

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.

24. Exempt property and property not comprised in bankrupt's estate

Chapter content

[Frequently asked questions](#)

[Introduction](#)

[Dealing with exempt property](#)

[Motor vehicles as exempt property](#)

[Household equipment as exempt property](#)

[Tools, etc. as exempt property](#)

[Claiming items of excess value](#)

[Other property excluded from the estate](#)

[Tenancies as exempt property](#)

[Claiming a tenancy – Whether as a vesting asset or as excluded property with excess value](#)

[Rent arrears and rent deposits](#)

[Right to buy and compensation payments](#)

Frequently asked questions

What is exempt property?

Exempt property does not form part of the bankrupt's estate and is therefore not automatically available to the trustee to realise on behalf of the creditors. Property which should be treated as exempt is defined in detail in section 283(2) of the Insolvency Act 1986.

What items are exempt property?

Property is exempt either on the grounds that it is necessary for satisfying a basic domestic need of the bankrupt or their family, or because it is necessary for use personally by the bankrupt in their employment, business or vocation. This might include household equipment, motor vehicles and/or tools of trade.

Careful considerations may need to be applied to decide whether certain items meet the definitions in the legislation and the guidance in this chapter will assist the official receiver in this regard.

Can exempt property ever be claimed by the official receiver?

Yes, if the property is of too great a value for the bankrupt to retain it can be claimed by the trustee. Once the asset is sold the trustee must provide the bankrupt with funds from the sale proceeds to purchase a reasonable replacement. No action should be taken by the official receiver, as trustee, to claim exempt property of excess value until satisfied that there will be a net benefit to the estate. A conservative view of the value of the item should be taken to provide a reasonable margin of safety.

Is there a time limit to make claim to property?

The official receiver, as trustee, has 42 days to make a claim to property once becoming aware of it or following appointment as trustee where prior knowledge held.

Introduction

24.1 Definition of the bankrupt's estate

In order to assist in properly understanding the extent to which a bankrupt's property may be treated as exempt, it will be useful to set out the provisions of the Act relating to exempt property¹:

The bankrupt's estate comprises all property² belonging to or vested in the bankrupt at the commencement of the bankruptcy except,

- such tools, vehicles and other equipment as are necessary to the bankrupt for use personally by him/her in their employment, business or vocation
- such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and their family

1. Section 283(1)

2. Section 436

24.2 Legislative purpose of the exemptions relating to tools of the trade

The exception is intended to enable a bankrupt to 'achieve his rehabilitation as a useful and productive member of society'¹ but it must be seen in the context of the operation of bankruptcy as a means whereby a debtor is freed from their debts but at the price of the gathering in and realisation of all their existing assets. The exception must not be artificially constrained but care must be taken not to interpret it excessively widely. An interpretation which would enable a bankrupt not just to earn a living by themselves working with particular equipment but also to keep all the equipment of his business out of the bankruptcy estate and so prevent it being available for the creditors would be excessively wide. Such an interpretation is not necessary to achieve the purpose of the exception and would run counter to the overall purposes of the bankruptcy².

1. Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 ('The Cork Report')

2. Birdi v Price [2018] EWHC 2943 (Ch)

24.3 Deciding whether something is exempt

For an item to be treated as exempt property it must be necessary for use personally by the bankrupt in their employment, business or vocation, or necessary to meet the basic domestic needs of the bankrupt and their family¹.

The court has held that the relevant questions around an item's position as exempt property are to be determined in light of the factual situation existing at the date of the bankruptcy order. The test to be applied is a non-technical one, taking into

account the normal use of the words 'necessary' and 'personally'. The application of the test will be highly fact-sensitive and close regard must be had to the circumstances of the particular bankrupt and of the particular item(s). An item that is necessary for one bankrupt to use in their employment might not be necessary to another even though the item and employment appear similar.

1. Birdi v Price [2018] EWHC 2943 (Ch)

24.4 Is the item necessary?

The fact that a particular tool used by a bankrupt is owned by them does not automatically or of itself make it necessary to them for use in his employment, business, or vocation. All will depend on the particular circumstances having regard to the chattel; the bankrupt; and the employment, business, or vocation. It will not be a good answer to a claim invoking the exception to say that the bankrupt could purchase a replacement chattel for himself. However, in a particular case it may be a good answer to say that such chattels are normally provided by others to those engaged in the particular employment, business, or vocation so that continued possession of the chattel in question is not necessary to the bankrupt.

Property that has been transferred to a third party is unlikely to be considered necessary even if still in use by the bankrupt, possibly preserving the ability of the official receiver to recover the property as a transaction at an undervalue¹.

It is the bankrupt's responsibility to satisfy the official receiver that the item is necessary, to the extent that no practical alternative exists, to meet a genuine need and not merely as a matter of convenience or desirability.

1. Official Receiver v Lloyd [2014] 10 WLUK 558

24.5 Is the item used personally?

It is unlikely that a person could be said to be personally using a tool, book, vehicle, or item of equipment if they were not themselves physically using that chattel. So for example, a bankrupt whose employees are using certain items in that bankrupt's business with no physical use of those chattels by the bankrupt can themselves be said to be using the chattels personally. Such use may well be "use by" the bankrupt but it cannot be "personal use by" him.

It is possible that the relevant use does not have to be exclusive in order to be personal and in particular cases a shared use might still be personal use for these purposes. However, use which is not exclusive is unlikely to be within the subsection at least where the shared use is by an employee of the bankrupt¹. Considerable caution must be exercised before the official receiver can conclude that equipment which is not used exclusively by a bankrupt is necessary for use personally by them.

25.6 Value of the item not a factor

The value of an item is not a factor in deciding whether it meets the relevant tests for being exempt. The legislation does however allow the trustee to claim an exempt item where it is possible for it to be replaced, at the cost of the estate, with a cheaper alternative – the difference then being funds in the estate. This is covered in detail below.

24.7 Exempt tenancies

The provisions relating to exempt property also includes certain residential tenancies¹. This is covered in detail below.

1. Section 283(3A)

24.8 Other exempt property

In addition to exempt property as described above, the following property is also excluded:

(a) Property held by the bankrupt on trust for any other person, which would include funds held on trust in an IVA for the IVA creditors^{1,2}. The onus of proof is on the person asserting to establish that a trust has been created³.

(b) The right of nomination to a vacant ecclesiastical benefice is also excluded⁴ (an ecclesiastical benefice is an endowed church office giving income to its holder such as a vicar or rector).

(c) Certain items are excluded by way of non-insolvency legislation, such as a student loan. As student loans are now excluded from the estate, any cash held by the bankrupt directly from the balance of a student loan is also excluded^{5, 6}.

1. Section 283(3) (a)

2. Re Coath (2000) BPIR 1009

3. Thandi v Sands [2014] EWHC 2378 (Ch)

4. Section 283(3) (b)

5. Section 283(6)

6. Education (Student Support) (no 2) Regulations 2008 regulation 94(1) (a)

24.9 Partnerships

The exempt property provisions of the legislation do not apply to partnership property, either whether the partnership is wound up as an unregistered company in conjunction with petitions against insolvent members, or where bankruptcy orders are made against the partners on their own petition^{1, 2}.

1. Insolvent Partnerships Order 1994 articles 10 and 11; schedule 7, paragraph 7(2); article 8; schedule 4, paragraph 28

2. Official Receiver v Hollens [2007] BPIR 830

Dealing with exempt property

24.10 Identifying exempt property

When dealing with potentially exempt property, there are two matters to consider:

- Whether the property is exempt (following the guidance above), and
- If the property is exempt property, whether or not it is of excess value.

Before dealing with any item of property, the official receiver should be satisfied that the item is not exempt property before taking action to claim or dispose of the property for the benefit of the estate.

This is the case even if bankrupt has not claimed the property as exempt through ignorance of the law. The risk in acting in this way is that the official receiver would have no defence to a claim that the item had been wrongly seized^{1, 2}.

The official receiver should therefore seek at an early stage to identify any property which could be considered to be exempt from the bankrupt's estate.

1. Section 287(4)

2. Section 304(3)

24.11 Bankrupt claiming property as exempt

This chapter will refer to the bankrupt 'claiming' property as exempt. Strictly speaking, property is exempt (or not) due to the provisions of the legislation and such 'claim' as is made by the bankrupt is to request that the official receiver confirms that a certain item of property is to be treated as exempt.

Such a claim might need to be supported with information and the guidance elsewhere in this chapter sets out what information requirements the official receiver would have, depending on the item concerned.

24.12 Trustee's right to reject bankrupt's claim to exempt property

The official receiver may reject a claim to exempt property by the bankrupt if it is considered that none of the grounds for exemption apply. A written record should be made of any claim made by the bankrupt to exempt property in the telephone interview notes, narrative statement or additional questions as appropriate, even if it is likely to be rejected.

Where the asset is straightforward to deal with, the notice rejecting the bankrupt's claim can be sent as soon as the official receiver becomes trustee^{1,2}. If there is any doubt as to whether an asset is exempt, or whether it is of excess value, the matter should be discussed with line management before notice is sent to the bankrupt. The bankrupt should not be led to believe that an asset is, or is not, exempt property in cases where an insolvency practitioner is likely to be appointed as trustee, as any decision is for the trustee to make.

1. REPR

2. ASTCAA

24.13 Explaining matters to the bankrupt

The concept of exempt property and the trustee's ability to claim exempt property of excess value should be explained to the bankrupt. This is also covered in the guidance available on GOV.UK.

24.14 Keeping full records of decisions taken

A note should be made in the telephone interview notes, narrative statement or additional questions as appropriate, of the information obtained from the bankrupt relating to the property in question, including whether and why they considered that the item should be treated as exempt. A record should be made in the examiner's instructions to insolvency case officers and on the file that the exempt provisions have been considered and do not apply, if appropriate.

24.15 Process for confirming property as exempt

When property is identified as exempt the standard notice should be sent to the bankrupt in relation to all items of exempt property identified. Items may be grouped

together, provided that an estimated value for the whole group of items is included (e.g. household furniture, £1,000).

24.16 Rejection of a bankrupt's claim that an item be treated as exempt

Where the bankrupt has claimed an asset as exempt, and the official receiver, as trustee, is rejecting that claim, notice should be sent to the bankrupt¹.

1. REPR

24.17 Bankrupt disposing of exempt asset

If the bankrupt subsequently sells an asset that has been treated as exempt, then as the item has changed character, it may no longer be needed or considered as exempt. The official receiver should consider whether the funds from the sale of the exempt asset are being used to purchase a new item which would also satisfy the same exemption criteria. The bankrupt should be asked to provide evidence that they have in fact purchased a replacement item. If the funds are not being used to provide a replacement item, then the official receiver should consider claiming such monies as after acquired property.

24.18 Information to creditors

All items which have been judged to be exempt property should be identified in the report to creditors. Items which are generally exempt in every case, such as household goods and furniture, may be listed in a note at the bottom of the report to creditors and grouped together as such, but items that are likely to give rise to queries, such as a motor vehicle or higher value items, should be individually listed. All other enquiries from creditors about exempt property matters should be dealt with as they arise.

24.19 Appointment of practitioner as trustee

If an insolvency practitioner is appointed trustee, the official receiver should provide them with details of all items that they consider may be exempt property and have not already been dealt with. Details of any action taken by the official receiver should also be given in the trustee's record book¹.

1. IPROH

Motor vehicles as exempt property

24.20 Official receiver to consider carefully the bankrupt's claim for a vehicle to be treated as exempt

Vehicles should not be treated as exempt property as a matter of course and a proper, active, decision should be taken in each case, taking into account the relevant facts and policies and recording all relevant facts, events and decisions on the file.

It would be expected that a vehicle be treated as exempt property to meet a domestic need (as opposed to an employment need) only in very limited circumstances.

24.21 Vehicle should be 'necessary' for the bankrupt to be treated as exempt

As detailed above, for a vehicle to be treated as exempt property it must be necessary for use personally by the bankrupt in their employment, business or vocation, or necessary to meet the basic domestic needs of the bankrupt and their family.

It is the bankrupt's responsibility to satisfy the official receiver that this is the case, particularly that the vehicle is necessary, to the extent that no practical alternative exists, to meet a genuine need and not merely as a matter of convenience.

It would be expected that a vehicle be treated as exempt property to meet a domestic need (as opposed to an employment need) only in very limited circumstances.

24.22 Use of the vehicle personally by the bankrupt

It is a requirement that the bankrupt satisfy the official receiver that the vehicle is necessary personally for it to be treated as exempt. This does not mean that the vehicle must be used exclusively by the bankrupt, but it must be necessary personally and not just necessary to others (where, for example, a spouse of the bankrupt needs it to get to/from work).

In considering whether the bankrupt is personally using the vehicle, the official receiver should consider the use to which the vehicle is put by the bankrupt and the frequency of that use. If the bankrupt is unable to demonstrate that the vehicle is used by them personally, or that the frequency of that use is low, the official receiver should give them the opportunity to introduce a third party to purchase the vehicle.

24.23 Bankrupt claims they need vehicle for work

When considering whether to treat a vehicle as exempt property under the provision relating to use of the vehicle in the bankrupt's employment, business or vocation, the principal points to be considered are:

1. Whether the vehicle is, in fact, used by the bankrupt in their employment, business or vocation and not, for example, for some, unrelated, domestic use.
2. The extent to which the bankrupt could reasonably travel to and from their place(s) of work using alternative transport (public transport, for example), taking into account their need to carry equipment or tools.
3. The extent to which the bankrupt's prospects of keeping employment would diminish without use of the vehicle.
4. If the vehicle requires repair, that it will be used to travel to work when repaired (taking into account points a – c above).

24.24 Bankrupt claims they need vehicle for work but is currently unemployed

It is not in the interests of the creditors of the bankrupt that the official receiver effectively puts the bankrupt out of the job market by removing one of his tools of employment. In circumstances where the bankrupt is unemployed or out of work, the official receiver can treat a vehicle as exempt if the bankrupt can satisfy the official receiver that:

1. their chances of gaining employment would diminish without the vehicle - whether that be because employment chances would be limited without the vehicle being available to travel to from work (though consider points (a) and (b) above) or that the bankrupt would need use of the vehicle directly in connection with their employment and,
2. they have a reasonable chance of obtaining employment or, in the case of a self-employed person, of obtaining work and,

3. if the vehicle requires repair, it will be used to travel to work and/or seek employment when repaired (taking into account points (a) and (b), above).

24.25 Vehicle in need of repair as exempt property

Where a vehicle requiring repair is claimed as exempt and the official receiver is minded to treat the vehicle as exempt, the official receiver should give the bankrupt 21 days to effect the repairs and provide evidence that the repairs have been effected. If such evidence is not supplied, the official receiver should realise the vehicle as, clearly, a vehicle that is not working cannot be exempt property.

24.26 Bankrupt is a carer for a relative

Caring for others clearly can be a vocation and the means by which an individual earns their living (nurses or care assistants, for example) and there seems no reason why caring for another who is, in fact, a relative should be treated any differently in principle. There are a considerable number of 'informal' and unpaid carers in the country who would describe their vocation as that of a carer. Many may be eligible for a [Carer's Allowance](#), which is an allowance payable if the carer is occupied in caring for another for at least 35 hours per week.

A bankrupt might, therefore, not be in paid employment and have no prospect of obtaining employment as a result of having taken on the care of a disabled relative (including a child). To decide whether a vehicle should be treated as exempt on these grounds, it is necessary to decide if the bankrupt's vocation is that of a carer.

24.27 Deciding if a bankrupt's vocation is that of a carer

In considering whether the bankrupt has a 'vocation' as a carer, material issues would be the time involved in undertaking the care, the receipt of a carer's allowance (which are connected) and the level of care required.

The normal care reasonably expected of a parent for a child is not considered to be a vocation in this context, but a parent caring for a disabled child would fall into the category of having the vocation of a carer.

24.28 Vehicle may be treated as exempt if bankrupt has the vocation of a carer

Subject to the guidance in above, a vehicle may be treated as exempt if the official receiver is satisfied that the bankrupt is an informal, full-time carer for a disabled relative or friend (in other words, has the vocation of a carer) and who would use the vehicle in connection with that role.

24.29 Bankrupt claims they need vehicle due to their own disability and/or for domestic use

A bankrupt may inform the official receiver that they have a disability and that their motor vehicle is necessary for mobility, or that the vehicle is necessary for domestic use (to take children to school, for example). The official receiver should treat such cases considerately, but where the bankrupt is unable to satisfy the official receiver that use of the vehicle is necessary for their use personally, they should nevertheless treat the vehicle as an asset of the estate.

24.30 Deciding if a vehicle is necessary for domestic use – Generally

It is for the bankrupt to satisfy the official receiver that the vehicle is necessary to meet a genuine need and not simply required as a matter of convenience.

For most journeys, a taxi service would offer an alternative to that of a private vehicle but, set against the costs of maintaining and running a modest vehicle, the use of such a service would be excessive if the required journey were a daily or frequent one. On the other hand, the task of undertaking the weekly shop may well be reasonably achieved more cheaply by taxi than by owning and running a private vehicle.

Bankrupts who live in an urban area with reasonable public transport links are unlikely (other than in the case of disability) to be in a position to claim that a motor vehicle is exempt for domestic reasons alone.

24.31 Deciding if a vehicle necessary for domestic use – Disability

Where a bankrupt's disability prevents them from seeking employment, the bankrupt must satisfy the official receiver that the vehicle allows them a degree of independent living which would be impossible without the retention of a vehicle, and/or there is no practical alternative to allow for attendance at medical appointments or other care associated with the disability.

24.32 Deciding if a vehicle is necessary for domestic use – The ‘school run’

Where a bankrupt claims a vehicle as exempt property as it is needed to transport their children to/from school, they will need to demonstrate that there is no public transport alternative or that the distance to travel would make walking (or cycling) an impractical alternative. It is not sufficient for a bankrupt who lives in a rural area to claim a motor vehicle simply by virtue of distance from the school.

The bankrupt must provide a statement that there is no transport alternative (for example, a local authority school bus service) or, if there is more than one child, show that diverse locations makes it impossible to transport all the children to school by public transport. In deciding matters here, it should be noted that local authorities are required to provide free transport to school where a child under eight lives more than two miles from their school or where a child over eight lives more than three miles from their school.

There will be exceptions to this – for example, where a parent has made a decision not to send their child to their catchment school the free transport provisions do not apply.

Practical problems such as organising children to walk to school, to travel with more than one child on public transport, or any general concerns about safety are simply matters of convenience and in such cases the vehicle is not necessary to meet a basic domestic need and the vehicle should be treated as an asset of the estate.

24.33 Consequence of bankrupt’s inability to satisfy the official receiver that vehicle is necessary

If the use of a vehicle does not meet the test for necessity the vehicle is vested in the bankruptcy estate and the official receiver may realise the vehicle. This includes giving the bankrupt the option to have a third party make an offer for the vehicle.

24.34 Official receiver should consider offers from third parties where vehicle not to be treated as exempt

Where the official receiver has taken the decision that a vehicle claimed as exempt by the bankrupt is not to be treated as such, they should enquire of the bankrupt

whether any third party introduced by them wishes to make an offer for the official receiver's interest in the vehicle to avoid the seizure and sale of the vehicle.

Where an acceptable offer is made agents will need to be instructed to undertake the sale.

24.35 Exempt vehicles of excess value

As outlined elsewhere in this chapter, where an exempt vehicle appears to have a significant value, it is open to the official receiver to claim it for the estate if they consider the realisable value of the vehicle exceeds the cost of a reasonable replacement.

24.36 Vehicle should have a net value to the estate to be worth claiming

The official receiver should not take any steps to claim an exempt vehicle unless reasonably satisfied that there will be a net benefit to the estate in doing so, after taking into account any costs of sale and of a replacement vehicle.

When valuing the vehicle, the official receiver should take into account the value of any personalised registration mark attached to the vehicle and any outstanding (accrued) tax and insurance on the vehicle.

24.37 Nature of bankrupt's employment relevant when deciding excess value

The nature of the bankrupt's occupation should be considered when deciding if a vehicle has excess value. Where, for example, the bankrupt is a self-employed chauffeur (for example, of a wedding car) or where they are required to travel many miles in their job, a vehicle of a higher value may be allowed to be retained.

Equally, the sum of money provided to the bankrupt to allow them to buy a replacement vehicle may be higher in these circumstances.

24.38 Provision of a suitable replacement vehicle – Amount allowed

Where the official receiver takes a vehicle of excess value, they will be required to provide a replacement vehicle. The official receiver has limited discretion as to the amount allowed for the bankrupt to buy a vehicle sufficient for their needs.

For consistency between official receivers' offices the amount to be available should be in the region of £1,000 unless a suitable replacement cannot be purchased for that amount. Generally, this figure should be adhered to except in exceptional circumstances - for example, due to the nature of the bankrupt's employment or the size of their family.

24.39 Provision of a replacement vehicle – Practicalities

It will be up to the bankrupt to find a vehicle suitable for their needs within the budget set by the official receiver. The official receiver will not directly provide the vehicle.

Depending on the circumstances of the case, the payment to purchase the replacement vehicle may be made to the bankrupt or directly to the vendor. Whilst the most secure way to deal with matters is by payment directly to the vendor, it is recognised that the bankrupt may get a better 'deal' if they are able to make a purchase from a private seller or through an auction – for which they may need the monies in advance of the sale.

24.40 Official receiver to check that bankrupt purchases car

If the monies required to purchase a replacement vehicle are provided to the bankrupt directly, the official receiver should request evidence of the purchase of a vehicle to be provided to them within one month of handing over the monies. If no such evidence is produced, the bankrupt should be requested to repay the monies, which will then be held pending them locating a car; the monies can then be paid directly to the vendor.

24.41 Official receiver should consider offers from third parties where vehicle has excess value

Where the official receiver is considering claiming an exempt vehicle of excess value, they may accept an offer from a third party equal to the net value of the car to the estate (that is, less the cost of a suitable replacement, but not the costs of sale) to avoid the seizure, sale and replacement of the vehicle.

When valuing the vehicle, the official receiver should take into account the value of any personalised registration mark attached to the vehicle.

Where the vehicle is exempt but of excess value and a third-party has offered to make a payment to allow the bankrupt to retain the vehicle, the official receiver need not instruct agents. This is because it is the right to remove and sell the vehicle that is being realised, rather than the vehicle itself (it not vesting in the estate unless/until claimed).

24.42 Vehicles with outstanding finance cannot be exempt property

It has been held that where an item is held on hire purchase terms, it is the hire purchase agreement that is the property and not the item to which the agreement relates. In reaching this judgment the court considered the wording of section 283 of the Insolvency Act 1986 and concluded that a hire purchase agreement is not capable of being a tool of their trade¹. The trustee can therefore agree to the sale of a car on finance with the surplus proceeds being payable to the estate – even if the vehicle would have been exempt property were it not subject to the finance agreement.

1. Mikki v Duncan [2016] EWCA Civ 1312

24.43 Otherwise exempt vehicle as insurance write-off

If a vehicle that otherwise would have been exempt has been written off by an insurance company (whether through an accident or theft) prior to bankruptcy, it will not be possible to treat the insurance payout as exempt property in lieu of the vehicle as the benefit under an insurance policy cannot be exempt property following the provisions of the Act.

The insurance company should be instructed to remit the insurance monies to the official receiver.

24.44 A motor-home as exempt property

If a bankrupt is living in a motor-home or campervan at the date of bankruptcy and this is their only place of residence, it is likely that they will be able to claim that the vehicle is necessary for their domestic use and it will, therefore, be appropriate to treat it as exempt, if it is not of excess value.

Likewise, a vehicle used by a bankrupt as temporary accommodation whilst working away from home may also be considered to be exempt.

Household equipment as exempt property

24.45 Items necessary for satisfying a basic domestic need

The legislation provides that 'such clothing, bedding, furniture, household equipment and provisions' are exempt from a bankruptcy estate on the grounds that they are necessary for satisfying the basic domestic needs of the bankrupt and their family¹. As outlined above, a motor vehicle may now be claimed in exceptional circumstances for the domestic needs of the bankrupt and their family as well as for their employment, business or vocation.

It is rare for household items to be claimed and sold by the official receiver as they generally have little second hand value. In cases where the official receiver is aware that the bankrupt's home contains items of a high resale value, such as antiques, these should be claimed for the estate.

1. Section 283(2) (a)

24.46 'Household equipment' and electrical goods

It is not considered that items such as stereo equipment, a television, a DVD player and computer are necessary to satisfy the basic domestic needs of the bankrupt and their family. Although such items will not therefore be considered exempt property under the heading of household equipment, the usual considerations concerning their likely realisable value and the prospective benefit to the estate should be considered before agents are instructed to deal with them. Depending on the nature of the bankrupt's work, such items might, however, be exempt as necessary to their employment, business or vocation e.g. a computer.

24.47 Claim to treat a computer as exempt property – data protection considerations

Where the official receiver is considering treating a computer as exempt property, it will be necessary to take into account the provisions of the data protection legislation and the possible need to retrieve the computer to meet investigatory duties when deciding how to respond.

By virtue of the vesting of the estate, the official receiver becomes data controller of any third-party data collected by the bankrupt and, in that position, has a duty to ensure that the data is protected and used appropriately.

If the data collected by the bankrupt was collected in the course of conducting their business, and they give a written undertaking to the official receiver that it will only be used in connection with that business, then it will be possible to treat the computer and the data contained thereon as exempt property.

Where the bankrupt has collected third-party data and it is no longer being stored for the original purpose of its collection, it will not be appropriate to treat the computer as exempt property and it must be recovered in line with local office procedure.

Data kept by the bankrupt for the purpose of their personal, family or household affairs are exempt from the principles of data protection legislation.

Tools, etc. as exempt property

24.48 Items necessary for use in employment

The legislation provides that 'such tools, books, vehicles and other items of equipment' are exempt from bankruptcy on the grounds that they are necessary to the bankrupt for use personally in their employment, business or vocation. This is most likely to be hand tools such as that used by a builder or plumber. Books that are necessary would not include, for example, books held by a bookshop as stock, or books of account, which contain financial information required by the official receiver.

24.49 Where business is one of hire

Where the business is solely one of hire, such as car hire, then it is unlikely that the items for hire will be used 'personally' by the bankrupt and so would not be considered exempt property. It may be appropriate to allow a certain number of vehicles provided they can either be used personally (e.g. a chauffeur service), or where the benefit to the estate would be greater than that of realising the vehicles. The court has previously offered a view that the exemption does not apply to "valuable or extensive plant, however necessary it may be to the conduct of the debtor's business"¹.

1. Pennell v Elgin [1926] SC9

24.50 'Other items of equipment'

The phrase 'other items of equipment' in the relevant provision¹ does not include stock or the insolvent's trading premises. The fact that stock and trading premises form part of the estate may mean that the bankrupt cannot continue in business, in which case, tools, books, vehicles and other items of equipment which would have been exempt property had the bankrupt continued trading, will instead fall to be dealt with as part of the estate¹.

1. Section 283(2) (a)

24.51 Official receiver's discretion in exempting items needed for a second or not for profit trade/profession

When deciding whether to accept a claim that items are necessary with regard to a bankrupt's 'employment, business or vocation', it may be that the 'business or vocation' is not the only source of income, or indeed may not generate an income at all (for example, a carer, see above).

If that is the case, then only assets that are necessary and are not of excess value should be permitted. There should be no discretion to allow the retention of excess value items, as this will not allow a greater return to the estate as no further income will be generated. If a bankrupt is running several businesses and makes a claim to several different assets as exempt, the official receiver should use discretion when deciding whether to allow only assets from the business that generates an income as exempt. Whether a business makes a profit is not the only factor in deciding whether an asset is exempt, but exempt items of excess value should not be permitted to be retained when the business is not profitable.

24.52 Bankrupt currently unemployed

An item may be exempt even though the bankrupt is not in employment at the date of the bankruptcy order if, without the asset, the prospect of them obtaining employment would be substantially reduced. The court has held that the exemption does not cease to apply because a bankrupt is unable to use the tools for a time due to ill health¹.

The definition of "employment, business or vocation" has been widened to include debtors who are informal, full-time, carers of a disabled friend or relative who would use the vehicle in connection with that role. See preceding paragraph for more details.

1. Wood v Lowe and others [2015] All ER (D) 133 (Sep)

Claiming items of excess value

24.53 Trustee's right to claim exempt property of excess value

The official receiver may claim exempt property for the bankrupt's estate if it appears that the realisable value of the whole or any part of the property exceeds the cost of a reasonable replacement for that property^{1, 2} and the costs of protecting and realising it.

1. Section 308

2. Section 308A

24.54 Valuation of asset

The bankrupt will have provided a valuation of the assets in the bankruptcy application, the questionnaire or at interview. If there is any doubt as to the accuracy, the examiner should obtain a telephone valuation from the official receiver's agents to act as a rough guide. The agents should also be asked to provide an estimate of their charges for selling such an item.

Where the items are of a specialist nature, or are otherwise difficult to describe, consideration should be given to incurring the cost of an agent's formal valuation. It should be considered likely that there will be a net gain to the estate after payment of agent's costs, insurances, and the costs of providing a replacement (if necessary).

24.55 Insurance of items with an excess value

If an exempt asset is considered to be of excess value and a net gain to the estate is considered likely, the official receiver should take steps to insure assets where it is appropriate to do so. It is more likely however to be appropriate for the official receiver to deal with the asset to avoid the expense of obtaining insurance cover. Where the official receiver insures the property it should be cancelled when no longer required.

24.56 Consideration of ability to make IPA/IPO payments

Where exempt property that could arguably be considered of excess value is allowed for the purposes of the bankrupt to continue to trade by keeping the assets, the official receiver should be looking to obtain an income payments agreement/income payments order (IPA/IPO). Such course of action makes the exemption of the assets justifiable to creditors.

24.57 Need for a net benefit to the estate

In all cases the official receiver should not normally take any steps to claim exempt property unless there is going to be a net benefit to the estate after taking into account any costs of sale and of a replacement item/vehicle. This means that the official receiver should take a conservative view of the value of the property so as to provide a reasonable margin of safety, after payment of agents' costs and the cost of a suitable replacement. Official receivers are expected to rely on advice from their agents as to whether such a net benefit can be achieved and may incur a debit balance on the estate to obtain such advice. Where a number of items, such as some pieces of antique furniture, would together achieve a net figure, the official receiver can consider them as a group.

24.58 Challenge by bankrupt

The bankrupt should be made aware that it is possible to challenge the official receiver's decision by making application to the court¹.

1. Section 303

24.59 42-day period to make claim to property

The official receiver in his capacity as trustee must make a claim¹ against the property in question by notice in writing² within 42 days of becoming aware of the property³. Note that the time limit, set by the Act, can be extended on application to the court⁴.

The court may refuse to permit the claim to be made after the expiry of the 42-day period⁵ and an administrative oversight is unlikely to be considered by the court to be a good reason for extending the period.

1. ASTCAA

2. Section 308(1)

3. Section 309

4. Section 376

5. *Solomons v Williams* [2001] BPIR 112

24.60 Property vesting in trustee once claimed

Once the official receiver has claimed the exempt property in writing the property will vest in the trustee as part of the bankrupt's estate from the date the bankrupt receives the notice. The trustee's title to the property has relation back to the commencement of the bankruptcy i.e. the date of the bankruptcy order¹. The trustee cannot then disclaim property claimed for the estate without the leave of the court².

1. Section 308(2)

2. Section 315(4)

24.61 Replacement property

Where the official receiver, as trustee, claims for the estate an item which is exempt property of excess value, funds comprised in the estate must be applied to purchase by, or on behalf of the bankrupt, a reasonable replacement. This duty on the trustee has priority over any duty on the trustee to distribute the estate¹. A purchase of replacement property can be made either before, or after the realisation of the property by the trustee². The official receiver is under no obligation to apply funds to the purchase of the replacement property until there are funds in the estate to do so³.

1. Section 308(3)

2. Rule 10.106(1)

3. Rule 10.106(2)

24.62 Money provided in lieu of sale

If a third party offers the official receiver the difference between the value of the property and the value of the replacement, the official receiver can accept that offer, enabling the bankrupt to retain possession of the property that would otherwise vest in the official receiver as trustee¹. The official receiver as trustee, may accept a third party's proposal if satisfied that it is a reasonable one, and that the estate will benefit to the extent of the value of the property in question less the cost of a reasonable replacement². The expenses of sale, which would otherwise be incurred, should also be taken into account in assessing any such offer.

1. Rule 10.107

2. Rule 10.107(2)

24.63 Appointment of an insolvency practitioner as trustee where there are items of excess value

Where an insolvency practitioner is to be appointed as trustee, the official receiver should hand over the estate as soon as possible when there are exempt items of excess value, due to the time limits on claiming property. Any delay by the official receiver may result in them becoming liable to recompense the estate for any loss due to the dissipation of the assets in the interim period¹. The insolvency practitioner's attention should specifically be drawn to the property which the official receiver considers may be claimed and the trustee's record book² should include details of any action taken by the official receiver in respect of that property.

The handover of the estate should take place so as to leave the trustee ample time to make the claim to the property. If necessary, the trustee may be given advance information about the property prior to the formal handover of the estate. To avoid property being lost for the benefit of the estate, the official receiver should serve the notice upon the bankrupt so that the property is claimed for the estate and proceed to hand over the estate to the insolvency practitioner trustee without delay. Any action taken by the official receiver in relation to the property should be included in the trustee's record book².

1. Section 304

2. IPROH

Other property excluded from the estate

24.64 Overview of other excluded property

In addition to items mentioned in the Insolvency Act 1986 that are exempt property¹, under the 'common law of bankruptcy', property which is peculiarly personal to the bankrupt is also excluded from the bankrupt's estate and does not vest in the trustee. This section provides an explanation of such property.

1. section 282(2), (3), (3A) and (6)

24.65 Rights of action as personal property

Certain rights of action are personal to the bankrupt. This is covered in detail in chapter 37.

24.66 Personal correspondence

It has been ruled that personal correspondence, whatever the subject matter, does not form part of the bankrupt's estate within the definitions of the Insolvency Act 1986¹. It was further ruled that, while some of the correspondence may relate to affairs relevant to the administration of the bankrupt's estate that does not bring it within the definition of estate. The judgment equated a bankrupt's personal correspondence to a right of action for damages for libel as being peculiarly personal to him/her and their life as a human being.

It is also possible that the removal and sale of a bankrupt's personal correspondence may contravene the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) article 8 which provides a right to respect for one's "private and family life, his home and his correspondence." This was considered in the case referred to above, but did not form part of the judgment. This aspect has not, otherwise, been considered in a court.

1. Haig v Aitken (2000) BPIR 462

24.67 Child Support Agency (CSA) payments

Assessments made under the provisions of the Child Support Act 1991 are made and enforced by the Secretary of State for the Department of Works and Pensions. Where a bankrupt is owed arrears of payments for child maintenance, the right to take action against the parent owing the child maintenance rests with the Secretary of State, and not with the parent/bankrupt who is owed the money, or the official receiver as trustee. Consequently, any arrears under an assessment are not vested in the bankruptcy estate.

Where a bankrupt receives arrears of child maintenance prior to discharge or whilst currently subject to an IPA/IPO, they do not automatically vest in the trustee, but they should be treated as part of the bankrupt's income and should be included in any calculation for an IPA/IPO. The CSA payments are additional income to the parent to meet the maintenance costs of any child/children (including food and shelter), the costs of which will be included in the bankrupt's household expenses. It is possible to claim the lump sum as a 'single payment' IPA/IPO but consideration needs to be given to the reasonable domestic needs of the bankrupt and their family.

24.68 Tax credits

Where a bankrupt receives arrears of tax credits for a period prior to or post the date of the bankruptcy order, the tax credits are only available to the trustee once they are paid to the bankrupt and therefore notwithstanding the fact that the payments may relate to a period prior to the bankruptcy order the funds do not automatically vest in

the trustee. The tax credits should be treated as part of the bankrupt's income and be included in any calculation for an IPA/IPO. Any lump sum received can also be claimed through an IPA/IPO when received by the bankrupt. It is possible to claim the lump sum as a 'single payment' IPA/IPO but consideration needs to be given to the reasonable domestic needs of the bankrupt and his family. This applies equally to Child Tax credits and, other tax credits.

24.69 Redundancy payments

An individual's entitlement to receive redundancy and associated compensation arises on the termination of their contract of employment by reason of redundancy. The redundancy payment represents compensation for loss of a job.

Where the employment has ended prior to the date of the bankruptcy order, but the bankrupt is awaiting receipt of the monies, then this is an asset which vests in the official receiver as trustee. If a bankrupt has received notice of redundancy, but not yet had employment terminated at the date of the bankruptcy order, then the right to receive a redundancy payment has not arisen.

Any redundancy monies paid after the bankruptcy order has been made but before the date of discharge does not vest in the official receiver as trustee but may be claimed as after acquired property. The trustee must make a claim to after acquired property within 42 days of becoming aware of that property^{1,2}. The official receiver must be satisfied that the amount claimed as after acquired property does not include any amount payable in respect of wages received whilst an individual works out a notice period, holiday pay or arrears of wages. Amounts received in respect of such payments should be included in any assessment for an income payments agreement/order.

1. Section 307

2. Section 309(1) (a)

Tenancies as exempt property

24.70 Introduction

This section deals with residential property that is rented by a bankrupt as their family home and is excluded from their estate¹.

The chapter also provides information on certain tenancy agreements that are not exempt but that are unlikely to be of any realisable value. In the normal course of

events, when a bankrupt is living in rented accommodation, they will usually do so under an assured shorthold tenancy. This type of tenancy will hold no value and will not form part of the bankrupt's estate.

1. Section 283(3A)

24.71 Legislative provisions relating to the exclusion of tenancies

The Act provides that certain tenancies are excluded from the bankrupt's estate¹. The detail is in the legislation but, in summary, most of the commonly encountered residential tenancies are covered and are therefore excluded.

The excluded tenancies include the four main types of residential tenancies used by private and local authority landlords. Any of these tenancies can be either a fixed term tenancy (for an agreed set period), or a periodic tenancy (for an indefinite rolling period e.g. monthly or weekly):

- The protected tenancy
- The assured tenancy
- The assured shorthold tenancy
- The secure tenancy

¹ Section 283(3A)

24.72 Differences between a lease and a tenancy

A tenancy is a type of lease, generally granted for a short fixed term and the obligations to repair and maintain generally remain with the landlord. The main difference between the usual type of lease encountered by the official receiver and a tenancy is that a lease is usually for a longer fixed period and the obligations to repair and maintain generally pass to the lessee. They both involve granting a period of property rights ownership, i.e. the tenant or lessee has an interest in the land and exclusive possession of the property for the specific period.

In addition to the obligation to pay rent, a lease may have been purchased by the payment of a one-off premium; this will not be the case with a typical tenancy agreement. Unless specified, a lease will often allow the lessee to assign the lease (sell on the lease), whereas a tenancy will not be capable of assignment by the tenant.

24.73 Types of tenancy agreements used by local authorities

Local authorities most commonly use secure tenancies. Housing associations, housing action trusts, and registered providers of social housing most commonly use assured shorthold tenancies.

24.74 Common Law tenancies

Common law tenancies fall outside the scope of the Housing Acts 1985, 1988 and 1996. 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.

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).

Any residential tenancy which is excluded from being an assured tenancy by the Housing Act 1988 is a common law tenancy.

24.75 Protected tenancy - Also known as a Rent Act tenancy

A protected tenancy is a tenancy agreement that is governed by the Rent Act 1977. This was the standard type of tenancy entered into prior to 15 January 1989. The protected tenancy was very favourable to tenants. The tenant has considerable security of tenure (it is very hard to evict them) and the level of rent paid is regulated¹. The Housing Act 1988 discontinued protected tenancies, but existing protected tenancies continue to be legislated by the 1977 Act.

A protected tenancy is excluded from the bankrupt's estate.

1. Rent Act 1977 section 1

24.76 The assured tenancy

Assured tenancies were introduced by the Housing Act 1988, and apply where a property was let to an individual as their home after 15 January 1989 but before 28 February 1997¹. These agreements give the tenant security of tenure, but the rent chargeable under these tenancies is permitted to be a market rent. Since 28

February 1997, notice must be given at the start of the tenancy to create an assured tenancy, or it defaults to an assured shorthold tenancy. It is difficult to evict a tenant with an assured tenancy, but it can be done on certain grounds as laid down in the legislation, e.g. if a tenant falls behind in rent payments for more than 2 months the landlord can apply to the court for a possession order.

An assured tenancy is excluded from the bankrupt's estate.

1. Housing Act 1988 section 1

24.77 Assured tenancy - Shared ownership lease

Even though the leases granted under shared ownership scheme are long leases it has been held¹ that they fall within the definition of an assured tenancy.

Where a shared ownership property has equity, the value of this equity will be lost to the bankrupt's estate unless it is claimed by the official receiver as trustee. Full guidance on property held by a bankrupt under a shared ownership leases is provided in [chapter 28](#).

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

24.78 Exclusion of tenancies at high rents – Tenancy created on/after 1 April 1990

A tenancy entered into on or after 1 April 1990 (otherwise than in pursuance of a contract made before 1 April 1990) where the rent is greater than £100,000 cannot be an assured tenancy¹.

The rent payable does not usually include amounts payable for council tax, services, management, repairs or insurance².

1. Housing Act 1988 schedule 1 paragraph 2(1)

2. Housing Act 1988 schedule 1 paragraph 2(2)

24.79 Exclusion of tenancies at high rateable values – Tenancy created before 1 April 1990

A tenancy entered into before 1 April 1990 (or on or after that date in pursuance of a contract made before that date), where the dwelling house had a rateable value on 31 March 1990 of in excess of £1,500 in Greater London and £750 elsewhere cannot be an assured tenancy¹.

In the unlikely event the official receiver encounters a lease where this exclusion may apply, a historic rateable valuation of the property as at 31 March 1990 can be obtained by contacting the [Valuation Office Agency](#).

1. Housing Act 1988 schedule 1 paragraph 2A

24.80 Exclusions of tenancies at low rents

The following tenancies cannot be assured tenancies;

- a tenancy under which for the time being no rent is payable¹.
- a tenancy which is entered into on or after 1 April 1990 (otherwise than, in pursuance of a contract made before 1 April 1990) and under which the rent payable for the time being is payable at a rate of £1,000 or less a year, if the dwelling house is in Greater London, and £250 or less a year, if it is elsewhere².

1. Housing Act 1988 schedule 1 paragraph 3

2. Housing Act 1988 schedule 1 paragraph 3A

24.81 Exclusion of tenancies at a low rateable value

The following tenancies cannot be assured tenancies:

A tenancy -

- which was entered into before 1 April 1990 or, where the dwelling house had a rateable value of 31 March 1990, on or after 1 April 1990 in pursuance of a contract made before that date, and
- under which the rent for the time being payable is less than two-thirds of the rateable value of the dwelling house on 31 March 1990¹.

In the unlikely event the official receiver encounters a lease where this exclusion may apply, a historic rateable valuation of the property as at 31 March 1990 can be obtained by contacting the [Valuation Office Agency](#).

1. Housing Act 1988 schedule 1 paragraph 3B

24.82 Other exclusions

The following also cannot be assured tenancies¹;

- business tenancies
- protected and secure tenancies

- a tenancy under which the dwelling house has a licence for the supply of alcohol
- agricultural tenancies where land exceeds two acres and tenancies of agricultural holdings
- lettings to students
- holiday lettings
- resident landlords
- crown tenancies
- tenancies where the landlord is a local authority, certain tenancies granted by the Homes and Communities Agency, the Welsh Ministers, an urban development corporation, a mayoral development corporation, a development corporation, London Fire and Emergency Planning Authority
- fully mutual housing association. This is a housing association where the rules restrict membership to people who are tenants of the association and prevent the granting/assigning of the tenancies to those who are not members. Fully mutual housing associations often have the word 'cooperative' in their title
- accommodation for asylum-seekers, persons with temporary protection,
- Family intervention tenancies unless the landlord notifies a tenant that it to be regarded as an assured tenancy.

1. Housing Act 1988 schedule 1 paragraphs 4 to 12

24.83 Assured shorthold tenancy

This is the standard type of residential tenancy for both private landlords and housing associations and was introduced by the Housing Act 1988. The Housing Act 1996 amended this act so that all new tenancies entered into since 28 February 1997 are automatically assured shorthold tenancies, unless the agreement has specified it to be an assured tenancy.

There are certain exclusions to this¹ but these mainly relate to when notice is served, the continuation of previous secure or assured tenancies, council tenancies, and assured agricultural occupancies.

If a bankrupt is the tenant of a residential tenancy agreement that was entered into verbally since 28 February 1997, it is by default an assured shorthold tenancy.

An assured shorthold tenancy in the name of a bankrupt as tenant is excluded from the bankrupt's estate.

1. Housing Act 1988 section 2A

24.84 Secure tenancy

Secure tenancies are agreements created by public bodies such as local authorities under the Housing Act 1985. Housing associations and housing co-operatives used

these agreements until 15 January 1989, but many now use assured and assured shorthold tenancies¹. When a tenancy is granted to a new council tenant, it may initially be on an introductory basis, later becoming a secure tenancy if there are no problems with the tenant.

A secure tenancy in the name of the bankrupt is excluded from the bankrupt's estate.

1. Housing Act 1985 sections 79 and 80

24.85 Introductory tenancy (also known as starter/probationary tenancy)

Introductory tenancies were introduced by the Housing Act 1996¹ and are available only to local authorities or a housing action trust. Introductory tenancies usually last for 12 months and provide the landlord with the facility to give tenants a trial period, and if there are any problems with the tenant, possession can easily be gained by court order. These tenancies are also known as a starter/probationary tenancy.

The tenancy will remain an introductory one until the expiry of the introductory period, although it may be extended by a further six months². Following satisfactory conduct by the tenant, on expiry of the introductory tenancy it will automatically mature into a secure tenancy.

1. Housing Act 1996 section 125

2. Housing Act 1996 section 125A

24.86 Introductory tenancies – Not excluded from bankrupt's estate

Introductory tenancies in the name of the bankrupt are not included in the tenancies excluded from the bankrupt's estate. It is therefore likely that such tenancies vest in the official receiver as trustee of the bankrupt's estate, though are likely not to have any value.

24.87 Demoted tenancy

Demoted tenancies were introduced in June 2004 by the Anti-Social Behaviour Act 2003¹ and enable a local authority or housing trust to deal more effectively with anti-social behaviour. Under such a tenancy it is much easier for a landlord to evict a tenant than one who has a full secure tenancy. Landlords are entitled to apply to court for an order demoting an otherwise secure or assured tenancy; and then, during this demoted period (usually one year), the landlord may seek possession of the property by following the appropriate statutory procedure where the tenant

continues to breach certain conditions. Where no possession order is sought within the period of demotion, the tenancy reverts back to the original tenancy.

- Where an assured tenancy has been demoted the landlord may obtain an order for possession within the first six months provided they follow the proper procedure².
- Where a secure tenancy has been demoted, at the end of the demotion period, the previously secure tenant will become a tenant on an assured tenancy instead of the previous more favourable secure tenancy terms. The tenant will lose rights during the period of demotion including the right to buy.

Demoted tenancies in the name of the bankrupt are not included in the tenancies excluded from the bankrupt's estate. It is therefore likely that such tenancies vest in the official receiver as trustee of the bankrupt's estate.

1. Housing Act 1988 section 20B

2. Housing Act 1988 section 21

24.88 Non-secure tenancy

Although not a true legal classification; the phrase 'non-secure tenancy' is often used to refer to a tenancy which would otherwise be secure, (i.e. the landlord and tenant conditions are satisfied), but which falls within one of the statutory exceptions¹. Such tenancies mean a landlord can gain possession with relative ease as no statutory grounds for repossession are required. Examples of a non-secure tenancy include when a local authority provides temporary housing to a homeless person or an asylum seeker². A landlord may gain possession of a non-secure tenancy with relative ease by serving a notice to quit and gaining an order for possession. They are not required to prove any statutory grounds for possession.

Non secure tenancies in the bankrupt's name are not included in the tenancies excluded from the bankrupt's estate. It is therefore likely that such tenancies vest in the official receiver as trustee of the bankrupt's estate.

1. Housing Act 1985 schedule 1

2. Housing Act 1985 schedule 1 paragraphs 4 and 4A

24.89 Family intervention tenancies

Family intervention tenancies came into force on 1 January 2009¹ and are a form of residential tenancy without security of tenure. Their creation aims to help local councils and housing associations to work with families who have been involved in antisocial behavior. These tenancies normally last between six months and one year.

Family intervention tenancies are not secure or assured tenancies as they are excluded from being so by the legislation^{2,3}. The tenancy can be converted into secure/assured tenancy on the relevant notice by the landlord to the tenant.

Family intervention tenancies in the name of the bankrupt are not included in the tenancies excluded from the bankrupt's estate. It is therefore likely that such tenancies vest in the official receiver as trustee of the bankrupt's estate.

1. Housing Regeneration Act 2008 section 297

2. Housing Act 1985 schedule 1

3. Housing Act 1988 schedule 2

24.90 Statutory periodic tenancy

A statutory periodic tenancy is a tenancy that is created when any of the main four types of tenancies referred to above come to an end¹. 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 of which the rent is normally payable². For example, if an assured shorthold tenancy comes to an end on 30 May, 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 30 June and monthly thereafter³.

1. Housing Act 1988 section 5

2. Housing Act 1988 section 5(3)

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

24.91 Informal tenancy

A residential 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. By default such tenancies are assured shorthold tenancies.

24.92 Occupation of property under licence

A licence is not a type of tenancy agreement but 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 land¹. Licence agreements do not generally vest in the official receiver as trustee as they are personal rights granted by the licensor to the bankrupt, and are not binding on any mortgagee or purchaser.

The general rule as to whether an arrangement is a lease 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) out of defined premises.

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

24.93 Occupation of property under licence – Family member

If the parties do not intend to enter into legal relations at all, no tenancy can be created. The circumstances which negate any intention to create a tenancy include a family arrangement or an act of friendship or generosity. It has been held that a father allowing his son to occupy his house on payment of the father's building society loan is a licence and not a tenancy agreement¹.

1. *Errington v Errington and Woods* [1952] 1 KB 290

24.94 Business tenancy

Business tenancies in the name of a bankrupt are not excluded from the bankrupt's estate and will vest in the official receiver as trustee of the bankrupt's estate.

A business tenancy is where the property comprised in the tenancy is or includes premises for the purposes of a business. 'A business includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporated'. The tenancy does not need to be in the name of a business to be a business tenancy; the important factor is the purpose that the property is let for¹.

The Landlord and Tenant Act 1954 Part II governs business tenancies. Business tenants generally have some rights to acquire a new tenancy on the expiration of a current tenancy agreement². This may result in that tenancy having a value to the estate. Tenancies that are not exempt should be treated like leases, and reference should be made to chapter 28.

1. Landlord and Tenant Act 1954 sections 23(1) and (2)

24.95 Continuation tenancies following expiration of a lease

A continuation tenancy occurs when a tenant remains in occupation after the expiration of a long tenancy at low rent under the Landlord and Tenant Act 1954 (a lease)¹. Following case law, continuation tenancies are considered to be property, and are deemed to fall into the estate. In a court of appeal case, the tenancy in question was a forty year lease under the Landlord and Tenant Act 1954 which had expired the year prior to the bankruptcy. The judge on appeal decided that the bankrupt had rights of occupation rather than rights under the former contractual lease, which came from legislation, therefore the tenant became entitled to protection under the Rent Acts rather than to a new tenancy². Continuation tenancies under this Act will vest in the trustee and should be treated like leases, reference should be made to chapter 28.

1. Landlord and Tenant Act 1954 sections 1, 2 and 3

2. Rothschild v Bell [1999] BPIR 300

Claiming a tenancy – Whether as a vesting asset or as excluded property with excess value

24.96 Claiming an excluded tenancy – value of bankrupt's interest

Before claiming the bankrupt's interest in an excluded tenancy, consideration should be given to the value of the interest to be claimed. Where the bankrupt's interest in the tenancy is less than £1,000 it should be considered to have no value to the bankrupt's estate and therefore should not be claimed. Where the value is greater than £1,000 consideration should be given to claiming the bankrupt's interest in the tenancy for the benefit of the estate.

24.97 How does the trustee claim an excluded tenancy?

To claim a tenancy to vest in the trustee as part of the bankrupt's estate the official receiver should serve written notice¹ on the bankrupt with a request for acknowledgement. The notice is normally served by both recorded delivery and ordinary 1st class post but it may be served by electronic means if the bankrupt has consented to electronic communication and provided an electronic address for delivery. If the official receiver is in any doubt about whether the electronic address provided is still being used by the bankrupt, service by post should also be used.

1. ASTCAA

24.98 Claiming a tenancy – Time limits

The official receiver in their capacity as trustee must make the claim against the property in question by notice in writing within 42 days of becoming aware of the property or, where the official receiver is trustee, within 42 days of becoming trustee if already aware of the existence of the property prior to becoming trustee¹. Note that the time limit, set by the Act, can be extended on application to the court².

1. Section 309(1)

2. Section 376

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

Once the notice claiming the tenancy has been served on the bankrupt, the assured tenancy (solely owned) or the bankrupt's interest in the tenancy (jointly owned) vests in the trustee as part of the bankruptcy estate, and the trustee's title to the property has relation back to the date of the bankruptcy order¹. Once the property has vested, the official receiver should take such action as is necessary to protect and realise the property including, where appropriate, the issue of letters to third parties such as the mortgage company. Where appropriate, the official receiver should seek to insure the property.

Essentially, once the assured tenancy forms part of the estate, the official receiver should deal with it as they would with any other family home forming part of the estate. From this point in the process, there are no special procedures for dealing with the asset, and the information and guidance given chapter 28 should be followed.

1. Section 308A

24.100 Disclaimer of assured tenancy claimed by trustee

Where the trustee claims an assured tenancy that is subsequently considered to be onerous, they will not be able to disclaim the property without permission of the court¹.

The application for permission to disclaim may be made without notice to any other party, and must be accompanied by a report giving details of the property, setting out the reasons why the property, having been claimed for the estate, is now to be considered for disclaimer and specifying the persons (if any) who have been informed of the trustee's intention to make the application. If the report states any person has consented to the disclaimer then the consent must be annexed to the report². It is presumed that the consent of the housing association, which may be obtained in advance of the hearing, will be persuasive to the court

For further information on disclaimers generally see chapter 42.

1. Section 315(4)

2. Rule 19.8

24.101 Vesting of certain local authority and housing trust tenancies

Some types of tenancy have been introduced since the Housing Act 1988 that are not currently excluded from a bankrupt's estate. Such tenancies are granted by a local authority or a housing action trust and include an introductory tenancy, a demoted tenancy, a non secure tenancy and family intervention tenancies. These tenancies will vest in the official receiver as trustee of the bankrupt's estate but are unlikely to be of any realisable value.

24.102 Vesting tenancies

When the official receiver encounters a tenancy granted by either a local authority, housing association, registered provider of social housing or housing action trust, and it is not excluded from the bankrupt's estate, then it will form part of the bankrupt's estate and will vest in the official receiver as trustee.

As these tenancies are not excluded, are likely to have no value and may place obligations on the official receiver as trustee (e.g. to pay rent) they should be disclaimed. See chapter 42 for guidance on issuing a disclaimer.

Rent arrears and rent deposits

24.103 Rent arrears generally

On the making of a bankruptcy order rent arrears are a bankruptcy debt insofar as the money owed is a debt to which the bankrupt is subject at the commencement of the bankruptcy¹, irrespective of whether the tenancy is an excluded tenancy. The landlord is a creditor in the proceedings with a provable debt for the amount owing up until the date of the bankruptcy order. Furthermore, the landlord has no remedy against the property or person in respect of that debt except with leave of the court or by a landlord's specific right².

Where a tenancy agreement does not form part of the estate, the bankruptcy does not affect the running of the tenancy, and the bankrupt has an ongoing obligation to pay future rents under the agreement. The arrears of rent and any service charges that exist at the date of the bankruptcy order are a provable debt and so are not payable by the bankrupt.

1. Section 382

2. Section 285

24.104 Rent arrears – Landlord's right to possession

Even though the rent arrears are a provable debt in bankruptcy there are instances when a bankrupt may wish to pay these arrears to avoid eviction from the property by the landlord. It is not possible for a landlord to gain possession of a property against the tenant's will without an order of the court. The courts have decided that a landlord still has the right to apply for an order of possession against a bankrupt tenant with rent arrears, and such an order can be sought before or after the making of a bankruptcy order, but no order can be made for the payment of the rent arrears¹.² The judge found that seeking a possession order was not seeking to enforce a remedy against the property of the bankrupt, but operated so as to determine the tenant's interest in the property. The landlord's ability to seek a possession order is not affected by, or connected to, the bankrupt's discharge, although as the bankrupt will be released from the rent arrears on discharge, the landlord will not be able to apply for a possession order after the bankrupt has been discharged.

1. Harlow DC v Hall [2006] BPIR 712

2. Places for People Homes Ltd v Sharples [2011] EWCA Civ 813

24.105 Rent arrears – Suspended possession orders

Should a bankrupt wish to avoid enforcement of a possession order, they must fulfil the conditions of the suspended order and pay the instalments ordered by the court. If a bankrupt wishes to make such payments to avoid losing their home, the official receiver should not object. When assessing the bankrupt's income and expenditure for IPA/IPO purposes, the official receiver should allow a sum ordered by court towards the repayment of rent arrears as a reasonable expense.

24.106 Rent arrears – Voluntary payments prior to possession order

Where a bankrupt has reached a voluntary agreement with the landlord to pay rent arrears following the landlord threatening to take possession proceedings, then the official receiver, as trustee, should not intervene in those payments. If the official receiver considers the payments to be excessive, and if they are likely to compromise the bankrupt's ability to make a payment under an IPA/IPO, the official receiver should ask the bankrupt to vary the agreement with the landlord.

24.107 Rent deposits

Where a bankrupt is living in rented accommodation, it is likely that they will have paid a security deposit. This is most likely being held by the landlord or agent. Where the tenancy agreement has been entered into after 6 April 2007, the deposit must be held in a separate Tenancy Deposit Scheme if it is an assured shorthold tenancy agreement¹. For information on this scheme see [The Deposit Protection Service](#) website. Alternatively, from 6 April 2007, a landlord may retain a deposit, but must take out an insurance policy to provide security to the tenant in respect of that deposit.

1. Housing Act 2004 section 213

24.108 Rent deposits – When claimable by trustee

A trustee should not attempt to claim a rental deposit whilst the bankrupt is still residing in the property as it may cause the bankrupt undue hardship to find funds to replace the deposit. If the landlord or agent holding the deposit is a creditor in the proceedings, they may claim a lien. If the holder is not a creditor, then they have no right to the monies and the monies should be recovered without difficulty at the end

of the tenancy if appropriate. The official receiver should not claim the monies where this will prevent the bankrupt from obtaining further accommodation. It is likely a further deposit will be needed if a further tenancy is to be taken on, and the monies should only be claimed in exceptional circumstances, for example if a bankrupt is moving back to reside with their parents and does not require the deposit.

Where a trustee has been appointed in a bankruptcy, any landlord or agent who holds any property to the account of, or for, the bankrupt has to pay or deliver to the trustee all the property in their possession or under their control which forms part of the bankrupt's estate and which they are not by law entitled to retain as against the bankrupt or trustee¹.

1. Section 312(3)

Right to buy and compensation payments

24.109 What is “right to buy”?

A “right to buy” is a right acquired by a secure (public sector) tenant after satisfying a residency qualification to purchase the freehold or acquire a lease to the dwelling house at a discounted price¹. The tenant or one of the joint tenants must have been resident in the public sector accommodation for at least 5 years. Prior to 18 January 2005, this period was 2 years². There are certain exceptions that preclude a tenant from exercising a “right to buy”, for instance, following an order suspending the right because of anti-social behaviour, if the landlord is a charity, if the tenant is an undischarged bankrupt or if the property is let in connection with employment³.

1. Housing Act 1985 section 118

2. Housing Act 1985 section 119

3. Housing Act 1985 sections 118(2) and 120; schedule 5

24.110 Right to buy – Joint tenancy

Where the secure tenancy is a joint tenancy then, whether or not each of the joint tenants occupies the dwelling house as their only or principal home, the right to buy belongs jointly to all of the tenants or to such one or more of them as may be agreed between them. Any such agreement is only valid if the person or at least one of the persons to whom the right to buy is to belong occupies the dwelling house as their only or principal home¹.

24.111 Right to buy – Housing association tenants

A housing association or housing co-operative tenant with a tenancy that began after 15 January 1989 will have an assured tenancy rather than a secured tenancy agreement. These types of agreement do not contain a right to buy option. Only housing association tenancies entered prior to this date will be secured tenancies with a right to buy option.

24.112 Right to buy cannot be exercised in bankruptcy

The right to buy cannot be exercised if the person, or one of the persons, to whom the right to buy belongs has a bankruptcy petition pending against them, or is an undischarged bankrupt¹.

1. Housing Act 1985 section 129(2) (a)

24.113 Right to buy does not vest in trustee

The right to buy cannot be exercised by the trustee in bankruptcy, as the right is personal to the bankrupt (and/or any joint tenant), so does not vest in the trustee. The trustee would not be able to fulfil the residency qualification, which is also personal to the bankrupt. Moreover, a secure tenancy, with limited exception is excluded from the estate by virtue of the Insolvency Act 1986.

24.114 Right to buy – right exercised prior to bankruptcy

If the bankrupt has already exercised a right to buy a public sector property prior to the bankruptcy order being made, then the bankrupt's beneficial interest in that property (if jointly owned), or the freehold or leasehold (if solely owned) will vest in the trustee on their appointment.

24.115 Right to buy – right exercised following bankruptcy

If the bankrupt exercises a right to buy whilst undischarged from bankruptcy, then it might give rise to an asset, which could be claimed as after acquired property. Any claim to an after acquired asset needs to be made within 42 days of becoming aware of that asset¹.

1. Section 309(1)

24.116 Right to buy discount

The discount available to secure tenants exercising their right to buy is linked to the number of years they have been resident. For a house this is calculated as a minimum of 35% plus 1% for every complete year exceeding the 5 year qualifying period, up to a maximum of 60%. In the case of a flat this is calculated as a minimum of 50% plus 2% for every complete year exceeding the 5 year qualification period, up to a maximum of 70%¹.

The courts have decided that a right to buy discount could be intended by the parties involved to be treated as a contribution to the purchase of the property by the person entitled to the discount, giving rise to a beneficial interest. The courts also decided that this is not an absolute principle but a matter for the courts to decide on the circumstances of the case. Where the transaction was found to be a sham, for example involving veiled operations such as the bankrupt entering into the transaction to disguise the sole beneficial owner, then the presumption could be displaced².

1. Housing Act 1985 section 129(2) (b)

2. Mumford v Ashe [2001] BPIR 1

24.117 Home loss payment

If a property in which a bankrupt resides is to be demolished they may be entitled to a home loss payment. In order to qualify for the receipt of a home loss payment the individual must, in the 12 months prior to displacement, have been in occupation of the property as their only or main residence¹. As the home loss payment relates to the bankrupt's occupation of the property the right to receive the payment is not capable of vesting in the official receiver as trustee as it is personal to the bankrupt. Once the funds have been received and changed character (for example, having been used to purchase an asset such as a car), the asset may be claimed by the official receiver, as trustee, as after acquired property. It would be for the bankrupt to make representation to the official receiver as to why the monies should be retained and not used for the benefit of the bankruptcy estate.

1. Land Compensation Act 1973 section 29

24.118 Disturbance payment

It is possible that a bankrupt may be paid a 'disturbance' payment as well as a home loss payment. If a "disturbance" payment is made, this will be to reimburse actual costs associated with the move such as removal costs, and the bankrupt should be allowed to retain such payments. If the actual costs are less than the payment received by the bankrupt, then the trustee may claim the balance as after acquired property.

If an "enhanced disturbance" payment is made, this will be towards potential costs such as re-decorating the new property, and this may be claimed by the trustee as after acquired property but where the bankrupt can show that this is needed for actual necessary costs, no claim should be made.