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 11 March 2020

49. Distributions

Annexes

Annex A - Summary detailing how to account for assets realised and payments to be made

Annex B - Example of a distribution from joint and separate estates under the Insolvent Partnerships Order 1994

Annex C - Guidance showing expected hours and The Insolvency Regulations 1994 current charge out rates required in making case distributions

Chapter content

Introduction

49.1 Distribution by means of a dividend or division of property

Whenever the liquidator or trustee has sufficient funds in hand for the purpose they shall, subject to the retention of such sums as may be necessary to meet the expenses of the winding up/bankruptcy, declare and distribute dividends among the creditors in respect of the debts for which they have proved.

In bankruptcies the trustee may deal with matters by the division of property amongst creditors, where, due to the specific nature or special circumstances of that property, it cannot easily or advantageously be sold.

49.2 Distributions where sufficient funds available

Distributions and interim distributions in those cases where sufficient funds are in hand for that purpose are carried out by dedicated teams within the Long-term Asset and Distribution teams.

49.3 Abbreviations

Where commonly referred to throughout the chapter the following abbreviations have been used:

Legislative abbreviations	
CA2006	The Companies Act 2006
EA2002	The Enterprise Act 2002
FO1986	The Insolvency Fees Order 1986 (as amended)
FO2004	The Insolvency Proceedings (Fees) Order 2004 (as amended)

IA86	The Insolvency Act 1986
IR86	The Insolvency Rules 1986
IR2016	The Insolvency Rules (England and Wales) 2016
IAR2009	The Insolvency (Amendment)Rules 2009/642
IAR2010	The Insolvency (Amendment)Rules 2010/686
IRegs 94	The Insolvency Regulations 1994 (as amended)
IPO94	The Insolvent Partnerships Order 1994
JA1838	The Judgments Act 1838
PA1890	The Partnership Act 1890
Other abbreviations	
CVA	Company Voluntary Arrangement
EAS	Estate Accounts Services
FSA	Financial Services Authority
FSCS	Financial Services Compensation Scheme
HMRC	HM Revenue & Customs
ISA	Insolvency Service Account
RPS	Redundancy Payments Service
LTADTs	Long Term Asset and Distribution Team

Distribution costs

49.4 Time and rate charging mechanism for distributions

The financial regime introduced from 1 April 2004 provides that the official receiver may charge time and rate, for the activity of distributing funds to creditors[1]. VAT is chargeable on this fee. Previously the official receiver charged a distribution fee but this was revoked by the Insolvency Proceedings (Fees) Order 2004 (as amended) (FO2004) for all cases, including those where the insolvency order was made before 1 April 2004.

1. Insolvency Regulations 1994 (as amended) Regulation 35

49.5 Standardisation of distribution costs

Actual time spent on dealing with distributions is not to be used. Instead, to achieve standardisation of costs associated with distributions, a charge should be made based on the tables provided at Annex C, except in exceptional circumstances. These tables avoid the need to complete a time recording sheet detailing time spent on distributions in each case, by providing guidance using the hourly rates as recorded in the legislation[1] and the anticipated time that will be spent in making a distribution, depending on the number of creditors.

Where there are more than 50 creditors, the official receiver, in practice now LTADT, should charge the highest cost as per the tables at Annex C.

1. Insolvency Regulations 1994 (as amended) Schedule 2, Tables 2 & 3

49.6 Calculating creditor numbers where set-off applied

When banks or similar organisations have submitted a proof of debt combining several debts such as a credit card, loan, overdraft etc, or where set-off has been applied, the balance of the debt as per the submitted proof should be counted as a separate creditor in respect of each account for calculating the number of creditors on a case when charging a time and rate fee.

49.7 Transfer of cases to the LTADT

The LTADT is located on 4 sites and contains teams dedicated to the distribution of money to creditors. These teams are located in Manchester, Cardiff, Ipswich and

Chatham. The Manchester team specialises in distributions arising from Payment Protection Insurance recoveries, the Cardiff team in distributions from the realisation of legacy pensions, whilst the teams in Chatham and Ipswich deal with all other distributions. The LTADT will accept cases from official receiver's offices that have a credit balance on the estate account and on which a dividend, either full or interim, can be declared and paid.

49.8 Level of time and rate fee to be charged according to IRegs 1994

The IRegs 1994 provide for a distinction between the official receiver of the London insolvency district and the official receiver of any other insolvency district for the purposes of charging the time and rate fee. The London insolvency district is defined by section 374 of the IA86. With regard to cases currently administered by the LTADT the non-London rates apply. Otherwise it will be the (original) last official receiver for the case who will remain as the official receiver in charge, so if the underlying case is based in a London court then the London rates will apply.

49.9 Distribution activity

The time and rate fee for distribution activity should be charged at the point at which the dividend payment is requested from EAS through ISCIS and should be applied to the total number of creditors to be paid out. The fee includes the distribution of funds to both preferential and non-preferential creditors and returns of capital to contributories. It does not include payment of expenses such as the return of the petition deposit or the payment of the petitioning creditor's costs (for which there is no charge). There is a standard block of activity which is performed in relation to all preferential payments or dividends, regardless of the number of creditors, which includes:

- issuing a notice of intended dividend
- preparing the advertisement although this is not mandatory where only a preferential distribution is being paid
- ensuring that the deposit has been posted to the account, any Indivisible Balances and/or Reserved Funds have been transferred back to the estate and all fees and disbursements have been charged correctly on the ISCIS Financials ledger ('Funds' tab)
- making a distribution calculation using the Dividend Probability Calculators which establishes if there are sufficient funds to make a distribution.
- consider transferring the case to the LTADT where the criteria for transfer are met.

49.10 Recording distribution activity on ISCIS.

The LTADT record in the data store on ISCIS (section 6 for liquidations and section 9 for bankruptcies) the following:

- that there is to be a distribution
- the date by which claims are to be submitted (last date to prove)
- the date the distribution has been gazetted.

49.11 Time and rate fees charged to be input on ISCIS Financials

The time and rate fees will need to be input on ISCIS Financials. They should be charged at the point at which the dividend payment is requested from EAS and should be applied to the total number of creditors to be paid out. VAT is charged on this fee. The LTADT arrange for the entries to be made on the ISCIS Financials estate ledger via a spreadsheet return to EAS.

49.12 Cost of advertising dividends

Advertisements for dividends are not covered by the administration fee (as they relate to distributions) and therefore need to be charged to the estate. This will also include advertisements of returns of capital to contributories in liquidations. Where a public notice or advertisement of a dividend payment is required, this is now dealt with by TMPW, the agent acting on behalf of the Service.

49.13 No distribution fees in cases administered under a previous insolvency regime

Where the official receiver is dealing with historic cases that are administered under a previous insolvency regime (such as the Companies Act 1985 or the Bankruptcy Act 1914) the official receiver must be aware that, should assets come to light in such cases requiring realisation (e.g. unpaid royalties), no fees can be charged in connection with action taken to recover or distribute the asset, following the revocation of the Bankruptcy Fees Order 1984, the Companies (Department of Trade and Industry) Fees Order 1985 and the Insolvency Fees Order 1986 (FO1986). In the case of the FO1986, there were saved fees (the Secretary of State

fees) which continued to be applicable to cases that were commenced under the IA86 after 29 December 1986 but in respect of which, a winding-up order or bankruptcy order was made before 1 April 2004 (described as the “old cases”). All fees relating to “old cases” were abolished on 1 April 2007 following the implementation of the Insolvency Proceedings (Fees) (Amendment) Order 2007. Regulations 33 and 36 of the IRegs94, dealing with the time and rate fee, continue to apply with reference to calculating the official receiver's remuneration in dealing with assets subject to a fixed or floating charge, where both the winding-up order and the realisation and distribution (if any) preceded 1 April 2004.

Dividend Process

49.14 Notice of intended dividend

Before declaring a dividend, the liquidator or trustee (office-holder) must give notice of their intention to do so using form DVDL[1, 2, 3]. This notice is to be sent to all the creditors whose addresses are known to office-holder, who have not proved their debts, and who have not previously been invited by notice to prove their debts[4]. This includes creditors owed “small debts” and who are not deemed to have proved under rule 14.3.

Where a member State liquidator has been appointed in relation to the insolvent, notice must also be given to that person using form DVDL.

1. Rule 14.27

2. Rule 14.28

3. Section 324

4. Rule 14.29

49.15 Small debts

The Insolvency (England and Wales) Rules 2016 introduced the concept of a “small debt” in insolvency proceedings. A small debt is defined as “a debt (being the total amount owed to a creditor) which does not exceed £1,000 (which amount is prescribed for the purposes of paragraph 13A of Schedule 8 to the Act and paragraph 18A of schedule 9 to the Act[1].

Where a debt is a “small debt” according to the accounting records or the statement of affairs of the company or bankrupt, the office-holder may treat that debt as if it were proved for the purposes of paying a dividend[2].

Where the office-holder intends to treat a small debt as proved the notice of intended dividend under Rule 14.29 must:

- state the amount of the debt which the office-holder believes to be owed to the creditor according to the accounting records or statement of affairs of the company or the bankrupt (as the case may be);
- state that the office-holder will treat the debt which is stated in notice, being for £1,000 or less, as proved for the purposes of paying a dividend unless the creditor advises the office-holder that the amount of the debt is incorrect or that no debt is owed;
- require the creditor to notify the office-holder by the last date for proving if the amount of the debt is incorrect or if no debt is owed; and
- inform the creditor that where the creditor advises the office-holder that the amount of the debt is incorrect the creditor must also submit a proof in order to receive a dividend[3].

The information required by the above may take the form of a list of small debts which the office-holder intends to treat as proved which includes that owed to the particular creditor to whom the notice is being delivered[4].

1. Rule 14.1

2. Rule 14.31(1)

3. Rule 14.31(2)

4. Rule 14.31(3)

49.16 Member State liquidator

The EC Council Regulation on Insolvency Proceedings (1346/2000) gives a liquidator appointed in insolvency proceedings in another member State the right to participate (i.e. lodge claims) in other insolvency proceedings in relation to a debtor, on the same basis as a creditor. Where a creditor has proved, and a member State liquidator has proved in relation to the same debt, payment of a dividend can only be made to the creditor[1].

1. Rule 14.43

49.17 Public advertisement of notice of intended dividend

Following the changes to the IR2016, the requirement to advertise an intention to declare a dividend by notice in a local paper is now discretionary[1].

IR2016 requires that where the office-holder intends to declare a first dividend or distribution the office-holder must gazette a notice containing:

- a statement that the office-holder intends to declare a first dividend or distribution;
- the date by which and place to which proofs must be delivered;

There is no requirement to gazette or advertise where the office-holder has previously, by notice which has been gazetted, invited creditors to prove their debts.

Where the intended dividend is only to preferential creditors the office-holder need only gazette a notice if the office-holder thinks fit.

1. Rule 14.28 (3)

49.18 Definition of terms “responsible insolvency practitioner” and “office holder”

Rule 1.2 replaces previous definitions and the only term used is office-holder who is now defined as “a person who under the Act or these Rules holds an office in relation to insolvency proceedings and includes a nominee.”

Previously under rule 13.9 for cases where the petition was presented before 6 April 2010 the term “responsible insolvency practitioner” is defined as the person acting:

- in a company insolvency, as the supervisor of a company voluntary arrangement; as an administrator; as an administrative receiver; as liquidator; or as provisional liquidator.
- in an individual insolvency, as the supervisor of a voluntary arrangement; as trustee; as interim receiver, or the official receiver acting as receiver and manager of a bankrupt’s estate

This includes the official receiver when acting in the relevant capacity as liquidator, as provisional liquidator, as trustee or as interim receiver

The term “office-holder” was introduced by The Insolvency (Amendment) Rules 2010 SI 686/2010 (IAR2010) with effect from 6 April 2010, as a general replacement for the terms “responsible insolvency practitioner” and “insolvency practitioner”, with regard to rules 11.1 to 11.12.

For cases where the petition was presented on or after 6 April 2010 (subject to transitional provision exceptions), the term “responsible insolvency practitioner” was defined as a person acting as any of the following:

- in a company insolvency the person (other than the official receiver) acting as supervisor of a voluntary arrangement under Part I of the Act, or as administrator, administrative receiver, liquidator or provisional liquidator;
- in an individual insolvency the person (other than the official receiver) acting as the supervisor of a voluntary arrangement under Part VIII of the Act, or as trustee or interim receiver.

49.19 Dividend declared for preferential creditors

Where a dividend is to be declared for preferential creditors only, the notice required under rule 14.29 (form DVDL) need only be given to those creditors who the office-holder believes may have a preferential claim. Advertisement of the intended dividend to preferential creditors by gazette need only be given if the insolvency practitioner thought fit[1]. This is applicable to all cases. The likelihood of there being preferential creditors in a case entitled to payment of a dividend ahead of ordinary unsecured creditors, is significantly less following the amendment of Schedule 6 of the IA86 (by the EA2002). In cases where the petition was presented on or after 15 September 2003, the most likely preferential creditors in a case will be the Redundancy Payments Service (RPS) for remuneration to employees and/or pension scheme contributions and the subrogation of their claims to the RPS.

1. Rule 14.28(2)

49.20 Last date for proving and time period within which a dividend must be declared

The notice before declaring a dividend or first dividend (form DVDL) is required to specify a date ("the last date for proving") up to which the proofs may be lodged. The date shall be the same for all creditors, and not less than 21 days from the date of that notice[1]. The office-holder must also state in the notice their intention to declare a dividend (specified as interim or final, as the case may be) within a given time period from the last date for proving. For all cases irrespective of the date of the petition this will be within the period of 2 months from the last date for proving[2].

1. Rule14.30(c)

2. Rule14.30(a)

49.21 Admission and rejection of proofs for dividend (including where received after the date for proving)

Unless the office-holder has already dealt with them, the office-holder must within 14 days of the last date for proving deal with the proofs by:

- admitting or rejecting them, either in whole or in part, or
- making such provision as they think fit in respect of them[1].

“Making provision“ may involve setting aside such funds as they consider appropriate to cover the payment of the dividend on the proof should it be admitted. Proofs received after the date for proving may be accepted at the discretion of the office-holder[2]. A proof may be admitted for dividend either for the whole amount or for part of the amount claimed by the creditor[3].

1. Rule 14.32(1)

2. Rule 14.32(2)

3. Rule 14.7

49.22 Faxed and emailed proofs for dividend purposes

A proof sent by fax or email can be accepted for dividend purposes, in the same way as for meeting purposes, provided the proof is signed (either by the creditor or by a person authorised in that regard) and the fax or email is received within the time limits set for the acceptance of proofs of debt. In the case of Inland Revenue Commissioners v Conbeer ([1996] BCC 189) it was held that a faxed proxy form was validly signed because when a creditor faxes a proxy to the chairman of a meeting, they transmit both the contents of the proxy and their signature applied to it. This is similarly applicable to proofs.

The proof will still be considered valid if it is faxed or emailed via an intermediary such as an insolvency practitioner, who does not hold an original proof of debt having been instructed by fax or email, as long as that intermediary is duly authorised by the creditor.

49.23 Rejected proofs

Where the office-holder has concerns regarding the admission of a proof, for example where they suspect miscalculation or misrepresentation of a debt and,

following enquiry of the creditor no satisfactory explanation is forthcoming, the proof should be rejected. The liquidator or trustee should prepare a written statement explaining their reasons for rejecting the proof, and send this statement to the creditor as soon as reasonably practicable[1]. The creditor who has submitted the proof then has 21 days in which to object to this rejection (via a court application under rule 14.8 IR2016. If a creditor does lodge an application to challenge the rejection of their proof, the /office-holder may postpone or cancel payment of the dividend[2].

1. Rule14.7

2. Rule14.33(1)

49.24 Withdrawal, variation or expunging of a proof

Where the creditor wishes to withdraw their proof or vary the amount claimed, this can be achieved by agreement between them and the liquidator or trustee[1].

The liquidator or trustee or a creditor may apply to the court for a proof to be expunged (erased) or for the amount of the proof to be reduced, where they have sufficient concerns that a proof has been improperly admitted or the amount ought to be reduced[2]. This applies where the liquidator or trustee suspects the proof has been admitted in error. Where following such an application the proof can be shown to have been improperly rejected, the court may decide to direct the trustee of liquidator to accept it under IR2016 rule 14.8.

1. Rule 14.10

2. Rule 14.11

49.25 Postponement or cancellation of dividend

Where the office-holder has rejected a proof, if a creditor is dissatisfied with this decision they may apply to the court for the decision to be reversed or varied within 21 days of receiving the written statement rejecting their proof[1]. A contributory or any other creditor or a bankrupt may also make such an application within 21 days of becoming aware of the decision to reject a proof[1].

Except with the permission of the court, the office-holder may not declare the dividend so long as there is a pending application to the court to reverse or vary a decision on a proof of debt, or to expunge a proof, or to reduce the amount claimed[2]. Where the court does give permission for the dividend to be declared, the office-

holder is required to make such provision in respect of the disputed proof as the court directs.

Where such an application is made to the court within the two months from the last date for proving, the office-holder may postpone or cancel the dividend[3].

Where a dividend is postponed or cancelled a new notice under rule 14.29 IR 2016 will be required if the dividend is paid subsequently.

1. Rule 14.8

2. Rule 14.34(2)

3. Rule 14.33(1)

49.26 Decision to declare dividend

If no application has been made to the court to reverse or vary the decision of the office-holder in respect of any proof, the dividend of which they gave notice must be declared within the period of two months from the last date for proving[1] (which is the date specified in any Gazette notice and any advertisement of intended dividend[2]. The declaration of the dividend is the notice given under rule 14.35 which contains the particulars set out therein. Usual practice is to issue the declaration and payment simultaneously[3].

Sufficient funds should therefore be allocated from those available for distribution, to cover the potential payment of the disputed or delayed claims.

49.27 Calculation of dividend

In calculating and distributing a dividend the liquidator/trustee must make provision:

- for any debtswhich appear to them to be due to persons who, by reason of the distance of their place of residence, may not have had sufficient time to tender and establish their proofs;
- for any debts that have not been determined, and;
- for disputed proofs and claims[1, 2]

Sufficient funds should therefore be allocated from those available for distribution, to cover the potential payment of the disputed or delayed claims.

1. Rule 14.28

2. Rule 14.39

49.28 Notice of declaration of dividend

Notice of the dividend must be sent to all creditors who have proved their debts[1] or just to preferential creditors if there is only sufficient to pay a dividend to that class of creditor[2]. The notice must contain the following particulars:

- amounts realised from the sale of assets, indicating (so far as practicable) amounts raised by the sale of particular assets;
- payments made by the insolvency practitioner in the administration of the insolvent estate;
- provision (if any) made for unsettled claims and funds (if any) retained for particular purposes;
- the total amount to be distributed and the rate of dividend; and
- whether and, if so, when, any further dividend is expected to be declared.

This ensures that creditors receive full information relating to the payment of dividends.

1. Rule 14.35

2. Rule 14.35(5)

49.29 Payment of dividend including where the debt is assigned

The dividend is distributed simultaneously (by post) with the notice declaring it[1]. Arrangements may be made for any creditor to be paid in another way or for payment to be held for their collection. The dividend may be paid to an assignee of a creditor if the creditor has given notice of the assignment along with the name and address of the assignee. When a debt is sold by one creditor to another creditor, the assignee creditor should be considered to be 'the' creditor for dividend purposes and any proof of debt lodged by the original creditor should be ignored, unless the assignee creditor has not submitted a proof of debt in which case the original proof of debt can be dealt with. However, the dividend should still be paid to the assignee[2]. It is important that proofs of debt submitted by the original creditors and the assignee are not both admitted for dividend purposes.

1. Rule 14.35(2)

2. Rule 14.43

49.30 Notice of no, or no further, distribution

When all the estate has been realised (or as much as can be realised without protracting the liquidation or bankruptcy) notice must be given that either no funds have been realised, or the funds realised have already been distributed or used or allocated for defraying the expenses of the insolvency[1].

1. Rule14.37

Dividend payments

49.31 Proof submitted after dividend declared

Where a creditor has not proved their debt before the declaration of the dividend, they are not entitled to delay or interrupt the distribution of that dividend or any other (further) dividend declared before their debt is proved[1].

After the creditor has proved for the debt, they are entitled to be paid the dividend which they had failed to receive, out of any money available for payment of further dividends at the time when their debt is proved. The payment of these unpaid dividends to the previously unproved creditor must be made from the available funds before any further dividends are paid. This would also apply, for example, where a late preferential creditor came to the fore when a dividend to ordinary unsecured creditors was being considered.

1. Rule 14.40(1)

49.32 Amendment of dividend cheque

There may be occasions when the name of the payee on a dividend cheque is incorrect (e.g. a company has changed its name or a creditor has died and the dividend is now payable to their executor). Before complying with a request for amendment, the official receiver should ensure that the reason given for wanting the amendment is valid and the new payee is entitled to payment, (e.g. certificate of change of name, looking at the information at Companies House, or a copy of the will provided). The original cheque must be cancelled.

49.33 Unclaimed dividends

Where a dividend cheque is not required (as the debt is satisfied or has been withdrawn) any unclaimed dividend cheque must be destroyed by the liquidator/trustee six months after the last day in the month in which they were issued. If a dividend is returned where, for example, the creditor's address is no longer current, enquiries should be made to attempt to trace the creditor's current address. If this cannot be found, the monies should be transferred to the Unclaimed Dividends Account.

Whilst it is usual banking convention to refuse to honour cheques presented for payment more than 6 months from the date of issue, there is no legal obligation on the bank to dishonour a cheque where it is presented for payment outside of this time.

To avoid any problems which may arise where a cheque is presented to the bank for payment outside of 6 months from the date of issue and the possibility that both original and re-issued cheques are presented and paid, Estate Accounts Services (EAS) will not pay any cheques which remain uncashed after 6 months. Expired dividend cheques will be automatically posted by EAS to the general Unclaimed Dividends Account applicable to the year in which the cheque expired

49.34 Distribution where a surplus arises and creditors' details are unknown following destruction of the official receiver's file and court file

In a limited number of cases a credit balance may occur where the official receiver's file and the court file have been destroyed and the creditors are not recorded on ISCIS. The official receiver should consider contacting the bankrupt to ask for information concerning the petition and their creditors. It should be possible to ascertain whether the case was a debtor's or creditor's petition from the amount of the deposit paid and/or whether the date of the petition and order were the same, where this information is available.

49.35 Unclaimed dividends (payment into the Consolidated Fund)

The Secretary of State shall from time to time pay into the Consolidated Fund out of the Insolvency Service Account (ISA) unclaimed dividends[1]. Where unclaimed dividends and undistributed balances have been held for a full seven years, the Secretary of State is required to pay them into the Consolidated Fund. EAS will also pass details of unclaimed dividends to firms of tracing agents (who have been vetted

and accredited by The Insolvency Service). Where the recipient of the dividend is located, they will be contacted by the tracing agent who, for a commission deducted from the payment will arrange for payment of the dividend.

1. Section 407

49.36 Returned dividend cheques (queries)

Where a cheque is returned because of a query, the recipient LTADT office will attempt to deal with the problem (which may be a missing reference etc). If the matter still cannot be resolved (e.g. the payee cannot be located), then the cheque will be cancelled and the funds transferred to reserve funds. The funds cannot be re-credited to the estate as the payee may come to light and if re-credited to the estate, the funds could be lost or reduced if a further dividend is paid.

49.37 Cases with a small credit balance - indivisible balances account

When a case has a credit balance after all known expenses, fees and disbursements have been dealt with in due order of priority (including the payment of VAT), consideration should be given as to whether it is actually worthwhile making a distribution first to preferential creditors (if any) and then to ordinary unsecured creditors. Account should be taken of:

- the official receiver's time and rate fees in making a distribution (plus VAT);
- other costs of a distribution: local advertisement of the intended dividend and, if the official receiver decides it is necessary, local advertisement of payment on account of preferential creditors;
- the maximum amount payable to the largest creditor; and
- the number of claims and the number of contested claims.

A dividend need not be declared if none of the creditors will receive £5 or more, unless total funds available to creditors for a distribution after the anticipated cost of the advertisement of intended dividend and the official receiver's anticipated remuneration exceed £100. Notice of the dividend (form NORAD) must be sent to all those creditors who have proved their debt, other than where the distribution is to preferential creditors only, whereby only that class of creditors needs to be notified. A dividend of less than £1 should not be paid to any individual creditor unless they specifically request it, although the claim should be included when calculating the dividend. If it is not worthwhile to make a dividend payment, then the funds are transferred to the Indivisible Balances Account without going through the dividend process/procedure.

49.38 Bona vacantia payments where amount of surplus too small for a distribution and company dissolved

When a company is dissolved, all property and rights vested in or held on trust for the company immediately before its dissolution (excluding property held by the company on trust or for any other person) are deemed to be bona vacantia (meaning “goods without an apparent owner") and accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall[1]. Where a company is dissolved and there is a balance left in a company estate which is too small to make a meaningful distribution, it should not be paid into the ISA. Instead, the balance should instead be paid to The Treasury Solicitor (BV) as bona vacantia. Where any monies are held by the liquidator where the company has not been dissolved, even though the surplus may be too small to make a distribution, these monies continue to be in the ownership of the company, therefore cannot be declared bona vacantia and should be paid in to or remain in the ISA.

1. Companies Act 2006, section 1012.

49.39 Undistributed balances to be paid in to the Consolidated Fund

The Secretary of State can from time to time pay balances, previously ascertained to be too small to be divided, from the Insolvency Services Account into the Consolidated Fund[1].

1. Section 407

49.40 Proof altered after payment of a dividend

If, after payment of a dividend, the amount claimed by a creditor in their proof is increased, the creditor is not entitled to disturb the distribution of the dividend but they are entitled to be paid, out of any money for the time being available for the payment of any further dividend, any dividend or dividends which they have failed to receive[1]]. If, after a creditor’s proof has been admitted, the proof is withdrawn or expunged, or the amount of it is reduced, the creditor is liable to repay to the office-holder, for the credit of the insolvent estate, any amount overpaid by way of a dividend[2]

1. Rule 14.40(2)

2. Rule 14.40(4)

49.41 Secured creditors and partly secured claims following declaration of a dividend

Where a secured creditor re-values their security at a time when a dividend has been declared, the following matters need to be considered by the liquidator or trustee:

- If the revaluation results in a reduction of the amount of any unsecured element of the claim ranking for dividend, the creditor is required to repay to the office-holder for the credit of the insolvent estate (as soon as is reasonably practical), any amount received by them as a dividend, which is in excess of that to which they are entitled, following the revaluation of their security[1].
- Equally, if the revaluation results in an increase of the creditor's unsecured claim, the creditor is entitled to receive payment of any dividend shortfall arising as a result of the revaluation of their security, from the money available for the payment of a further dividend (before any such further dividend is paid)[2].

The creditor is not entitled to disturb any dividend declared (whether or not distributed) before the date of the revaluation.

1. Rule 14.41(2)

2. Rule 14.40(3)

49.42 Debt payable in the future

A creditor may prove for a debt where payment would have become due at a date later than the insolvency proceedings[1], and it is only because the company or individual has entered into insolvency proceedings that the debt is claimed by the creditor in advance of its due payment date. Where this occurs, the creditor is entitled to the dividend equally with others but, solely for the purpose of the dividend, the amount of the creditor's proof (or, if a distribution has been made to them, the amount outstanding in respect of their admitted proof) shall be reduced by applying the following formula:

X divided by 1.05n

Where X is the value of the admitted proof and "n" is the period beginning with the relevant insolvency date and ending with the date on which payment of the creditors debt would otherwise be due expressed in years and months in a decimalised form[2].

An example of this calculation is as follows:

1. Mr A purchases a suite of furniture costing £3,500 on 1 September 2009, for immediate delivery. He pays a £500 deposit and signs a contract requiring him to make no further payments for two years.

2. The contract states the remaining £3,000 becomes due and payable on 1 September 2011, and can be paid interest free as a lump sum at that date or via 10 monthly payment instalments of £300 commencing on that date.

3. Subsequent to signing this contract Mr A is declared bankrupt on 1 February 2010, over a year before his contracted future payment of £3,000 becomes due.

4. To calculate the amount by which the creditor's proof should be reduced for dividend purposes using the above formula, firstly the period should be worked out between 1 February 2010 (the insolvency date) and 1 September 2011 (the future payment date).

5. In this example this constitutes 1 year and 7 months. This should be turned into decimalised form (19 months divided by 12 months), which is 1.58.

6. 1.05 to the power of 1.58 = 1.0801

7. The calculation would then be:

£3,000 divided by 1.0801 = £2,777.52.

The creditor is therefore entitled to prove for dividend purposes for a reduced amount of £2,916.40 against their future debt, following this calculation.

1. Rule 14.44

49.43 Creditors' entitlement to interest

(a) Statutory interest

Creditors who are due interest on their debts are not entitled to interest from any surplus funds (interest which accrues on debts outstanding since the date of the winding-up order or bankruptcy order until the date the debts are paid[1, 2]), until any creditor who has a debt payable at a future time has been paid the full amount of their debt.

The rate of interest payable is whichever is the greater of:

- The rate specified in section 17 of the Judgments Act 1838 (JA1838) on the day the order was made (currently this stands at 8%)
- The rate applicable to that debt apart from the winding up or bankruptcy (contractual interest)[3, 4]

(b) Interest due on debts for periods up to the date of the insolvency order

In certain circumstances creditors may include interest accumulated on their debt for periods prior to the insolvency order although not previously reserved or agreed[5], where a debt is due by written instrument and payable at a certain time. Interest may be claimed for the period from that specified time to the date of the insolvency order[6].

For all other claims, interest may only be claimed if, prior to the presentation of the petition a written demand for payment was made by or on behalf of the creditor, giving notice that interest would be payable from the date of the demand to the date of payment[7]. Interest claimed for periods up to the date of the insolvency order can only be claimed for the period between the date of the demand and the date of the insolvency order[8], and the maximum rate of interest chargeable is the rate specified in section 17 of JA1838 at the date of the insolvency order (currently 8%)[9].

1. Section 189(2)

2. Section 328(4)

3. Section 328(5)

4. Section 189(5)

5. Rule14.23(2)

6. Rule 14.23(3)

7. Rule14.23(4)

8. Rule14.23(5)

9. Rule14.23(6)

49.44 Payment of statutory interest (no deferred creditors)

Where the official receiver is handling a case with substantial assets and there are no deferred creditors, after the payment in full of all the known proved creditors, statutory interest may then be paid to those creditors[1 2]. If there is a surplus remaining in liquidations, with the court's sanction[3] it may then be distributed to the members of the company according to their adjusted entitlement[4]. Where there is a surplus in bankruptcy cases it is paid to the (former) bankrupt[5].

1. Section 189(2)

2. Section 328(4)

3. Section 154

4. Section 330(5)

49.45 Payment of statutory interest (deferred creditors)

Where there are deferred creditors, following payment in full of ordinary unsecured (proved) creditors, including statutory interest, remaining funds should be used to pay (proved) deferred creditors (if any) and statutory interest on those claims. After this, any surplus funds may be paid to the members of the company in liquidation or the (former) bankrupt, as appropriate.

49.46 Defining payment in full to allow final distribution of surplus funds

The decision in the case of Gill v Quinn [2005] BPIR 129 hinders a bankrupt in obtaining an annulment of the bankruptcy order on the payment in full grounds when not all of the creditors can be paid. Following this decision this means that a handful of known but unproved creditors' claims can not only prevent the payment of statutory interest to proved creditors but also prevent the members of the liquidated company from receiving the distribution to which they are entitled or the (former) bankrupt from receiving a surplus. Creditors cannot be made to prove, they may choose to take no part in the insolvency proceedings (on economic grounds or for other reasons). This can have the adverse effect that creditors will be treated unfairly in not receiving statutory interest. The members of the company or bankrupt will also be affected by not receiving a surplus.

There is authority in the case of In Re Ward, Ex parte Hammond and Son v The Official Receiver and the Debtor [1942] Ch 294 to the effect that for the purposes of section 330(5), in the current legislation "creditors" means creditors who have proved in the bankruptcy. This case may be used as the authority to overcome the problem of defining when payment in full has occurred, to enable payment of statutory interest to creditors and repayment of any surplus.

49.47 Treatment of creditors not proving in surplus bankruptcy cases

Where the official receiver is dealing with a distribution of surplus funds and is experiencing difficulty with creditors who have not proved, they should ensure that these creditors are included in all steps up to and including the issue of the notice of intended dividend (form DVDL). Where a dividend of 100p in the £ is expected, and prior to the declaration of a dividend, the appropriate steps to include the unproved creditors in the distribution have been taken correctly by issuing individual notices to unproved creditors to prove their claims, and gazetting the intended dividend

payment (further advertising is discretionary), the official receiver should consider that as being a payment in full and meeting the pre-condition to pay statutory interest[1, 2]. Where the official receiver expects the rate of dividend to reach 100p in the £, by issuing the notice of intended dividend (form DVDL), they are informing creditors who have not proved that continued failure to do so will mean they do not participate in the dividend. Form DVDL also advises that any remaining funds will be used to pay statutory interest to those creditors who have proved, and any surplus then remaining will be paid to the members of the company in liquidation or (former) bankrupt, as appropriate.

1. Section 189(2)

2. Section 328(4)

49.48 Distribution of property in specie (division of unsaleable property)

When dealing with property which, because of its peculiar nature or other special circumstances, cannot readily or advantageously be sold, the trustee may make a distribution in specie (in its existing form and essence and not in its equivalent) amongst the bankrupt's creditors, according to the estimated value of the property.

The prior permission of the creditors' committee is required[1] . Any permission must relate to a specific proposed exercise of power and must not be given generally[2] . The official receiver, when acting as trustee in such cases, will need to obtain the prior consent by emailing ORS.Advice (acting on behalf of the Secretary of State) before acting in this way – see chapter 1.

Where prior permission was not obtained and the property has been distributed, subsequent ratification may be granted by the creditors' committee if it appears that the circumstances were urgent and that the trustee did not delay unduly in seeking ratification[3]. This is unlikely to apply in cases administered by the official receiver.

1. Section 326(1)

2. Section 326(2)

3. Section 326(3)

Distribution of funds by liquidator

49.49 Introduction

When the liquidator has complied with the necessary procedural steps to declare a dividend, they must distribute the funds (after providing for liquidation expenses). Secured creditors at this point will have either realised their charged assets in part or full satisfaction of their debts or, if the liquidator has realised the assets, will have been paid out of the proceeds.

49.50 Floating charge secured creditors and the prescribed part

In cases where a floating charge was created on or after 15 September 2003, the payment to the holder of a floating charge (who is a type of secured creditor) will be made, subject to the share of assets secured by that floating charge being made available to ordinary unsecured creditors under the prescribed part.

49.51 Priority of payment of unsecured creditors' debts

After all expenses have been paid in full in a winding up, the company's unsecured preferential debts are paid in priority to all other debts[1].

Preferential debts rank equally among themselves after the payment of the liquidation expenses and are required to be paid in full, unless the assets are insufficient to meet them, in which case they share the assets between themselves in proportion to their debts[2].

When admitting a claim as preferential, or partly preferential, that fact should be noted on the proof. Non-preferential unsecured debts rank equally between themselves in the winding up and are entitled to be paid in full after the preferential debts where there are sufficient assets; otherwise they share the assets between themselves in proportion to their debts[3, 4]. Each class of creditor is paid in full before any distribution can be made to the next class.

1. Insolvency Act 1986 section 175(1)

2. Section 175

3. Rule14.12

4. Insolvency Act section 328

49.52 Abolition of Crown Preference

The implementation of the EA2002 reduced the creditors who were previously entitled to preferential ordinary unsecured status. The majority of unsecured

creditors now rank equally as non-preferential ordinary secured creditors. This applies to most cases where the petition was presented on or after 15 September 2003.

49.53 Debts ranking as preferential where petition presented before 15 September 2003

For those cases where the petition was presented before 15 September 2003, Schedule 6 IA86 (prior to amendment by the EA2002) defined the different categories of preferential debts. These included debts due to HM Revenue and Customs and social security contributions. Whilst these categories of preferential debt will not be applicable in cases where the petition was presented on or after 15 September 2003, there may still be cases where the petition was presented before 15 September 2003 and where a distribution is to be made after this date, where the preferential status of these creditors will still need to be considered.

49.54 Debts ranking as preferential where petition presented on or after 15 September 2003

Following the abolition of Crown preference, in cases where the petition was presented on or after 15 September 2003, Schedule 6 to the IA86 (as amended by the EA2002 details the remaining categories of preferential debt, which are applicable in all types of liquidations and administrative receiverships, voluntary arrangements and bankruptcy, as follows:

- any sums owed by the company which are subject to Schedule 4 of the Pension Schemes Act 1993; these constitute contributions to occupational pension schemes and state scheme premiums;
- remuneration etc. of employees (where they have been an employee of the company), as defined by Schedule 6 to the Insolvency Act 1986, paragraphs 13 to 15, and limited to amounts payable for the whole or any part of the 4 month period immediately prior to the relevant date (as defined by IA86 section 387). In a compulsory winding up where there have been no prior insolvency proceedings, the relevant date is the date of appointment of a provisional liquidator or, where no provisional liquidator has been appointed, the date of the winding-up order[1]. The claim cannot exceed £800[2]
- levies on coal and steel production.

1. Section 387(b)

2. Insolvency Proceedings Monetary Limits Order 1986 (SI 1986/1996)

49.55 HM Revenue and Customs not a preferential creditor

Following the implementation of EA2002 HM Revenue and Customs (HMRC) is not a preferential creditor and its debt(s) (irrespective of the nature of the tax owed), will rank with all other unsecured creditors.

49.56 Exceptions where the change to preferential status introduced by EA2002 does not apply in company cases

The change introduced by the EA2002 does not apply in the following cases where prior to 15 September 2003:

- A petition for an administration order had been presented;
- A company voluntary arrangement (CVA) had effect;
- A receiver or administrative receiver was appointed under the terms of a floating charge;
- A resolution for the winding up of the company was passed; or
- A petition for a winding-up order was presented[1].

It will also not apply to a company where a CVA has effect after 15 September 2003 which follows a "pre-commencement" liquidation or administration. This applies to a CVA proposal made either before or after 15 September 2003, by a liquidator (following a winding-up order), where the winding-up petition was presented or, where the resolution for winding up was passed, before the 15 September 2003. The same applies where a CVA proposal is made, either before or after 15 September 2003, following an administration order made on a petition presented before 15 September 2003[2].

For cases where the winding-up petition was presented before 15 September 2003, Schedule 6 of the IA86 (prior to amendment by the EA2002) defined the different categories of preferential debts. These included debts due to HMRC and social security contributions. There may still be cases where the petition was presented before 15 September 2003 and where a distribution is to be made after this date, where the preferential status of these creditors will still need to be considered.

1. Enterprise Act 2002 (Commencement No. 4 and Transitional Provisions and Savings) Order 2003/2093, Article 4

2. Enterprise Act 2002 (Commencement No. 4 and Transitional Provisions and Savings) Order 2003/2093, Article 4(2)

49.57 Preferential debts arising from contingent liability for employees' protective awards (Haine and Secretary of State v Day)

The Court of Appeal in the case of Haine and Secretary of State v Day ([2008] EWCA Civ 626) held that the entitlement of employees to remuneration under a protective award made by an Employment Tribunal is a contingent liability and as such[1] is provable in the liquidation. The contingent liability for the remuneration constitutes a preferential debt in the proceedings.

1. Rule14.1.

49.58 Preferential charge on goods distrained

Where any person has distrained upon the goods or effects of the company in the 3 month period before the date of the winding-up order, those goods or effects, or the proceeds of sale, are charged for the benefit of the company's estate for payment of preferential debts. The effect is to make the claims of the preferential creditors a first charge on the distrained goods/proceeds, but only to the extent that the other property of the company's estate is insufficient to meet them[1]. Any person surrendering goods distrained, to the priority of preferential creditors in this way, is entitled to share in any dividend to preferential creditors payable out of the other assets but not the surrendered assets. The following example illustrates this:

Preferential charge on goods distrained	
£	
Distraint assets	10,000
Other assets	10,000
Preferential creditors	40,000

Preferential charge on goods distrained	
Distraint creditor	15,000

The preferential creditors will receive 25p in the £, (10,000 /40,000 x 100) from the distraint assets. The balance of the remaining preferential creditors i.e. (£30,000) and the distraint creditors (£15,000) will receive 22.2p in the £ (10,000/(40,000 - 10,000 +15,000) x 100) from the other assets. The distraining creditor is entitled to include distraint costs in their claim.

1. Section 176(2)

49.59 Source of funds available to preferential creditors including claims over floating charge assets

The claims of preferential creditors are payable first out of the assets (if any) that are not subject to the floating charge (the insolvent's general assets). If such assets are insufficient to meet the claims in full, where a company has created a floating charge, recourse is made to the assets subject to a floating charge in priority to the holder of that floating charge. Preferential creditors' claims take priority over the claims of the holder(s) of the floating charge, or debenture holder whose claim is secured by the floating charge[1]. This includes where a floating charge has subsequently crystallised to become a fixed charge. Monies should only be recovered in this way for the benefit of preferential creditors if no other, or insufficient, assets are available and there are preferential claims to pay. This recovery should not be undertaken as an academic exercise. In practice, in view of the nature and extent of a floating charge, it is likely that recourse to floating charge assets will be necessary to pay the preferential creditors.

1. Section 175(2)(b)

49.60 Reversal of Leyland Daf ruling by IA86 section 176ZA

In March 2004 the House of Lords gave their judgment in the case of Re Leyland Daf Ltd, Buchler v Talbot [2004] UKHL 9;[2004] 2 A.C. 298;[2004] B.C.C 214 (known as the Leyland DAF case). The question raised by the case was whether the liquidation costs and expenses could be paid from the monies realised from the sale of assets secured by the floating charges. The judgment overruled existing case law governing the way in which liquidators dealing with companies whose assets were subject to a

floating charge, could attempt to recover the payment of the liquidation expenses and pay the (liquidation) preferential creditors. It was held that the liquidator was not entitled to claim their expenses in priority to the rights of the holder of a floating charge, and that it was immaterial whether or not the charge had crystallised before the commencement of the liquidation.

The insertion of section 176ZA into the IA86 by the Companies Act 2006 (CA2006) section 1282, reverses the Leyland Daf ruling with effect from 6 April 2008. This section provides for the expenses of the liquidator to be paid in priority to the claims of the floating charge holder or debenture holder whose claim is secured by the floating charge, to the extent that the assets of the company available to general estate creditors are insufficient to pay those expenses.

49.61 Payment of expenses from floating charge assets

The expenses of the winding up have priority over any claims of the floating charge-holder, or of the debenture holder whose claim is secured by the floating charge, to the extent that the assets of the company available to general estate creditors are insufficient to pay those expenses[1] [2]. This does not include the assets which have been set aside for the prescribed part available for the payment of unsecured debts[3].

1. Rule 6.42

2. Rule 7.108

3. Section 176A(2)

49.62 Charging the official receiver's administration and the secretary of state's administration fee against floating charge assets

Where the deposit is insufficient to satisfy the official receiver's administration fee in full, since 6 April 2008 the balance of the administration fee can be recovered from the property comprised in or subject to a floating charge.

The payment of monies into the Insolvency Services Account (ISA) as a result of the realisation of floating charge assets will cause the Secretary of State's administration fee to be charged to the general estate account.

49.63 Limitation of section 176ZA limited by Insolvency Rules 1986

The IR2016 rules 6.44 to 6.48 and 7.111 to 7.116 limit section 176ZA, by requiring the liquidator to obtain advance authorisation or subsequent approval from the floating charge-holder and any preferential creditor, for the incurring of expenses in certain categories of litigation (as detailed in those rules). Failure to obtain this authorisation will result in the loss of entitlement to the priority provided by section 176ZA over any claims to property comprising or subject to a floating charge created by the company, and payment for unauthorised litigation expenses cannot be paid out of any such property. The exception to this is where the actual or anticipated litigation expenses do not exceed £5,000[1, 2].

1. Rule 6.44

2. Rule7.111 and 7.112

49.64 Company subject to a fixed and floating charge

If the assets of a company are subject to a standard clearing bank security in the form of a fixed and floating charge, it is likely that the official receiver, as liquidator, in the absence of the appointment of an administrative receiver, will have to use three accounts through which to account for the assets realised. They are a secured creditor's or fixed charge account, a floating charge or debenture account and the (general) estate account.

49.65 Floating charge created before 15 September 2003

Where the floating charge was created before 15 September 2003, the three accounts will be sufficient to separate out the proceeds received in the liquidation.

49.66 Floating charge created after 15 September 2003 (separate account for the prescribed part)

Where the floating charge was created after 15 September 2003, then an additional fourth account may be required to those detailed in 68. This fourth account is the

prescribed part account, to deal with the funds so prescribed under section 176A(2) of the IA86.

49.67 Secured creditor’s or fixed charge account

The secured creditor's or fixed charge account may be used to receive the realisation proceeds of assets subject to fixed charges. Expenses paid from this account can include the costs of preserving and realising the asset(s) and the official receiver’s remuneration. Any balance remaining on the account may be remitted to the holder of the fixed charge under the terms of the fixed part of its charge until its debt is paid in full. The Secretary of State’s administration fee should not be charged to this account as this is not provided for by the FO2004. Where assets are held by more than one secured creditor, separate accounts should be used for each creditor.

49.68 Floating charge or debenture account

The floating charge or debenture account may be used to receive the proceeds of assets subject to the floating charge. Expenses paid from this account can also include the costs of realising and preserving the assets, the official receiver’s remuneration. Following the insertion of Section 176ZA into the Insolvency Act 1986 (with effect from 6 April 2008), the general expenses of the winding up can also be paid from this account in priority to the floating charge holder and any preferential creditors. After payment of the expenses any balance may be used to pay the preferential creditors, but only in so far as they cannot be paid from the general estate account, and then the debenture holder until its debt is paid in full.

49.69 When to calculate the prescribed part

Once the preferential creditors have been paid in full, or if there are no preferential creditors, the balance of the money held in the floating charge/debenture account may be subjected to the calculation of the prescribed part. The sum of money to use for this purpose is the sum of money which would otherwise be paid to the debenture holder under the terms of its floating charge. If, in paying the preferential creditors, expenses have been incurred, those expenses should be deducted from the floating charge/debenture account before the calculation of the prescribed part is made. Once the prescribed part calculation is made, the liquidator can transfer the prescribed part monies in to the prescribed part account.

The monies remaining in the floating charge/debenture account may be remitted to the debenture holder, although only to the extent that the debenture holder remains a creditor.

49.70 Prescribed part account

Following the calculation of the prescribed part, the monies set aside in the prescribed part account are then distributed by way of a dividend to the ordinary unsecured creditors, discounting the preferential creditors (as they have already been paid), and any balance owed to the debenture holder, who is excluded from a claim against this money until the unsecured debts are paid in full[1]. The usual distribution expenses may be charged to the prescribed part account.

1. Section 176A(2)

49.71 General estate account

The general estate account may be used to receive the realisation proceeds of any assets not subject to a fixed or floating charge, this could include a fruitless payment (which is treated as an asset), paid into the main estate account. In addition, the general estate account may receive any surplus arising from the realisation of an asset subject to a fixed charge not caught by the floating part of the charge, or from the assets secured by the floating charge. Expenses paid from this account include all other liquidation fees, costs and charges, including the costs of realising and preserving the assets credited to the account, and the official receiver’s remuneration. A Secretary of State fee should be charged to this account including any charge transferred from the floating charge or debenture account.

Thereafter this account may be used to pay the preferential creditors, the holder of a floating charge to the extent that preferential debts have been paid out of the assets subject to the floating charge, and then the general body of creditors. It is important to note that on a distribution from this account, the holder of a floating charge will only have priority as described above. There will be no general floating charge-holder's priority. The reason for this is that if the floating charge-holder held security over an asset, it would be accounted for separately.

49.72 Rates of judgment interest

The appropriate rates of judgment interest are dependent on the rate prevailing at the date of the insolvency order, and are applicable in both liquidation and bankruptcy. Recent rates are:

Statutory Instrument	Date	Interest rate
Judgment Debts (Rate of Interest) Order 1985 [SI 1985/437]	16 April 1985 - 31 March 1993	15%
Judgment Debts (Rate of Interest) Order 1993 [SI 1993/564]	1 April 1993 to date	8%

Where a creditor is claiming a higher contractual rate, they should be asked to supply documentation detailing their rates, contract terms and conditions etc. Where the contractual interest rate is higher, that rate should be used, unless such a rate is considered extortionate[1]. Where no contractual rate is supplied, the statutory rate according to section 17 of the JA1838 on the date the company went into liquidation should be applied.

1. Section 343

49.73 Statutory interest and its application

Statutory interest is applicable on proved debts, from the date of the winding-up order, even where the debt as proved includes interest already charged as part of the repayment terms of a loan. Statutory interest runs from the date of the winding-up order until a final dividend is declared or all the proved debts have been paid in full. The rate of statutory interest is limited to the greater of either the rate specified in section 17 of the JA1838 at the date of liquidation, or the contractual interest rate applicable had the company not entered into liquidation.. All statutory interest ranks equally for payment, whether or not the debts on which it is payable rank equally[1].

1. Section 189(3)

49.74 Payment of interest from surplus funds after payment of proved creditors

If all secured, preferential and unsecured creditors have been paid in full, including any creditors whose debts only become due after dividends have been paid (i.e. debts payable at some future time), any surplus funds then remaining become available for the payment of interest on all classes of debts proved, before any money is returned to contributories. Interest is calculated on trade debts from the date of the liquidation and on other debts with a fixed payment date (such as loans, bills of exchange and tax liabilities), from the date payment is due, where this occurs after the date of liquidation. Where the fixed payment date occurs before the date of

liquidation, interest may be claimed for the period from that specified time to the date when the company went into liquidation.

49.75 Creditors' right to waive statutory interest

Where the liquidator has been able to pay creditors in full, and the estate holds sufficient funds to pay statutory interest to the creditors, in some circumstances it may be that the proved creditors decide to waive their right to statutory interest.

Where a creditor cannot be traced at the date of the distribution, the liquidator cannot waive the right of the untraced creditor to statutory interest, without their consent. The liquidator should reserve the amount of the debt plus statutory interest at the appropriate rate for the period until the dividend is paid, pending a claim being made on the monies by the untraced creditor at a later date.

49.76 Postponed claims

The following debts are not provable until all other claims of creditors, and the interest due on those claims (including statutory interest), have been paid in full:

- claims under s382(1) of the Financial Services and Markets Act 2000 (where profit has been made or one or more investors have suffered a loss as a result of a person contravening a relevant requirement of the Financial Services and Markets Act 2000); and
- any other claim which is postponed by the Insolvency Act 1986 or any other enactment.

Priority of debts

49.77 Priority of debts

After all expenses in the bankruptcy have been paid in full, payments are made to creditors in the following order of priority[1]

1. Section 328

49.78 Specially preferred debts – apprenticeships[1]

This section applies where a bankruptcy order is made in respect of an individual to whom another was an apprentice or articled clerk at the time when the petition on which the order was made was presented and the bankrupt or apprentice gives notice to the trustee terminating the apprenticeship or articles. Where an articled clerk or apprentice has paid a fee, the trustee may pay a sum in respect of the unexpired period of their training (as at the date of the bankruptcy order), in which case the sum ranks as a pre-preferential debt. In calculating the sum to be repaid the trustee will take into consideration the duration of the apprenticeship unexpired and the general circumstances of the case. It is unlikely this situation will be encountered in practice.

1. Section 348

49.79 Specially preferred debts – trustee expenses from a previous (undischarged) bankruptcy

Where a bankrupt is adjudicated bankrupt again following an earlier bankruptcy, and where they remain undischarged from the earlier bankruptcy[1], any expenses incurred by the trustee as part of their asset recovery duties in the earlier bankruptcy (including dealing with an income payments agreement or income payments order), shall be a first charge on the assets recovered in the later bankruptcy[2].

1. Section 334(1)(b)

2. Section 335(3)

49.80 Abolition of crown preference and remaining preferential creditors

The implementation of the EA2002 reduced the creditors who were previously entitled to preferential ordinary unsecured status. The majority of unsecured creditors (including HM Revenue and Customs(HMRC),) now rank equally as non-preferential ordinary unsecured creditors where the petition was presented on or after 15 September 2003. The remaining categories of debt defined as preferential (contributions to occupational pension schemes, remuneration etc. of employees, levies on coal and steel production) apply in both liquidation and bankruptcy proceedings[1 2].

1. Section 386(1)

2. Schedule 6

49.81 Debts ranking as preferential where petition presented before 15 September 2003

For those cases where the petition was presented before 15 September 2003, the different categories of preferential creditors historically included debts due to HMRC and social security contributions.

Whilst these categories of preferential debt will not be applicable in cases where the petition was presented on or after 15 September 2003, there may still be cases where the petition was presented before 15 September 2003 but where a distribution is to be made after this date, where the preferential claims of these creditors will still need to be considered.

49.82 Debts ranking as preferential where petition presented on or after 15 September 2003

Following the abolition of Crown preference, in cases where the petition was presented on or after 15 September 2003, Schedule 6 to the IA86 (as amended by the EA2002) details the remaining categories of preferential debt, which are applicable in all types of liquidations, administrative receiverships, voluntary arrangements and bankruptcy, as follows:

- Any sums owed by the bankrupt which are subject to Schedule 4 of the Pension Schemes Act 1993; these constitute contributions to occupational pension schemes and state scheme premiums;
- remuneration etc. of employees (where they have been an employee of the bankrupt), as defined by Schedule 6 to the IA86, and limited to the whole or any part of the 4 month period immediately prior to the relevant date (as defined by IA86 section 387. In bankruptcy proceedings, the relevant date is the date the interim receiver appointed under section 286 is first appointed, following the presentation of the bankruptcy petition, or where no interim receiver has been appointed, the date of the making of the bankruptcy order[1]. The claim cannot exceed £800[2];
- levies on coal and steel production[3, 4].

1. Section 387(6)]

2. Insolvency Proceedings Monetary Limits Order 1986 (SI 1986/1996) article 4

3. Section 386

4. Schedule 6

49.83 Exceptions where the change to preferential status introduced by EA2002 does not apply (bankruptcy cases)

The transitional provisions, where the change introduced by the EA2002 does not apply, are applicable where prior to 15 September 2003, a petition for a bankruptcy order was presented, or an individual voluntary arrangement (IVA under part VIII of the IA86) had effect[1]. It will also not apply to a case where a proposal for an IVA is made (under part VIII of the IA86) either before or after the 15 September 2003, by a person who was adjudged bankrupt on a petition presented before 15 September 2003[2].

For cases where the bankruptcy petition was presented before 15 September 2003, Schedule 6 of the IA86 (prior to amendment by the EA2002) defined the different categories of preferential debts. These included debts due to HMRC and social security contributions. There may still be cases where the petition was presented before 15 September 2003 and where a distribution is to be made after this date, where the preferential status of these creditors will still need to be considered.

1. Section 386 Enterprise Act 2002 (Commencement No. 4 and Transitional Provisions and Savings) Order 2003/2093, article 4(1)

49.84 Landlords

Where a landlord levies distress upon the goods or effects of an individual who is adjudged bankrupt before the end of the period of 3 months beginning with the distraint, then the goods or effects, or the proceeds of sale, are charged for the benefit of the preferential creditors but only to the extent that the bankrupt's estate is insufficient to meet those debts. When this has occurred, the landlord may rank as a preferential creditor, to the extent of the value of the goods or proceeds surrendered by them. Any person surrendering distrained goods in this way is entitled to share in any dividend to preferential creditors payable out of the other assets, but cannot be paid from the proceeds of the surrendered assets[1].This applies in bankruptcy as it does in corporate insolvency.

1. Section 347

49.85 Unsecured debts which are neither preferential nor postponed

Non-preferential unsecured creditors (which are neither preferred or postponed, rank equally between themselves in the bankruptcy proceedings and are entitled to be paid in full after the preferential creditors where there are sufficient assets. If there are insufficient funds to pay them in full, they share the available assets between themselves in proportion to their debts[1].

1. Section 328(3)

49.86 Dividend payments for joint debts listed in separate estates

Where the official receiver or trustee is dealing with a case where both husband and wife are subject to separate bankruptcy orders, it is sometimes the case that both have joint and several liability for the same debt, for example a joint bank account which is overdrawn.

The trustee should consider the claim and where appropriate admit it in full in each of the bankruptcy estates. When the trustee is ready to pay a dividend from the separate estates, they should pay the dividend, as normal, in the first estate (the case with the earlier court number). Then, in the second estate (the later court number), they should also calculate the dividend as normal, that is on the joint creditor's claim in full, together with any other claims, but, in total, the joint creditor should not be paid more than the amount of its full claim.

If the joint creditor's claim is likely to be overpaid as a result of the second estate dividend payment, the trustee should not pay the joint creditor more than its claim but split the surplus monies in two. One half should be remitted back to the first estate where it should be treated as an asset and, subject to any fees due, used to pay other creditors. In the second case, the share of the surplus monies should be used to pay other creditors, but not the joint debt.

In this way, the principle of, in effect, the first estate paying a portion of the second estate's debt under guarantee is acknowledged and accounted for. It is likely that in practice the adjustments will need to be planned and made before the dividends are actually paid.

Interest

49.87 Statutory interest

Any surplus left after payment of the debts that are neither preferential nor postponed should then be used to pay interest on the debts outstanding since the

commencement of the bankruptcy (to the date of payment of the debt). Interest on preferential debts ranks equally with interest on all other debts (except those that are postponed)[1]]. The interest payable is the greater of:

- that applicable under s17 of the Judgments Act 1838 (JA1838)at the date of the commencement of the bankruptcy (statutory interest) currently this stands at 8%[2]; and
- the rate of interest that the bankrupt would have to pay in respect of the debt if they had not been adjudicated bankrupt (contractual interest)[3]. Interest should be calculated on a simple basis.

1. Section 328(4)
2. Section 328(5)(a)
3. Section 328(5)(b)

49.88 Interest due on debts for periods up to the date of the bankruptcy order

In certain circumstances creditors may include interest accumulated on their debt for periods prior to the bankruptcy order, even where this has not previously been reserved or agreed, as follows[1]:

- If a debt is due by written instrument and payable at a certain time, interest may be claimed for the period from that specified time to the date of the bankruptcy order[2].
- If the debt is due otherwise, interest may only be claimed if, prior to the presentation of the petition a written demand for payment was made by or on behalf of the creditor, giving notice that interest would be payable from the date of the demand to the date of payment[3]]. Interest claimed in this way can only be claimed for the period between the date of the demand and the date of the bankruptcy order[4]. The rate of interest to be claimed cannot exceed the rate specified in section 17 of the JA1838 on the date of the bankruptcy order.

1. Rule14.23
2. Rule14.23(3)
3. Rule14.23(4)
4. Rule14.23(5)

49.89 Considering the period for statutory interest (Wilcock v Duckworth [2005] BPIR 682 ChD)

Where all creditors have been paid in full, statutory interest is applicable on proved debts, from the date of the bankruptcy order[1]. This applies even where the debt as proved includes interest already charged as part of the repayment terms of that debt, up to the date of the bankruptcy order[2].

In the case of Wilcock v Duckworth [2005] BPIR 682 ChD, the court considered the payment of statutory interest when using third party funds to fund a paid in full annulment, where there were difficulties in identifying all the creditors due to the time that had elapsed since the making of the bankruptcy order.

In deciding which creditors should be paid statutory interest, the court divided the creditors in to three categories:

- Creditors who require interest to be paid;
- Creditors who advise the trustee that they waive their claims to interest;
- Creditors who offer no view (including creditors that cannot be located).

With regard to the period for which statutory interest should be paid, the court decided that the debtor should pay statutory interest on the debts from the date of the bankruptcy order, to the date the official receiver was released; and then for the period from the date of the appointment of a trustee until annulment. This solution is only to be applied where creditors have been denied their money over a long period, but also where it would be unfair for the debtor to carry the burden of interest for the entire period in those cases where considerable time has elapsed.

In making this judgment the court considered the decision in Harper v Buchler [2004] BPIR 724 concerning circumstances where there is sufficient surplus to pay the debts in full with statutory interest (see also chapter 9).

1. Section 328(4)

2. Rule 14.23

49.90 Surplus cases and the payment of statutory interest (Harper v Buchler (No 2) [2005] BPIR 577)

In Harper v Buchler (No 2) [2005] BPIR 577, due to property prices increasing in the ten years between the date of the bankruptcy order (1995) and the date of the annulment application, assets held within the bankruptcy estate provided funds which were more than sufficient to pay not only all of the debts, costs and liabilities of the bankruptcy but also statutory interest. The court held that this was a case where it was entirely appropriate for statutory interest to be paid before an order of annulment could be granted.

Postponed debts in bankruptcy cases

49.91 Debts to spouse or civil partner

Where a person is married to or has a civil partnership with the bankrupt at the date of the bankruptcy order, and that person has provided credit to the bankrupt, the outstanding debt is postponed and ranks behind all other categories of debt. This includes any interest payable on the debt when a surplus arises. This debt postponement applies irrespective of whether they were or were not married to, or in a civil partnership with the bankrupt, at the date the credit was given, as long as they are married to or in a civil partnership with the bankrupt at the date of the bankruptcy order[1].

1. Section 329

49.92 Other debts

The following debts are not provable until all other claims of creditors, plus interest due on those claims (including statutory interest), have been paid in full:

49.93 Student loans

Student loans have been made under several pieces of legislation and their status depends on the legislation under which they were made and the date of the bankruptcy. The current position is that in all bankruptcy cases where the order was made on or after 1 September 2004, all outstanding student loans are not provable debts and thus are not released on a bankrupt's discharge from bankruptcy. Further, where the order was made on or after 1 July 2004, all student loans made under the Education (Student Loans) Act 1990 (often referred to as mortgage style loans) were also made non-provable in bankruptcy with the consequence that they were also not released on discharge[1, 2]. Where the date of the bankruptcy order occurs prior to these dates (1 July 2004 for loans under the Education (Student Loans) Act 1990 and 1 September 2004 for loans made under the Teaching and Higher Education Act

1988 (often referred to as income contingent loans), student loans may be treated as provable debts and thus be included in the bankruptcy and released on discharge.

1. The Higher Education Act 2004 section 42

2. The Education (Student Support) (No.2) Regulations 2002 (Amendment) (No.3) Regulations 2004

49.94 Stay of distribution in case of second bankruptcy

Where a bankruptcy order is made against an individual who is an undischarged bankrupt and their existing trustee[1] has been given the prescribed notice of the presentation of the petition for the later bankruptcy[2], any further distribution or other disposition to them, as described below, is void except to the extent that it was made with the consent of the court or is or was subsequently ratified by the court[3].This applies to[4]:

The creditors of the bankrupt in the earlier bankruptcy and the creditors of the bankrupt in any bankruptcy prior to the earlier one, are not creditors of the later bankruptcy in respect of the same debts, but the trustee may prove in the later bankruptcy for the unsatisfied balance of the debts, together with any interest payable on the balance and any unpaid expenses of the earlier bankruptcy. The claim made by the trustee in the earlier bankruptcy will rank in priority after all the debts, and the interest on those debts, have been paid in full from the later bankruptcy.

1. Insolvency Act 1984 section 334(1)(c)

2. Insolvency Act 1984 section 334(1)(a)

3. Insolvency Act section 334(2)

4. Insolvency Act section 334(3)

49.95 Existing trustee's expenses

The trustee in the earlier bankruptcy may have incurred expenses in dealing with assets which, upon the commencement of the later bankruptcy, must be treated as part of the estate for the purposes of the later bankruptcy[1]. Where this has occurred, such assets are subject to a first charge in favour of the earlier trustee, for any bankruptcy expenses incurred by them in relation to dealing with these assets.

1. Section 335 (1) & (2)

Priority of debts in joint estate

49.96 General

The provisions of the Insolvent Partnerships Order 1994(IPO94)section 175A apply as regards priority of debts in a case where IPO94 article 8 applies (winding up of an insolvent partnership on a creditor's petition, where concurrent petitions are presented against one or more members of the partnership). Only after the payment of expenses, are the joint debts of the partnership paid out of the joint estate in the following order of priority;

- the preferential debts
- the debts which are neither preferential nor postponed (ordinary unsecured debts);
- statutory interest under section 189 on joint debts (other than postponed debts);
- the postponed debts;
- statutory interest under section 189 on postponed debts;
- surplus to the (insolvent) members (possibly as an asset in their bankruptcy)

49.97 Ranking of preferential and non preferential debts

The preferential debts rank equally between themselves, and separately the debts which are neither preferential nor postponed (ordinary unsecured debts) rank equally between themselves. If there are insufficient funds to pay the preferential creditors in full, each receives the same amount in the £[1]. If there are sufficient funds to pay the preferential creditors in full, and surplus funds remain, the non-preferential and non-postponed creditors each receive the same amount in the £.

1. Insolvent Partnerships Order 1994/2421 Sch. 4 Art 8 Part II paragraph 23 section 175A(4)

49.98 Joint estate deficiency claimed against separate estate(s)

Where the joint estate is not sufficient for the payment of all the debts, the insolvency practitioner or official receiver as liquidator (or trustee of the partnership estate in article 11 cases) should aggregate the value of each different category of debt that has not been satisfied. Any shortfall which remains after part payment of the preferential and ordinary unsecured debts is then claimed by the liquidator/trustee

proving in each of the separate estates for the full amount of the shortfall. The claim by the liquidator/trustee ranks equally for payment with the unsecured creditors in the separate estates[1]. The same applies to the postponed debts.

The unpaid total of each category of debt shall be a claim on each member's estate as follows:

- where the aggregate amount of claim relates to preferential debts or debts that are neither preferential or postponed (ordinary unsecured debts) the claim shall rank equally with the ordinary unsecured debts of the member (i.e. the preferential debts of the joint estate are not accorded preferential status in the separate estates)[1],
- where the aggregate amount relates to interest on the joint debts (other than postponed debts), the claim shall rank equally with the interest on the separate debts of the member[2],
- where the aggregate amount relates to postponed debts, the amount shall rank equally with the postponed debts of the member[3],
- where the aggregate amount relates to interest on the postponed debts, the claim shall rank equally with the interest on the postponed debts of the member[4].

An illustrative example of a distribution from joint and separate estates, where a winding-up order and concurrent bankruptcy orders have been made following creditors petitions under article 8 IPO94 against a partnership and two individual partners, is attached at Annex B.

1. Insolvent Partnerships Order 1994/2421 Sch. 4 Art 8 Part II paragraph 23 section 175A(5)
2. Insolvent Partnerships Order 1994/2421, Schedule 4, Article 8, Part II paragraph 23 s175A(6)
3. Insolvent Partnerships Order 1994/2421, Schedule 4, Article 8, Part II paragraph 23, s175A(7)
4. Insolvent Partnerships Order 1994/2421, Schedule 4, Article 8, Part II paragraph 23, s175A(8)].

49.99 Dealing with the liability of the estate of a deceased partner

When dealing with the liability of the estate of a deceased member section 9 of the Partnership Act 1890 (PA1890) still applies to the provisions of IPO94 section 175A as regards priority of debts. This states that whilst every partner in a firm (partnership) is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner, after his death his estate is also severally liable for any unsatisfied debts for which he is jointly liable, subject to the prior payment of his separate debts[1].

1. Partnership Act 1890 section 9

49.100 Priority of debts in separate estate

The priority of debts in the separate estate of each member against whom an insolvency order has been made, after the payment of expenses, is the same order of priority as the joint estate. The preferential debts rank equally between themselves and separately the debts which are neither preferential nor postponed (ordinary unsecured) rank equally between themselves[1]. The order of payment of debts in the separate estates is[2]:

- preferential debts
- debts which are neither preferential nor postponed debts (ordinary unsecured debts including any liquidator's claim from the joint estate)
- interest under sections 189 and 328(5) on all debts
- postponed debts (including any liquidator's claim from the joint estate)
- interest on the postponed debts
- surplus to the bankrupt or shareholders of the company.

Refer to Annex B for a worked example of how to calculate a distribution from joint and separate estates.

1. Insolvent Partnerships Order 1994/2421 Sch 4 Art 8 Part II paragraph 23 section 175B(2)

2. Insolvent Partnerships Order 1994/2421 Sch 4 Art 8 Part II paragraph 23 section 175B(1)

49.101 Debts postponed by section 3 of the Partnership Act 1890

By virtue of section 328(6) IA86, the general law on deferred creditors is preserved, including section 3 of the Partnership Act 1890. Where a person has loaned or sold in consideration of a share of the profits of a business, Section 3 of the PA1890 makes provision for the postponement of the rights of that person in cases of insolvency. A postponed debt is usually a loan where the rate of interest varies according to the profits earned by the partnership. These postponed debts are:

- loans to a person engaged or about to engage in business on terms that interest varies with the profits or that the lender shall receive a share of the profits[1], or
- loans advanced by a person to a buyer of goodwill in consideration of the receipt of a share of the profits[2].

The lender of the funds and the seller of the goodwill are treated as deferred creditors and these claims are payable after all the creditors' claims for valuable consideration in money or money's worth have been satisfied[2]. The interest on these debts is not payable in the same priority as the debt itself. Interest on the postponed debts is a separate category in the order of priority ranking after the postponed debts themselves have been paid[3,4].

1. Partnership Act 1890, section 2(3)(d)

2. Partnership Act 1890, section 3

3. Section 175 modified by schedules 4 and 5 IPO94

4. Section 328 modified by schedules 4 and 5 IPO94

49.102 Distribution of assets from one estate to another

Where a distribution is received from the joint estate or from the separate estate of another member of the partnership (who is subject to an insolvency order) to the separate estate of another member, that distribution shall become part of the separate estate to which it is paid, and shall be distributed in accordance with the order of priority set out in IPO94 Schedule 4, Article 8, paragraph 23,section 175B(1)[1,2].

Where a distribution is received from the separate estate of a member, to the joint estate, the distribution becomes part of the joint estate and is distributed in the order of priority as set out inIPO94 Schedule 4, Article 8, paragraph 23, section 175A(2)[3,4].

1. Insolvent Partnerships Order 1994/2421 Sch 4 Art 8 Part II paragraph 23 section 175B(1)

2. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II paragraph 23 s175B(3)

3. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II paragraph 23 s175A(9)

4. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II paragraph 23 s175A(2)

Interest on debts

49.103 Statutory interest

Any surplus left after payment of the debts that are neither preferential nor postponed, should then be used to pay interest on the debts outstanding since the winding-up order was made against the partnership or any corporate member (as the

case may be) or the bankruptcy order was made against any individual member (to the date of payment of the debt)[1].

The rate of interest payable is whichever is the greater of;

- The rate specified in s17 of the Judgments Act 1838(JA1838) on the day the order was made (currently this stands at 8%);and
- The rate applicable to that debt apart from the winding up or bankruptcy (contractual interest)[1].

Interest on preferential debts ranks equally with interest on other debts which are neither preferential nor postponed debts (ordinary unsecured debts)[2]. Interest should be calculated on a simple basis.

1. IA86 sections 189 and 328 as modified by IPO 94 Sch 4 Art 8 Part II paragraph 24)

2. Insolvent Partnerships Order 1994/2421 Sch 4 Art 8 Part II para 23 s175C(4)

49.104 Interest due on debts for periods up to the date of the insolvency order (winding-up order against the partnership or bankruptcy order(s) against an individual member or members)

In certain circumstances creditors may include interest accumulated on their debt for periods prior to the insolvency order, even where this has not previously been reserved or agreed[1]. If a debt is due by written instrument and payable at a certain time, interest may be claimed for the period from that specified time to the date of the bankruptcy order[2]. If the debt is due otherwise, interest may only be claimed if, prior to the presentation of the petition a written demand for payment was made by or on behalf of the creditor, giving notice that interest would be payable from the date of the demand to the date of payment[3]. Interest claimed in this way can only be claimed for the period between the date of the demand and the date of the bankruptcy order[4]. The maximum rate of interest to be claimed is the rate specified in section 17 of the JA1838 on the date of the bankruptcy order[5]

1. Rule14.23

2. Rule14.23(3)

3. Rule14.23(4)

4. Rule14.23(5)

5. Rule14.23(6)

49.105 Surplus on joint estate

Where a surplus exists on the joint estate, the insolvency practitioner shall adjust the rights among themselves of the members of the partnership as contributories and shall distribute any surplus to the members or, where applicable, to the separate estates of the members, according to their respective rights and interests in it[1].

1. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II, Paragraph 23 s175A(3)

49.106 Provisions generally applicable in distribution of joint and separate estates.

Separate accounts must be kept for the joint estate of the partnership and of the separate estate of each member of that partnership against whom an insolvency order is made[1].

No member of the partnership shall prove for a joint or separate debt in competition with the joint creditors, unless the debt has arisen as a result of fraud or in the ordinary course of business carried on separately from the partnership business[2].

For the purpose of establishing the value of any debt where the joint estate is insufficient to pay the joint preferential debts, the joint ordinary unsecured debts or the joint postponed debts, the value of the aggregated claim may be estimated by the responsible insolvency practitioner in accordance with section 322 (where a trustee is able to estimate the value of a debt subject to a contingency or which does not bear a certain value)or (as the case may be) in accordance with the rules[3].

Sections 175A and 175B are without prejudice to any provision in the IPO94 or of any other enactment concerning the ranking between themselves of postponed debts and interest thereon but in the absence of any such provision, postponed debts and interest thereon rank equally between themselves[4]. The interest on postponed debts is a separate category of debt, ranking after the postponed debts have been paid[5, 6].

Where any two or more members of a partnership constitute a separate (sub) partnership, the creditors of this separate partnership will be a separate set of creditors and subject to the same statutory provisions as the separate creditors of any member of the insolvent partnership. Any surplus in the separate partnership will be distributed to the members or the separate estates of the members of that partnership according to their respective rights and interests in it[7].

The official receiver, the Secretary of State or a responsible insolvency practitioner are not entitled to remuneration for their services in connection with:

- the transfer of a surplus from the joint estate to a separate estate,

- a distribution from a separate estate to a joint estate, or
- a distribution from the estate of a separate partnership to the separate estates of the members of that partnership[8].

1. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II, paragraph 23 section 175C(1)

2. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II, paragraph 23 section 175C(2)

3. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8,Part II, paragraph 23, section 175C(3)

4. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II, paragraph 23, section 175C(5)

5. Section 175 modified by schedules 4 and 5 IPO94

6. Section 328 modified by schedules 4 and 5 IPO94

7. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II, paragraph 23 section 175C(6)

8. Insolvent Partnerships Order 1994/2421 Schedule 4, Article 8, Part II, paragraph 23, section 175C(8)

49.107 Winding up of insolvent partnership on members' petition where concurrent petitions are presented against all members

The provisions of IPO94 Schedule 4, Part II are also applied in the case of a winding up of an insolvent partnership on a member's petition where concurrent petitions are presented against all the members[1].

1. Insolvent Partnerships Order 1994/2421 Schedule 6 Article10

49.108 Insolvency proceedings not involving winding up of insolvent partnership as unregistered company where individual members present joint bankruptcy petition

IPO94 Schedule 7 Article 11 paragraph (2) provides that Part IX (other than sections 273, 274 and 287) and Parts X to XIX of the IA86 are to apply. As a result IA86 section 328 applies (concerning the priority of expenses and debts) which is modified in IPO94 schedule 7. This provides for the administration of the partnership assets in

the same manner as scheduled under IPO94 Schedule 4 article 8 in relation to the winding up of an insolvent partnership on a creditor's petition, where concurrent petitions are presented against one or more members of the partnership.

Return of capital to the contributories of a company

49.109 Surplus assets - distribution to members

Any surplus of funds remaining after satisfaction in full of all the liabilities is distributable to the members of the company according to their rights and interests[1]. Where the liquidator intends to apply to the court for an order authorising a return of capital, the application should be accompanied by a list of the persons to whom the return is to be made which must include any necessary alterations to take account of matters after settlement of the list and the amount to be paid to each person. Where the court makes an order authorising the return, it shall send a sealed copy to the liquidator[2].

1. Section 154

2. Rule 6.1

49.110 Distribution process - checks to be made

The official receiver should check the following before making a distribution to contributories:

- Check that all other distributions required including the payment of contractual or statutory interest and postponed creditors have been made as appropriate.
- Check for any resolutions under section 247 of the Companies Act 2006 (CA2006) making payment of any surplus payable to the employees rather than the contributories.
- Once it has been established that there is a surplus due for return to the contributories of the company, check with HM Revenue and Customs (HMRC) whether there is any liability to taxation on the proposed distribution. Matters affecting the level of tax due could include; any income earned by the company during its liquidation, (including interest earned on the funds deposited in the

ISA); any capital gains tax accrued on the disposal of an asset in the liquidation and; any liability to tax on the return of the surplus to the contributories.

- The list of contributories and their claims must be settled[1]. The company's statutory records, namely the register of members, may be required in order to verify the individual entitlements of the members. Where different classes of shares exist, it may also be necessary to refer to the company's articles of association to check whether there are any preference shares authorised by the company's articles, entitled to take priority over other company shares (including over other preference shares).

1. Rule 7.117

49.111 Distribution process - application to settle the list of contributories

Once the tax position has been resolved and the list of contributories has been settled, an application to court should be made, including a summary of the receipts and payments in the liquidation and the settled list of contributories (including details of any disputed contributories to be taken in to account)[1] [note 2]. The contributories should, where appropriate, be included as parties to the application.

The court will "adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled to it"[2]. Where it authorises the return of capital, the court will send a sealed copy of the order to the liquidator[3].

1. Rule 6.1

2. Section 154

3. Rule 7.117

49.112 Distribution process - payment to contributories

Following the procedures outlined above, the liquidator will then make the required payments, bearing in mind any requirements to deduct tax prior to distribution as required by HMRC. The liquidator will inform each person to whom a return of capital is made the rate of return and the likelihood of any further return. The payment will be sent by post unless an alternative payment arrangement has been agreed with the payee[1].

49.113 Recovering unpaid share capital following an application to settle the list of contributories

Where the liquidator becomes aware of uncalled share capital in the course of settling the list of contributories, they should take the necessary steps to recover the unpaid capital on behalf of creditors. Shareholders (also called "members" or "contributories") are liable to contribute to the assets of a company limited to the extent of the value of the shares they hold in the company (limited liability). It is possible for a company to issue shares which will be paid for at a later date. This can either be at a date agreed when the shares are issued, by instalment payments on defined dates, or by payment when a call is made on unpaid capital by the company, at the instigation of the directors. The manner in which a call on unpaid capital will be made will be set out in the company's articles of association.

49.114 Interest due on unpaid calls

Under article 15 of Table A where a sum called is not paid on or before the date specified, the person is due to pay interest on the amount. Under articles 18 and 19 if payment is not made the share(s) may be forfeit. The share is forfeit by resolution of the directors (also in writing).

49.115 Action following settlement of list of contributories

Following settlement of the list of contributories (the procedure for doing this is set out in rules 7.79 to 7.91 of the IR2016 and document production forms are LOCCL, LOCPL and LOCOBJ), the liquidator requires the leave of the court to make the call on the unpaid sum[1]. The costs of settling the list of contributories and making calls should be charged on a time and rate basis and deducted from the estate assets before making any payment to creditors. The insolvency regulations permit the official receiver, when acting as, liquidator or trustee, to charge remuneration, based on hourly rates, when making a distribution to creditors and which is referred to as a time and rate fee.

1. Rules 7.86 to 7.91

49.116 Liquidator’s call on contributories

Once the list of contributories is settled then the liquidator can write to the contributories and ask them formally for their proposal for payment. If the

contributories fail to respond or make no reasonable offer, the liquidator can then make an application to court for leave to make the calls. The court order obtained establishes the liquidator's ability to take enforcement action on the debt should it remain unpaid.

49.117 Payment in to the ISA of unclaimed dividends (following dissolution)

Where there is a surplus arising in a liquidation following compulsory winding up proceedings and the liquidator has invited shareholders to make a claim, any surplus monies not claimed by contributories[1] still held by the liquidator upon the dissolution of the company, must be paid into the Insolvency Service Account (ISA). In cases administered by the official receiver the unclaimed surplus will already be held in the ISA[2].

It should be noted that where a dividend or other sum is paid to a person via a payment instrument such as a credit transfer or cheque, 6 months or more from the date of the payment instrument must have elapsed before any payment is made in to the ISA in respect of the unclaimed dividend or sum. In cases administered by the official receiver the monies are already held in the ISA[3].

1. Insolvency Regulations 1994 (SI 1994-2507) regulation 18(1)(b)

2. Insolvency Regulations 1994 (SI 1994-2507) regulation 18(2)(b)

3. Insolvency Regulations 1994 (SI 1994-2507) regulation 18(4)

49.118 Preference shares

Preference shares are shares authorised by the memorandum or articles of association and are entitled to some priority over the other shares of the company. There may be several classes of preference shares ranking one after the other. Preference shares do not as a matter of course have a priority in the repayment of capital in a winding up. However, this right is usually given by the articles of association of a company. If so, the surplus is applied as follows after the payment of all the company's debts and liabilities:

- arrears of preference dividend;
- repayment of preference capital; then
- repayment of ordinary shareholders' capital.

Where there are surplus assets available after discharging all the company's liabilities and repayment of the capital to shareholders, and there is no reference made in the articles giving preference shareholders further rights to capital in such a

surplus, then the preference shareholders have no right to participate in such surplus assets Re Wilson and Clyde Coal Co Ltd v Scottish Insurance Corporation Ltd 1949 S.C. (H.L.) 90. Where the articles do provide further rights for preference shareholders they are entitled to share in surplus assets after the repayment of capital. The articles of association should always be consulted in these circumstances.

49.119 Surplus assets - power to make over assets to employees

Before the commencement of a winding up, a company may have resolved under section 247 of the CA2006[1] to provide for employees and former employees in the event of the cessation or transfer of the company's business, by making over assets to employees. Any such payment must be made out of profits of the company which are available for dividend.

Once the winding up has commenced, the liquidator may still make over assets to the employees[2]. Any payment must be taken from the company's assets which are available to the members on the winding up i.e. the surplus held by the liquidator after all the costs of the winding up have been met and the company's debts have been fully satisfied, including the payment of any interest. The liquidator should also ensure that the company has made a resolution (by ordinary resolution of the shareholders unless a larger majority has been stipulated in the company memorandum and articles), sanctioning the exercising of its power to provide for employees[3]. In practice this is likely to be a rare occurrence. Also in compulsory liquidations, the actions of the liquidator's power in this regard can be challenged by an application being made to the court by any creditor or contributory[4].

1. Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007/2194 Schedule 4, Part 3, paragraph 42(2)

2. Section 187(1)

3. Section 187(2)

4. Section 187(4)

Return of surplus to bankrupt

49.120 Surplus in bankruptcy

Where a surplus remains after payment of the expenses of the bankruptcy and payment in full and with interest of all the bankrupt's creditors, the bankrupt is

entitled to the surplus[1]. Where the trustee has paid interest at the statutory rate to all the creditors, they may consider waiting 28 days to pay the surplus to the bankrupt, to allow for late notification from a creditor of contractual interest above the statutory interest rate which is applicable to the debt.

1. Section 330(5)

49.121 Surplus in first estate where bankrupt subject to a subsequent bankruptcy order

Where an individual is the subject of more than one bankruptcy order, if there is a surplus arising in the first estate, following the payment in full of all expenses and creditors (including interest), that surplus becomes an asset in the subsequent bankruptcy and as a result should not be paid to the bankrupt. It should be paid in to the subsequent estate as a normal asset, and is subject to the same fees as other assets recovered in the subsequent estate[1]

1. Rule 10.15