

REVISED COMMENTS ON v.8.0 OF THE INTERMEDIARY GUIDANCE NOTES v.3.0

Apart from some minor drafting amendments, the substantive changes to this issue of the Guidance are as follows:

Page 4: A reminder that the application fee should be paid on the submission date at the latest (see also **Please Note** on p.52).

Page 6: This refers to the section on **Payments to Creditors** with regard to **rent arrears** which starts on p.7. However, the relevant text (which was on p.8 of the previous Guidance) has now been deleted apart from the sentence: 'A debtor should seek their own independent advice as to their position regarding payment of any rent arrears'.

The DRO Unit has said: "The position here is that the Insolvency Service is no longer making a comment with regards to the applicability of the decision in Harlow v Hall to DROs.

In summary:

- Schedule rent arrears in any DRO application.
- Debtors to seek their own advice and where appropriate liaise with landlord.

Once the position is clarified by a decided case, the Intermediary Guidance Notes will be updated accordingly."

~~Previous versions of the Guidance read as follows: 'Rent arrears being paid under an Suspended Possession Order should be an allowable expense. Where a debtor is voluntarily paying rent arrears under the threat of a possession order then the position is more unclear but, provided there is **evidence** of an agreement to repay the arrears by instalments, this would ordinarily be an allowable expense'.~~

~~However, it is being reported that the DRO Unit is now saying that rent arrears can no longer be included as an expense in the DRO application.~~

~~The DRO Unit Manager has been asked to clarify the position.~~

~~Therefore, if a client only fulfils the £50 a month qualifying condition if payment of rent arrears is included in as expenditure but has more than £50 a month surplus income if rent arrears are not included as expenditure, the DRO application should not be submitted until clarification has been received. The reference to 'a decided case' is to A2 Dominion v Godfrey (which has now been heard by the Court of Appeal and judgment is awaited). In the meantime, the DRO Unit issued the following interim guidance on 16th May:~~

“a) where the debtor has in force a suspended possession order at the date of the application the amount payable in respect of rent arrears under that order will be an allowable expense.

b) where the debtor has an agreement with the landlord to repay the arrears but no order for possession has been sought the amount payable will **not** be an allowable expense.

If a debtor were to proceed with a DRO application in this way, intermediaries and debtors will need to give some consideration to what might happen if the Court of Appeal determines that the landlord has no remedy, as debtors who only matched the income limit because the rent arrears were an allowable expense could potentially be liable to have their DROs revoked.”

The DRO Unit always has discretion whether or not to revoke a DRO (the only exception being where the client has died during the moratorium) and so the interim guidance should not be applied retrospectively.

Where there is no possession order, the DRO Unit has confirmed that the client can arrange to make payment of rent arrears scheduled to the DRO out of their surplus income, if so advised (eg, where in addition to the rent arrears the landlord has other grounds to apply for a possession order). However, the DRO Unit has pointed out that, if the Court of Appeal does decide that possession proceedings are a remedy in respect of the debt, then the situation could arise where landlords are required to repay any sums paid towards the arrears which in turn could potentially lead to revocation of the DRO if that repayment exceeds the £300 asset parameter.

Where a client with rent arrears scheduled to a DRO either defaults on a ~~suspended~~ possession order during the moratorium period or the landlord ~~threatens to issue~~ possession proceedings on the ground of rent arrears during the moratorium period, the client should be advised to apply for a stay of any enforcement action or possession proceedings pending the Court of Appeal's decision in *A2 Dominions v Godfrey*.

Advisers should always check the client's landlord's policy on dealing with rent arrears included in a DRO. If their policy is to write off the arrears immediately, then there will be no need for the client to make payments towards their rent arrears or to include those payments in their essential expenditure whether or not there is a possession order.

Pages 8 – 9: Fines are now given a separate bullet point in the list of excluded debts, including the definition in s.150 of the Magistrates Courts Act 1980. Penalties registered in the magistrates court for enforcement are treated as payable under a conviction and so are 'fines'. On the other hand, the Guidance points out that Penalty Charge Notices issued by local authorities (which are enforced through the Traffic Enforcement Centre at Northampton County Court) are not fines and are, therefore, qualifying debts which should be scheduled to the DRO.

Page 9: Student loans are excluded debts but, although the Guidance states that student grants and overpayments of student grants are qualifying debts, the DRO Unit has agreed that, as recovery is discretionary, until the SoS makes a recovery decision, there is no debt 'payable either immediately or at some certain future date'. This is because the position appears to be analogous to that of a benefit overpayment where case law (the Steele and Balding decisions) says that an overpayment is not a debt until the recovery decision is actually made. That means that the recovery decision has to be made before the date of the DRO in order to be a qualifying debt (Category 1 overpayment).

Page 10: A reminder that the client's assets must not exceed the £300 asset parameter (but no reference to the 'single domestic vehicle' disregard or any exempted assets).

Page 12: Footnote 4 contains details of the new web address for the electronic Individual Insolvency Register. Also a reminder that the signed signature page (there is now a signature box on the Submission Form page below the 'Important Notice' and above the 'Intermediary Declaration Statement') needs to be forwarded to the DRO Unit and that this can be done by email.

Page 16: Note the new website address to access the application form.

Page 17: Following the enhancement of the web application, there is now a facility to 'save' and the 'save' and 'exit' functions have been separated.

Page 18: Guidance on using the new 'View Applications' function to enable Intermediaries to review and search for applications.

Page 20: The sub-paragraph 1.2.1.1 which deals with the Applicant ID has been moved to a new sub-paragraph 2.0 on p.21 and slightly amended.

Page 24: Para 2.12. The Guidance suggests using the 'Lookup Address' facility to enter the client's current address in the application. Where the client's current address is in prison, the 'address withheld' box at the end of the application should be used to trigger the Insolvency Service's internal protocol. This means that the prison address will not appear on the DRO or on the e-IIR. Although no further application to the court is necessary in relation to this procedure, if the client or their family is at risk of violence (for example, at the client's home address), then an application to the court will be necessary (see further at p.51).

Para 2.13. If 'Yes' is selected to the question 'Do you currently live etc?' referred to at para 2.13, then the questions at paras 2.13.1 and 2.13.2 will no longer appear and have to be answered 'No' in order to move on. Instead, the Intermediary will be directed straight to the previous addresses question (para 2.13.3) (p.25).

Page 25: Para 2.14. Only numeric values can be used in the telephone number field.

Page 34: The reference to pension funds as assets has been deleted and the new guidance on dealing with pensions can be found on pps.39 – 41.

Page 35: Para 5.4. An additional paragraph has been inserted to confirm that, in addition to disregarding property necessary for the basic domestic needs of the client and their family, books, tools and equipment necessary to the client in their employment and vocation can also be disregarded.

Pages 39 – 41: From 6th April 2011, an 'approved' pension is disregarded as property but details of any such pensions must be provided.

Para 5.8. The question about rights to a personal/occupational pension relates solely to pensions that are not in payment and have not matured. Therefore if a client has a pension that is currently being paid to them, then the income from the pension should be recorded in the income and expenditure section of the DRO application and there is no necessity to record such pensions in payment in the assets section (see para 5.9 on p.40). The DRO Unit has confirmed that the question 'Do you have rights to a personal/occupational pension?' relates solely to pensions not currently in payment and that, therefore, if they are in payment the answer is 'No'.

Para 5.9 contains information to enable advisers to identify which pensions are 'approved'.

Attention is drawn to the section headed 'Excessive Pension Contributions' at the top of p.41. As the Guidance says, this is only relevant to the issue of a DRRO. The DRO Unit's view is that the issue will not arise in many cases, if at all, and, if it did arise, then it would be dealt with in the same manner as antecedent transactions i.e. on a case by case basis with no definitive guidance being available for each potential scenario.

The DRO Unit has said that this section is in fact a statement. Intermediaries do not have to consider this issue and merely have to answer the questions at paras 5.8 and 5.9 Yes/No and if Yes provide details.

If the DRO Unit were to receive information from a third party that the client has made excessive contributions, then action would be taken in accordance with the excessive contributions statement and Intermediaries should, therefore, warn clients accordingly.

Page 46: Para 7.2. Contains instructions for use of the 'Save Creditor' button to ensure that data for the last creditor is not lost.

Para 7.6. Clarification, that where the creditor hold security for the debt, they are a secured creditor and that details of the security is required.

Page 47: Para 7.8. Enhancement of the web application has involved the removal of the 'Any More Creditors' function in favour of a simple 'Save Creditor' button. There is also a running total of the scheduled qualifying debts which will turn red if the £15,000 total debt parameter is exceeded.

Page 51: Some clarification of the 'address withheld' information including confirmation of the position where the client is in prison (discussed in the comments on p.24 above).

Page 57: The Glossary contains a new definition of 'Approved Pensions'.