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## Time limits for recovering overpayments

### England and Wales

- 7.00 In England and Wales, overpayments being recovered using methods other than court action, can be recovered at any time regardless of how old they are. However, in cases when the overpayment covers a long period of time, LAs may find it difficult to obtain the information and evidence to make and support their calculations and therefore they may be unable to 'prove' the overpayment existed. The same may apply to 'old' overpayments that have been left for some time (unable to be recovered), as the information and evidence that supported their calculation may no longer be available.
- 7.01 Once an overpayment debt is created between an LA and the person it is recoverable from, an LA in England or Wales may choose to pursue the debt in the County Court. However, such action must be brought within six years, as per The Limitation Act 1980 (s9).
- 7.02 The time limit is applicable from the date the overpayment decision was made by the LA. For overpayments caused by a mistake or error, including fraudulent overpayments, the time limit is applicable from the date the mistake or error was discovered by the LA. This applies to both overpaid HB and excess CTB.
- 7.03 It should also be noted that the time limit starts again when there is later relevant acknowledgement by the debtor of that debt. An example may be in the form of a payment made against the debt, or a letter from the debtor admitting the debt, such as enquiring about the amount outstanding.
- 7.04 The Limitation Act 1980 does not apply to recovery other than by bringing an action in the courts.

### Scotland

- 7.05 In Scotland, any obligation to repay overpaid HB and excess CTB is extinguished (and therefore must be written off) 20 years after the date the overpayment decision was made by the LA, as per The Prescription and Limitation (Scotland) Act 1973 (s7), if
- there has been no 'relevant claim' made against the debt (e.g. the LA has not brought any action in the courts to recover the overpaid benefit, such as pursuing a method of diligence or initiating/claiming in sequestration proceedings), or
  - there has been no acknowledgment of the debt (e.g. the LA has not received part payment of the debt or a written admission of the debt from the debtor. Part payment of the debt could include a deduction taken from benefits payable to the debtor)
- If a decision is made to pursue through the Court this must be brought within 5 years, although if there is a later acknowledgement by the debtor of that debt, in whatever form, the time limit starts again.
- 7.06 The 20 year time limit starts again, as per The Prescription and Limitation (Scotland) Act 1973 (s7), when

- the LA brings action in the courts to recover the overpaid benefit (e.g. pursuing any method of diligence or initiating/claiming in sequestration proceedings), or
- the debtor acknowledges the debt (e.g. makes a part payment of the debt, such as a deduction from benefits, or a written admission of the debt)

7.07 The Prescription and Limitation (Scotland) Act 1973 is different to The Limitation Act 1980 (which applies in England and Wales), as The Limitation Act just limits the period within which court action can be taken. Section 7 of The Prescription and Limitation (Scotland) Act 1973 (extinction of obligations by prescriptive periods of twenty years) applies the 20 year period to obligations to repay debts, including repaying overpaid benefits under sections 75 and 76 of the Social Security Administration Act 1992.

7.08 – 7.09 Spare

### Appeals

7.10 Any appeal against the decision must be made according to the review procedures and not to the County Court. The court will not accept a dispute regarding the fact that there is a recoverable overpayment or from whom it should be recovered. This is a matter that can only be taken up by applying for a revision or by appealing. The LA should have allowed one month for appeal rights and so disputes should have been raised before pursuing the debt in court.

7.11 If an overpayment decision notice is defective or the appeal rights have been ignored by the LA, then an application can be made to the court for them to set aside the order.

7.12-7.19 Spare

### Court Procedures

7.20 Before pursuing recovery via the courts, an LA should

- allow the appeal rights' period to expire (at least one month), and
- allow any outstanding appeal to be fully determined

7.21 Good practice would be to issue at least two letters requesting repayment.

7.22 Further good practice is to ensure that procedures are in place to check that the claimant is receiving all the HB and any other benefits that they may be entitled to (with the aim of reducing the overpayment or recovering the overpayment from their benefit entitlement).

7.23 Legal proceedings should only be considered after attempts to achieve recovery by other means have failed (see *Recovery of Overpayments Part 4* in this guide) and there is good reason to believe the debtor can afford to make repayments.

7.24 Section 75, Subsection 7 of the SSAA 1992 provides that HB overpayments not recovered by deductions from prescribed benefits may be recovered by execution in

- the County Court in England and Wales, as if under a court order, and

- In Scotland as if it were an extract registered decree arbitral.

7.25-7.29 Spare

### **Court Costs**

7.30 Section 75(7) of the SSAA 1992 states that

‘...where any amount recoverable under this section is to be recovered otherwise than by deduction from prescribed benefit ... if the person from whom it is recoverable resides in England and Wales and the County Court so orders, it is recoverable by execution issued from the County Court or otherwise as if it were payable under an order of that court’

7.31 HB overpayment decisions can be registered as a judgment of the court. This allows the LA to use any of the court’s enforcement procedures for recovery should the debtor not pay. However, the LA may still wish to enter Court Proceedings and apply for a County Court Judgement as these are on the register for 6 years.

### **England and Wales**

7.32 Form N322A (County Court form) should be used, see Annex B later in this section, or visit the court website for a downloadable copy –

<http://www.hmcourts-service.gov.uk/HMCSCourtFinder> then select form number in search.

7.33 There are guidance notes on completing N322A on the court website, but the following may be useful

- The LA is applying to enforce a decision. The date that should be used is the date the original overpayment decision was made.
- The LA is not required to complete the box headed ‘What is the name of the Tribunal/court that granted your award’.
- The LA is not required to complete the box headed ‘Give the reference number of your decision’.
- In the box headed ‘Please give details of the legislation that allows you to enforce this decision’ the LA should quote Section 75(7) of the Social Security Administration Act 1992
- The LA is not required to complete sections 4 and 5
- The LA can decide which officer signs N322A, as it is not prescribed. This could be a member of the Overpayments team.

7.34 You should send the completed document to the court together with

- a certificate detailing the amount remaining is due to be paid, this could be an invoice or letter and
- the overpayment decision notice\*, a duplicate is acceptable, and
- the appropriate fee

\*Note: The decision notice is a copy of the letter to the person or persons who the overpayment is legally recoverable from, telling them that there has been a recoverable overpayment. This decision notice must fully comply with Schedule 9 of the HB Regs 2006/(SPC) Sch 8). See Decision notices earlier in this guide.

- 7.35 It is important to remember that the application is usually filed in the court for the district in which the person from whom the debt is recoverable resides, i.e. the court covering the debtor. Details of the appropriate court for the debtor's current residence can be found at [www.hmcourts-service.gov.uk/hmcscourtfinder](http://www.hmcourts-service.gov.uk/hmcscourtfinder)
- 7.36 The LA's local court should be contacted when advice is required for completion of their forms, and if there are queries on any part of the court's procedure.
- 7.37 Court costs (or in Scotland, expenses) cannot be recovered from ongoing HB or by transferring them to a CT account. Recovery of these costs must be sought by an alternative method, such as by invoice.

#### **What happens next?**

- 7.38 An officer of the court will make a decision whether to grant an order and they will inform the LA of the decision. Should an order be granted, a copy will be sent to both the LA and the debtor. This order can then be enforced (see Methods of enforcement later in this section) as if it were a County Court judgment.

If, however, the County Court does not grant such an order the LA will have to revisit the debt again and decide their next action. The LA should consider if the debt should be written off.

- 7.39 Spare

#### **Enforcement/Diligence (Scotland)**

- 7.40 All LAs should weigh up the pros and cons of spending further money on enforcement that may not be successful. The LA should consider the following

- are they likely to get their money and court fee from the debtor?
- does the debtor owe other people money?
- does the debtor own any goods or assets which can be taken and sold at auction?
- is the debtor working?
- does the debtor have other earnings, such as income from investments?
- does the debtor have a bank, building society or other account?
- does the debtor own property?
- does anyone else owe the debtor money?

The LA should choose the method that is most likely to recover the overpayment.

**England and Wales**

7.41 Full details of methods of enforcement and advice are available from the Court's website, [www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk) details of which forms to use and leaflets containing full information are contained in Annex A, at the end of this section. LAs may also seek advice from their own legal department.

7.42-7.49 Spare

**Types of Enforcement****Order to obtain information**

7.50 If the LA holds little or no information about the debtor they may ask the court for an 'order to obtain information' from the debtor (sometimes known as an oral examination). The debtor will be ordered to come to the court to be questioned on oath by a court officer. This is not a method of enforcement, but a way of finding out details of the debtor's

- employment status
- employer, wages or salary (if appropriate)
- additional income
- property owned which may have a saleable value (house, car, caravan etc)
- bank or building society accounts and their balances
- dependants and outgoings from income

Note: You must have details of the debtor's address in order to obtain this information.

7.51 You can apply for an order to obtain information at any time after you have registered a debt. The debtor does not have to be behind with their payments.

7.52 The information collected from this order can help the LA decide

- whether the debtor can pay them, and
- which method is most likely to be successful

7.53 A fee is payable for this action, but the court may add this fee to the money the debtor already owes the LA.

Note: the Order must be served and therefore service fees may be payable.

7.54 Further guidance on orders to obtain information can be found at

[www.justice.gov.uk/about/hmcts](http://www.justice.gov.uk/about/hmcts)

**Third Party Debt Order**

- 7.55 This order is usually made to stop the defendant taking money out of their bank/building society account (the money the LA is owed is then paid to them from the account). It can also be sent to anyone who owes the debtor money.
- 7.56 An application for a third-party debt order can be made at any time after you have registered the debt at court, but it will not be granted unless the debtor has either
- failed to pay the amount of the debt when it was due, or
  - failed to make one or more agreed payments
- 7.57 You cannot apply for a third-party debt order against a joint bank account unless both parties are held liable for the debt.
- 7.58 When the court order is received by the bank/building society, they will freeze the account immediately, so only funds that are in the account on that day will be affected. LAs should therefore consider carefully when to make the application. If the order is received the day before the debtor is paid their wages, it is possible there will be little or no funds to be frozen.
- 7.59 Further guidance on third party debt orders can be found at [www.justice.gov.uk/about/hmcts](http://www.justice.gov.uk/about/hmcts)

### **Attachment of Earnings**

- 7.60 This can be made when a debtor is employed. Money is collected direct from their employer and paid to the LA. As an alternative to Attachment of Earnings without the cost of court action and where the debtor's employer details are known, you could set up a **Direct Earnings Attachment** (DEA). See Part 4, paragraph 4.350 to 4.355.
- 7.61 In order to enforce an attachment of earnings, the debtor must have defaulted on at least one of their payments and owe more than £50 and not be
- unemployed or self-employed
  - a firm or a limited company
  - in the armed forces
  - a merchant seaman
- 7.62 If you are unsure if the debtor is employed, you can ask for a search of the attachment of earnings index, which lists all the attachment of earnings orders against people. There is no fee for this service. If the debtor has an existing attachment of earnings, you may ask the court to consolidate the debts.
- 7.63 You can also ask for the debtor to be questioned. This is called an 'order to obtain information', details of which can be found later in this section.
- 7.64 You do not need to know who the debtor's employer is, in order to apply for an attachment of earnings. The court will get this information from the debtor. However, if they are not employed, e.g.

they are unemployed or self-employed; you will still have to pay the court fee.

- 7.65 The court will tell the debtor to either pay the debt in full or complete a statement of means, which will allow a court officer to decide how much should be taken and how often.
- 7.66 An order is sent to the debtor's employer that tells them to take an amount from the debtor's earnings each payday and send it to a collection office. The money is then sent to the LA.
- 7.67 Sometimes it is enough to inform the debtor that the LA intends to apply for an attachment of earnings order. Many debtors do not like their employers to know they are in debt and so will make a voluntary arrangement to pay.
- 7.68 Further guidance on attachment of earnings can be found at [www.justice.gov.uk/about/hmcts](http://www.justice.gov.uk/about/hmcts)

### **Charging Order**

- 7.69 This order prevents the debtor from selling their assets, such as property, investments or land, without paying what is owed to the LA.
- 7.70 An application for a charging order can be made at any time after you have registered the debt at court, but will not be granted unless the debtor has
- failed to pay the amount of the debt when it was due, or
  - failed to make one or more agreed payments
- 7.71 A charge on a property means that if the property is sold, the charge has to be paid before any of the proceeds can be given to the debtor.
- Note: A charging order does not mean the claimant must sell their property, although a creditor could request this through the courts. If there are already charges on the property when the charge is registered, for example a mortgage, then that charge will be paid first.
- A debtor can also place a charge voluntarily which is less expensive and may be taken up as an option. This is called a Mortgage by Deed.
- 7.72 The Land Registry must also be made aware of a final charging order.
- 7.73 It may be useful for the LA to take advice from their legal department if they intend to use this method of enforcement.
- 7.74 Further guidance on charging orders can be found at [www.justice.gov.uk/about/hmcts](http://www.justice.gov.uk/about/hmcts)

**Compensation Order**

- 7.75 When an LA has decided to prosecute a claimant following fraudulent activity, you may apply to the court for a compensation order. A compensation order is intended to punish the offender whilst providing some degree of financial recompense to the victim.
- 7.76 When making the order the court will consider the offender's circumstances and ability to pay. A compensation order will often not cover the full amount of the overpayment.
- 7.77 When an order has been made the offender will be required to pay the money to the court who will then pass it on. The offender may not be asked to pay in one lump sum if the court considers they cannot afford to do so and may arrange to pay in instalments.
- 7.78 It is good practice to contact the claimant to advise if there is any difference between the amount of compensation order to pay and the outstanding balance of the overpayment. The LA can continue to recover the outstanding balance but should wait until they know how much they are going to get back via the compensation order.
- 7.79 If the debtor disputes the LAs right to recover the balance of the overpayment, for example because they think that the order replaced the overpayment, it should be pointed out to them that
- the compensation order was imposed by the Court as part of the sentence for the offence for which they were convicted
  - it did not replace or remove any associated fraud overpayment, determined under the HB or CTB regulations
  - any payment they made to the Court has gone towards the compensation order, not the overpayment
  - the LA has voluntarily taken into account any payment to the Court for the compensation order against the associated fraud overpayment, even though there is no requirement under the HB or CTB regulations to do so. Any outstanding balance of the overpayment is therefore recovered as appropriate.

Note: *Compensation Order Q&A at Annex E*

**Money Claim Online**

- 7.80 There is a cheaper, alternative method of obtaining a judgement called a Money Claim On-Line and is available to England and Wales addresses only. Go to [www.gov.uk/make-money-claim-online](http://www.gov.uk/make-money-claim-online) You have to register for this service, you can use this service to claim
- for a fixed sum under £100,000
  - against no more than two people or organisations

There is a fee.

**Warrant of Control**

7.81 This gives court bailiffs the authority to take goods from the debtor's home or business. Bailiffs will try to either

- collect the money the LA is owed, or
- take goods to sell at auction and then pass the money on to the LA

7.82 Before the court can issue the warrant, the debtor must have

- failed to pay the amount they have been ordered to pay, or
- fallen behind with at least one of their payments

7.83 A bailiff cannot always remove and sell the debtor's goods. For example, they cannot remove essential household items for example beds, and tools of the trade needed for work, or goods subject to hire purchase or rental agreements. They also cannot remove any item that has already been seized by bailiffs acting under another warrant. The bailiffs will deduct the costs of taking goods and selling them at auction.

7.84 The County Court bailiff can only enforce a warrant of execution for debts of £5,000 or less. For any other amount the order should be transferred to the High Court, although the High Court enforcement charges can run up quite quickly. An enforcement officer will then enforce the order.

Note: The enforcement officer cannot recover any debt of £600 or less.

7.85 A warrant is valid for a period of one year. Once this period has expired and the warrant has not been paid, then it is no longer valid. You can, however, ask the court to 'extend the warrant's life', but you will have to pay a further fee.

7.86 Further guidance on warrant of executions can be found at

[www.hmcourts-service.gov.uk/infoabout/enforcement/warrant/index.htm](http://www.hmcourts-service.gov.uk/infoabout/enforcement/warrant/index.htm)

**Scotland**

7.87 For more information or to download forms visit the

- Scottish courts website [www.scotcourt.gov.uk](http://www.scotcourt.gov.uk) , or
- Accountancy in Bankruptcy (Scotland's Insolvency Service) website [www.aib.gov.uk](http://www.aib.gov.uk)

7.88-7.89 Spare

## **Types of Diligence**

### **Arrestment**

- 7.90 This can be used to freeze money or goods which belong to the debtor, but which are in the hands of a third party, for example a bank or building society. For example, if an arrestment is served on the debtor's bank any funds held in the debtor's account are frozen. The debtor cannot withdraw any money or use it to pay any standing orders or direct debits. Joint accounts can be included in the arrestment.
- 7.91 Funds which are arrested are automatically released to the creditor 14 weeks after the arrestment if no objection is lodged. Alternatively, where the debtor signs a mandate (instruction) authorising the third party to do so, the third party may release the sums arrested before the expiry of that period. If the debtor objects to the automatic release of funds, the court will fix a hearing to determine the objection.

### **Attachment**

- 7.92 This is a diligence which involves the attachment, removal and auction of certain goods which are not kept within a home. There are limitations on what types of goods can be attached. It is not possible, for example, to attach the tools of the debtor's trade
- 7.93 Attachment is executed on behalf of the creditor by sheriff officers and may only be used after a charge for payment is served on the debtor and the specified period has expired without payment having been made. The sheriff officer will value the articles to be attached and make a report to the Sheriff. The debtor has the right to buy back articles which have been attached, at the value which has been placed on the article by the sheriff officer, within 14 days of the date on which the article was attached. After the report has been received, the Sheriff Officer may remove and arrange for the sale of the attached articles at auction. The money raised is then handed over to the creditor.

### **Charge for Payment**

- 7.94 This is a formal demand for payment of the debt within a fixed period (usually 14 days) warning that further action will be taken unless the debtor repays the debt within the specified period.

### **Earnings Arrestment**

- 7.95 This can be used when a debtor is employed. Money is collected directly from the employer and paid to the LA.
- 7.96 The earnings arrestment is sent directly to the debtor's employer, ordering them to deduct a sum from the debtor's wages each pay day. The amount to be deducted is calculated using fixed tables. There are limits on how much can be deducted, depending on when and how much the debtor is paid. The employer will continue to make deductions until all of the money the debtor owes is repaid. An employer can charge the debtor a fee for making the repayments. As an alternative to an Attachment of Earnings without the cost of court action, and where the debtor's employer's details

are known, you could set up a Direct Earnings Attachment (DEA) See part 4 m) Recovery using a Direct Earnings Attachment (DEA) Para 4.230-4.242

### **Exceptional Attachment**

- 7.97 It is possible to attach goods from within the debtor's home if an exceptional attachment order is obtained from the Sheriff. A Sheriff will only grant an exceptional attachment order if a creditor can show that they have tried to negotiate a settlement of the debt; the creditor has already tried to recover the debt by arrestment/earnings arrestment and they have failed; there is a reasonable prospect that execution of an exceptional attachment would lead to recovery of sufficient money to cover the expenses of the attachment and it would be reasonable in the circumstances to grant the exceptional attachment order.
- 7.98 An exceptional attachment order permits the attachment, removal and auction of non-essential items from within the home. When the goods are sold at auction the proceeds are handed over to the creditor.

### **Money Attachment**

- 7.99 In certain circumstances it is possible for a creditor to attach money (including cash or cheques) which belongs to the debtor, if a charge for payment has been served and the specified period has expired without payment having been made. Creditors are not allowed to use money attachment if arrestment is available to them and it cannot be implemented in someone's home. As with other forms of attachment, money attachment is carried out on behalf of the creditor by sheriff officers. The sheriff officers will remove any money which is found (up to the value of the debt including interest and expenses) and will deposit it in a bank account. The sheriff officers will then serve a document on the debtor providing details of the money which has been attached and report to the sheriff on this. In order to access the money which has been attached, the creditor must make an application to the sheriff within 14 days of the report being made.

### **Inhibition**

- 7.100 This prevents the debtor from selling their home (or other property) or any land they own, or securing further credit against it. It does not give the creditor the right to take possession of, or to force the debtor to sell their property.

7.101-7.109

### **Insolvency**

- 7.110 Insolvency is the inability of an individual (or company) to pay debts. Where their situation is such that formal action is necessary, there are several options open to them or their creditors including:
- Administration Order (England and Wales)
  - Bankruptcy (England and Wales)
  - Debt Relief Order (DRO) (England and Wales)
  - Individual Voluntary Arrangement (IVA) (England and Wales)

- Debt Arrangement Scheme (DAS) (Scotland)
- Sequestration (Scotland)
- Trust Deed (Scotland)

### Secretary of State's Right to Recovery in Insolvency

- 7.111 There is nothing in the legislation or case law which prevents an LA from making deductions to recover an overpayment during a period of insolvency. There are however a number of Supreme Court decisions which have produced exceptions.
- 7.112 The relevant HB provisions which allow for the making of deductions from the claimant's benefit provides for deductions at source and not a 'claw back' (*R v Secretary of State for Social Security Ex parte Taylor and Chapman and Mulvey v Secretary of State for Social Security*). In other words, the debtor has no right to receive by way of benefit more than the net amount and at no time does the deduction become the property of the debtor. However, the cases cited will not apply when the person comes off benefit, given that the effect of insolvency is to prevent an LA, as creditor, from taking any action to enforce its debts.
- 7.113 LAs should always take into account a claimant's health and financial circumstances when deciding whether to commence deductions and the level of deduction, to avoid causing undue hardship to the claimant or their dependants. It must be remembered that a debtor, by definition, who is involved in insolvency has very little surplus income.
- 7.114 Once Bankruptcy, Sequestration or Trust Deed action has commenced an LA **must cease** recovery of any overpayments decided prior to the order being granted. This is different to DROs where it is only the debt included in the DRO that is affected. Debts that have been included in an Administration Order, IVA or DAS can continue to be recovered from on going HB or prescribed DWP benefit during the period of insolvency but LAs should be aware that whilst there is currently no legal barrier to recovery by deduction during an IVA this may be open to challenge.
- LAs should be careful not to over-recover an overpayment if they are receiving payments through the terms of the insolvency, alongside recovery from on going entitlement.
- 7.115 Once Bankruptcy or a DRO has been discharged the debt must be written off (except Fraud debts) See 7.130 to 7.131. For all other types of Insolvency, including Sequestration these must be written off on discharge (including Fraud debts).

*Re Nortel, Re Leman (2013)UK SC52*

- 7.116 Overpayments that have not been included, for whatever reason, in an administration order, IVA (at any point during the IVA), DAS or DRO are not affected by the insolvency order and therefore can be recovered by any recovery methods. They do not have to be written off when the administration order, IVA, DAS or DRO is discharged.
- 7.117 For more information about insolvency please refer to
- The Insolvency Service website at [www.insolvency.gov.uk](http://www.insolvency.gov.uk) , or
  - the Accountant in Bankruptcy (Scotland's Insolvency Service) website [www.aib.gov.uk](http://www.aib.gov.uk)

### How to treat fraudulent overpayments during Insolvency

7.118 Fraudulent overpayments that were decided prior to bankruptcy, can continue to be recovered after the bankruptcy, has been discharged. Any recovery methods can be utilised after discharge.

Discharge does not release the bankrupt from any bankruptcy debt which he incurred in respect of, or forbearance in respect of which was secured by means of, any fraud or fraudulent breach of trust to which he was a party.

*Insolvency Act 1986 Section 281(3)*

*Bankruptcy (Scotland) Act 1985 Section 55(2)*

Discharge from Sequestration will release the debtor from all debts that pre-date the date of sequestration, including fraud debt.

A letter of discharge does not discharge the debtor from any liability arising after the date on which the trust deed was granted or any debt which would be excluded from a discharge under section 55(2) of the Act, nor does it affect the rights of secured creditors.

*Protected Trust Deeds (Scotland) Regulations 2008 Regulation 19(2)*

7.119 Fraudulent overpayments that were included in a DRO can continue to be recovered after the DRO has been discharged. Any recovery methods can be utilised after discharge.

*Insolvency Act 1986 Section 251(3)*

7.120 The word 'fraud' in section 281 of the Insolvency Act 1986, is not defined in the legislation. However, in the High Court judgment of *Mander v Evans* (3 All ER 811 [2001]), 'fraud', within the context of section 281, was held to mean 'actual fraud' and did not include constructive fraud 'such as undue influence'. It was emphasised that the word has to be given its natural meaning. It follows that there must be clear evidence of dishonesty in a particular case in order to classify an act as 'fraud'.

7.121 For HB purposes 'fraudulent overpayment' means an overpayment, in respect of a period falling wholly or partly after 31st March 1993, where the claimant has in respect of the overpayment

- (a) been found guilty of an offence whether under a statute or otherwise;
- (b) made an admission after caution of deception or fraud for the purpose of obtaining relevant benefit; or
- (c) agreed to pay a penalty under section 115A of the SSAA 1992 (penalty as an alternative to prosecution) and has not withdrawn that agreement.

In paragraph (b) 'admission after caution' means

- (a) in England and Wales, an admission after a caution has been administered in accordance with a Code issued under the Police and Criminal Evidence Act 1984;
- (b) in Scotland, an admission after a caution has been administered, such admission being duly witnessed by two persons.

7.122 Overpayments classified as Fraud that are included in an Administration Order, IVA or DAS, which are still outstanding on discharge, cannot continue to be recovered. They must be written off on discharge.

7.123-7.129

## **Types of insolvency**

### **England and Wales**

#### **Administration Order**

- 7.130 When a debtor has at least two creditors, which total less than £5,000 and they have at least one County Court or High Court judgment against them, they can apply to the County Court for an administration order to be granted. The debtor must have a regular income and agree to make weekly or monthly payments to Court, who then distribute the money between the creditors on a pro-rata basis, according to the size of each debt.
- 7.131 The Court makes contact with the creditors named by the debtor, and they have 16 days in which to tell the Court of any objections they have, for example if they think the offer the debtor has made is too low or if they think the amount of the debt quoted by the debtor is incorrect. If there are no objections and the Court is happy with the debtor's offer of repayment, the order will be made.
- 7.132 Unless the judge makes a composition order or the debtor stops making regular repayments, an administration order will normally continue until the debts are fully repaid. Details of the administration order will be recorded on credit reference files for a period of six years. If a debtor defaults on their payments to the Court, they will return the case and the LA can then pursue recovery by other means.
- 7.133 Only debts that have been included in the administration order will be affected by the order. During the period of the administration order overpayments can only be recovered by making deductions from ongoing HB or prescribed benefits. However, as overpayments are normally fully recovered when included in an administration order, making deductions may not be appropriate. Debts that haven't been included can be recovered by any recovery methods, both during the period of the administration order and after it has been discharged
- 7.134 Unlike bankruptcy overpayments that have been caused by fraud, cannot continue to be recovered once the Administration Order has been discharged. However, as most Administration Orders continue until the debts are fully repaid, there shouldn't be anything outstanding to write off.

#### **Bankruptcy**

- 7.135 A court makes a bankruptcy order after a bankruptcy petition has been presented. It is usually the debtor or one or more of the creditors who are owed at least £750 by the debtor. The bankruptcy process can either be voluntary or involuntary and the order can still be made if the debtor does not agree to it. The debtor must owe at least £750
- 7.136 The official receiver has responsibility for administering the bankruptcy and protecting the debtor's assets from the date of the bankruptcy order. They will also act as the trustee unless an insolvency

practitioner is appointed. The trustee takes over the assets, disposes of them, then shares out any proceeds (after expenses) to the creditors

- 7.137 In most cases, when a person is made bankrupt after 1 April 2004 the bankruptcy will be discharged after one year. However this period can be shorter, for example if the court annuls the bankruptcy. If however the debtor does not carry out their duties under the bankruptcy proceedings, the official receiver or trustee can apply to have the discharge postponed.
- 7.138 Discharge from bankruptcy will release the debtor from all debts that pre-dated the bankruptcy order. However there are some exceptions, such as debts arising from fraud (Fraud overpayments), certain crimes and fines, and debts incurred after the bankruptcy order was made (overpayments where the dates of the overpayment, from and to fall after the date of the Bankruptcy Order or where the dates, from and to, span the Bankruptcy Order). These exceptions can continue to be recovered after discharge and any recovery methods can be utilised.
- 7.139 Overpayments that were in existence prior to the bankruptcy order cannot be recovered and must cease if in recovery at the point of the bankruptcy. This overrides previous guidance. HB/CTB bulletin G10/2013 refers (Para 31). A Supreme Court case (Nortel) has overturned previous reliance on "Steele". Any amounts outstanding must be written off on discharge (excluding Fraud overpayments).

*Re Nortel, Re Leman (2013) UK SC52*

*Steele, R (on the application of) V Birmingham City Council & Anr [2006] 1 WLR2380*

Note: See Bankruptcy Q&A at Annex B

#### **Debt Relief Order (DRO)**

- 7.140 DROs are suitable for people with relatively low liabilities, little or no surplus income and no realisable assets with which to make contributions to creditors. In contrast to other forms of debt relief, DROs are delivered in partnership with debt advisors, primarily from the advice sector, e.g. Citizens Advice Bureau. Representatives from the advice sector act as 'approved intermediaries' and assist debtors in making their application for a DRO to The Insolvency Service, via an online application form. Only an intermediary can actually submit the application to The Insolvency Service.

Note: See *Debt Relief Order Q&A at Annex C*

- 7.141 There are certain requirements, which must be satisfied for the debtor to be able to apply for a DRO. These are
- the debtor must be unable to pay his/her debts
  - the debtor's total liabilities must not exceed £15,000 (not including un-liquidated or excluded debts)
  - the debtor does not own their own home
  - the debtor's total gross assets must not exceed £300 (however, there are certain items that are disregarded, such as a car up to the value of £1000)

- the debtor's disposable income, following deduction of tax, National Insurance and normal household expenses, must not exceed £50 per month
- the debtor must live in England and Wales, or in the last three years have been resident or carrying on business in England and Wales
- the debtor must not have been subject to a DRO within the last six years, and
- the debtor must not be involved in any other formal insolvency procedure at the time of application for a DRO, such as
  - an undischarged bankruptcy order
  - a current IVA
  - a current Bankruptcy Restrictions Order or Undertaking
  - an interim order
  - a current Debt Relief Restrictions Order or Undertaking

7.142 If there is a pending debtor's bankruptcy petition, but the debtor has not been referred to the DRO procedure by the court; or there is a pending creditor's bankruptcy petition against the debtor, but the debtor has not obtained the creditor's permission for entry into the DRO process, the debtor will not be eligible for a DRO. If the creditor has information to indicate that the debtor does not meet the criteria, they can provide this information to the Official Receiver, who may then after consideration of the objection, revoke the DRO if it is appropriate to do so.

7.143 Debts that **can** go into a DRO are called qualifying debts. They include:

- credit cards, overdrafts and loans
- arrears with rent, utilities, telephone, council tax and income tax
- **benefit overpayments**
- hire purchase or conditional sale agreements
- buy now, pay later agreements
- business debts

Note: Debts obtained fraudulently must still be paid when the DRO ends.

7.144 Debts that **cannot** go into a DRO are:

- Magistrates Court fines and confiscation orders – these are fines relating to criminal activity
- child support and maintenance
- student loans
- Social fund loans

- compensation for death and injury
- 7.145 Upon receipt of the application and payment of the fee, the Official Receiver is able to make the DRO, administratively without the involvement of the court. The Official Receiver is able to make an Order or can choose to delay the decision pending further information from the applicant.
- 7.146 During the period that a DRO is in force, the debtor will
- be protected from enforcement action by the creditors included in the application
  - be obliged to provide further information to, and co-operate with the Official Receiver
  - inform the Official Receiver of any improvement in their financial circumstances. Should this be sufficient to allow them to make contributions to their creditors, the Official Receiver will need to consider whether to revoke the DRO
  - be discharged from debts included in the DRO at the end of the period (normally 12 months from the date of the order), unless the debt arose from fraudulent activity.
- 7.147 As with other forms of personal insolvency, a DRO debtor's credit rating will be affected and there will be civil and criminal penalties for those who abuse the system. The Official Receiver is able to investigate, either on his own account or as the result of an objection from creditors, whether the debtor has provided a full and accurate account of their financial affairs. The Official Receiver is able to revoke the order, if, for example the debtor has understated their assets or income. Failure to provide an accurate account may result in civil and criminal sanctions
- 7.148 Notifications from the DRO Unit – The DRO Unit issues all notifications to creditor organisations when a DRO is issued or in the instance when it is revoked. An LA can provide The Insolvency Service with a central email or postal address to take receipt of these notifications. They must provide the following information
- a LA name
  - b Handling department name, telephone and fax number
  - c Full postal address
  - d Email address (if applicable)
  - e Named contact(s)
  - f Named contact(s) email addresses
  - g Named contact(s) telephone numbers
- This information should be emailed to [DRO.Unit@insolvency.gov.uk](mailto:DRO.Unit@insolvency.gov.uk) with a covering explanatory note.
- 7.149 If the LA would prefer notifications to be sent electronically to an inbox, the notifications will be sent as a .pdf attachment to an email that will be encrypted. The debtor in submitting

their application to The Insolvency Service agrees for information to be sent in this way. By providing an email address/inbox to the DRO Unit, it is assumed that the preferred method of communication is via email.

Note: If the LA does not provide this information, notifications will be sent by second class post to the address provided by the debtor scheduling the debt.

### **Individual Voluntary Arrangement (IVA)**

- 7.150 An IVA is a formal agreement between a debtor and their creditors, where they come to an arrangement to pay off a percentage of what they owe. This is usually over a period of five years. A creditor normally receives a larger repayment than would have been made if the debtor was made bankrupt.
- 7.151 The debtor needs the help of an insolvency practitioner to draft a formal proposal, which sets out how much the debtor intends to pay each month and the duration of the arrangement.
- 7.152 A creditors' meeting is called, the purpose of which is to allow the creditors to agree to or reject the debtor's proposals. Acceptance of the IVA requires creditors holding 75% (in monetary value) of the debt, who vote at the meeting (either in person or by proxy), agreeing to the proposals. If they do so, all creditors will be bound by the IVA regardless of whether they voted for it or not.
- 7.153 A creditor that is included at some point in the IVA, but that was not given notice of the creditors' meeting is still bound by the IVA. However, if on discharge that creditor has not been paid the amounts agreed in the IVA, they remain entitled to be paid. This means if an LA didn't receive notice of an IVA, they would still be bound by it, but if they didn't receive any payments, on discharge they would still be able to recover the amount of debt that would have been payable under the agreement.

#### **Example**

The IVA stated that the debtor was to pay creditors 50p of every £1.00 they were owed. If the LA is not paid 50% of their debt by the time the IVA is discharged, they will

- Write off 50% of their debt, when the IVA is discharged
- Continue to recover the remaining 50% using any recovery method after discharge

- 7.154 A creditor that is included at some point in the IVA, but was excluded from the creditors' meeting, is entitled to challenge the IVA before the court, on the ground that their interests have been unfairly prejudiced, e.g. a creditor who is owed a large amount may argue that the debtor could have afforded to pay back a higher percentage of their debts. If they had been given notice of the creditors' meeting, they may have been able to block the making

of the IVA.

- 7.155 Where creditors agree, the arrangement is endorsed by the Court and registered. The debtor then makes repayments to the insolvency practitioner, who ensures it is distributed to all creditors on a pro-rata basis. On successful completion of the IVA, e.g. everything is repaid that was agreed to in the arrangement, the debtors will have to write off any of their debts that are still outstanding.
- 7.156 Only debts that have been included at some point in the IVA will be affected by the arrangement. During the period of the IVA, overpayments that have been included in the IVA can only be recovered by making deductions from ongoing HB or prescribed benefits. Any amounts outstanding will have to be written off on discharge. Debts that haven't been included, either at the outset of the IVA or at any point during the IVA, can be recovered by any recovery methods, both during the period of the IVA and after it has been discharged.
- 7.157 An LA can challenge through the court as a creditor, their inclusion in an IVA. You must however, have grounds for appeal, such as, you were not contacted in time for the creditors' meeting or the size of the debt owed to you means the other creditors did not hold 75% of the debt and the decision was made without full information.
- 7.158 If you do not receive the payments due through the IVA you can continue to recover the overpayment by deduction from HB or other benefit. You cannot recover from both at the same time.
- 7.159 If the overpayment was due to proven fraud, then you may contact the IVA practitioners to ask to have it removed from the IVA. There is no rule that says they have to remove it.
- 7.160 The Supreme Court decision in respect of 'Nortel' has no effect on IVAs. It affects Bankruptcies and DROs only.
- 7.161 Unlike bankruptcy, overpayments that have been included in the IVA that have been caused by fraud cannot continue to be recovered once the IVA has been discharged.

Note: See *Individual Voluntary Arrangement Q&A at Annex D*

## **Scotland**

### **Debt Arrangement Scheme (DAS)**

- 7.162 The Debt Arrangement Scheme (DAS) has been available in Scotland since 30 November 2004. It was introduced by the Scottish Executive in order to protect debtors from diligence and sequestration. It isn't available in England or Wales, although English and Welsh LAs may have debtors residing in Scotland who may be involved in the DAS. It is a statutory scheme run by the Scottish Government.
- 7.163 The DAS is available to debtors habitually resident in Scotland, with two or more outstanding debts and sufficient income available to make repayments to creditors. Under DAS you apply for a Debt Payment Programme (DPP). There is no limit on the level of debt or the repayment period in a DPP.

- 7.164 The DAS allows a debtor to apply for their debts to be paid under a DPP. Such a programme cannot be applied for without the debtor first having obtained the advice of a 'money adviser' (a person approved to provide such advice). Creditors are asked to agree to the DPP. Those that do not respond within 21 days are deemed to have consented to the programme. The agreement allows the debtor to pay off their debts over a period of time. The DPP can be for any amount of money and for any reasonable length of time
- 7.165 The application is then sent to the Accountant in Bankruptcy, who is the DAS administrator, for approval. When all creditors have consented to the debtor's application, the Accountant in Bankruptcy will approve the programme, although he may make his approval subject to conditions. When one or more creditors have not consented to the debt payment programme, the Accountant in Bankruptcy may nevertheless approve the programme if it is fair and reasonable.
- 7.166 The debtor usually makes a single regular payment to an approved payments distributor who distributes sums received to creditors in accordance with the DPP. The initial payment must be made within one month of the date the DPP was approved.
- 7.167 With some very limited exceptions, enforcement action cannot be taken against a debtor in respect of a debt included in an approved DAS debt payment programme, for more information visit <http://www.dasscotland.gov.uk> or <http://www.aib.gov.uk/services/das> .
- 7.168 Only debts that have been included in the DAS programme will be affected by the arrangement. During the period of the DPP, overpayments that have been included in the DAS programme can only be recovered by making deductions from ongoing HB or prescribed benefits
- 7.169 On completion of the programme, the debtor will have repaid their debts in full unless the creditors agree to accept a part payment of debts in full and final settlement, or the creditors agree that the programme should complete early. If the DPP is revoked, the debtor remains liable to creditors for all sums outstanding. Any of the overpaid benefit that is still outstanding when the DAS is completed will have to be written off.
- 7.170 Debts that haven't been included can be recovered by any recovery methods, both during the period when the programme is in operation and after it has been discharged.
- 7.171 Unlike bankruptcy overpayments that have been caused by fraud cannot continue to be recovered once the DAS debt payment programme has been discharged.

### **Sequestration**

#### **Traditional Sequestration**

- 7.172 This is the Scottish equivalent of bankruptcy. There are two methods of sequestrating a debtor; by debtor application to the Accountant in Bankruptcy or by petition to the Sheriff Court. A petition for the sequestration of a debtor may be brought (amongst others) by one or more qualified creditors. The sequestration is administered by a trustee, who could be the Accountant in Bankruptcy or an

insolvency practitioner.

- 7.173 Sequestration involves the transfer of the debtor's assets and property to the trustee for the benefit of the creditors. The trustee has a duty to sell the assets/property. The trustee may also seek a voluntary contribution from the debtor's income, if in regular employment.
- 7.174 If a debtor applies for their own sequestration, they will normally be discharged one year after the date the order was awarded. If a creditor petitioned for the sequestration, discharge will be one year after the date that the court issued the warrant citing the debtor to appear at a hearing. If a debtor does not co-operate with the trustee, the trustee can ask the sheriff to delay the discharge by up to two years at a time.
- 7.175 'Low Income Low Asset' is a route into sequestration for debtors who have low income and low or no assets. They must apply for it, like any other sequestration, to the Accountant in Bankruptcy and pay a £200 fee.
- 7.176 Low income means a gross weekly income of no more than the standard national minimum wage for a forty-hour working week. However, when calculating the debtor's income no account will be taken of social security benefits or tax credits, although they may be taken into account when considering whether the debtor should pay a contribution during the sequestration. Low assets means that the debtor has no single asset worth more than £1,000 and total assets worth no more than £10,000. They must not own or jointly own a house, property or land.
- 7.177 Like bankruptcy, discharge from sequestration will release the debtor from all debts that pre-dated the date of sequestration. However, there are exceptions, such as debts arising from fraud (Fraud overpayments), certain crimes, fines, and debts incurred after the date the sequestration was made (overpayment where the date of the overpayment, from and to, fall after the date of sequestration). These exceptions can continue to be recovered after discharge and any recovery methods can be utilised.
- 7.178 Overpayments that were decided prior to sequestration can only be recovered during the period of insolvency, by making deductions from ongoing HB or prescribed benefits and only up to the date of discharge. Any amounts outstanding must be written off on discharge (including Fraud overpayments).

#### **Scottish Certificate of Sequestration**

- 7.179 The certificate of sequestration was introduced in November 2010, as a simpler route to sequestration. One difference between traditional sequestration and the certificate of sequestration is that you no longer need to prove your apparent insolvency. However, the 'Low Income Low Assets' route may be applicable if you have apparent insolvency already. See Para 1.793 above.
- 7.180 There are qualifying criteria, one of which is that you must owe at least £1,500 in unsecured debt. Only the person in debt can be granted the certificate, creditors cannot apply for this.

**Trust Deed - Granted Between 1 April 2008 and 27 November 2013**

- 7.181 A trust deed is a voluntary, but legally binding agreement by which a debtor transfers some or all of their assets to a trustee, to be administered for the benefit of creditors and the payment of debts. The trustee must be a qualified insolvency practitioner.
- 7.182 Creditors are bound by the terms of the trust deed, if they have agreed to it. However, if the trust deed becomes protected, even if the creditors have not agreed to it, they will be bound by it. An exception to this would be if the creditor was successful in applying to the sheriff for an order that they will not be bound by the trustee's discharge. A protected Trust Deed prevents the debtor from applying for bankruptcy or for a debt payment programme under the Debt Arrangement Scheme (DAS).
- 7.183 If certain conditions are met, a trust deed will become protected from the date the trust deed is recorded in the register of insolvencies, by the Accountant in Bankruptcy. One condition is that the trustee must publish a notice in the Edinburgh Gazette and write to all known creditors enclosing copies of the notice and trust deed. The notice advises that the trust deed may become protected, unless the majority of creditors, or creditors representing at least two thirds of the debts, make written objections to the trustee within five weeks. Furthermore, if a trust deed is to become protected, the debtor must transfer everything they own, except household goods and current income, to the trustee. Any new debts arising after the Trust Deed is signed will not protect them from action by their new creditors.
- 7.184 The terms of discharge will usually be included in the trust deed. Discharge is normally three years after the date of granting. If the trust deed becomes protected, the discharge will be binding on all creditors, including the LA (unless a creditor has successfully applied to the sheriff for an order that the creditor will not be bound by the discharge). If the trust deed does not become protected, the discharge will only be binding on those creditors that agreed to it. Those that did not agree to it will be able to pursue the debtor for repayment after discharge.
- 7.185 For protected trust deeds, a letter of discharge does not discharge the debtor from any liability arising after the date on which the trust deed was granted or any debt which would be excluded from discharge if the debtor was sequestered. As a debtor cannot be discharged, following sequestration, from any liability incurred by reason of fraud or breach of trust, this means an LA can continue to recover fraudulent overpayments after discharge, using any recovery methods.
- 7.186 Like bankruptcy and sequestration, overpayments that were decided prior to the trust deed being granted can only be recovered during the period of the trust deed, by making deductions from ongoing HB or prescribed benefits and only up to the date of discharge. Any amounts outstanding must be written off on discharge (excluding Fraud overpayments). Please see Bankruptcy/Sequestration/Trust Deed flowchart, later in this section.

**Trust Deed - Granted On Or After 28 November 2013**

- 7.187 The main difference between this and a post 27 November 2013 Trust Deed is that the minimum repayment period is 48 months, not 36 months as it was before. It will automatically become

protected if there are no written objections from either the majority of creditors or those representing at least one third of the debts (rather than two thirds as previously).

#### **The history of Payne & Cooper, Steele and Nortel**

7.188 A Court of Appeal decision (Payne & Cooper) found against DWP and stated that any debts being recovered by DWP should cease where a debt is subject to a DRO. This also applies to HB debt being recovered by LAs or DWP. The Supreme Court affirmed this decision and widened the scope to include debts in a Bankruptcy Order. Again, this applied to LAs recovering HB/CTB debt. DWP continued to rely on "Steele" to recover debts in existence prior to bankruptcy

DWP issued HB/CTB U1/2012 bulletin to affirm the decision and also to advise that any deductions already taken from benefit for HB where they were included as a relevant debt in a DRO must be refunded.

Where there is a Bankruptcy Order, deductions cannot be taken or continue to be taken in respect of any overpayments that pre-date the Order, in contrast to DROs where it is only where the debt is included in the DRO.

Once discharged, these must be written off, except in Fraud cases.

In August 2013 a Supreme Court decision was made in respect of a case "Nortel" which had an effect on DWPs ability to rely on "Steele" to recover overpayments in existence prior to bankruptcy. This decision means that DWP can no longer rely on Steele and that they must cease recovery from cases that were in existence prior to bankruptcy. Housing Benefit Bulletin G10/2013 (paragraphs. 31 to 36) gives details. This also applies to LAs recovering HB debts.

7.189 Overpayments caused by fraud can continue to be recovered once the DRO has been discharged and any recovery methods can be utilised.

7.190-7.999

## Information – HM Courts and Tribunals Services

### Information (England and Wales)

Further information is available

- useful website: <http://www.justice.gov.uk/about/hmcts>
- forms and leaflets are available on this website (including Form N332A – Application to enforce an award). They can be downloaded or printed
- local County Courts will have copies of the forms and leaflets should an LA require hard copies
- all fees should be made payable to HM Courts and Tribunals Service. A digital fee service is to be launched on 17 November 2014
- current fees are listed on the above website, 'Court and Tribunal Fees'
- addresses of local courts are available on this website

### Forms

The following is a list of useful forms/leaflets available from the courts, including a brief description of the contents of the leaflet

Form	Description
N322A	Application to enforce an award (This is the form you should issue to the court to apply for an 'order' to be made against your debtor. This form should be completed with the relevant details along with the overpayment notification and the relevant fee. A copy is included at the end of this section.
N323	Request for warrant of control
N324	Request for warrant of delivery of goods
N325	Request for warrant for possession of land
N336	Request and result of search in the attachment of earnings index
N337	Request for attachment of earnings order
N349	Application for third party order
N379	Application for charging order on land or properties

## Annex A

## Leaflets

Leaflet	Description
EX50	Civil and Family Court Fees –This includes information on fees including costs of enforcement of orders (from 4 August 2014)
EX301	I'm in a dispute – what can I do? This includes information on how to try and settle matters without going to court etc
EX321	I have a judgment but the defendant hasn't paid – what do I do? Enforcing your judgment (general procedures), this includes information of what to do to enforce your order if the debtor does not pay
EX322	How do I ask for a warrant of execution?
EX323	How do I ask for an Attachment of Earnings Order?
EX324	How Do I Apply for an Order? – Order to Obtain Information from a Person Who Owes You Money. This is not an enforcement option but allows you to obtain information about debtors income, this could help you to decide whether a debtor can pay and which method of enforcement is most likely to obtain your monies.
EX325	Third party debt orders/and Charging orders – how do I apply?

**BANKRUPTCY Q & A**

**Q.** Guidance currently states: "When a debtor is discharged from bankruptcy (or \*Sequestration in Scotland) then any non-fraud debts, where the end date of the overpayment is before the date of the bankruptcy, must be written off." Does this only apply to debts that we have made a determination on whilst the debtor is within the bankruptcy period? (i.e. before discharge). Or does it mean that at anytime, if we raise a debt that has an end date prior to a date of bankruptcy, we must write-off? For example, customer was declared bankrupt on 1 January 2011 and discharged on 1 January 2012. On 1 October 2013, the LA raises an overpayment for the period 1 June 2009 to 1 December 2009. Since this overpayment has an end date prior to the bankruptcy date, does this have to be written off?

**A.** If the overpayment period is wholly before the date of the bankruptcy order, then that debt is considered as a debt or contingent debt for bankruptcy purposes and would need to be written off on discharge. This is regardless of when the overpayment was discovered or decided upon.

\*There has been no further update for sequestration cases. The current position is that discharge from sequestration will release the debtor from all debts that pre-dated the date of sequestration, including fraud debts. However, there are exceptions including where an overpayment has been calculated the dates of the overpayment "from" and "to" fall after the date of sequestration. These can be recovered after discharge. Overpayments that were decided prior to sequestration can only be recovered during the period of insolvency by making deductions from on going HB or prescribed benefits and only up to the date of discharge.

**Q.** If "*any non-fraud debts, where the end date of the overpayment is before the date of the bankruptcy, must be written off*"; what about debts where the start date is before the date of bankruptcy, but the end date is after the date of bankruptcy?

**A.** If the end date of the calculated overpayment is before the bankruptcy then you cannot recover it. If it spans the order then you can recover it on discharge.

Example: Overpayment from 1/1/13 to 6/5/13 and bankruptcy date is 12/4/13 you can recover on discharge of the order

Example: Overpayment from 1/1/13 to 6/5/13 and bankruptcy date is 13/5/13 you cannot recover it.

**Q.** Does this have an impact on current procedures for dealing with DROs and IVAs?

**A.** There is no impact for IVAs or DROs unless the debt is included in the DRO.

**Q.** There are so many bulletins and changes in respect of Supreme Court decisions e.g. Nortel, Steele etc. What is the history of this?

**A.** In Bulletin HB/CTB U6/2011 The Supreme Court affirmed an earlier decision that DWP cannot recover overpayments of benefit by deduction where the overpayment is included in a Debt Relief Order. The same applies to Local Authorities in respect of HB and CTB. This also has wider implications and DWP must cease making deductions from benefit to recover overpayments included in a Bankruptcy Order. This also applies to LAs recovering HB and CTB.

Bulletin HB/CTB U1/2012 Affirmed the decision above and also advised deductions already taken from benefit for HB where they were included as a relevant debt in a Debt Relief Order must be refunded. Where there is a Bankruptcy Order, deductions cannot be taken or continue to be taken in respect of any overpayments that pre-date the order, in contrast to Debt Relief Orders where it is only where the debt is included in the DRO. Once discharged these must be written off, except in Fraud cases.

Latest Bulletin HB G10/2013 gives most recent guidance following new judgement which overturns previous guidance where we were able to recover overpayments that were in existence prior to a

Bankruptcy or Debt Relief Order and we can no longer do this. Recovery must cease in these cases as well.

You can recover a debt once the bankruptcy or DRO is discharged if the end date of the calculated overpayment spans the Bankruptcy or Order.

**Q** I understand that any non-fraud OP must be written off after the date of discharge only covering the period up to the date of bankruptcy.

What would happen in the following cases?

**a. Date of bankruptcy 01/06/2013**

In September 2013 a new op created for period 01/04/2013 to 02/09/2013. HB remains in payment.

**A.** As the overpayment period spans the date of the Bankruptcy you can recover it on discharge, but you must cease recovery immediately the Bankruptcy Order is in place until after it is discharged.

**b) New OP's created before the discharge date, any OP created up to the date of discharge, would we deal with them as above?**

**A.** The important date is the end date of the actual overpayment. If the overpayment end date (i.e. the calculated end date, not the date of the decision) is before the date of the Bankruptcy you have to cease recovery and write it all off on discharge. This applies even if you only discover the overpayment after the date of the Bankruptcy.

**c) OP's created after discharge date.**

If after the discharge date a new OP is created and it is for a long period, going before the bankruptcy date, would we have to write off any amount up to the bankruptcy date, or because it was created after the discharge date, it will never be subject to the bankruptcy and the whole debt remains recoverable.

**A** As above, it is governed by the dates of the calculated overpayment. If the overpayment dates inclusive are before the Bankruptcy order you have to write it off even although the decision date might be after the end of the Bankruptcy discharge. If the overpayment dates span the date of the Bankruptcy, you can recover it all on discharge.

**d) Fraud debts**

Do we also have to suspend recovery of fraud OPs until the date of discharge before we continue recovery.

**A.** Yes

**Q.** If there is no ongoing HB and there are overpayments created after the date of bankruptcy, can the Council use other methods of recovery, including DEA, Court before the date of discharge, or are we prohibited from recovering all debts until after the date of discharge.

**A.** You must wait until the date of discharge to resume recovery of any other overpayments.

**DEBT RELIEF ORDER (DRO) Q & A**

- Q.** Can Housing Benefit overpayments continue to be recovered during the period of a Debt Relief Order (DRO)?
- A.** Where a customer's overpayment is included in the list of debts a DRO deduction must cease. HB/CTB U6/2011 and U1/2012 refer.
- Q.** What should be done about deductions already taken prior to finding out about the DRO?
- A.** These should be refunded.
- Q.** What happens when the DRO is discharged, can we recommence with recovery?
- A.** The debt should be written off, except in cases where it is proven fraud. In Fraud cases recovery can recommence.
- Q.** Does the customer decide what debts to include in a DRO?
- A.** Yes, if your debt is not included you can continue with recovery as normal.
- Q.** A customer has added a Housing Benefit debt that is not his to his DRO. The debt belongs to his partner. We were taking deductions from his benefit to pay partner's overpayment as they were a couple at the time and remain so in a joint claim. Should he be able to have a debt that does not belong to him in his DRO?
- A.** No, the debt does not belong to him so should not be in the DRO. Deductions for the HB Overpayment can revert to being taken from the partner's HB claim even if the claim is being paid in joint names.

**INDIVIDUAL VOLUNTARY ARRANGEMENT (IVA) Q & A**

- Q.** We are recovering an HB overpayment through a Direct Earnings Attachment (DEA). Can we continue with this if the customer provides proof of an Individual Voluntary Arrangement (IVA)?
- A.** You must treat the HB overpayment the same as you would if recovering from benefit in this situation i.e. you must not take payments from both the IVA practitioner and the DEA. If you are not receiving anything through the IVA agreement you can continue to take payments via the DEA.
- Q.** Can I continue with recovery of an HB Overpayment after the IVA has been discharged?
- A.** No, you must write any remaining balance off, even if the debt has been caused by fraudulent action and the claimant has been prosecuted. This is different to Bankruptcy or Debt Relief Orders where Fraud cases do not get written off following discharge.
- Q.** What if I have not received the amount promised in the IVA i.e. I was promised 50p in every £1 of debt would be repaid through the IVA?
- A.** You can continue to recover the amount that you were promised if you did not receive it all during the period of the IVA.
- Q.** Can I object to an HB overpayment debt being included in an IVA?
- A.** If the debt was due to fraudulent activity ask the Insolvency Practitioner to remove it from the IVA.

In all other cases, provided the creditors who hold 75% of the debt agree to the IVA then you need to comply with it if your debt is included. You can appeal being included but you would need to have grounds for this, for example, the creditors who agreed didn't hold 75% of the debt.

Even if you were not given notice at the time of the IVA and your debt is subsequently included you have to agree to it.

**COMPENSATION ORDERS Q & A**

- Q.** Are monies received in relation to the Compensation Order a) over and above the HB o/p or b) form part of the HB o/p recovery.

So, for example: -

£10,000 HB o/p + £2,500 CO = £12,500 to be recovered.  
£2,500 by the Court and £10,000 by the LA.

OR

£10,000 HB o/p - £2,500 CO = £7,500 to be recovered. (i.e. £2,500 by the Court and £7,500 by the LA).

- A.** The compensation order is a separate debt and does not replace the overpayment, it is paid to the court who should pass the recovery on to you. It is up to the individual LA whether they can accept that any money paid through the court towards the compensation order should be deducted from the overpayment. If you do accept that payments from the compensation order can go towards the overpayment you can continue to recover any balance where there is a difference in the amount awarded as compensation and the overpayment but you should wait to see how much difference there is first.