

39. English Insolvency Entitlement Order

Proof of Debts

The following sets out the claims procedure and priority of entitlement to the proceeds of sale of an insolvent debtor's assets. The rules in bankruptcy are broadly similar. The reference to insolvency officer refers to a liquidation, official receiver or trustee depending on the type of insolvency procedure. The insolvency officer may be a court official or a private insolvency practitioner. The private insolvency practitioner will have legal duties to the court and under law.

The insolvency officer must send a "proof of debt" form to every creditor so that creditors must prove the liability or debt which the insolvent debtor owes them. The form includes certain details of the creditor, the amount of the debt, VAT, particulars of security held etc. The amount of the creditor's debt will usually be fixed at the date when the debtor goes into insolvency. A debt may arise afterwards by reasons of obligations incurred before that date. Creditors may also apply to prove for interest.

Claims against an insolvent debtor for civil wrongs may be proved. Debts may be present or future, contingent fixed or liquidated or capable of being ascertained.

The creditor is only entitled to vote in a meeting of creditors if he has lodged the proof of his debt in time. When debts are unspecified and unascertained, the creditor is not entitled to vote in creditors' meetings unless it is agreed that an estimated minimum value is put on the debt. Insolvency officers must estimate the value of any debts, which may be contingent or which do not bear a certain value.

If creditors do not wish to attend meetings, they can usually lodge a proxy form to allow another person to vote on their behalf. The chairman is entitled to admit or reject proof of debt and entitlement to vote.

Interest may be payable on the debt. Contractual interest may be due. There is a statutory right to interest for late payment, under the Late Payment of Commercial Debts Interest Act in the UK. There are equivalent rules in Ireland. The UK rate is 8% over the base rate. Separately the rate of interest on Judgements is specified currently (early 2009) at 8%.

Foreign currency debts must be translated into sterling. Discounts must be allowed and

deducted. Where a debt is of a periodical nature, sums due up to the date insolvency can be proved.

A secured creditor may realise its security and may prove for any shortfall balance. Alternatively, it can surrender its security and prove for the whole debt. Alternatively, it can estimate the value of the property and prove for the balance as an unsecured creditor. See our chapter on the significance of insolvency procedures for secured creditors.

Future debts are proved by discounting at a discount rate provided by the rules. Where a debtor goes into insolvency and there are mutual credits or debits with creditor, there may be a "set off" and the balance is provable in the insolvency.

Arrears of rent and rent due for the current period can be claimed. Unspecified amounts due for breach of covenant can be proved. The Landlord must attempt to minimise his loss.

Preferential Creditors are paid in priority to other creditors out of floating charge assets. Preferential creditors include holiday pay and wage arrears in the four months prior to winding up to a maximum of £800.00 per employee.

Where an insolvency officer has sufficient funds to hand, he is obliged subject to retaining funds to cover necessary expenses, to pay a dividend in respect of debts which have been proved. An insolvency officer must give notice of intention to declare and distribute a dividend, to all creditors known to him who have not proved their debt. This must state the last date for proving debts.

An insolvency officer must deal with each creditor's proof of debts. If an insolvency officer rejects a proof, he must give a written statement to the creditor and give the reason for rejecting the claim. The creditor may be entitled to apply to Court within 21 days, if dissatisfied.

A notice of a dividend must be given to all creditors. The notice must contain information to enable the creditors to comprehend the calculation of the amount. This would include the amounts realised in assets sales, payments made in the course of insolvency, total amounts to be distributed and whether and if so what further dividends may be expected.

When calculating dividends, the insolvency officer must make a provision for debts due to persons who may not have been able to establish their proofs and to determine their debts in time and to disputed debts.

A creditor who has not proved his debt before the declaration of a dividend is not entitled to undo the distribution. Further monies available for future dividends may be used to pay outstanding dividend payments before payment of future dividends. Certain dividends must be paid to the Insolvency Services Account.

The rules of priority are laid down by law. There are as follows:

- ❖ secured creditors holding fixed charges;
- ❖ the expenses of the winding up including the insolvency officer's remuneration;
- ❖ preferential creditors (see above);
- ❖ creditors secured by a floating charge (see below);
- ❖ ordinary unsecured creditors;
- ❖ debts due to its members e.g. dividends or profit;
- ❖ shareholders capital.

Fixed charge secured creditors are only entitled to be paid out of the proceeds of their security. If security is by way of a floating charge, preferential debts must be paid first.

Floating Charge Holders

Where a floating charge is created after the 15th September 2003, certain rules apply which have no equivalent in Ireland. Where a insolvent debtor goes into insolvency, enters administration or appoints a receiver a prescribed part of the net property available must go to the unsecured creditors.

The net property is what would have been available for floating charge holders (i.e. floating charge realisations less expenses and preferential creditors). The prescribed part is 50% on the first £10,000.00 of property plus 20% of the balance up to a maximum prescribed part of £600,000.00.

In practice, the ordinary security for creditors will never get £600,000.00 because the cost of making the distribution must be subtracted from the prescribed part itself.

The prescribed part rules do not apply where the property concerned is less than £10,000.00 in value if the administrator believes that the cost of distribution outweighs the benefits.

If the net property is £10,000.00 or more, the administrator may apply to Court for an order that the prescribed part rules do not apply. Where an insolvency officer proposes a CVA or other arrangement can they

disapply the prescribed rule. Unsecured creditors will have a vote on the proposal.

The former "crown preferences" for tax and VAT was removed in 2003.

Lavelle Coleman is an Irish firm of solicitors with an England and Wales legal practice. Our England and Wales qualified and regulated solicitors provide a wide range of legal services from our Dublin offices. We have written legal guides in relation to a broad range of England and Wales legal matters as they relate to Irish based individuals and businesses. These guides are available on our website at <http://www.lavellecoleman.ie/England-Wales-Law.aspx>

This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1st August 2009.

© Paul McMahon, Lavelle Coleman 2009

CONTACTS

Paul McMahon

pmcmahon@lavellecoleman.ie

Phone: (353) 1 6445800

Fax: (353) 1 6614581

Lavelle Coleman
Solicitors
20 On Hatch
Lower Hatch Street
Dublin 2
Ireland

www.lavellecoleman.ie

LAVELLE COLEMAN

Lavelle Coleman Solicitors

20 On Hatch, Lower Hatch Street,
Dublin 2, Ireland.

t +353 1 644 5800

f +353 1 661 4581

dx 109010 Fitzwilliam

e law@lavellecoleman.ie

w www.lavellecoleman.ie