not to appoint a receiver.

29.46 Position of mortgagee when buy to let/consent to let given

The mortgagee is bound by the terms of the tenancy agreement and so cannot evict the tenant if they repossess the property without giving proper notice[1] in the following situations:

a) if the tenancy has been granted with the consent of the mortgagee, either on:

- a buy-to-let mortgage, or

- a residential mortgage where the mortgagee has subsequently consented to the mortgagor renting out the property

b) if the tenancy was already in place prior to the mortgage loan being granted[2] or

c) where the mortgagee has acknowledged a tenancy by its action after the tenancy was granted without its initial consent[3].

For information on proper notice required to evict a tenant, see Eviction.

1. Housing Act 1988 section 21

2. Land Registration Act 2002 sections 28 to 32

3. Underhay v Read [1887] 20 QBD 209

29.47 Position of mortgagee when consent to let not given

A tenancy agreement is not binding on the mortgagee when the following criteria are met:

- where a property is rented out after a mortgage loan is obtained on the property without the mortgagee's consent and
- the mortgagee has not acknowledged the tenancy by any subsequent positive action (for example, receiving rent directly from tenant). Inaction by the mortgagee with the knowledge that there is an unauthorised letting on the property of the bankrupt does not amount to positive action[1]

If both the above criteria are met, the mortgagee is free to sell the property with vacant possession[2] and without giving the tenant proper notice[3].

Where the property has been rented out without the mortgagee's consent the official receiver may wish to consider investigating the reasons for this.

1. Parker v Braithwaite [1952] ALL ER 837

2. Rust v Goodale [1957] Ch 33 at 44

3. Keech v Hall (1778) 1 Doug KB 21

29.48 Likelihood of mortgagee appointing receiver where consent to let not given

It is unlikely that a mortgagee will appoint a receiver when they have not given the bankrupt permission to rent out the property. This is because to do so may bind the mortgagee to a tenancy that they are not currently bound by[1]. The likely action, if any

action is to be taken by the mortgagee, will be to commence possession proceedings.

1. Keech v Hall (1778) 1 Doug KB 21

29.49 Mortgage terms and conditions

Some mortgage deeds may contain a clause entitling the mortgagee to security over the rent. This is only likely where a specific buy-to-let mortgage has been obtained. Official receivers should proceed on the basis that the mortgage does not contain such a clause. If the notice to the mortgagee prompts them to notify the official receiver of such a clause, a copy of the mortgage terms and conditions should be requested to verify this.

Where there is a condition in the mortgage entitling them to the rent directly, the official receiver should ask the mortgage company to confirm that they will also be taking on the responsibility for the tenancy agreement. If the mortgage company refuses to do so, and the property is in negative equity, consideration should be given to disclaiming the reversionary interest in the property and tenancy agreement. See paragraph 29.33 for a definition of reversionary interest.

29.50 Letter to letting agent

If a letting agent has been appointed by the bankrupt, the type of service they provide will depend on the terms of the contract. These range from the collection of rent only to a full management service where the agent is responsible for arranging any repairs and safety inspections and dealing with tenants. A letter should be sent to the letting agent[1] to ascertain the level of service provided, and details of the tenancy. It should also be established whether the agent holds any rent or other money and, if so, the agent should be asked to hold those monies to the order of the trustee.

1. ISCIS letter Annex H1 – sole – letter of enquiry to letting agent

29.51 When to continue with letting agent's services

Having obtained a copy of the agency agreement from the agent in response to the letter sent to the letting agent, the agreement should be inspected and a decision made as to whether or not the official receiver wishes to continue with the services of the agent. If the letting agency is a well established and reputable business, and the terms of the agreement do not place excessive requirements or fees on the landlord, then the official receiver should consider continuing with the services provided. If the

agency is a member of the National Association of Estate Agents (NAEA) or the Association of Residential Letting Agents (ARLA), then it may reasonably be considered to be reputable. Both of these websites have the facility to check if a letting agent is registered with them.

If the official receiver decides to continue with the agency agreement, contact by telephone with the agent should be made to discuss with the agent whether or not they would consider allowing the official receiver to continue with the agreement. If the agent is not prepared to act, see paragraph 29.54. A template letter is available[1].

1. ISCIS letter Annex H2 – sole – letter retaining or releasing let agent

29.52 If letting agent will not act, or fees are excessive

If the letting agent will not consider allowing the official receiver to continue the agreement, consideration should be given to seeking the services of another agent (see paragraph 29.54).

If the letting agent's fees seem excessive for the services provided, and the official receiver believes that the services can be obtained elsewhere at a better rate, the assistance of another agent should be sought. Letting agents' fees are usually around 10% to 15% of the rent collected.

29.53 Letting agent is creditor

If the letting agent is owed money by the bankrupt at the date of the bankruptcy order, then the agent is a creditor in the proceedings for that amount. The agent should not be allowed to deduct this debt from future rent collected. This should be made clear to the agent should the official receiver wish to continue the agent's services. If the agent disagrees with this course of action, then their services should not be continued to prevent possible future disputes. In certain exceptional circumstances, if it may be better overall, this guidance may not be followed.

29.54 Official receiver using other agents

Where it is not possible to use an existing letting agent or there was no letting agent managing the property at the date of the bankruptcy order the official receiver can consider asking their local agent to act in the collection of rent and management of the property or consideration can be given to the use of a letting agent in the locality who is prepared to act. If a new letting agent is found, then the agents fees and services should initially be agreed by telephone, and then confirmed in writing by sending a letter instructing the agents[1].

Before instructing the letting agent the official receiver should ensure that after payment of the agent's costs there will be a benefit to the estate. The letting agent's fees should not seem excessive for the services provided. A letting agent's fees are usually around 10% to 15% of the rent collected where management services are provided.

1. Annex H3 – solely owned – letter of instruction to OR's agent

29.55 Letter to deposit-holder – custodial scheme

A letter[1] should be sent to the Deposit Protection Service scheme administrator if the tenant's deposit has been protected (see paragraph 29.45 for contact details). A copy of the bankruptcy order should be sent as evidence of its existence, and the deposit ID number should be quoted, where known. If the bankrupt cannot provide the deposit ID number, the scheme administrator should be able to find the deposit using the name of the bankrupt landlord, the name of the tenant, and the address of the rented property. The (approximate) date that the tenancy commenced will also assist in locating the deposit.

The scheme administrator should be told that the official receiver is and the landlord and that no action should be taken to release the deposit without the official receiver's agreement.

1. ISCIS letter Annex G2 – sole – letter to custodial scheme deposit holder

29.56 Letter to deposit-holder – insurance based scheme

A letter should be sent to the relevant scheme administrator[1] if the tenant's deposit has been protected by an insurance based scheme (see paragraphs 29.27 and 29.31 for contact details). A copy of the bankruptcy order should be sent as evidence of its existence, and the relevant reference number should be quoted where known. If the bankrupt cannot provide a reference number, the scheme administrator should be able to find the deposit with the name of the bankrupt landlord, the name of the tenant and the address of the rented property. The (approximate) date that the tenancy commenced will also assist in locating the details.

The letter to the scheme administrator should provide information as to whether or not the deposit is still held. If not, then the tenant will be able to claim back the deposit from the scheme administrator who, on settling the claim, will then become a creditor in the proceedings for that amount. The insurance company is subject to the same restrictions on taking proceedings for a bankruptcy debt as the tenant[1].

Following bankruptcy, the insurance based schemes may terminate cover. If the cover is terminated, the tenant will have 90 days from the date of the cancellation notice to make a claim or the deposit will cease to be protected.

1. ISCIS letter Annex G1 – sole – letter to insurance based deposit scheme

2. Section 285(3)

29.57 Deposit not protected or retained

If the bankrupt has not protected the deposit, and at the date of the bankruptcy order the deposit is not held, then the tenant will become a creditor for the amount of the deposit which would be due back on termination of the tenancy[1].

Where the bankrupt has not protected the deposit the official receiver may wish to consider investigating the reasons for this.

1. Section 382

29.58 Official receiver to protect any deposit recovered

The official receiver should ensure that any deposit held by the bankrupt at the date of the order is protected. Where a deposit is held by the bankrupt at the date of the order, it should be secured by immediately writing to the bank (or other party) where the deposit is held (see chapter 33). The official receiver should then withdraw the deposit monies and place them into the Deposit Protection Service scheme (see paragraph 29.27).

29.59 Deposits taken prior to 6 April 2007

Where a deposit has been taken prior to 6 April 2007 (see paragraph 29.25), or for a type of tenancy which is not subject to the provisions of tenancy deposit schemes, then provided it has been retained, the official receiver should look to secure the account in which it is held for future release to the tenant. If the monies cannot be identified (for example, if they have been kept in the bankrupt's current account), the tenant would be a creditor in the bankruptcy proceedings. See paragraph 29.57.

29.60 Decision on receipt of initial information

Where possible the official receiver needs to obtain sufficient information to make an immediate decision on how to best proceed with the property. All the information received from the questionnaire and responses from the tenant, any agent appointed and the mortgagee should be reviewed to decide how the property will be dealt with.

The official receiver should attempt to ascertain:

- information which will assist in deciding whether the property, including the tenancy agreement, is onerous, see paragraph 29.61
- information from the mortgagee to ascertain whether the mortgagee intends to appoint a Law of Property Act receiver or to take possession of the property, see paragraph 29.62
- information in relation to any charges on the property and the value of the property to ascertain whether there is any equity in the property, see paragraph 29.63

29.61 Information to establish whether property is onerous

The official receiver, should, obtain sufficient information to make a decision on whether or not to disclaim the tenancy agreement and reversionary interest in the property.

For this purpose the official receiver's enquiries should ascertain:

- the current condition of the property and whether any major or expensive repairs are required (e.g. roof or chimney unsafe). See paragraph 29.77 onwards for further guidance on the cost of repairs
- details of the current occupants of the property and the terms of their occupancy
- details of any rent arrears in relation to any tenancy agreement and the willingness of the tenant to pay these arrears and the future rent
- details of any tenancy with unusual and excessive requirements on the landlord

29.62 Law of Property Act receiver already appointed

If a Law of Property Act receiver has already been appointed, then a letter should be sent to the mortgagee asking for a copy of the document of appointment. The receiver should also be informed that the official receiver considers that if the mortgagee has the right to receive the rent, they will also be considered to be the landlord of the property and that the official receiver will not be taking any action in relation to the obligations attached to the tenancy agreement.

29.63 Tenanted property with equity

Where a tenanted property has sufficient equity to attract an insolvency practitioner, then an appointment should be sought as soon as possible via the Secretary of State (see chapter 45). Such an appointment is considered urgent as the property

(including the tenancy agreement) can be regarded as being an asset in jeopardy. A mortgagee in relation to the property should be given seven days to reply to the notice sent. If the mortgagee has not replied within seven days, the letter should be followed up with a telephone call to be certain that the mortgagee has been given sufficient opportunity to consider the contents of the letter prior to an insolvency practitioner being appointed trustee.

An insolvency practitioner appointment may be appropriate even if the mortgagee has indicated that they are going to appoint a receiver or take possession if they have not indicated when they will take that action.

29.64 Tenanted property without equity but other assets

Where there are assets in a bankrupt's estate other than the tenanted property e.g. the family home, a motor vehicle or book debts, then consideration should be given by the official receiver to a possible appointment of an insolvency practitioner, to act as trustee of the bankrupt's estate, from the local rota.

29.65 Tenanted property only asset

Where there are no assets in a bankrupt's estate other than the tenanted property and the mortgagee has not indicated that a receiver of rents will be appointed or that action will be taken to repossess the property, then the official receiver may consider whether the case should be offered to the next insolvency practitioner on the local rota depending on the nature, number and value of the tenancies concerned. If the mortgagee has indicated that they are going to take immediate steps to appoint a receiver, then the case should not be offered to an insolvency practitioner.

Official receiver's duties and obligations as landlord

29.66 Obligations of official receiver as trustee in relation to tenancy agreement

The obligations of landlord vest in the official receiver automatically upon their appointment as trustee[1] whether or not the rent is collected (see paragraph 29.94). Action can be taken by the tenant where the landlord refuses to accept rent tendered

or to perform the duties of landlord under the terms of the tenancy agreement, as this would be a breach of the covenants under the AST agreement. Refusal to receive the rent would not have the effect of terminating the tenancy agreement.

1. Section 306

29.67 Official receiver to secure spare keys

When the official receiver is landlord of a solely owned tenanted property, the official receiver should establish the whereabouts of all sets of keys to the property as a matter of urgency. The official receiver should make a list of all persons who hold a set of keys on the file for future reference and require the bankrupt to deliver up all sets of keys in their control. The official receiver should place all keys that they secure into the office safe for safe keeping. Any keys placed in the safe should be clearly and securely labelled with details of the name of the case and the property concerned and the details should be entered into the office safe register. The keys should be retained until the property is disposed of.

29.68 Trustee's duty to notify tenant of change of landlord

If the interest of a landlord under a residential tenancy agreement is assigned (which includes the automatic vesting of the tenancy in the trustee under the Insolvency Act 1986), then the new landlord must give notice in writing of the assignment[1]. The notice must provide the new landlord's name and address and be sent to the tenant not later than the next day on which rent is payable under the tenancy or, if that is within two months of the assignment, the end of that period of two months.

The official receiver should ensure that where a solely owned tenanted property vests in them as trustee, the letter to the tenant (see paragraph 29.43) provides information that the official receiver is the new landlord and relevant contact details

1. Landlord and Tenant Act 1985 section 3

29.69 Penalty for failing to notify tenant of new landlord

If the new landlord under that tenancy (the trustee), fails without reasonable excuse to notify the tenant of the assignment and of their name and address, they commit a summary offence and is liable on conviction to a fine currently up to £2,500[1].

1. Landlord and Tenant Act 1985 section 3(3)

29.70 Duty of care regarding waste

Where the bankrupt is the landlord of a solely owned residential property, the official receiver is under a duty of care regarding any waste if it can be said that the official receiver is "keeping" household waste[1]. The term "keeping" is believed to include having the temporary possession or being in the presence of something, so the official receiver may be "keeping" waste when the property where it is situated forms part of the insolvent's estate. An offence may be committed even if the waste is "kept" for only a short time.

The landlord should ensure that tenants have suitable and sufficient facilities to cope with their waste. It is advisable that the tenant is encouraged to deal with their own waste whilst in occupancy of the property as if the property becomes vacant, and the landlord is left with unwanted items, then this waste is no longer considered as household but becomes commercial waste and is now the responsibility of the landlord. As the Household Waste Recycling Centres are provided and licensed only for household waste, this avenue of disposal is not available for use by a landlord. A skip, direct delivery to a private disposal point or professional removal services would be required in this case. If the official receiver has to deal with waste left behind by a tenant, any deposit held could be used to defray the costs incurred (see paragraph 29.126).

1. Environmental Protection Act 1990

29.71 Landlord duties under an assured shorthold tenancy

The official receiver's obligations as trustee in relation to solely owned property cases are the same as that of the landlord[1], as prescribed by the tenancy agreement and legislation. Under an AST the landlord's obligations will usually be to:

- allow the tenant peaceful enjoyment of the property[2] (see paragraph 29.73)
- hold any deposit paid by the tenant in a government authorised tenancy deposit scheme (see paragraph 29.24)
- insure the property and any fixtures or furniture provided by the landlord and provide a copy of the insurance policy to the tenant (specific landlord insurance including public liability is needed, see paragraphs 29.38). This should already be in place so a copy of the policy should be obtained, held, and renewed if it expires
- keep the exterior structure in good repair and repair and keep in good working order the installations in the property relating to heating, gas and sanitation[3] (see paragraphs 29.77 onwards)
- comply with Gas Safety (Installation and Use) Regulations 1998 to have a gas safety check on the property annually[4] (see paragraph 29.83)

- ensure smoke alarms are fitted on each storey and a carbon monoxide alarm in each room in which solid fuel is used[5]
- ensure the electrical installation complies with legislation (a certificate is valid for between 1 and 5 years, depending on the electrician's recommendations) and ensure smoke alarms are fitted[3, 6] (see paragraph 29.84)
- if it is a furnished let, ensure furnishings comply with fire safety regulations[7, 8] (see paragraph 29.87)

1. Landlord and Tenant (Covenants) Act 1995 section 3(1)(b)

2. Markham v Paget [1908] 1 Ch 697

3. Landlord and Tenant Act 1985 section 11

4. Gas Safety (Installation and Use) Regulations 1998 regulation 36

5. Smoke and Carbon Monoxide Alarm (England) regulations 2015

6. Electrical Equipment (Safety) Regulations 1994

7. Consumer Protection Act 1987 section 11 and 46

8. Furniture and Furnishings (Fire Safety) (Amendment) Regulations 2010

29.72 Initial inspection of property

As the official receiver becomes landlord upon appointment as trustee, they need to ensure that the property is reasonably safe. The official receiver should rely on the bankrupt's account of the property unless there is reason to doubt the bankrupt. If the bankrupt cannot provide copies of the required gas and electrical safety certificates and assurances that the property is in good order, then the official receiver may consider arranging for a general inspection of the property by local agents (or previous agents retained) to determine its general condition and any risks. There is no Service Level Agreement with an agent for this service.

29.73 Allow the tenant peaceful enjoyment of the property

Under a standard AST the tenant has a right to peaceful enjoyment of a property. Where this clause is not specified in the terms of the tenancy agreement, it is an implied covenant[1]. This should be taken to mean that the tenant has a right to remain undisturbed by the landlord, who should not gain entry without the tenant's consent or make unannounced visits on a regular basis.

1. Markham v Paget [1908] 1 Ch 697

29.74 Repairs and maintenance of the property

The official receiver should ensure any necessary repairs and maintenance of the property are carried out where funds permit (see following paragraphs) Reference should be made to the terms of any tenancy agreement in place to see what the landlord is responsible for. For example, this may include arranging for a 'Gas Safe Register' registered gas engineer to repair a broken boiler.

The cost of making a repair should be met from the rental income. If the costs of the repair are likely to be expensive in relation to the rental income being received, it is possible that the tenancy agreement may have become onerous and the official receiver may need to give consideration to disclaiming the reversion of the property and the tenancy agreement.

29.75 Practicalities of arranging repairs and general maintenance

The official receiver, as trustee and landlord, is responsible for arranging any repairs on the property specified in the AST. Firstly, the official receiver should establish the likely costs of any repairs by obtaining quotes to carry out the required work. If there are letting agents in place, the official receiver may consider requesting that the agents arrange for the appropriate repairs to be made and account to them for the expenditure, provided that the costs of obtaining the agent's services in this regard are reasonable.

29.76 Allowing tenant to arrange for repairs

Consideration may also be given to allowing the tenant to arrange the repairs and account to the official receiver for the cost, providing receipts as evidence. As the tenant is not responsible for arranging these repairs, they may refuse. Any such request should be made over the telephone initially to see if the tenant would be prepared to find a suitable person to carry out the repairs and attend at the property at the tenant's convenience. If the tenant does not wish to assist the official receiver in this way, then they should not be pushed on the matter.

29.77 Repairs – what is considered essential?

Repairs of a cosmetic nature, such as redecorating, should not be considered as being essential. The landlord's responsibility is provided for in legislation[1] and includes;

a) to keep in good repair the structure and exterior of the property (including drains, gutters and external pipes)

b) to keep in repair and proper working order the installations in the property for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity)

c) to keep in repair and proper working order the installations in the property for space heating and heating water (the heating including pipes, radiators and boiler)

If the tenancy agreement contains a covenant that the tenant be responsible for these things rather than the landlord, it has no effect[2].

In determining the standard of repair required, regard must be had to the age, character and prospective life of the property and locality in which it is situated[3].

1. Landlord and Tenant Act 1985 section 11

2. Landlord and Tenant Act 1985 section 11(4)

3. Landlord and Tenant Act 1985 section 11(3)

29.78 Repairs that are not necessary

Where one of the repairs referred to above is required under 'the landlord's repairing covenant', it is not, however, to be construed as requiring the landlord[1];

a) to carry out works or repairs for which the tenant is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part

b) to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident; or

c) to keep in repair or maintain anything which the tenant is entitled to remove from the property

For a definition of covenant, see paragraph 29.33.

1. Landlord and Tenant Act 1985 section 11(2)

29.79 Tenant to give reasonable access to property for purposes of repair

In order to carry out necessary repairs the tenant is required to give access to the property to the official receiver, as landlord, or any person authorised by them in writing, at reasonable times of the day on receipt of 24 hours notice in writing for the

purpose of carrying out the repair[1]. The right of entry is limited to that which is strictly necessary to do the work and the repair and does not oblige the tenant to give the landlord exclusive occupation or access to all parts of the house at the same time unless this is essential for the execution of the repairs[2].

1. Landlord and Tenant Act 1985 section 11(6)

2. McGreal V Wake (1983) 13 HLR 107

29.80 Repairs needed – examples

The repair of the structure and exterior includes the reinstatement of decorations damaged by the work of repair[1] but not damage to decorations and furnishings caused by condensation which was not due to structural damage[2]. Saturation of the plaster is considered to be damage to the structure[3].

'The structure of the dwelling house' has been said to 'consist of those elements which give it its essential appearance, stability and shape' but not to extend to 'the many and various ways in which the dwelling house will be fitted out, equipped, decorated and generally made to be habitable'; it is not limited to load-bearing elements; it does not include a separate garage, gates, internal plaster and door furniture but does include windows, including their sashes, cords, frames and essential furniture[4]. Floor joists included in the lease of the flat were part of the 'main structure' of the building and so within the landlord's repairing obligations[5].

In addition, repairs to slabs in a back yard were found to not be covered[6].

1. McGreal V Wake (1983) 13 HLR 107

2. Quick v Taff-Ely Borough Council [1986] QB 809

3. Staves v Leeds City Council (1990) 23 HLR 107

4. Irvine v Moran (1990) 24 HLR 1

5. Marlborough Park Services Ltd v Rowe [2006] EWCA Civ 436

6. Hopwood v Cannock Chase District Council [1975] 1 All ER 796

29.81 Duty to repair does not extend to repairs landlord isn't aware of

The landlord's obligation to repair extends only to instances where the landlord has knowledge of the defect but it is sufficient if they have information about the existence of a defect which would put a reasonable person on inquiry as to whether repairs are needed[1].

1. O'Brien v Robinson [1973] 1 ER 583, HL

29.82 Repairs to be carried out in a timely manner

The official receiver, as landlord, should ensure that where it is considered that the repairs should be carried out the repairs should be undertaken within a reasonable time of receiving notice of the defect[1].

1. Morris v Liverpool City Council (1987) 20 HLR 498

29.83 Gas safety

The official receiver, as trustee and landlord, is required to ensure that all gas appliances and flues are in good order so as to prevent the risk or injury to any person lawfully occupying the premises. As landlord, the official receiver is required to ensure that an annual safety check is carried out by a 'Gas Safe Register' registered tradesman[1] (see www.gassaferegistrer.co.uk). A copy of the issued safety certificate should be issued to the tenant within 28 days of the check.

If the bankrupt cannot produce a current gas safety certificate, the official receiver should arrange for one to be obtained as a matter of urgency. Where a current certificate does not exist, the official receiver should make an appointment for a gas safe engineer to attend on the property within five working days, with the aim of obtaining the certificate within ten working days of the official receiver becoming trustee (or within ten working days of first becoming aware of the property). Where the property being inspected is an average size home, (e.g. one domestic boiler, one gas fire and one gas cooker), where the equipment passes the safety check, the cost of obtaining a certificate should not be greater than £200.

1. Gas Safety (Installation and Use) Regulations 1998 regulation 35(2)

29.84 Electrical safety

The official receiver, as trustee and landlord, is required to ensure that any electrical system and appliances supplied by the landlord should be safe when a tenancy begins, and remain safe throughout the tenancy[1, 2]. This is usually achieved by obtaining a periodic electrical certificate on the property from a qualified electrician, normally every 1 to 5 years depending on the electrician's recommendation[3].

The official receiver should seek to ascertain that the electrical safety certificates are current and, where they are not, should make arrangements to obtain the certificates in respect of the property at the earliest opportunity in order to comply with the legislation. Where a current certificate does not exist, the official receiver should

make an appointment for an appropriate tradesman to attend on the property within five working days, with the aim of obtaining the certificate within ten working days of the official receiver becoming trustee (or within ten working days of first becoming aware of the property). The cost of obtaining these certificates should be paid from the estate and covered by the rental income. The cost of the assessment and certificate should not cost more than £200 in an average home.

1. Landlord and Tenant Act 1985 section 11

2. The Electrical (Safety) Regulations 1994 SI 1994 No. 3260

3. Code of Practice for In-Service Inspection and Testing of Electrical Equipment

29.85 Smoke and Carbon Monoxide Alarms

On 1 October 2015 The Smoke and Carbon Monoxide Alarm (England) Regulations 2015 came into force in respect of rented properties in England (for Welsh properties see paragraph 29.86). Private sector landlords are required from 1 October 2015 to have at least one smoke alarm installed on every storey of their properties and a carbon monoxide alarm in any room containing a solid fuel burning appliance (eg a coal fire, wood burning stove). After that, the landlord must make sure the alarms are in working order at the start of each new tenancy.

The requirements will be enforced by local authorities who can impose a fine of up to £5,000 where a landlord fails to comply with a remedial notice.

The official receiver is therefore advised to check with the bankrupt/any letting agent that a smoke alarm is fitted, as required, on each floor of the property, preferably in the hall and landing areas. Where no smoke alarms are fitted in the property, the official receiver should ensure that they are fitted. Where the alarms are battery operated, and thus must be regularly checked and replaced, the onus for doing this should be placed on the tenant. Where the tenancy agreement does not specifically refer to this, a letter should be sent to the tenant (see paragraph 29.43) informing them that they have the obligation to check that any smoke alarm fitted in the property is working and to replace the batteries regularly in accordance with the manufacturer's instructions.

29.86 Tenanted properties in Wales

Housing Act (Wales) 2014

Under the Housing Act (Wales) 2014, landlords of tenanted properties in Wales are subject to compulsory registration and licensing delivered through Rent Smart Wales. Any landlord with a rental property in Wales, which is rented on an assured,

assured shorthold or regulated tenancy, is required to register. It is therefore necessary for the Official Receiver to be licensed where they act as ‘landlord’ for a Welsh tenanted property and register the property with Rent Smart Wales.

The implications of failing to comply with the compulsory registration and licencing requirements are that the official receiver would be:

- in contravention of the Housing Act (Wales) 2014 resulting in liability for a fine
- unable to serve a Section 21 Notice, where a tenancy eviction is necessary, if the property is not registered

The Official Receiver in Cardiff holds a licence, and has the responsibility to manage and register all Welsh solely owned tenanted properties where the officer receiver would act as landlord. Therefore all cases where Welsh solely owned tenanted properties have been identified will now be dealt with by the Official Receiver in Cardiff. Those cases identified must be transferred to the Official Receiver at Cardiff in line with the protocol at Annex B so that the property can be registered and managed in line with the legislation and the protocol .

Smoke alarms

As above, properties built since 1992 must be fitted with mains-powered, inter-linked smoke detectors/alarms.

For Welsh tenanted properties, those built since 1992 must be fitted with mains-powered, inter-linked smoke detectors/alarms but landlords are advised to provide at least battery operated alarms in older properties.

There is no legislation requiring smoke alarms to be fitted in older tenanted property but it is considered that common law duty of care means that landlords could be held liable should a fire cause injury or damage in a tenanted property. Landlords are therefore advised to provide at least battery operated alarms in older properties.

The official receiver should therefore check with the bankrupt/any letting agent that a smoke alarm is fitted on each floor of the property, preferably in the hall and landing areas. Where no smoke alarms are fitted in the property, the official receiver should ensure that they are fitted. Where the alarms are battery operated, and thus must be regularly checked and replaced, the onus for doing this should be placed on the tenant. Where the tenancy agreement does not specifically refer to this, a letter should be sent to the tenant (see paragraph 29.43) informing them that they have the obligation to check that any smoke alarm fitted in the property is working and to replace the batteries regularly in accordance with the manufacturer’s instructions.

29.87 Fire safety of furnishings

Where the property is rented out as furnished or part furnished, the official receiver should check that the furniture complies with current fire safety regulations[1]. Where a letting agent has been employed by the bankrupt, the letting agent should be able to confirm that any furnishings supplied comply with the legislation.

1. Furniture and Furnishings (Fire Safety) (Amendment) Regulations 2010

29.88 Service agreements

Where the bankrupt has maintained a service agreement on something such as the heating system, the official receiver should obtain all documents relating to that agreement and consider continuing the agreement if the cost of doing so is not prohibitive.

29.89 Local Authority action against hazardous property

The Housing Act 2004 provided for a new system of assessing the condition of residential premises. A local authority must review the housing conditions in their area and if they consider a property should be inspected with a view to determining whether a hazard exists, they must arrange for such an inspection to take place[1].

If a Local Authority inspects a property and finds it to be dangerous, it can take enforcement action by serving improvement notices, prohibition orders, or hazard awareness notices. There are also emergency measures that may be taken, or in worse case scenarios, slum clearance declarations or demolition orders may be obtained. Generally, a notice will firstly require the landlord to put the hazard right[2]. If the official receiver is notified of or served with one of the above notices, the reversionary interest in the property is likely to be onerous and the most likely course of action for the official receiver will be to disclaim the reversionary interest and tenancy agreement (see paragraph 29.142). Only where the costs of rectifying the hazard are less than the combined equity and rent, should the official receiver consider effecting the repairs required (see following paragraphs for guidance on balancing the costs against benefit).

1. Housing Act 2004 sections 1 to 4

2. Housing Act 2004 sections 5 to 10

29.90 Considering paying for repairs and other essential costs

The official receiver will need to decide on a property by property basis whether or not the cost of any repairs or other expenses on the property are necessary. See guidance in paragraphs 29.77 on what is considered necessary. If an essential cost or repair is considered necessary, the official receiver will then need to decide whether it should be paid/the work undertaken and paid for, or whether the property has now become onerous, with a disclaimer being more appropriate. Deciding factors will include:

- how much rent has already been collected
- whether the tenant is a reliable, good payer
- whether the rent is significant in relation to the cost of the repairs
- whether the tenant has given notice to quit or the tenancy has ended
- if the mortgagee is about to appoint a receiver or take possession
- whether or not there is equity in the property. If there is no equity, it may be more appropriate to disclaim the reversion and tenancy

29.91 Example of a circumstance when a repair would be paid for

The official receiver is dealing with a case in the early stages after being appointed trustee, and they have collected 2 months rent (£2,000, from £1,000 a month). The boiler breaks down, and the official receiver instructs a gas safe engineer to inspect and quote for the repairs (see paragraph 29.83). The gas engineer advises that repairs will cost £1,000. The tenant is left without heating and it is winter, so the decision is urgent. The official receiver inspects the case file and the mortgagee has said they are not going to appoint a receiver or take possession proceedings. The tenant has paid the rent on time and does not have any rent arrears. His tenancy is due to run for another three months and he has spoken to the official receiver saying he doesn't want to lose his home.

In this case it would be reasonable to go ahead with the repairs as the next 3 months rent will total £3,000. £2,000 has already been collected, so after paying the £1,000 for the repairs to the boiler the estate should benefit by £2,000.

29.92 Decision not to pay for necessary repairs

The official receiver has an obligation as landlord to carry out necessary repairs and so not to do so, means they are in breach of the relevant legislation[1] and terms of the tenancy agreement. When the official receiver decides that although the repair is necessary, the obligation to pay for the repair has meant that the property has become onerous, the official receiver will need to consider disclaiming the reversionary interest in the property and the tenancy agreement.

1. Landlord and Tenant Act 1985 section 11

29.93 Paying for repairs and other essential costs

Where the official receiver, as trustee, concludes that payment for repairs is going to be made, the repairs should usually be funded from income already collected. Occasionally an expense may need to be paid prior to the collection of rental income, for example insurance. Where an essential payment is needed immediately on notification of the case, it will need to be paid for from the main estate account. See chapter 14 for guidance on the payment of insurance premiums.

The official receiver may also need to pay for essential expenses from the rental income collected. Where such a payment is needed, this should be paid from the estate account set up for rental income balance (see paragraph 29.103). If there is no such balance from rent already collected, then the official receiver needs to decide whether or not it is likely that sufficient rent will be collected in the future to cover the expense. If there is a risk that sufficient monies will not be collected to cover the cost, then consideration needs to be given to disclaiming the reversionary interest in the property and the tenancy agreement instead.

Collection of rent

29.94 When to commence collection of rent

The official receiver should collect the rent as soon as the bankruptcy order is made and they are trustee and has collected sufficient information to enable rent collection. The rent should be collected in full from the date of the bankruptcy order, including any arrears arising prior to the order. The official receiver should ensure that any rent that was held by the tenant or letting agent pending their appointment as trustee is also collected.

The rental income should be collected where there is a current tenancy agreement in place, which includes a statutory periodic tenancy. (See paragraph 29.99 for circumstances when rent should not be collected.

29.95 Collection of rent when fixed term of AST has expired

A tenancy is still current if an assured shorthold tenancy (see paragraph 29.12) has ended but the landlord has allowed it to continue verbally, as by default, the tenancy continues as a statutory periodic assured shorthold tenancy with the same terms and conditions as the former tenancy. In this situation rent should continue to be collected.

29.96 When rent collection should cease

The official receiver should only cease to collect rent if the mortgagee appoints a receiver, takes possession of the property, or their reversionary interest in the property and interest in the tenancy agreement is disclaimed or the property is sold. The official receiver, as trustee, continues to be responsible as landlord for the collection of rent and other landlord duties even after the bankrupt receives their discharge.

29.97 Collection of rent prior to obtaining information regarding tenancy agreement

Rental income should be collected by the official receiver, as trustee, directly from the tenant or letting agent in the circumstances detailed in paragraph 29.94 whilst waiting for the mortgagee to reply or to take other action. The mortgagee does not have any right to the rent until it either a) enters into possession of the property or b) appoints a receiver. In the meantime, the rent should be collected for the benefit of the bankruptcy estate.

29.98 Need for timely collection of rent

By collecting the rent from the tenant, the official receiver will generally ensure that no further payments are made in respect of any mortgage on the property. Where the mortgage payments cease, this is likely to have the effect of ensuring that the mortgagee takes early action to protect any interest held in the property, thereby relieving the official receiver of their responsibility.

The official receiver should not allow rent to build up for long with an agent. If the mortgagee appoints a receiver of rents or enters possession, the receiver will be entitled to collect any rents that have yet to be collected by the official receiver, including any arrears and consequently this rental income would be lost to the bankruptcy estate[1]. See paragraph 29.161.

1. Law of Property Act 1925 section 190(3)

29.99 Circumstances when rent should not be collected by official receiver as trustee

The official receiver as trustee should not collect rent when there is;

- a tenant who has defaulted on their obligations (for example, to pay rent) (but see paragraph 29.100 for further guidance on the circumstances when rent arrears should be collected), or
- a squatter or a tenant who has stayed on in the property after being given valid notice to quit

To collect rent in these circumstances may validate an otherwise invalid tenancy to the detriment of the value of the property and thereafter to the bankruptcy estate. The basic rule is that if one party permits another into possession of their land on payment of rent, without more the inference sensibly and reasonably to be drawn is that the parties intended there to be a periodic tenancy[1].

1. Javad v Aqil [1991] 1 All ER 243

29.100 Rent arrears

Although under normal circumstances rent arrears should not be collected (see paragraph 29.99 above), it will sometimes be acceptable to do so and to be beneficial to the estate. Where rent arrears exist, the official receiver needs to decide on a case by case basis whether or not to attempt to collect them from the tenant. Generally where rent arrears are ongoing and significant (e.g. over 3 months is owing at the date of the bankruptcy order), or where the bankrupt has already commenced action to evict the tenant prior to the bankruptcy order, then rent should not be collected.

Where rent is offered up by the tenant, the official receiver as trustee and landlord cannot refuse to accept it, and the tenant may even come to the office and leave money in order to preserve their rights of occupation. If a tenant pays rent arrears, a record should be kept of how much and when payment is made in case future action is taken to evict the tenant for breaching the terms of the tenancy agreement.

29.101 Rent arrears post bankruptcy order

The official receiver, as trustee, should actively attempt to collect rent arrears from a tenant where the arrears have only built up since the date of the bankruptcy order or within a short period prior to the bankruptcy order. Consideration should be given as to why the tenant has fallen into arrears and the official receiver should exercise their discretion on a property by property basis in deciding whether or not to collect the arrears. On this, professional assistance maybe required.

29.102 How to collect rent

The official receiver may consider:

a) asking the tenant to send in a cheque for the rental amount every month/week (as per the terms of the tenancy agreement)

b) asking any current letting agent to continue to act and send in the balance on the account every month (see paragraphs 29.51)

c) asking the official receiver's local agent to act in the collection of rent (see paragraph 29.54)

d) using a letting agent in their locality who is prepared to act for the official receiver (see paragraph 29.52)

29.103 How to account for rent collected

All rent collected by the official receiver, as trustee and landlord, in respect of a tenanted property should be banked in the usual manner.

This applies even where the bankrupt is the sole owner of more than one tenanted property. To ensure that the necessary decisions can be made in relation to a particular property the official receiver will need to know all the receipts and payments of monies which relate to that property. The official receiver should therefore maintain a schedule of receipts and payments in relation to each tenanted property.

All receipts are banked centrally by Estate Account Services in Birmingham. To ensure that rent due in relation to a particular tenanted property has been received it is the responsibility of the local office to monitor its receipt.

29.104 Rights of bankrupt in relation to tenant

Where there is a tenant in occupation, and the official receiver as trustee is the landlord, the bankrupt no longer has any rights to deal with the tenancy. This means they do not have the right to evict the tenant; only the official receiver as landlord has that right. From the date the official receiver becomes landlord (upon appointment as trustee), the bankrupt no longer has any reason to be in contact with the tenant.

Rights of entry

29.105 No right of bankrupt to re-enter property

The bankrupt should not be permitted to move back in to the property should any tenant subsequently vacate the property. As from the date of the bankruptcy order, the property, and any tenancy agreement vests in the official receiver as trustee and the bankrupt no longer has any right to enter the property. If the bankrupt enters the property without the official receiver's permission, they would be a trespasser on the property. The official receiver would then have to consider taking steps to evict the tenant or to disclaiming the property (see paragraphs 29.137 and 29.189).

If the official receiver were to accept rent from the bankrupt in such circumstances this may result in the creation of a tenancy agreement between the bankrupt and the official receiver, as trustee, and the bankrupt would become a tenant of the official receiver[1].

1. Javad v Aqil [1991] 1 All ER 243

29.106 Rights of mortgagee if bankrupt re-enters property

If the official receiver were to let the bankrupt move back in to the property, it would compromise the position of the mortgagee, as when there is an unauthorised tenancy or a vacant property, the mortgagee can seek repossession and sell the property with vacant possession. Allowing the bankrupt to move back in would make selling the property in the event of repossession more difficult.

As the mortgage payments are not an allowable expense, see paragraph 29.113, repossession is a possibility. For these reasons the bankrupt should not be offered the option to buy back the interest in the property from the official receiver[1], see paragraphs 29.180 to 29.186 for more details.

1. Form MP1

29.107 Mortgagee's rights on repossession

As soon as a receiver of the property is appointed, or the mortgagee takes possession, it becomes the mortgagee's responsibility to carry out the duties of the landlord and their right to collect the rental income, including arrears[1, 2].

1. Landlord and Tenant (Covenants) Act 1995 section 15(1)

2. Cockburn v Edwards [1881] 18ChD 449

Leasehold, ground rent and service charges

29.108 Dealing with leaseholds that are tenanted

When the official receiver encounters property owned by the bankrupt on a leasehold basis, which has subsequently been let out on an assured shorthold tenancy agreement, there are very few differences to dealing with freehold property. The official receiver should check that the lease does not contain a restriction on the granting of tenancies. If it does, then the tenancy will be invalid and the official receiver will need to consider whether or not to acknowledge the tenancy by collecting the rent or to disclaim the leasehold reversionary interest and tenancy agreement. See paragraphs 29.138 onwards for guidance on disclaimers.

Where there is equity in the leasehold property, the official receiver should consider whether or not the leasehold property and the invalid tenancy agreement are onerous when considered together. Where there is equity in the property, the official receiver may consider it to be more appropriate to collect the rent rather than issuing a disclaimer, where there are no current onerous obligations attached to the tenancy agreement.

29.109 Ground rent on leasehold property

When dealing with leasehold property, the lease usually contains a requirement to pay ground rent, either annually or monthly. It is effectively a rent charge for the underlying freehold land where the leasehold is situated. The official receiver would not usually pay ground rent when dealing with a leasehold property in negative equity. The requirement to pay ground rent would normally cause a leasehold property with no or negative equity to be onerous and consequently the leasehold reversion and tenancy agreement should be disclaimed (see chapter 42). Where the leasehold property is tenanted, and there is sufficient surplus for the estate from the rent after allowing for the ground rent, then the ground rent should be paid by the official receiver as trustee.

Ground rent differs from mortgage payments in that it is a requirement for payment attached to the leasehold property; whereas a mortgage is a debt in the bankruptcy proceedings and is not attached to the underlying lease.

29.110 Service charges on leasehold property

Service charges are a requirement to pay, for example, the upkeep of a communal area and are often payable on leasehold flats. Where the service charges are not excessive in comparison to the rent being paid by the tenant, the charges should be paid by the official receiver, as trustee, as long as they wish to preserve the benefit of the reversionary interest in the leasehold property and the tenancy agreement.

Taxation

29.111 Taxation of profits

Any profits from renting out a property are taxable and are treated as income for income tax purposes, see chapter 59. Generally speaking, profits are considered to be all rental income received less all allowable expenses (see HMRC guidance). The LTADT or official receiver will need to account to HM Revenue and Customs prior to the case being closed by tax return.

29.112 Accounting for taxation on rental income

As explained in paragraph 29.3, property letting is not considered to be a trade by HM Revenue and Customs, but is considered an investment, and the official receiver must account to HM Revenue and Customs for tax due on any investment income (see chapter 59). Rental income is not classed as ‘earnings’ and so is not subject to National Insurance Contributions. The owning official receiver or LTADT office as appropriate (whichever office has the case at the time the tax becomes due) should complete the tax return. Tax returns are due by 31 January in the year following the end of the tax year. All rental income is accounted for on a standard tax period of 6 April to 5 April. Therefore if the bankruptcy order was made on 2 May 2009, income tax is due from the official receiver on any income received in the tax year 6 April 2009 to 5 April 2010 and the tax return and payment would be due by 31 January 2011.

29.113 Allowable deductions for taxation purposes

Allowable deductions from rental income for taxation purposes are based on actual expenses incurred in that taxation period. Note it is the period the expense was incurred in or invoiced in and not the date it was actually paid that is relevant for tax purposes. Deductions from rental income are allowed for:

- letting agent's fees
- building and contents insurance
- maintenance and repair costs (but not improvements)
- rent, ground rent and service charges
- utility bills (such as gas, water, electricity)
- council Tax
- services the landlord pays for (such as gardening or cleaning)
- legal fees (for drafting tenancy agreements etc)
- accountant's fees
- interest on property loans (mortgages)
- other direct costs of letting the property such as stationery, advertising, telephone calls

If the annual rental income received is less than £15,000 before deducting expenses, then only the total for the expenses needs to be entered onto the tax return and not a breakdown of each expense.

29.114 Calculating taxation

When the bankrupt has more than one tenanted property, all the rental income should be added together for taxation purposes. Income tax is due on the rental income due in the relevant period minus allowable deductions. All of the rental income for that period is added together and then all of the allowable expenses are added together and deducted from the income figure, leaving the amount of net profit made in that period. Tax is payable on the net profit. A loss from one property can be offset against the profit from another property.

29.115 Taxation - Rent a room scheme

Where the bankrupt is renting out a room in their home (under a licence rather than tenancy agreement, see paragraph 29.18), then tax is not payable provided the total income generated is £4,250 or less a year. This includes rent and any other income paid by the lodger for meals, bills etc. Tax is only payable on anything received above the £4,250 allowance. See also chapter 59.

29.116 Taxation - Holiday lets, letting overseas property

Holiday lets and foreign letting taxation is generally calculated in the same way as for AST's. Tax is payable on income from overseas property whether or not the money received in rent is brought into the UK. With foreign property, the income needs to be declared on the foreign pages of the tax return. Where more than one foreign property is held, it is classed as one business, and all foreign rental income and deductions are taken together. Where a UK rental property is also held, this is kept separate from overseas property, and they are treated as two separate businesses for tax purposes. See HMRC guidance for more information.

29.117 VAT

A property investment business does not need to register for VAT, as the letting of residential property is an exempt supply for VAT purposes. The letting of holiday accommodation is standard rated for VAT (currently payable at 20% of all taxable supplies), although it is unlikely to reach the threshold for compulsory registration. In the tax year 2017/2018, the threshold for compulsory registration was £85,000. See the Directgov website for further information on VAT.

29.118 Taxation records

The official receiver needs to keep all records for the rental income and expenses for 6 years after the tax year they are for. This should include any invoices, receipts, rent books, letting agent papers and LOLA records.

Disposal or ending of an assured shorthold tenancy agreement

29.119 Introduction

This part deals with the ending of an assured shorthold tenancy (AST) agreement and covers ways that the tenancy may be ended by the tenant, mortgagee or official receiver. In addition, this part deals with the disposal of the underlying property when the tenancy is continuing.

29.120 Ways that a tenancy may be brought to an end

When the official receiver is trustee, they will, at some point, want to cease to be responsible for a tenanted property. The official receiver's role as landlord of a tenanted property will be brought to an end following the occurrence of any of the following events:

- the tenant decides to leave the property (see paragraphs 29.122 to 29.135)
- the official receiver, as trustee, disclaims their interest in the reversionary interest in the property and tenancy agreement (see paragraphs 29.138 to 29.1545)
- the mortgagee takes possession action against the property (see paragraphs 29.156 to 29.166)
- the mortgagee appoints a receiver of rents (see paragraphs 29.167 to 29.172)
- an insolvency practitioner is appointed as trustee (see paragraph 29.173)
- the official receiver, as trustee, sells the legal and beneficial interest to a third party or back to the bankrupt (only in exceptional circumstances) (see paragraphs 29.175 to 29.188)
- eviction of the tenant under the Housing Act 1988 (see paragraphs 29.189 – 29.194

29.121 Landlord and Tenant Act 1987 and disposal of tenanted property

When a property let on an AST agreement is disposed of, it is not classed as a 'relevant disposal' for the purposes of the Landlord and Tenant Act 1987. Part 1 of this act gives 'qualifying tenants' of certain premises the right of first refusal to acquire a landlord's interest in premises, when a landlord proposes to make a 'relevant disposal'. The official receiver does not need to be concerned with these obligations when disposing of property let on an AST because a tenant on an assured tenancy (which includes ASTs) cannot be a qualifying tenant[1] (see chapter 28).

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

29.122 Where tenant leaves before end of tenancy agreement

If a tenant wishes to leave the property, they should give proper notice to the official receiver as landlord. The notice should be in writing[1] and comply with the period specified in the tenancy agreement.

Where the period of the tenancy agreement has not expired, the tenant should be expected to stay until the end of the fixed term within the agreement or pay the rent until the end of that term (e.g. if the tenant has only been in a property for 2 months out of a 6 month tenancy, the requirement under the terms of the agreement is that

the remaining 4 months rent should be paid). If the tenant leaves during the fixed tenancy agreement period, see the following paragraphs.

1. Protection from Eviction Act 1977 section 5(1)a

29.123 Where tenant leaves without proper notice – rent

If a tenant leaves without giving the official receiver proper notice, then they are liable for the rent for the unexpired period of the tenancy. Where the official receiver has an address for the tenant, the official receiver should pursue the tenant for any unpaid rent. The official receiver should give consideration to instructing Clarke Willmott (agents appointed by The Insolvency Service under the book debt and IPA contract) to collect the outstanding rent.

29.124 Where tenant leaves after tenancy has expired

Where the initial tenancy period has expired, and the tenancy is a statutory periodic tenancy (see paragraph 29.17), then the tenant should give notice of one period of that tenancy[1]. A tenancy period is usually determined by the period that rent is paid for. Thus if the rent is paid per calendar month, the tenant should give one calendar months notice in writing to the landlord, subject to a statutory minimum of not less than four weeks notice before the date on which it is to take effect[2].

1. Lemon v Lardeur [1946] K.B. 613

2. Protection from Eviction Act 1977 section 5(1)b

29.125 Where tenant leaves – retaining deposit for rent owed

Where the tenant leaves the property without giving proper notice, owing rent for the notice period, then the official receiver should claim an amount from the deposit for the outstanding rent. Where the deposit is held in the Deposit Protection Service scheme (see paragraph 29.28), the official receiver as landlord needs to make a statutory declaration at least 14 calendar days after the tenancy has ended under the Single Claim Process[1] either because:

- the official receiver has no current address for the tenant, or

- that the official receiver has given notice to the tenant requiring that the they be paid some or all of the deposit within 14 calendar days of the end of the tenancy and the tenant has failed to respond to the official receiver as landlord's written notice

To start the single claim process then the landlord needs to call the Deposit Protection Service on 0330 303 0030 to request the prescribed form for completion. Information is available on the Deposit Protection Scheme website.

Payment should be made payable to the official receiver by name, as trustee of the bankrupt's estate.

Where the deposit is not retained in this scheme any recovery of the deposit is unlikely.

1. The Housing Act 2004 Schedule 10, sections 4A and 4C

29.126 Where tenant leaves – deposit

If the tenant leaves the tenanted property, either at the end of the tenancy agreement, or earlier than permitted by the agreement, and the official receiver is acting as trustee and landlord, then the deposit will need to be dealt with. Tenants have a responsibility to make sure that the property is in as good a condition when they move out as it was when they moved into it, subject to normal/fair wear and tear. When the tenancy comes to an end, the landlord is entitled to check the condition and contents of the property, and if all is well, the full amount of the deposit should be returned to the tenant. Where damage, other than usual wear and tear, has occurred the landlord may be entitled to withhold all or part of the deposit to restore the property to the original position.

Any deduction from the deposit is not to compensate the landlord for damage; it is to pay to make good the damage. The official receiver should not normally carry out repairs at the end of a tenancy.

Unless there is a detailed inventory from commencement, and a further one at termination of the tenancy, it is unlikely that a deduction will be accepted readily by the tenant.

29.127 Where tenant leaves – inspection

The official receiver should be conscious of the fact that when a tenant leaves the property, an inspection of the property will need to be funded by the bankrupt's estate and may not result in any deduction from the deposit being made. Further, any deduction made should be used for undertaking any required repairs and an inspection and retention of deposit in a property where there is negative equity is unlikely to benefit the creditors in any way, other than the mortgagee.

It is therefore unlikely to be beneficial for the official receiver to arrange for an inspection in the majority of cases.

29.128 Where tenant leaves – inspection when equity in property

Where there is equity in a property, and the official receiver is trustee, the official receiver should not normally consider carrying out an inspection or repairs as it is unlikely to result in a benefit to creditors. Additionally, unless there is a detailed inventory from commencement, and a further one at termination of the tenancy, it is unlikely that a deduction from the deposit will be accepted readily by the tenant.

The official receiver should ensure that proper insurance is in place when a property becomes vacant and a disclaimer is not going to be issued, see paragraph 29.130.

29.129 Where tenant leaves – dealing with deposit where there is minimal or negative equity

Where there is minimal (£25,000 should be used as a minimum guide figure but this may vary depending on local and general circumstances) or no equity in the property, the mortgagee should be informed that the property is empty and asked if they wish to inspect the property and to take possession. The mortgagee should be given a set time, for example, 10 days, to decide whether they wish to take possession of the property and deal with the deposit and should be informed should they fail to do so, the official receiver will authorise its release in full to the tenant. If the mortgagee does not respond within the time given, the deposit should be released to the tenant. If the mortgagee is not going to take any action, the official receiver will need to decide whether the property has become onerous and consider disclaiming their interest in the property within 30 days of the property becoming vacant to prevent the insurance cover from lapsing, see following paragraphs.

29.130 When tenant leaves – inspection for insurance purposes

Where the tenant leaves, and the mortgagee does not wish to take possession of the property, the official receiver will need to decide to either inspect and insure the property on an ongoing basis, or to disclaim their interest in it (assuming it has not been possible to get an insolvency practitioner appointed as trustee). Even if no deductions are going to be made from the deposit for repairs, where there is an

empty property in a bankruptcy estate, there are specific insurance requirements that will necessitate an inspection and the securing of those premises (see Annex A to chapter 14). Insurance cover is available for unoccupied buildings from Willis Ltd, provided that within 30 days of the building becoming unoccupied the code of practice referred to Annex A of chapter 14 for securing that building is followed. The official receiver should consider disclaiming the property prior to the 30 day period expiring if they decide to disclaim rather than insure the property on an ongoing basis at a cost to the estate.

29.131 When tenant leaves – insurance or disclaimer

Where the property is in negative equity, and the estate is no longer in receipt of rental income, the obligation to inspect and insure the property is likely to mean that the property has become onerous. If the mortgagee does not wish to take possession of the property, and where it has become onerous, the official receiver, as trustee, should consider disclaiming their interest in the property to protect the estate from ongoing insurance costs.

Only when there is some equity in the property should the official receiver consider the continuation of insurance. Where the official receiver decides to insure a property on an ongoing basis, rather than disclaiming it, the case should be transferred to LTADT to deal with in accordance with guidance provided in chapter 28.

29.132 When tenant leaves – tenant cannot withhold rent to recover deposit

If the deposit has not been retained by the bankrupt, and the tenant vacates the property at the end of the tenancy agreement, the tenant will be a creditor in the bankruptcy proceedings for the amount of the deposit (see paragraph 29.43).

The tenant may attempt to withhold the last month’s rent due under the tenancy agreement as repayment of the deposit. The deposit is a debt in the bankruptcy, and thus cannot be repaid in this way. The rental income due, is due to the official receiver as the landlord for occupation for the property post bankruptcy, and should be collected for the benefit of the estate (see chapter 48). If the tenant were to retain rent in this way, the official receiver should attempt to recover it.

A deposit debt cannot be off-set against rental income as there must have been mutual dealings prior to the date of the order and the deposit was money held on trust. See chapter 43.

29.133 When tenant leaves – furnished property

The official receiver should arrange for their agents to dispose of any furnishings left in the property when a tenant vacates, if this is likely to produce some benefit to the estate. The tenant should be asked to confirm, prior to the agent's instructions, that they have removed all their personal belongings from the property.

Where the property is in negative equity, and the furnishings are of no value, the official receiver should consider disclaiming their interest in the property and the contents (see paragraph 29.70).

Any furniture in a rented property would not be claimable by the bankrupt under the exempt property provisions[1].

1. Section 283(2)b

29.134 When tenant leaves – keys to property

When the tenant leaves the property, the official receiver, as landlord, should ensure all keys for the property are returned to them and placed in the office safe. The tenant should not return the keys to the bankrupt who no longer has any legal interest in the property. The whereabouts of all sets of keys should be established as soon as a tenant vacates the property, including making enquiries of the bankrupt who may still retain a set. See paragraphs 29.131 regarding insurance if the property is not to be disclaimed. When the tenant leaves the property, if the property is not going to be disclaimed, the case should be transferred to LTADT to deal with in accordance with guidance provided in chapter 28. Where the official receiver as trustee disclaims the property, any keys held should be returned to the mortgagee.

29.135 When tenant leaves – council tax

Council tax is a tax set by local councils to help pay for local services. There is one council tax bill for each dwelling, whether it is rented or owned. Generally speaking, the occupier(s) of the property are the liable person(s) for payment of the tax[1].

When the tenant(s) vacate(s) a property and it is left unoccupied, the legal owner is, generally speaking, the person liable for payment of the council tax. A property is exempt from council tax where the liable person is a trustee in bankruptcy[2] or the property has been taken into possession by the mortgagees[3] (see chapter 28). These exceptions apply even if the property is furnished, and will still apply if the trustee is liable with some other person (see chapter 30).

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

1. Local Government Finance Act 1992 section 6

2. Council Tax (Exempt Dwellings) Order 1992 article 3 Class Q

3. Council Tax (Exempt Dwellings) Order 1992 article 3 Class L

29.136 Position of bankrupt in relation to vacant property

The bankrupt no longer has a legal interest in the property owned by them at the date of the bankruptcy as the property vests in the official receiver as trustee appointed on the making of the bankruptcy order (see paragraph 29.6) or a subsequently appointed trustee. When the tenant vacates the property, the official receiver should not permit the bankrupt to move into the property. The reasons behind this are:

a) it is no longer the bankrupt's property, it vests in the official receiver, as trustee. If the bankrupt enters without permission, they are a trespasser

b) if the bankrupt takes up residence in the property, and the official receiver allows this without taking action, a new tenancy agreement may be created with the official receiver as the landlord and the bankrupt as the tenant. This would leave the official receiver subject to all the usual landlord's obligations

c) allowing the bankrupt to move back into the property is likely to compromise the mortgagee's ability to sell the property with vacant possession see paragraph 29.106

29.137 When bankrupt moves back in without permission

Should the official receiver discover that the bankrupt has moved back in to the property without permission, and an insolvency practitioner has not been appointed because there is minimal (£10,000 or less), or no equity in the property, then the official receiver needs to consider the most appropriate course of action. The official receiver could consider taking court action to obtain possession of the property from the bankrupt as a trespasser (see paragraph 29.105) but the costs of such proceedings would have to be paid for by the estate and consequently such action may not be in the best interests of creditors. Instead, the official receiver should write to the mortgagee informing them that the bankrupt has moved back in to the property and asking if they, the mortgagee, intend to take any action. If the mortgagee does not take any action ,then it is unlikely that the official receiver will take any further

action in relation to the bankrupt. The official receiver can rely on the bankruptcy restriction registered on the property at HM Land Registry as security for any equity in the property (see chapter 28). If the property later becomes onerous, the official receiver would then need to consider disclaiming their interest in the property (see paragraphs 29.138 onwards).

As the property is not a family home, it is not capable of re-vesting in the bankrupt at any point (see paragraph 29.8). A letter should be sent to the bankrupt informing them that although they have moved back in to the property, it will not re-vest in them but will remain as part of the bankruptcy estate until the interest is sold. Upon sale, any surplus will be paid to the bankruptcy estate. The letter to the bankrupt should explain the situation and potential loss to the estate and suggest that the bankrupt consider seeking legal advice. Consideration should be given by the official receiver to any potential misconduct for the purposes of a BRO.

If there is equity in the property it is likely that the case will have been handed over to an insolvency practitioner to act as trustee.

Disclaimers

29.138 General

Disclaimer of tenanted property should only be considered by the official receiver, as trustee, where the tenancy agreement and property when considered together are onerous[1]. Onerous property is defined as any unprofitable contract or any other property which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act[2].

Where a tenanted property is found to be onerous, the proper course of action is to disclaim it unless the mortgagee is going to take urgent action (see paragraphs 29.48). See chapter 42 for further information on disclaimers. If the property has any equity, or a paying tenant, then the decision should be taken with care and with regard to the creditors. The bankrupt should provide information regarding equity and rental income when completing the ORTPQ - Tenanted Property Questionnaire. See paragraph 29.61 for a list of issues which may cause a property to be onerous.

1. Section 315

2. Section 315(2)

29.139 When is a solely owned tenanted property onerous?

Tenanted properties are not usually onerous on the basis that the tenancy agreement simply imposes certain covenants (see paragraph 29.33) on the official receiver as landlord, e.g. to ensure the exterior of the property is kept in good repair. These covenants are not usually particularly onerous. If a tenancy agreement is producing rent which is greater than the outgoings in relation to that agreement, it cannot be considered to be onerous even if the underlying freehold/leasehold property is in negative equity. The official receiver will need to balance the benefits of the reversionary interest in the property and the tenancy agreement against the detriments to decide whether the agreement is onerous[1].

A tenanted property will generally only be considered onerous when the obligation to pay monies in carrying out the landlord's obligations (see paragraph 29.71) exceeds any equity in the property and any expected rental income (less expenses). See chapter 42 for more information on disclaimers and the process for issuing one.

1. SSL Realisations (2002) Ltd [2006] Ch 610

29.140 Mortgagee to appoint receiver – onerous property

A disclaimer should not be issued where the mortgagee has indicated they are going to appoint a receiver. When dealing with onerous property, it is imperative that it is dealt with quickly and so the mortgagee should be pressed for a time by which they will appoint a receiver or take possession. Onerous property should not be left whilst the mortgagee makes a decision on how to proceed. The mortgagee should be warned that if they have not dealt with the property by a certain date, a disclaimer will be issued.

29.141 Tenanted property becomes onerous in the future

A solely owned tenanted property which cannot be considered by the official receiver to be onerous initially, as the rental income exceeds any outgoings, may become onerous at a future point in time. This may occur where the official receiver is notified of a required expensive repair in a property with no equity e.g. the roof of the property requires extensive repair. As soon as the property and tenancy agreement, when considered together, become onerous, the official receiver is then able to consider disclaiming the property. See examples below.

29.142 Disclaimer cannot be against tenancy agreement only

Should the official receiver decide to proceed with a disclaimer, care should be taken to disclaim both the freehold/leasehold reversionary interest in the property and the tenancy agreement, as legal advice suggests that to disclaim only the tenancy agreement would not fully protect the official receiver from liability. Reference in the Insolvency Act to an “unprofitable contract” is considered to be to pure contract, in contrast to other forms of property[1]. By disclaiming a tenancy only, the trustee would be destroying someone else’s property, rather than their own. Instead, it is thought that all the trustee can do is to disclaim the bankrupt’s property, which in the case of tenanted property is the freehold reversion and any interest held in the tenancy agreement as landlord (see paragraph 29.33). Where a tenancy agreement has ended, and the property is vacant, or the bankrupt has moved back in, any disclaimer would be against the freehold/leasehold property only.

1. ABC Coupler & Engineering Ltd (No 3) [1970] 1 WLR 702

29.143 Disclaimer – example of onerous tenanted property

A bankrupt solely owns a negative equity property with a tenant, on a statutory periodic assured shorthold tenancy (see paragraph 29.17) the rent being £300 a month. The property was not considered to be onerous initially as the rental income from the property exceeded the costs in renting the property. The tenant has paid two months rent (£600). The tenant calls the official receiver and informs them that the boiler has broken. A subsequent quote from a gas safe engineer is that the boiler cannot be fixed and should be replaced at a cost of £2,000. As his tenancy agreement is a statutory periodic tenancy renewable monthly (as the original 6 month agreement has expired), the tenant can leave with 1 months notice. The obligation to replace the boiler has made the property onerous for the first time, as there is no guarantee that funds will become available from the rental income to recoup the costs of replacing the boiler. The official receiver decides to disclaim his interest in the reversion of the property and tenancy agreement.

29.144 Disclaimer – further example, roof repairs

The official receiver is trustee in a case where the bankrupt solely owns a property let on an assured shorthold tenancy agreement (AST). The AST still has four months to run and the rent is £500 a month. The tenant is therefore contracted to pay a

further £2,000 under the terms of the tenancy agreement. One months rent has so far been collected by the official receiver. The bankrupt has stated that the property has £5,000 equity. The case has been offered to an insolvency practitioner but they have declined the appointment. On initial investigation, the property and tenancy are profitable and so disclaimer action by the official receiver, as trustee, is not appropriate. Shortly after the official receiver becomes trustee the tenant notifies the official receiver that the roof is in need of repair as it is dangerous. Following a storm there are several slipped slates which have fallen off narrowly missing the tenant on two occasions and there is also rain water leaking into the house causing damp.

29.145 Disclaimer – roof repairs example, action to take

Because of the equity in the property, and the potential future rent, the official receiver cannot disclaim the reversionary interest in the property without further enquiries to see if the costs of repairing the roof will cause the property to become onerous or not. The official receiver obtains three quotes from roofing contractors for the work, and all three contractors recommend the roof is replaced at a cost of approximately £4,000.

The official receiver has no guarantee that the tenant will not default on future rent payments and given the current state of the housing market, and the costs involved in any sale of the property, there is no guarantee that the £5,000 equity will be realised. The official receiver therefore decides that the property has become onerous and decides to disclaim his interest in the reversion of the property and the tenancy agreement.

29.146 Disclaimer following collection of rent

The collection of rent does not preclude the official receiver, as trustee, from disclaiming their interest in the reversion of the property and tenancy agreement at a later date. Irrespective of an intention to disclaim the tenanted property, the official receiver should arrange initially for the collection of the rent for the benefit of the insolvent estate. Once the disclaimer has become effective, the right to collect rent, including any rent arrears, comes to an end.

29.147 Disclaimer – effect

Disclaimer brings to an end the official receiver's interest in the tenancy and reversion in the property from the date of the disclaimer. It will also bring the tenant/landlord relationship to an end and discharge the trustee from all personal liability in respect of the property as from the commencement of their trusteeship[1].

1. Section 315(3)

29.148 Disclaimer – effect on tenant's rights

The disclaimer does not bring to an end the rights and obligations of any third parties interested in the property. The tenant will not lose their rights of occupation under the tenancy. As the disclaimer brings to an end the trustee's rights and obligations under the tenancy, the official receiver will no longer have the right under the tenancy agreement to seek possession of the property or to collect rent.

After a disclaimer has been served, the rental income does not revert to the bankrupt who has no remaining interest in the property. The tenant may still wish to pay the rent to preserve their rights under the tenancy agreement, if so, the official receiver should inform the tenant to contact the mortgagee, who still retains security on the property post disclaimer, to request that the mortgagee accept the rent.

A copy of the disclaimer should be served on the tenant and anyone else known to be living in the property or with a right to occupy it[1] (see chapter 42).

1. Section 318

29.149 Disclaimer – effect on guarantor of tenant

Disclaimer of the freehold/leasehold reversionary interest in the property and tenancy agreement by the official receiver does not affect the rights or liabilities of any other person. It has been held that a guarantor of a tenant remained liable notwithstanding disclaimer[1].

1. Hindcastle Ltd v Barbara Attenborough Associates Ltd [1997] A.C. 70

29.150 Disclaimer – property vests in Crown Estate

Disclaimed land vests in the Crown Estate by escheat. The Crown Estate does not incur any liability in respect of land unless it takes possession of, or exercises control over it. Where a property is mortgaged for more than its value, the Crown Estate is unlikely to take any action as in doing so it may become liable for that property. By accepting rent, the Crown Estate would most likely be exercising some control and so become liable for the property. Instead, the most likely course of action is that the mortgagee will exercise control to protect their interest (see chapter 42).

29.151 Disclaimer – effect on mortgagee's rights

As a disclaimer does not end third party rights or liabilities, the mortgagee will retain its security over the property, and its right to appoint a receiver of rents or take possession[1]. If the mortgagee enters possession of the property after the tenancy agreement has been disclaimed, it would be a matter between the mortgagee and the tenant whether a new agreement is created. It would also be the mortgagee's responsibility to deal with any deposit still held.

A copy of the disclaimer should be served on the mortgagee[2] (see chapter 42)

1. Scmlla Properties Ltd v Gesso Properties (BVI) Ltd [1995] NPC 48

2. Insolvency Act 1986 section 318

29.152 Disclaimer – vesting orders

Where the official receiver disclaims a freehold or leasehold reversion, then any person with an interest in it may apply for a vesting order[1], (see chapter 42). This will include the tenant, any other occupiers and the mortgagee, but not the bankrupt.

1. Section 320

29.153 Disclaimer – insurance

Following disclaimer, the official receiver, as trustee, will no longer be the landlord of that property or have any rights or liabilities in respect of it. Any insurance taken out by the official receiver on the tenanted property should therefore be cancelled.

29.154 Disclaimer – letter to tenant

Along with serving notice of the disclaimer on the tenant, the official receiver should also write to the tenant stating that the official receiver is no longer the landlord and is no longer responsible for the property using the template letter[1].

The official receiver should provide the tenant with the mortgagee's contact details and inform them that contact may be made by the mortgagee shortly regarding the tenancy. If the official receiver is aware of a deposit being held, they should inform the tenant of its whereabouts and how to obtain the funds when the tenancy ends.

1. ISCIS letter Annex J2 – sole – disclaimer letter to tenant

29.155 Disclaimer – letter to bankrupt

Along with serving notice of the disclaimer on the bankrupt, the official receiver should send a letter confirming the implications of the disclaimer using the template letter[1].

1. ISCIS letter Annex J1 – sole – disclaimer letter to bankrupt

Mortgagees

29.156 Mortgagee's right to take possession

A mortgagee usually has the power to take possession of a property over which they hold a secured charge when the borrower (mortgagor) breaches the terms of their mortgage loan[1]. Where the mortgagor has not obtained permission from the mortgagee to grant a tenancy over that property, they are usually in breach of the mortgage terms and so granting an unauthorised tenancy is usually sufficient grounds for repossession. Failing to make mortgage payments will also make the mortgagor in breach of the terms of their mortgage.

1. Law of Property Act 1925 section 101

29.157 Mortgagee's right to actual possession when consent to let granted

When a mortgagee has given a bankrupt consent to let their property out, or the mortgage is a buy-to-let mortgage, their right to repossess the property is the same as above, although they are bound by the tenancy agreement. This prevents the mortgagee from obtaining vacant possession (i.e. evicting the tenant), without following the proper notice period[1]. See paragraphs 29.189 onwards.

1. Housing Act 1988 section 21

29.158 What constitutes possession

Where a mortgagee takes actual possession of a property, there is no doubt as to their intention to take possession and they assume the liabilities of a mortgagee in possession (see paragraph 29.160). Where the mortgagee gives notice to the tenant to pay rent to them, it is also clear that they intend to go into receipt of rents and profits. This is equivalent to taking possession[1]. This is also the case if they give notice to the tenant not to pay rent to the mortgagor[2]. The mortgagee must either take possession or leave the mortgagor in possession[3].

1. Horlock v Smith [1842] 11 LJCh 157

2. Mexborough UDC v Harrison [1964] 2 All ER 109

3. Heales v M'Murray [1856] 23 Beav 401

29.159 Mortgagee not in possession

A mortgagee cannot be said to be in possession when they merely receive a sum equal to the rent from the mortgagor's agent, when the agent has not served on the tenant any notice on the mortgagee's behalf[1]. The mortgagee must act in such a manner to substitute themselves for the mortgagor in the control and management of the property. The mortgagee does not assume possession by insuring the property or by making arrangements with the tenant if the tenant does not recognise the mortgagee as landlord[2].

1. Noyes v Pollock [1886] 32 ChD 53

2. Ward v Carttar [1865] LR 1 Eq 29

29.160 Landlord's duties when mortgagee in possession

When a mortgagee is in possession of a tenanted property, the official receiver, as trustee, is no longer actively in control of that property, and is no longer entitled to collect rent. The mortgagee will assume the role of manager of that property[1], effectively becoming the landlord. When a mortgagee takes possession of a tenanted property, they also take on responsibility for that tenancy, including the collection of rent[2].

1. Kendle v Melson [1998] 193 CLR 46

2. Cockburn v Edwards [1881] 18 ChD 449

29.161 Mortgagee's right to rent arrears

When a mortgagee enters possession, they are entitled to collect any rent arrears that exist at the date of possession[1]. The mortgagee is entitled to arrears of rent whether falling due before or after the mortgage was granted. They are also entitled to receive rents held by a letting agent not yet paid over to the official receiver, as trustee. Any rent collected by the mortgagee in possession should be used firstly in paying the current outgoings such as insurance, repairs and taxes. The balance is then used in payment of the interest on the mortgage loan, followed by the capital[2].

1. Landlord and Tenant (Covenants) Act 1995 section 15(1)

2. Webb v Rorke [1806] 2 Sch & Lef 661

29.162 Mortgagee's right to sell when tenancy not binding

When a mortgagee in possession exercises its right to sell the property, and a tenancy was granted by the mortgagor without the mortgagee's consent, then the tenancy is void against the mortgagee. Where a tenancy agreement is void against the mortgagee, it is also void against any purchaser from the mortgagee[1]. The mortgagee would normally obtain vacant possession prior to selling a property either by peaceful entry of the property or by obtaining an order for delivery of the land. See paragraphs 29.164 and 29.165 below on the repossession process. The mortgagee may choose to sell a property with a sitting tenant.

1. Rust v Goodale [1957] Ch 33 at 44

29.163 Mortgagee's right to possession when tenancy is binding

Where a tenancy is binding on a mortgagee, the mortgagee must give a minimum of two months notice to the tenant to evict them[1] see paragraph 29.189.

1. Housing Act 1988 section 21

29.164 Repossession process – overview

Before a mortgagee can obtain actual possession of a property by evicting a tenant, the mortgagee must obtain a court order. If the mortgagee is not aware of the tenant's details, notice needs to be served on the property addressed to "the occupiers" of the hearing date, at least five days before the hearing. There are various options open to the court at the possession hearing, but if the mortgagee proves grounds for possession, and the application is not defended, the court will most likely make a possession order.

The possession order will give the occupier a date by which they should leave, which is usually 28 days after the hearing, although it may only be a few days in some cases. If the occupants have not left by the date on the possession order, then the mortgagee will need to go back to court and obtain a warrant for possession before they can evict the occupants. This usually occurs only one or two weeks after the date to leave on the possession order.

29.165 Repossession process – enforcing the order

The court's bailiffs will execute a warrant for possession and will change the locks to secure the property. They can break into the property if it is empty at the time they attend.

29.166 Mortgagee in possession entitled to appoint receiver

A mortgagee in possession may relieve itself of its position and responsibility by appointing a receiver under its statutory power[1] and the court may appoint a receiver after a mortgagee has taken possession if the circumstances render it just and convenient. The receiver would be the agent of the mortgagee not the mortgagor in this instance (see paragraph 29.168).

1. Anchor Trust Co v Bell [1926] Ch 805 at 817

29.167 Mortgagee's right to appoint a receiver of rents

A mortgagee has the right to appoint a receiver of any rents and profits of a property on which they hold a secured charge when the borrower (mortgagor) breaches the terms of their mortgage, see paragraph 29.156. This right is enshrined in the Law of Property Act 1925[1] and it is also normally contained in the terms of the mortgage deed. Failing to make mortgage payments will make the mortgagor in breach of the terms of their mortgage loan. Where the mortgagor has not obtained permission from the mortgagee to grant a tenancy over that property, the mortgagee will not normally appoint a receiver as to do so will be acknowledging and giving validity to that tenancy.

1. Law of Property Act 1925 section 101(1)iii and section 109(1)

29.168 Receiver of rents is agent of mortgagor

It is worth noting that when a receiver is appointed either by the mortgagee (under the terms of the mortgage) or by the court (under the Law of Property Act 1925), they act for the mortgagor (the borrower) and not the mortgagee[1]. The receiver is therefore unable to bring possession proceedings against the mortgagor being the same person. Instead, if possession proceedings are taken following the appointment of a receiver, it will be in the name of the mortgagee.

1. Law of Property Act 1925 section 109(2)

29.169 Receiver's duties to repair property

Where a receiver is appointed by the mortgagee, they are responsible for paying the running costs of that property from the rents received as follows[1];

- all rents, taxes, rates and outgoings whatever affecting the mortgaged property
- keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage of which he is receiver
- in payment of his commission, and of premiums on fire, life and other insurances, and the cost of executing necessary repairs directed by the mortgagee
- in payment of the interest accruing in respect of any principal money due under the mortgage
- towards discharge of the principal money, if so directed by the mortgagee

1. Law of Property Act 1925 section 109(8)

29.170 Receiver's duty to manage property

The receiver's duty of care was tested in a case where the receiver had failed to serve notice under a rent review clause in a lease, which meant that the rent was not increased and income was lost[1]. The judge found that the receiver had failed to come up to the standard of care required of a receiver. The receiver had regarded his function as to do what he was told by the lender but that was an unhappy misapprehension of the function of a receiver; for although he was appointed by one party, his function was to look after the property of which he was receiver for the benefit of all those interested in it. The receiver took over the management of the properties from the borrowers and it was held that failure by the borrowers to take steps to alert the receiver to the rent review clause did not amount to contributory negligence.

1. Knight & Anor v Lawrence [1991] BCC 411

29.171 Checking validity of receiver appointment

Where the official receiver receives notice of the appointment of a receiver of rents, they should request a copy of the relevant appointment document. This may take the form of a court order or of a document signed by the mortgagee provided the power of sale has become exercisable[1]. When the official receiver is satisfied the appointment is valid, they should write to the mortgagee and receiver confirming that they have accepted that the appointment is valid and that they are no longer

responsible for the tenancy or property from the date of the appointment. The official receiver should also write to the tenant providing information of the appointment of the receiver and stating that the receiver will deal with all further tenancy queries as landlord.

1. Law of Property Act 1925 section 109(1)

29.172 Transfer of case to LTADT following appointment of receiver

Where a receiver of rents is appointed and the property is the only outstanding asset matter, the case may be transferred to LTADT where it is unlikely that the property will be sold within 12 months (probable where rents are being received). If the property is likely to be disposed of by the receiver of rents within 12 months, the case should remain with the local official receiver to deal with. The official receiver will need to consider each case on an individual basis.

The official receiver should check that a bankruptcy restriction has been registered against the property in every case, and prior to any transfer to LTADT (see chapter 7).

Appointment of insolvency practitioner

29.173 Grounds for appointment

When there is significant equity in a tenanted property, the case should be offered to an insolvency practitioner as a property with a tenant in occupation does not classify as a straightforward asset realisation. As there is a need for a trustee to be in office as soon as possible to deal with any landlord responsibilities and rights under the tenancy agreement it is likely that their appointment will be via the SOS rota. See chapter 45 for guidance on Secretary of State rota appointments.

Where there is little or no equity in a tenanted property, but the property is still producing an income for the estate, an appointment from the SOS rota should still be considered (see paragraph 29.65).

29.174 Appointment of insolvency practitioner, mortgagee enquiries

Prior to seeking the appointment of an insolvency practitioner to act as trustee, enquiries should be made of any mortgagee to ascertain whether they intend to appoint a receiver or take possession (see paragraph 29.44). If the mortgagee is going to take imminent action, an insolvency practitioner is unlikely to accept the appointment unless there is significant equity in the property or there are other assets in the bankrupt's estate, as any rental income will no longer be available for collection by the trustee.

Sale of the legal and beneficial interest

29.175 Tenanted property not a family home

The main point to remember when dealing with a solely owned tenanted property is that it no longer belongs to the bankrupt; it vests in the official receiver as trustee. Neither is it a qualifying property under section 283A[1] if the bankrupt (or their family) did not live in it at the date of the bankruptcy order (see paragraph 29.10). There is no reason for the official receiver to consider selling a tenanted property back to the bankrupt as they do not need it for living in.

1. Section 283A

29.176 Legal and beneficial interest to be sold in exceptional circumstances only

For the reasons in paragraph 29.175 the official receiver should only consider selling a solely owned tenanted property back to a bankrupt in exceptional circumstances (see paragraph 29.180). It is possible to sell the legal and beneficial interest to a third party if the sale is for the financial benefit of the estate (see paragraph 29.178).

29.177 Mortgage debt in the bankruptcy

The unpaid element of the mortgage loan (including any negative equity) is provable in the bankruptcy. Even if the monthly mortgage payments are up to date at the date of the bankruptcy order, no further mortgage payments will be made from future rental income, except if the mortgagee goes into possession of the property, there are likely to be future liabilities relating to the mortgage loan and the costs of any subsequent repossession which would be provable in the bankruptcy.

The mortgage loan is a contributing reason not to sell the legal interest in the property back to the bankrupt, as to sell the legal interest in the property may entail

the mortgage company insisting that the bankrupt acknowledge the mortgage loan as a post bankruptcy debt, leaving the bankrupt fully liable for the mortgage debt post discharge (see paragraph 29.184).

29.178 Sale of legal and beneficial interest to a third party

The official receiver, as trustee, can sell and transfer the beneficial interest and legal title to a third party (but this should only take place in exceptional circumstances – see paragraphs 29.174 to 29.176 and 29.179). As a rule, and as the property is an investment rather than the bankrupt's home, it should only be sold if to do so would benefit the creditors over and above what would be achieved by the official receiver retaining the property. Where the property is solely owned, the transfer will need to be a transfer of the legal title, and the low cost conveyancing scheme will not apply (see chapter 28). A separate quote from TLT Solicitors (solicitors appointed by The Insolvency Service under the property conveyancing scheme) for their fees will need to be obtained by the official receiver. It is likely that the purchaser will need to take out a new mortgage loan for the purchase of the property, as the existing mortgagee is very unlikely to allow the legal title to be sold without the mortgage loan being redeemed (as occurs in the usual sale of a property).

29.179 Sale to third party – calculating value

Before the transfer of the legal title to a third party can proceed (subject to contract), the official receiver has to agree on the value of the interest being transferred. To do this, the official receiver will need to see an up to date valuation of the property prepared by an independent valuer or agent and up to date details of the amounts owed to creditors claiming mortgages and other charges over the property. The official receiver will also need details of how much rent is likely to be achieved for the estate over the remaining period of any tenancy agreement in place or a suitable period calculated on a case-by-case basis. The payment from a third party will need to compensate the estate for the loss of this rental income (e.g. if the rental income is £400 per calendar month and there is four months left on the tenancy, the official receiver may expect £1,600 plus all the costs), plus any equity in the property. The official receiver may consider accepting a lower amount for the rental income as there is no guarantee that the tenant will not default on rental payments. Ultimately, the best should be done for the creditors.

29.180 Sale to bankrupt (exceptional circumstances)

In exceptional circumstances the official receiver may consider selling the legal interest back to the bankrupt. Provided all of the following grounds are met it may be possible:

a) where the property was originally purchased as a home and was only let out on a temporary basis (e.g. whilst the bankrupt “got back on their feet”)

b) where the property has no equity

c) where no income is being received as the tenant has left

d) where the property is available (as the tenant has left) and suitable for the bankrupt to live in

e) where the bankrupt does not currently have any permanent residence (e.g. is lodging with friends) and needs to find a home

f) where the bankrupt can afford the monthly mortgage loan payment and it is not excessive for a suitable home in that area

g) the bankrupt has sought independent legal advice, see paragraph 29.181

h) the mortgagee’s consent has been obtained, see paragraph 29.183. If the tenant is still resident in the property, it is very unlikely to be practical as the property is not available for the bankrupt to move in to and they would not be able to afford the mortgage loan payments as well as their own accommodation costs

29.181 Bankrupt encouraged to seek independent legal advice

Whenever the bankrupt expresses a desire to purchase the legal and beneficial interest from the official receiver, as trustee, they should be strongly encouraged to seek independent legal advice. Where a property is in negative equity, or has little equity, the purchase of the legal title may not be in the bankrupt’s best interest. If the bankrupt agrees to take on the mortgage debt post bankruptcy, and they subsequently default on the mortgage loan following the purchase of the legal and beneficial interest, the mortgagee could take action to recover the debt against the bankrupt outside the current bankruptcy proceedings.

29.182 Discussion between mortgagee and bankrupt

The official receiver should distance themselves from any negotiations between the bankrupt and the mortgagee in relation to the bankrupt’s intention to purchase the legal and beneficial interest in the previously tenanted property. The official receiver

should ensure that they are not a party to any negotiations between the mortgagee and the bankrupt to avoid any future criticism.

29.183 Mortgagees consent to sale

Prior to the official receiver agreeing to sell the legal and beneficial interest in the property to the bankrupt, they will need to obtain consent from the mortgagee to the sale of the legal and beneficial interest from the official receiver to them. The mortgagee may require the bankrupt to come to an arrangement in relation to the existing mortgage debt.

29.184 Bankrupt to take over mortgage post-bankruptcy

Should the mortgage company be prepared to consent that the bankrupt purchase the legal and beneficial interest in the property and therefore to move into the property, it is highly likely that the bankrupt will be asked to sign an agreement to take over the mortgage debt post bankruptcy. This effectively means the bankrupt will not be released from the mortgage debt on discharge from bankruptcy. It is for this reason that the official receiver should strongly encourage the bankrupt to seek independent legal advice before proceeding in this way.

29.185 Process for selling interest to bankrupt

If the bankrupt obtains the mortgagee's written consent in relation to the property transfer, the official receiver should then proceed to sell the legal title and beneficial interest to the bankrupt on the basis that the bankrupt pays for the costs of the transfer and £1, if there is no equity in the property (see paragraph 29.178).

The bankrupt may contact the official receiver seeking to move back into the property as a matter of urgency, only when the official receiver is in receipt of the funds for the transfer and permission from the mortgagee, should the bankrupt be allowed to move into the property.

29.186 Selling interest to bankrupt post discharge

The bankrupt may wish to buy back the legal and beneficial interest in the property after discharge for various reasons, for example, their credit rating may restrict future mortgage products being available to them. If there is still a tenant in the property, it may be possible to sell the legal and beneficial interest back to the bankrupt

following their discharge, provided they are not subject to an IPA/O which will restrict the amount of available income the bankrupt has. In addition to the payment for the legal fees and any equity (or £1,000 if negative equity), the discharged bankrupt will also need to pay an amount equal to the rent that will be lost to the insolvent estate. The official receiver should ensure that the bankrupt is strongly encouraged to get independent legal advice before proceeding with the transfer (see paragraph 29.181). The bankrupt will also need to obtain the necessary permission of the mortgagee, see paragraphs 29.183.

29.187 When bankrupt allowed to move back in, IPA/O calculation

The official receiver needs to make it clear that if the bankrupt were to move back into the property after purchasing the legal and beneficial interest, and then take on a lodger to help with the mortgage payments, the official receiver would assess the rent received from that lodger as income, available for inclusion in any calculation for an IPA/IPO entered into before discharge, or in any variation of the amount to be collected under an existing IPA/IPO.

29.188 Termination of insurance after sale of interest

If the legal and beneficial interest is sold to a third party or the bankrupt, the official receiver no longer holds any responsibility for that property, and should ensure that any insurance taken out is cancelled to prevent further costs accruing.

Eviction

29.189 Eviction under Housing Act 1988 Section 21

Under the Housing Act 1988, a landlord who has granted an AST has a legal right to get their property back at the end of the tenancy. To legally terminate an AST in England and Wales at the end of a fixed term, the landlord must serve a section 21[1] possession notice personally on the tenant and must give the tenant a minimum of two months notice. The notice can be served in one of two circumstances, either at the end of the agreement (see paragraph 29.191) or during the running of the agreement (see paragraph 29.192), provided that it does not seek to terminate the

tenancy any earlier than the day the agreement ends. If the tenant fails to vacate the property after proper notice, possession action is needed to evict them. Not until an order for possession is made by the court would the tenancy actually terminate.

1. Housing Act 1988 section 21

29.190 When to serve section 21 notice to quit

The official receiver should not normally consider bringing a tenancy to an end by evicting a tenant. The most appropriate course of action is to either allow a tenancy to continue where the tenant is paying rent, or to disclaim the reversionary interest in the property and tenancy agreement where it subsequently becomes onerous (see paragraphs 29.138 onwards). If the official receiver were to evict a tenant, they would be left with an empty property and a public liability insurance risk for which insurance would be required. See paragraphs 29.38.

If the official receiver considers that it would be appropriate to serve a section 21 notice on a tenant of a property of which, as trustee, they are landlord advice should be sought from ORS Advice who may seek legal advice depending on the circumstances of the case. Failure of the tenant to vacate the property following service of a valid section 21 notice is contempt of court and will allow enforcement action to be taken by the trustee (see paragraph 29.193).

29.191 Service of notice to quit on a tenant – after AST comes to an end in exceptional circumstances only

A section 21 notice to quit can be served after the AST has come to an end, provided no further assured tenancy is in existence other than a periodic tenancy[1]. An AST will become a statutory periodic tenancy if it continues after the expiration of the fixed term see paragraph 29.17. For a section 21 notice to be effective:

- two months notice should be given in writing that the landlord wants possession of the property on the termination of the agreement
- the section 21 notice has to expire the last day of a period of the tenancy, which is usually the day before rent is due for a new period. To find out what the period of the tenancy is, the original AST agreement will need to be referred to
- the notice should be served by post or in person, but when served by post it should be sent by recorded delivery and three working days should be allowed for receipt

There is no prescribed form for a section 21 notice but it must comply with statutory requirements. The official receiver should only consider issuing a section 21 notice in

exceptional circumstances, and should consult ORS Advice before issuing one (see paragraph 29.190).

1. Housing Act 1988 section 21(1)a

29.192 Service of notice to quit on a tenant – during life of AST in exceptional circumstances only

A section 21 notice requiring a tenant to quit the premises can be served during the running of the AST[1] to expire after the tenancy has ended. For notice to be served under this section:

- two months notice should be given in writing that the landlord wants possession of the property on the termination of the agreement
- the two month period cannot expire before the end of the tenancy agreement
- the section 21 notice should be served by post or in person, but when served by post it should be sent by recorded delivery and three working days should be allowed for receipt

There is no prescribed form for a section 21 notice but it must comply with statutory requirements. The official receiver should only consider issuing a section 21 notice in exceptional circumstances, and should consult ORS Advice before issuing one (see paragraph 29.190).

1. Housing Act 1988 section 21(1)b

29.193 Service of notice to quit on a tenant – action after expiry of notice

If following the expiry of the two months notice mentioned in either paragraphs 29.191 or 29.192, the tenant has not vacated the property, court action may be taken to evict the tenant. The official receiver would need to seek legal advice before commencing any further action. Taking court action to evict a tenant may be costly and time consuming.

29.194 Service of notice to quit when deposit not retained

When the deposit paid by the tenant is not being held in an authorised tenancy deposit scheme, then a section 21 notice evicting the tenant may not be served until such time as the deposit requirements are complied with[1]. Where the official receiver

wishes to serve a section 21 notice and the deposit has not been retained, they would need to rectify the breach by providing such deposit funds from the estate, but see paragraph 29.190. This is not an option that the official receiver should consider, instead disclaimer action is likely to be more appropriate (see paragraph 29.138 onwards).

1. Housing Act 2004 section 215

Unusual circumstances

29.195 Company in liquidation as landlord of a tenanted property

In company cases, assets do not vest in the liquidator unless a specific order is sought from the court vesting the assets in the liquidator[1]. This is an extremely rare occurrence. The assets remain as property of the company (in liquidation), and so the official receiver is not directly the landlord of the property, the company remains as such. As the official receiver is the liquidator of the company, it is prudent to act appropriately to protect them from any residual liability as ultimately; they will be responsible for the company's actions. When giving the tenant written notice of a change of landlord (see paragraph 29.43)[2], the letter should state that the company (in liquidation) is still landlord, and that the official receiver (by name) is the liquidator of the company and has the powers of liquidator as provided by legislation to deal with the company's assets[3]. The official receiver, as liquidator, should ensure that the company, as landlord, complies with the duties and obligations as landlord or otherwise seeks to end the tenancy agreement.

1. Section 145

2. Landlord and Tenant Act 1985 section 3

3. Insolvency Act 1986 schedule 4

29.196 Dissolution of company

A company that owns property is not suitable for early dissolution and indeed, the official receiver will not be able to apply for their release as liquidator until any property owned by the company is sold (or otherwise dealt with) and, thereafter, the proceeds of sale dealt with (see chapter 48). Where a receiver is appointed, or the mortgagee takes possession, dissolution should be deferred to prevent the property becoming bona vacantia (see chapter 54).

29.197 Tenant failing to cooperate with the official receiver

The official receiver becomes landlord of a solely owned tenanted property when they are appointed as trustee immediately upon the making of a bankruptcy order (see paragraph 29.6). Provided notice has been served on the tenant notifying them of the change of landlord (see paragraph 29.43)[1], the tenant is obliged to continue paying rent and complying with the terms of the tenancy agreement.

Where a tenant defaults in the payment of rent to the official receiver, a letter should be sent to the tenant chasing payment and attempting to ascertain the reasons for non payment (if agents are not being used to deal with this matter). Where the tenant continues to default on rental payments, without reasonable explanation, a further letter should be sent to the tenant warning of the consequences of failing to pay the rent (see paragraph 29.198) and the tenant should be advised to seek legal advice if they are in any doubt as to the position of the official receiver/company as their landlord.

1. Landlord and Tenant Act 1985 section 3

29.198 Action to be taken to enforce cooperation

If the tenant continues to fail to cooperate after a letter has been sent chasing unpaid rent, then the official receiver, as trustee and landlord, should consider taking appropriate enforcement action, depending on the reasons for the default in payment (see below).

Landlords have a right to distrain for unpaid rent under the Law of Distress Amendment Act 1908. The right to distrain is only available to the person who is legally entitled to the landlord's interest both at the time the rent falls due and at the time of the distress. Under common law the right is limited to distraint for rent. Any sum treated as rent in the lease may be distrained for e.g. service charges (see chapter 12). The official receiver is likely to require specialist advice before commencing such action.

29.199 Tenant defaults in payment of rent – tenant cooperating

Where a tenant defaults in the payment of rent, it may be as a consequence of a change in circumstances of the tenant since the date the tenancy agreement was signed (e.g. the tenant is no longer in employment). Where a tenant notifies the

official receiver of a change in circumstance, and subsequent difficulty in meeting rental payments, the official receiver will need to take these reasons into consideration before commencing any enforcement action.

29.200 Bankrupt failing to cooperate with the official receiver

Where the bankrupt is failing to cooperate with the official receiver, and continues to attempt to collect rent from a tenant, the official receiver should take appropriate enforcement action. The bankrupt has a duty to deliver possession of their estate to the official receiver[1], failure to do so is contempt of court. A public examination of the bankrupt and/or suspension of the bankrupt's discharge from bankruptcy should be considered to enforce cooperation (see chapter 19 for further guidance on enforcing the bankrupt's co-operation).

If the bankrupt is threatening or intimidating a tenant, the official receiver should report the bankrupt's conduct to the police. Consideration should also be given to changing the locks to protect the tenant from the bankrupt entering the property without authority.

1. Section 291

29.201 Tenant paying mortgagee directly

Where the tenant pays rent directly to the mortgagee whilst the official receiver is entitled to receive that rent, the official receiver can recover the rent directly from the mortgagee[1] who is not entitled to keep the rent unless they appoint a receiver or take possession of the property. By attempting to collect the rent (back) from the mortgagee, the official receiver may prompt the mortgagee into taking action to appoint a receiver so that the mortgagee can legitimately collect the future rents from the tenant.

1. Gledhill v Hunter [1880] LR 14 Ch D 492

29.202 Solely owned property, tenancy agreement in joint names

Where the bankrupt solely owns property but the tenancy agreement is in joint names, how the official receiver treats that tenancy depends on the intentions of the parties at the time the tenancy was created, and how the tenancy has been dealt with by both parties. Enquiries need to be made by the official receiver to establish

why the tenancy agreement is in joint names, and evidence sought to back up those claims.

29.203 Solely owned, joint tenancy, payment of mortgage loan

When deciding how to treat a tenancy agreement, the official receiver should consider what the rental income received so far has been used for. If the rental monies have been used solely to discharge a debt in the bankrupt's name (e.g. the mortgage loan is in the bankrupt's name and the rent has historically been used to pay the mortgage loan), and the monies were not used by both parties then the official receiver should give consideration to treating the tenancy as though it is solely owned by the bankrupt (i.e. it will vest in the official receiver as trustee) and all the rent, less expenses, should be collected. Other factors will need to be taken into consideration and if the non bankrupt joint tenancy holder contributed to the property (e.g. by providing a significant deposit for the property's purchase or by paying for a significant improvement to the property), this may give weight to accepting the tenancy as a joint tenancy as the third party would be able to claim a beneficial interest in the property (see below and chapter 28).

29.204 Solely owned, joint tenancy claim of beneficial interest

Where the property is solely owned by the bankrupt, but the tenancy agreement is in joint names with another, it is possible that the non bankrupt joint tenancy holder has a beneficial interest in the property.

The official receiver will need to investigate any claim to a beneficial interest in the property from the joint tenancy holder in considering whether to accept that the tenancy agreement as a joint tenancy agreement or a sole agreement in the bankrupt's name. If there is a valid reason for the third party interest, for example, the third party has a beneficial interest in the property from contributing to the deposit paid on the purchase of the property, then it may be considered to be a joint tenancy and the official receiver should treat the tenancy as a jointly owned tenancy agreement and only seek to collect the bankrupt's share of the rental income less allowable expenses (usually 50% or other percentage as evidenced by the parties to the official receiver). Expenses would not include payment of any of the mortgage loan if the mortgage loan is in the bankrupt's sole name (see paragraph 29.45).

29.205 Solely owned, no claim to beneficial interest

If there is no claim to a beneficial interest by the joint tenancy owner, the official receiver should question why the tenancy was placed in joint names and, if there is no valid reason, treat the tenancy agreement as though it has vested fully in the official receiver as trustee. Where this is the case, the official receiver, as trustee and landlord, should seek to collect the full rent less allowable expenses notifying the other joint tenancy owner as appropriate (see paragraph 29.113).

If the official receiver believes the tenancy agreement is a solely owned tenancy agreement, then they will need to give the third party, and the bankrupt, written notice of the official receiver's decision to treat the tenancy agreement as if it were in the sole name of the bankrupt and the consequences of the decision.

29.206 Tenancy in name of third party

Where a tenancy agreement, on a property solely owned by a bankrupt, is created in the sole name of a third party, whilst it is not likely to be a legal lease (tenancy), it is probably what is known as an equitable lease and the tenant is likely to be considered by the courts to have a valid tenancy agreement.

Where a tenancy is created in the sole name of a third party, it may only be legally binding when that third party owns 100% of the beneficial interest in the property and the owner of the legal title simply holds the property on trust for that third party. If this is the case, the official receiver should treat the property as though the property is held in trust and consequently it would not form part of the bankruptcy estate. Legal advice may be needed to verify the third party's claim to 100% of the beneficial interest. Also see paragraph 29.209 on tenancy by estoppel.

Such a tenancy is unlikely to be legally binding on any mortgagee on the property unless the consent of the mortgagee to the tenancy agreement was obtained prior to it being granted.

29.207 Tenancy agreement in name of third party – action by official receiver

The official receiver should seek to ascertain the reason why a tenancy agreement on a solely owned property was placed in the name of a third party. The factors discussed in paragraphs 29.202 to 29.205 should be considered. Where no underlying reason can be established for the tenancy agreement to have been placed in the name of a third party, the official receiver should inform the third party,

as trustee, that in their opinion the tenancy agreement vests in the bankruptcy estate and that as trustee they will seek to enforce the rights and obligations as landlord under the terms of the tenancy agreement. The official receiver should treat the tenancy agreement as though it was created in the bankrupt's sole name and so the official receiver should write to the tenant informing them that the tenancy vests in the official receiver as trustee and that they are now landlord, see paragraph 29.43.

29.208 Tenancy agreement created after bankruptcy order and appointment of trustee

Where a bankrupt creates a new tenancy agreement after a bankruptcy order is made and after a trustee is therefore appointed, the tenancy agreement has no legal standing. This is because the legal title to the property vests in the trustee on appointment and the bankrupt had no legal title to the property on the date the tenancy was created.

The tenant does not have a legal lease (tenancy) but has a tenancy by what is known as estoppel with the bankrupt, as the tenancy was granted by the bankrupt without any legal interest in the property. A tenancy by estoppel is a valid tenancy agreement between the bankrupt and the tenant, but only comes into force when one of the parties seeks to default on the agreement on the basis that the landlord had no legal estate at the date of creation of the tenancy[1]. A tenancy agreement by estoppel is not binding on the official receiver as trustee.

As soon as the official receiver becomes aware of such a tenancy they should attempt to ascertain full details of the agreement.

1. Bruton v Quadrant Housing Trust [1998] 3 WLR 438

29.209 Tenancy created by the bankrupt after the official receiver's appointment as trustee – action to be taken

Although a tenancy agreement created by the bankrupt post the appointment of the official receiver as trustee is not legally binding on the official receiver as trustee, the official receiver will need to take some action in relation to the agreement. The official receiver has various options and will need to decide how to proceed on a property-by-property basis, depending on how cooperative the tenant and bankrupt are, and whether the property is onerous. As the bankrupt has no legal interest in the property, the official receiver should write to the bankrupt informing them that no further contact should be made with the tenant. The official receiver can either:

- acknowledge the tenancy by writing to the tenant in accordance with earlier guidance in this chapter and take on the role of landlord and obtain the rental income for the benefit of the insolvent estate
- disclaim the reversionary interest and tenancy if it is onerous (see paragraphs 29.138 onwards)
- ask the tenant to leave as they do not have a legally binding tenancy agreement against the official receiver. See guidance at paragraphs 29.119 onwards on vacant property. If the tenant refuses to leave, court action is likely to be required to evict the tenant

29.210 Tenancy created by the bankrupt after the official receiver's appointment as trustee – mortgagee and insurance

The official receiver should inform the mortgagee of the position immediately and ask whether they intend to take an action in relation to the tenancy agreement.

By default, as the property vests in the official receiver as trustee, they may become ultimately liable for any claims that the occupier may make for injury. Public liability insurance should therefore be obtained as soon as possible.

29.211 Protection of deposit

The official receiver should obtain details from the tenant/bankrupt as to any deposit paid. Where possible the official receiver should locate the deposit ensure it is protected (see paragraphs 29.26 onwards).

29.212 Tenancy created by the bankrupt after the official receiver's appointment as trustee – letter to bankrupt

Where the official receiver decides to acknowledge a tenancy agreement created after their appointment as trustee and become landlord, action should be taken to ensure the bankrupt is informed in writing of the official receiver's decision

The official receiver should inform the bankrupt of the decision to acknowledge the tenancy, that they are now landlord and that the bankrupt is not entitled to collect any rent due under the terms of the agreement.

29.213 Tenancy created by the bankrupt after the official receiver's appointment as trustee – letter to tenant

The official receiver should write to the tenant informing them of the decision to adopt the tenancy agreement. The official receiver will become landlord from the date notice is served on the tenant. The letter should request that the next payment of rent is sent to the official receiver on the next date payment is due.

29.214 Annulment applications

The official receiver may be informed that the bankrupt has made an application to court for an annulment of the bankruptcy order (see chapter 6A). Where the official receiver is trustee and landlord they will need to consider, on a property by property basis, what action needs to be taking pending the outcome of the hearing.

29.215 Stay of advertisement

Where a stay of advertisement (see chapter 8) is ordered pending the annulment hearing, the official receiver should ask the bankrupt to hold the rent to the order of the trustee pending the outcome of the hearing. If the official receiver feels the stay of advertisement will jeopardise the collection of rent, they can apply to the court for directions[1].

1. Rule 13.4

29.216 Houses of Multiple Occupancy (HMO's) - definition

Since 6 April 2006 mandatory licensing of any 'House of Multiple Occupancy' (HMO) came into force[1]. A building or part of a building is a HMO[2] if it meets one of the following conditions:

1) It meets the "standard test" which is;

- it consists of one or more units of living accommodation not consisting of self contained flats
- the living accommodation is occupied by persons who do not form a single household
- the living accommodation is occupied by those persons as their only or main residence or they are to be treated as so occupying it

- their occupation of the living accommodation constitutes the only use of that accommodation
- rents are payable or other consideration is to be provided in respect of at least one of those persons' occupation
- two or more of the households who occupy the living accommodation share one or more basic amenity or the living accommodation is lacking one or more basic amenity (a toilet, personal washing facilities or cooking facilities)

2) It meets the "self contained flat test", i.e. it consists of a self contained flat, and meets conditions 1) a) to f) above.

3) It meets the "converted building test", i.e. it is a converted building, and meets conditions 1) a) to e) above.

4) A HMO declaration is in force.

5) It is a converted block of flats, i.e. a building or part of a building which has been converted into and consists of self contained flats, if the building work undertaken did not comply with the appropriate building standards, and still does not comply with them, and less than two thirds of the self contained flats are owner occupied[3].

1. Housing Act 2004 section 55

2. Housing Act 2004 section 254

3. Housing Act 2004 section 257

29.217 Landlord's additional obligations in relation to HMO

HMOs are subject to additional regulation such as maintenance of the common parts, a duty to display the landlord's details in the common parts, and compulsory mains electric smoke alarms. The landlord needs to be a fit and proper person and there needs to be adequate amenities in place[1].

1. Housing Act 2004 section 67

29.218 HMO and action required by official receiver as trustee

Where the official receiver is aware that the bankrupt is the landlord of a HMO, they need to check that the proper licence is held, and the property complies with all requirements imposed by the local authority which regulates such licences.

When the official receiver becomes the landlord of a HMO, they will need to obtain an appropriate licence to continue managing that property and collect the rent[1]. The

application should be made to the local authority and a fee is payable, which is set by each local authority. The fee is likely to be in the region of £300 to £500. Alternatively, when a licence is already held by the bankrupt, an application can be made to either vary that licence[2] or an application for a temporary exemption of three months[3] can be made if the property is likely to be handed to an insolvency practitioner or repossessed.

1. Housing Act 2004 section 63

2. Housing Act 2004 section 69

3. Housing Act 2004 section 62

29.219 HMO penalty for non compliance and disclaimer

Failure to apply for a licence when needed is a criminal offence[1] subject to a maximum fine of £20,000. A maximum fine of £5,000 is also payable for any HMO regulation breached by a licence holder. If the official receiver is unable to verify that the accommodation complies with the licensing requirements, and there is unlikely to be sufficient income received to bring the property up to the compliance standard, then they will need to consider disclaiming their reversionary interest in the property and all the tenancy agreements (see paragraphs 29.138 onwards). If a disclaimer is issued, it should be served on the local authority responsible for granting the HMO licences along with all other interested parties. See chapter 42 on disclaimers.

1. Housing Act 2004 section 72

29.220 Selective compulsory landlord licences in certain areas

In addition to all HMO's requiring a licence, certain areas of the country which suffer from low housing demand and significant and persistent anti-social behaviour can also introduce local regulation requiring compulsory licensing of all private rented accommodation[1]. The local authorities which currently contain such areas are (please also see note below):

- Salford City Council
- Middlesbrough Council
- Manchester City Council
- Gateshead Council
- Sedgefield Borough Council
- Burnley Council

- Bolton Council
- Blackburn Council
- Leeds City Council
- Easington Council
- Hartlepool Council
- Nottingham

It should be noted local authorities may be consulting on implementing selective licensing within any of their areas at any time and therefore the list above may not be comprehensive. Each office should therefore be aware of the possibility of selective licensing coming into force and check as necessary on the local authority website.

1. Housing Act 2004 sections 79 and 80

29.221 Selective compulsory licences of certain areas

When the official receiver encounters a solely owned rented property in one of the areas referred to in paragraph 29.221, they will need to check that the bankrupt held an appropriate licence with the local authority and enquire whether the property complies with all requirements imposed by the local authority which regulates such licences.

The official receiver will need to obtain an appropriate licence to continue managing that property and collect the rent[1]. The application should be made to the local authority and a fee is payable, which is set by each local authority. The fee may be in the region of £300 to £800. Alternatively, when a licence is already held by the bankrupt, an application can be made to either vary that licence into their name[2], or an application for a temporary exemption of three months[3] can be made if the property is likely to be handed to an insolvency practitioner or repossessed.

1. Housing Act 2004 section 87

2. Housing Act 2004 section 92

3. Housing Act 2004 section 86

29.222 Selective compulsory licence penalty for non compliance and disclaimer

Failure to apply for a licence when needed is a criminal offence[1] subject to a maximum fine of £20,000. A maximum fine of £5,000 is also payable for any regulation breached by a licence holder. If the official receiver is unable to verify that the accommodation complies with the licensing requirements, and there is unlikely to

be sufficient income received to bring the property up to the compliance standard, then they will need to consider disclaiming their reversionary interest in the property and all the tenancy agreements. If a disclaimer is issued, it should be served on the local authority responsible for granting the selective landlord licences along with all other interested parties. See chapter 42 for information on disclaimers.

1. Housing Act 2004 section 95