

Trustees and Liquidators in Bankruptcies and Compulsory Liquidations

Information on the appointment, functions, powers and payment of trustees and liquidators, and their complaints procedure.



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1. Purpose of this guide

This guide summarises the functions and powers of a private sector insolvency practitioner who is appointed as:

- trustee of a bankrupt; or
- liquidator of a company in compulsory liquidation.

It also summarises how the practitioner is paid.

Even though a private sector insolvency practitioner may be appointed, the official receiver remains responsible for investigating the affairs of the bankrupt or company. If you have any queries or information that would assist these investigations, please send them to the official receiver dealing with the case.

2. Appointment of an insolvency practitioner as trustee or liquidator

Only authorised persons may act as insolvency practitioners, and only an insolvency practitioner can be appointed as trustee or liquidator in place of the official receiver.

The role of a trustee or liquidator is to realise the assets and make payments to creditors. The official receiver may act where the realisation of assets is straightforward. However, in most cases where the realisation is likely to be complex, the official receiver will seek to appoint a private sector insolvency practitioner to act as trustee or liquidator, unless the court has already appointed one.

The insolvency practitioner will be appointed at a meeting of creditors or under powers given to the Secretary of State for Trade and Industry in the Insolvency Act 1986, usually at the request of, or in consultation with, the main creditor(s).

An insolvency practitioner will usually be appointed as trustee or liquidator within four months of the bankruptcy or winding-up order being made. In the meantime the official receiver will act as receiver and manager of the bankrupt's estate or as liquidator of the company, and will collect or protect the assets. An insolvency practitioner may be appointed later if, for example, assets come to light or, in the case of a bankruptcy, when assets have been acquired since the date of the bankruptcy order or have increased in value (e.g. an increase in house prices giving equity in a property). A trustee can be appointed even after the bankrupt has obtained their discharge from bankruptcy if there are still assets in the bankruptcy to be dealt with.

The official receiver will notify the bankrupt if an insolvency practitioner is appointed to deal with their affairs, but will not usually send a separate notification to creditors. An insolvency practitioner who is appointed trustee or liquidator at a meeting of creditors must advertise their appointment in a newspaper where the advertisement is most likely to come to the attention of the creditors. If the insolvency practitioner is appointed trustee or liquidator by the Secretary of State, they must give notice to the creditors individually or, if the court allows, by an advertisement.

3. Functions of a trustee or liquidator

The main function of the trustee or liquidator is to realise and distribute the assets of the bankruptcy estate or company. The trustee or liquidator has a duty to the creditors to dispose of the assets - subject to exemptions (see below) - of the bankruptcy estate or company for the best possible price. The aim is to enable the creditors to receive as large a share of the assets as

possible after the fees, costs and expenses of the bankruptcy or liquidation have been paid (see "Payments to creditors" for details of the order of distribution).

A trustee or liquidator may apply to court for an order restoring property which a bankrupt or company has disposed of in a way that is unfair to their creditors (for example if, before bankruptcy, a property had been transferred to a relative of the bankrupt for less than its full value).

In certain circumstances, a liquidator may also take action in the court against the directors or former directors personally for the benefit of creditors of the company (for example, for wrongful trading).

A trustee may claim property obtained by a bankrupt during the bankruptcy. The trustee may also ask the bankrupt to pay, for up to three years, part of their wages, salary or other income to the trustee, or ask the court to order them to do so, if that income is more than the bankrupt and their family need to live on while they are bankrupt.

A bankrupt's estate will not include the following items, but the trustee can claim, sell and replace an item if the individual value is more than the cost of a reasonable replacement:

- tools, books, vehicles and other items of equipment which a bankrupt needs to use personally in their employment, business or vocation;
- clothing, bedding, furniture and household equipment necessary for the basic domestic needs of the bankrupt and their family.

4. Powers of a trustee or liquidator

A creditors' or liquidation committee can be appointed at a meeting of creditors, and consists of at least three and not more than five elected creditors or their representatives. The committee's purpose is to protect and promote the interests of the creditors and, where appropriate, the shareholders. The committee will meet to consider the general progress of the bankruptcy or liquidation, and any matters that are of interest to the committee. The trustee or liquidator must write a report for the committee at least once every six months, or more often if required by the committee, but not more often than once every two months. The trustee or liquidator must keep separate financial records for each bankruptcy or liquidation, and these are open to inspection by the committee.

The committee also controls the costs and expenses of the bankruptcy or liquidation, and this is dealt with below in section 5.

The powers of a trustee or liquidator are set out in the Insolvency Act 1986, the Insolvency Rules 1986 and the Insolvency Regulations 1994. Some of those powers can only be used with the permission of the creditors' or liquidation committee or the court, while others can be used without permission. Examples of the powers that can only be used with the permission of the committee or the court are:

- the power to carry on the business of the bankrupt or company so far as may be necessary for the benefit of the creditors;
- the power to bring or defend legal actions relating to the property of the bankrupt or company;
- the power to come to a compromise with creditors of the bankrupt or company about their debts;
- the power to sell the property of the bankrupt for a sum of money payable in the future; and
- the power to mortgage the property of the bankrupt to raise money to pay the bankrupt's debts.

The trustee or liquidator must tell the committee when they employ a solicitor to help them, or if they dispose of any property of the bankrupt or company to a person connected with that bankrupt or company. However, they do not need the committee's permission.

If the trustee or liquidator has done something for which they require the committee's permission but did not get it beforehand, the committee may still approve what has been done. The committee should only approve if they are satisfied that the trustee or liquidator had to act as a matter of urgency and has since sought their approval without undue delay.

If no committee is appointed, then the Secretary of State acts as the committee (in practice this will be the Insolvency Practitioner Unit of the Insolvency Service, acting on behalf of the Secretary of State). The trustee or liquidator then needs the permission of the Secretary of State or the court to use these powers.

Some of the powers of the trustee or liquidator can be used without the need to get permission. Examples of these are:

- the power to sell the property of the bankrupt or company (as long as it is not for a sum of money payable in the future);
- the power to act and to sign documents in the name and on behalf of the bankrupt or company;
- the power to employ an agent; and
- the power to do all other things necessary for winding up the affairs of the bankrupt or company.

5. Payment of a trustee or liquidator

A trustee or liquidator is entitled to be paid for the work they do. The amount they are paid can be calculated:

- as a percentage of the value of the assets realised or distributed (or both); or
- on a time-and-rate basis - where an hourly rate is charged for the time spent on dealing with the bankruptcy or liquidation.

If a creditors' or liquidation committee has been appointed, the committee must decide on which basis the payment to the trustee or liquidator is to be calculated and, where necessary, the percentage to be used. If there is no committee, then the basis on which the trustee or liquidator is to be paid, and also the amount they are to be paid, can be agreed at a meeting of creditors.

When fixing the basis of the trustee's or liquidator's remuneration, the creditors must have regard to the following:

- the complexity (or otherwise) of the case;
- any exceptional kind or degree of responsibility which falls on the trustee or liquidator in connection with the bankruptcy or liquidation;
- how effectively the trustee or liquidator appears to be carrying out, or to have carried out, their duties;
- the value and nature of the assets which the trustee or liquidator has to deal with.

If payment is agreed on a time-and-rate basis, the trustee or liquidator is paid according to the number of hours they and their staff have spent working on the bankruptcy or liquidation. The hourly rate paid is set by the trustee or liquidator.

Where the trustee or liquidator seeks agreement to their fees during the course of a bankruptcy or liquidation they should give the committee, or the creditors, enough information to enable them to judge whether the proposed payment is reasonable, having regard to all the circumstances. This should include explaining what has been done during the bankruptcy or liquidation, the grade of staff working on the case and their hourly rate. Statement of Insolvency Practice 9 (SIP9: Remuneration of insolvency office holders) sets out a format the trustee or liquidator can use when providing the information.

The trustee or liquidator should also offer creditors a guide explaining their rights to approve and monitor payments to the trustee or liquidator. The guide will include, among other things:

- information about the creditors' or liquidation committee;
- an outline of the procedure for agreeing a trustee or liquidator's payment;
- information that should be provided to creditors when they are asked to agree the fees of a trustee or liquidator;
- what to do if the creditors are dissatisfied; and
- what the trustee or liquidator can do if he or she is dissatisfied.

Where the basis of the payment to the trustee or liquidator has been fixed before they have completed the main part of their work, the trustee or liquidator should specify the amount of remuneration already drawn when they report to the creditors on their progress or submit their final report.

If the basis on which a trustee or liquidator is to be paid is not agreed by a creditors' or liquidation committee or at a meeting of creditors, then the trustee or liquidator will be paid according to the statutory scale shown below:

- The realisation scale

| | |
|-----------------------------------|-----|
| On the first £5,000 or part of it | 20% |
| On the next £5,000 or part of it | 15% |
| On the next £90,000 or part of it | 10% |
| On all further sums realised | 5% |
- The distribution scale

| | |
|-----------------------------------|------|
| On the first £5,000 or part of it | 10% |
| On the next £5,000 or part of it | 7.5% |
| On the next £90,000 or part of it | 5% |
| On all further sums distributed | 2.5% |

If a creditor considers that the amount paid to a trustee or liquidator is too high, then they can apply to court for an order to have it reduced. A creditor can only apply for this if they have the support of at least 25% in value of the unsecured creditors.

If a trustee or liquidator considers that the amount they are paid is too low, they can ask the creditors to increase it or apply to court for an order to have it increased, or both.

Payment of the expenses and disbursements of a trustee or liquidator does not need approval by the creditors' or liquidation committee, or the creditors. Agents' fees for selling assets, and statutory advertisements, are examples of expenses and disbursements. However, if the trustee or liquidator is making, or intends to make, a separate charge in the bankruptcy or liquidation for expenses and disbursements to recover the cost of using their firm's facilities (referred to in SIP9 as category 2 disbursements) - for example, photocopying, postage or storage charges - then they should disclose those charges to the committee or the creditors, and seek approval of them,

when seeking approval of their fees. They should also explain how these fees and disbursements arise and have been calculated.

6. Payments to creditors

After realising the assets of a bankrupt or company, a trustee or liquidator will distribute the money raised. This distribution is made in accordance with an order of priority set out in insolvency law.

In a bankruptcy, the priority is as follows:

Expenses of the bankruptcy - there is also a set order of priority for paying these. The expenses include:

- expenses properly incurred in preserving, realising or getting in the assets of the bankrupt;
- fees and remuneration payable to the official receiver and the Secretary of State. The trustee has to pay all money realised into a bank account held at the Bank of England called the Insolvency Services Account. A fee, known as the Secretary of State fee (sometimes also called an "ad valorem" fee), is calculated as a percentage of the money paid into the account;
- the costs of the petitioner;
- any necessary disbursements made by the trustee;
- the payment of anyone employed by the trustee to perform services in the bankruptcy as required under insolvency law;
- the payment of the trustee; and
- capital gains tax due on any increases in the value of assets since the date of the bankruptcy order.

Claims of preferential creditors - these are defined in insolvency law, and include, subject to limits, claims by employees for unpaid wages and holiday pay and certain contributions to occupational pension schemes. These are the first creditors to get paid. If insufficient money is realised to pay them in full, the money that is realised is paid to them in proportion to the amount they are owed.

Debts which are neither preferential nor postponed (see below) - these are usually referred to as debts of unsecured creditors, who will include trade and expense creditors. If insufficient money is realised to pay them in full, the money that is realised is paid to them in proportion to the amount they are owed. This is described as a dividend of pence in the £, where 100p in the £ equals payment in full.

Interest on debts - if the debts of the preferential and unsecured creditors are paid in full, then they are entitled to interest on their debts from the date of the bankruptcy order. The rate of interest paid is the greater of: the statutory rate of interest at the date of the bankruptcy order, and the rate of interest the bankrupt would have had to pay if they had not been made bankrupt. Since 1 April 1993 the statutory rate of interest has been 8%.

Debts to postponed creditors - these are defined in insolvency law, and include money owed to a person who was the spouse of the bankrupt at the date of the bankruptcy order.

Surplus - if there is a surplus after paying in full all the expenses of the bankruptcy, all debts of the bankrupt and interest on the debts, then this money is returned to the bankrupt.

Secured creditors - if a creditor holds a mortgage or charge over an asset of the bankrupt, then if that asset is sold the secured creditor receives the proceeds. If the debt owed to the secured

creditor is paid in full from the proceeds, the trustee will receive the bankrupt's share of that surplus. Examples of secured creditors will be a bank or building society holding a life policy or a mortgage over a house. If the debt owed is not paid in full, the balance is an unsecured debt in the bankruptcy.

In a liquidation the priority is as follows:

Expenses of the liquidation - there is also a set order of priority for paying these. The expenses include:

- expenses properly incurred in preserving, realising or getting in the assets of the company;
- fees and remuneration payable to the official receiver and the Secretary of State. The liquidator has to pay all money realised into a bank account held at the Bank of England called the Insolvency Services Account. A fee known as the Secretary of State fee (sometimes also called the "ad valorem" fee) is calculated as a percentage of the money paid in to the account;
- the costs of the petitioner;
- any necessary disbursements made by the liquidator;
- the payment of any person employed by the liquidator to perform services in the liquidation as required under insolvency law;
- the payment of the liquidator; and
- capital gains tax due on any increases in the value of assets since the date of the winding-up order.

Claims of preferential creditors - these are defined in insolvency law, and include, subject to limits, claims by employees for unpaid wages and holiday pay and certain contributions to occupational pension schemes. These are the first creditors to get paid. If not enough money is realised to pay them in full, the money that is realised is paid to them in proportion to the amount they are owed.

Floating charge - Instead of, or as well as, having a mortgage or charge over a specific asset(s) of the company, a creditor may have a mortgage or charge over the assets of the company generally. This is known as a "floating charge". From the proceeds of assets subject to a floating charge, preferential creditors will be paid first (to the extent that they have not already been paid from the company's general assets that are not subject to the charge) Where the charge was created on or after 15 September 2003, part of the proceeds from the sale of these assets will be set aside for distribution to unsecured creditors. Any surplus will be paid to the secured creditor holding the floating charge.

Debts that are neither preferential nor postponed (see below) - these are the debts to unsecured creditors, who will include trade and expense creditors. They will be paid if there is a surplus after paying the preferential creditors in full and any secured creditor holding a floating charge. If not enough money is realised to pay the unsecured creditors in full, the money that is realised is paid to them in proportion to the amount they are owed - this is described as a dividend of pence in the £, where 100p in the £ equals payment in full.

Interest on debts - if the debts of the preferential and unsecured creditors are paid in full, then they are entitled to interest on their debts from the date of the winding-up order. The rate of interest paid is the greater of: the statutory rate of interest at the date of the winding-up order, and the rate of interest the company would have had to pay if it were not in liquidation. Since 1 April 1993, statutory interest has been 8%.

Claims of postponed creditors - these are defined in insolvency law, and include certain claims where the company has been carrying on unauthorised investment or banking business.

Surplus - if there is a surplus after paying in full all the expenses of the liquidation, all debts of the company, and interest on the debts, then this money is distributed to the shareholders of the company.

Secured creditors - if a creditor holds a mortgage or charge over a specific asset(s) of the company, then if that asset(s) is sold the secured creditor receives the proceeds. If the debt owed to the secured creditor is paid in full from the proceeds, the liquidator will receive the surplus and distribute it first to preferential creditors and then, if there is still a surplus, to unsecured creditors. If the debt owed is not paid in full, the balance is an unsecured debt in the liquidation.

7. Completion of the administration by a trustee or liquidator

When a trustee or liquidator has realised and distributed all the assets, they will arrange a final meeting of creditors. They will send notice of this meeting to all creditors they are aware of. At this meeting, the trustee or liquidator will report on what they did during the bankruptcy or liquidation and will give creditors a summary of their receipts and payments. The trustee or liquidator will also seek their release from office. The creditors have a right to object to the release of the trustee or liquidator.

8. Other matters

If you are the bankrupt or company officer (both current and former):

You have a duty to co-operate with the trustee or liquidator. This is in addition to your duty to co-operate with the official receiver.

A trustee must provide information about time spent administering the bankruptcy to a bankrupt who requests such information during the bankruptcy and up to 2 years after the trustee has left office.

If you are a director or contributory:

The liquidator must provide their most recent receipts and payments account to any director or contributory of the company who requests one during the course of the liquidation, and must also provide information about time spent administering the liquidation for up to 2 years after they have left office.

If you are a creditor:

A trustee or liquidator is not required to send regular reports to creditors, although they must keep the creditors' or liquidation committee regularly informed (see section 4). A trustee or liquidator must provide a copy of their most recent receipts and payments account to any creditor who requests one during the bankruptcy or liquidation, and must also provide information about time spent administering the bankruptcy or liquidation for up to 2 years after they have left office.

9. How do I complain about the actions of a trustee or liquidator?

Bankruptcy and compulsory liquidation (winding-up) are court procedures, so a trustee or liquidator is subject to the control of the court. The Insolvency Act 1986 enables bankrupts, creditors, directors or contributories to ask the court to intervene, and gives the court wide-ranging powers. If you wish to complain about an insolvency practitioner's unprofessional conduct, you should contact their authorising body. You can get details of a practitioner's authorising body through 'find an IP' on our website www.insolvency.gov.uk or by telephoning The

Insolvency Service Central Enquiry Line on 020 7291 6895 or emailing
Central.Enquiryline@insolvency.gsi.gov.uk

The Insolvency Service publishes a leaflet "How to make a complaint against an IP" giving general guidance on making a complaint.

The authorising bodies each have publications which explain how their complaints procedures work. The authorising bodies cannot settle disputes in individual cases, and disciplinary procedures should not be regarded as an alternative to asking the court to intervene. For example, an authorising body cannot decide the amount to be paid to a trustee or liquidator, or settle a dispute where the trustee or liquidator does not accept a proof of debt sent in by a creditor; these are matters for the court.

Before complaining to the trustee or liquidator's authorising body, or applying to court, you should write or speak to the insolvency practitioner to try and resolve the issue.

Appendix 1 - Other Insolvency Service publications

The Insolvency Service publishes several other publications that may be of use.

A Guide for Creditors

A Guide for Directors to Compulsory Liquidation

Guide to Bankruptcy

What will happen to my home?

What will happen to my pension?

What will happen to my bank account?

What happens when you are interviewed by the Official Receiver?

Bankruptcy Restriction Orders

When will my bankruptcy end?

Can my bankruptcy be cancelled?

Fast-Track Voluntary Arrangements

You can get more copies of this booklet from The Insolvency Service website:
www.insolvency.gov.uk

You may also, free of charge, order copies of our publications from the DTI Publications Orderline. To do this you will need the reference number (URN) of the forms you require. You can find this on the back cover of the leaflets or on the website.

By telephone: 0845 015 0010 (calls to this number are charged at national rate).

By email: publications@dti.gsi.gov.uk

By fax: 0845 015 0020

Minicom users should telephone: 0845 015 0030

You can contact The Insolvency Service Central Enquiry Line for general enquiries on insolvency matters on 020 7291 6895; or email: Central.Enquiryline@insolvency.gsi.gov.uk

Appendix 2 - Glossary of terms

Ad valorem

In proportion to the value

Assets

Anything that belongs to the bankrupt or company that may be used to pay the debts or the costs of the insolvency proceedings.

Contributory

Every person liable to contribute to the assets of a company if it is wound up. In most cases this means shareholders who have not paid for their shares in full.

Creditor

Someone owed money by a bankrupt or company.

Director

A person who conducts the affairs of a company.

Disbursements

Money paid out/expenditure

Discharge

Freed from bankruptcy

Estate

The assets or property which your liquidator or trustee can deal with to pay the creditors

Equity

The difference between the value of, for example, a property and any loans outstanding on it.

Insolvency practitioner

An authorised person who specialises in insolvency, usually an accountant or solicitor. They are authorised by the Secretary of State or one of several recognised professional bodies.

Liquidation (winding up)

Applies to companies or partnerships. It involves the realisation and distribution of the assets and usually the closing down of the business. There are three types of liquidation - compulsory, creditors' voluntary and members' voluntary.

Liquidator

The official receiver or an insolvency practitioner appointed to administer the liquidation of a company or partnership.

Official receiver

An officer of the court and civil servant, employed by The Insolvency Service, who deals with bankruptcies and company liquidations under orders of the court.

Petition

Formal application made to a court

Preferential creditors

These are unsecured creditors whose claims are paid before those of the general body of unsecured creditors. They are defined in insolvency law and include, subject to limits, employees claiming unpaid wages and holiday pay.

Realise

To sell the assets of the bankruptcy estate or company and obtain the proceeds.

Remuneration

Payment for work done by the trustee or liquidator.

Release

The discharge of the official receiver or an insolvency practitioner from the liabilities of office as trustee or liquidator.

Secured creditor

If a creditor holds a mortgage or charge over an asset of the bankrupt or company, then they are a secured creditor and will receive the proceeds from the sale of that asset. An example of a secured creditor is a bank or building society with a mortgage over a house or other buildings.

Statement of Insolvency Practice (SIP)

A professional standard adopted by all the authorising bodies that insolvency practitioners must comply with.

Trustee

The trustee in bankruptcy is the official receiver or an insolvency practitioner who takes control of the bankrupt's assets. The trustee's main duties are to sell these assets and share the money among the creditors.

Unsecured creditor

A creditor who does not hold security (such as a mortgage) for money owed. Some unsecured creditors may also be preferential creditors.

Vacation of office

Where the trustee or liquidator ceases to be in office (e.g. through resignation or removal).

You can obtain further copies of this booklet from the following website:
<http://www.dti.gov.uk/publications>

You may also order copies of our publications by telephone by calling the Publications Orderline on 0845 015 0010 (calls to this number are charged at national rate). You may also fax orders to the Orderline on 0845 015 0020. Minicom users should telephone 0845 015 0030.

Publications are also available on our website www.insolvency.gov.uk