ACCA

insolvency

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insolvency newsletter

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1. TECHNICAL NEWS

SIP 16

As members will be aware, the issue of pre-pack administrations continues to arouse interest and regulatory concern.

In July, the Insolvency Service (IS) published a report setting out the results of the first six months' operation of the arrangement whereby practitioners copy to the IS the information they provide to creditors pursuant to SIP 16. The report, which can be accessed via the IS website, identified the respects in which the IS consider compliance with SIP 16 to be widespread, and the respects in which practitioners need to provide more and better information. Overall, the IS found that two-thirds of the SIP 16 reports it had received were wholly compliant with the SIP's requirements; the remaining third were non-compliant in one or more individual respects.

On the strength of these findings, the IS has issued further guidance on what it expects practitioners to provide in its SIP 16 information. This guidance, which is included in Issue 42 of Dear IP, identifies a number of specific matters which it is expecting practitioners generally to focus on when formulating their SIP 16 information. These matters are, in summary, as follows:

- Practitioners should treat para 8 of the SIP – this calls for a detailed explanation and justification of why a pre-pack was undertaken - as the key driver of and influence on the information to be prepared; compliance with the overriding objective set out in para 8 may not be achievable solely by providing short responses to the individual bullet points which follow.
- The SIP 16 information should aim to enable all creditors to understand, inter alia, the primary cause of the company's insolvency and any issues which have necessitated a quick sale of the assets and/or the business.
- The SIP 16 information should be disseminated, in all but the most exceptional cases, within 14 days of the completion of the sale.
- Practitioners should disclose the name of the person (if any) who introduced them to the company concerned and the circumstances leading to the referral.
- Any previous relationship between the practitioner and the company and/or its directors should be explained, taking into account that not all creditors will be aware of the requirements of the law and ethical rules in this area.
- Details of the process which led to the sale should be included, including any marketing activity that may have been engaged in.
- Better disclosures are called for regarding any valuations obtained of the business or its underlying assets; where none have been obtained, the practitioner should explain why not.

As the statement says, the RPBs were informed in advance of the plan to issue the statement and the RPBs have agreed to have regard to it in the context of any complaints they receive regarding the non-compliance with SIP 16 on the part of their members and licence-holders. ACCA licence holders are thus encouraged to read the IS guidance in full before preparing any SIP 16 information in future. The prompt provision of a transparent account of a pre-packaged sale is considered to be important for the reputation of the insolvency profession as a whole.

The issue of this guidance is not intended, however, to be the long-term solution to the issue. The Joint Insolvency Committee is committed to reviewing the content of SIP 16 as part of its wider review of the whole collection of SIPs. Accordingly a revised version of SIP 16 will be prepared and issued in due course.

INSOLVENCY GUIDANCE PAPER – HANDLING OF CASES

Members will be aware that a new Insolvency Guidance Paper (IGP) has been issued on the handling of complaints made to individual IPs. The new IGP suggests a number of specific steps that IPs should consider taking once they receive a complaint from a third party. The IGP can be viewed on the ACCA website at **http://www.accaglobal.com/members/professional_standards/monitoring/insolvency/guidance_papers**

NEW SIP 3A – TRUST DEEDS

A new 'Scottish' SIP, on trust deeds, has been agreed by JIC and endorsed and issued by the RPBs. The new SIP takes account of changes in Scottish legislation made via the Protected Trust Deed (Scotland) Regulations 2008 and has an effective date of 7 December 2009. NB the guidance in the new SIP 3A only applies to trust deeds which are signed on or after 1 April 2008; deeds signed earlier that that remain covered by the earlier, 2007 version of SIP 3A. The text of the new version (as well as the old version) can be found on the ACCA website at: **http://www.accaglobal.com/scotland/sips**

OFT STUDY INTO CORPORATE INSOLVENCY

On 12 November, the OFT announced that it was undertaking a market study into corporate insolvency.

The review will encompass the structure of the insolvency market, the appointment process for IPs and market features which 'could result in harm', such as high IP fees or lower recovery rates for certain groups of creditors.

The OFT cites, as part of the rationale for its initiative, a recent World Bank study which suggested that the cost of closing down a business in the UK was higher than other countries which have similar or even better recovery rates. In support it cites a report by R3 which claimed that the cost of insolvency was a relative weakness of the UK's insolvency regime. R3 has responded to this by claiming that its report actually concluded that the UK has one of the best insolvency regimes in the world – in terms of high

returns to creditors and speed with which businesses are turned around or closed down. It has also pointed out that there are just seven other countries in the world where the cost of closing down a business is lower than it is in the UK for the recovery of similar amounts.

The OFT expects to complete its review by the end of 2010.

STATISTICS

In the third quarter of 2009, there were 4,716 compulsory liquidations and creditors' voluntary liquidations in total in England and Wales in the third quarter of 2009 (on a seasonally adjusted basis). This was a decrease of 4.7% on the previous quarter but an increase of 14.6% on the same period a year ago. Additionally, there were 1,578 other corporate insolvencies in the third quarter of 2009 (not seasonally adjusted) comprising 410 receiverships, 974 administrations and 194 company voluntary arrangements. In total these represented an increase of 9.3% on the same period in 2008.

There were 35,242 individual insolvencies in England and Wales in the third quarter of 2009. This was an increase of 28.2% on the same period in 2008. This was made up of 18,347 bankruptcies (which were up 6.4% on the corresponding quarter of the previous year), 12,390 Individual Voluntary Arrangements (IVAs), (which were up 20.9% on the corresponding quarter of the previous year) and 4,505 Debt Relief Orders (DROs).

In Scotland, insolvent liquidations were down by 3.1% on the same quarter in 2008 and individual insolvencies were down overall by 4.2% over the same period (though there was an increase of 16.5% in the number of protected trust deeds). Northern Ireland showed a rise of 16% in insolvent liquidations and a slight decrease in individual insolvencies.

2. REGULATORY NEWS

ACCA REGULATORY WORKSHOP

ACCA will be holding a regulatory workshop on 15 January 2010 at Lincoln's Inn Fields in London. The workshop will focus on ACCA's regulatory regime for insolvency but with a focus on the current global economic conditions. An email advertisement with a booking form will be sent out to licence-holders shortly.

THE PENSION PROTECTION FUND

The Pension Protection Fund (PPF) is concerned that it is still receiving statutory notifications and notices relating to insolvent employers later than is allowed for under the law. Members are thus reminded of their duties under the Pensions Act 2004 in relation to occupational pension schemes associated with insolvent employers

Under section 120 of the Act, office holders are obliged to notify the Pension Protection Fund (PPF) whenever a defined 'insolvency event' occurs in relation to an occupational pension scheme. This should happen within 14 days of the insolvency event occurring or of the date that the practitioner finds out about the existence of the scheme. Notification should also be sent to the Pensions Regulator and the scheme trustees. Under section 122, office holders are expected to issue a notice, again to the PPF, the Regulator and the trustees, covering the implications of the insolvency for the scheme concerned.

The section 120 notice should be submitted to the PPF using the pro-forma form which can be accessed via their website at: **http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/s120notice.pdf**

It can be submitted online or by post. Further guidance on the responsibilities of IPs under the 2004 Act, also produced by the PPF, can be found at: **http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/insolvency_guidance.pdf**

OLD PENSION CASES

Practitioners who have a number of old bankruptcy cases which are being kept open to deal with a pension are invited to consider whether there is any potential benefit to creditors in keeping the cases open. The ACCA Monitoring Unit invites practitioners to consider closing cases in which the cost of dealing with the pension exceeds the realisations from the pension.

MILEAGE CHARGES

Until recently, monitors have been treating mileage charged at 40p as a category 1 expense. At a recent meeting of monitors this matter was discussed and following the change in HMRC's treatment of mileage charges it was agreed that this distinction is erroneous and should be reconsidered. In the interim, practitioners are advised to treat all mileage as a category 2 expense and obtain approval for it in the usual way.

VAT ON BONDS

Practitioners are advised to look out for guidance on whether VAT should be charged on specific penalty bonds. A Dear IP letter on this matter is to be issued in the near future.

JIC ANNUAL REPORT

The JIC annual report for the year ended 31 December 2008 can be viewed on the ACCA website at **http://www.accaglobal.com/members/professional_standards/monitoring/insolvency/**

3. LEGISLATION

REFORMS TO BANKRUPTCY LAW

The Insolvency Service has published proposals for reforming the rules regarding the presentation of debtor petitions for bankruptcy.

The headline idea is that debtors should be able to apply for their own bankruptcy by means other than going to court. Instead, their applications would fall to be decided by one of a number of Government-appointed 'Decision Makers'. It is suggested further that applications should be able to be made electronically. By allowing for these matters to be dealt with outside the court system, the idea is that it would save time for the courts and debtors alike.

The other proposal of note covers early discharge. It is being suggested that the current provision for debtors to be discharged earlier than twelve months be repealed, so that automatic discharge would take place on the first anniversary of the bankruptcy.

The proposals can be found on the IS website and are out for consultation until February 2010.

ENCOURAGING CORPORATE RESCUE

The Insolvency Service has officially responded to the consultation exercise which took place earlier in the year on proposals for reforms in the area of corporate rescue. The proposals put forward included extending the CVA moratorium to facility to larger companies and introducing a new general moratorium procedure. The official commentary can be viewed online at: **http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/responses/Encouraging_Company_Rescue_-_Consultation_response.doc**

The IS reports that the moratorium proposals were 'broadly' welcomed by consultees and that initiatives in that area would be taken forward over the coming months. It appears that there was less support from consultees for the proposals for giving new priority status to finance made available to companies already in formal insolvency procedures; as a result, no action is planned in that area.

MODERNISATION OF THE INSOLVENCY RULES 1986

As members may be aware, a draft of the updated Insolvency Rules, scheduled to take effect in April 2010, has been posted on the insolvency Service's website for information and to help practitioners come to terms with the forthcoming changes.

The changes are numerous and detailed. But they are especially significant in respect of two areas in particular – meetings and fees.

With regard to meetings, inconsistencies in provisions applying to different types of insolvency procedure are to be eliminated and the minimum period of notice is to be reduced to 14 days. In winding up and bankruptcy, it will be possible to pass resolutions in writing, as is already possible with respect to administrations. It will also become possible for parties to attend formal meetings on a 'virtual' basis.

On fees, the revised rules will allow a liquidator's remuneration to be fixed either on one or other of the current permitted bases (percentage of distributions or time costs) or as a fixed amount. In an amendment to IR 4.131, creditors may in future apply to the court to reduce a liquidator's remuneration on one of three stated grounds, viz:

- the liquidator's remuneration is, in all the circumstances, excessive
- the basis originally agreed under IR 4.127 is, in all the circumstances, excessive
- expenses incurred (or to be incurred) are or would be so excessive as to be unreasonable.

The court, if it accepts any such application, will be able to make one of four types of order. It will be able to fix the remuneration at a reduced rate or amount, change the basis of remuneration, order the some or all of the expenses incurred are not to be allowed, or order the liquidator or his personal representative to account for such excessive amount as the court may specify.

Then, a new IR 4.131A will allow a liquidator to apply to the court to rule that there has been such a material and substantial change in the circumstances that were previously taken into account under IR 4.127 that the agreed basis be changed.

The full current draft of the modernised rules is available from the Insolvency Service website at: **http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/consolidation/updateNov09.htm**

4. CASES

ASSIGNMENT OF INTEREST IN A BANKRUPT'S HOME

Lewis v Metropolitan Property Realisations Ltd [2009] EWCA Civ 448

Where an assignment is made by a trustee of a bankrupt's interest in the family home, this does not affect the revesting of the interest in the property for the purposes of s283A(2) of the Insolvency Act 1986. The case involved the bankrupt husband and his wife and their mortgaged home. An important creditor in the bankruptcy had taken an assignment from the trustee of the husband's interest in the property. The bankrupt argued that, since three years had elapsed since the bankruptcy started, the interest in the property had revested in him. The creditor claimed that the act of assignment had the effect of 'realising' the interest, so that revesting could not take place. The court disagreed and held that 'realisation' must mean some form of reduction of the interest in an asset into cash. The result was that the husband's interest revested in him.

COMPLEX CONTRACTUAL PROVISIONS AND THE ANTI-DEPRIVATION RULE

Perpetual Trustee Co v BNY Corporate Trustee

Butters and others (joint administrators) v BBC Worldwide and others [2009] EWCA Civ 1160

The Court of Appeal has ruled on two cases affected by the anti-deprivation rule, which prevents parties from contracting out of insolvency legislation by removing assets that would be otherwise available to creditors. It held that the principle did not apply to contractual provisions by which investors were granted rights over assets derived from their own moneys, rights which were modified when a default event occurred triggering insolvency, or to licence termination and share option provisions operative on insolvency which did not contravene the Insolvency Act 1986. Transactions which amounted to a deprivation for the purposes of the rule, but which were completed before the liquidation or bankruptcy occurred, did not normally come within the scope of the rule.

The first case, involving the administration of Lehmans, concerned the setting up, via an SPV, of arrangements which, on the occurrence of an insolvency event, switched the priority of assets and changed the allocation of costs to the potential detriment of Lehmans. The second case concerned the administration of Woolworths. BBC Worldwide had granted a licence to a joint venture set up by the two companies and the agreement at issue provided that it would terminate automatically if, inter alia, any member of the parent groups suffered an insolvency event. Upon such an event, the other shareholder was entitled to issue a purchase notice requiring the insolvent shareholder to sell its shares to the other.

UNLIQUIDATED DEBTS – IMPLICATIONS FOR BRINGING A BANKRUPTCY PETITION

Truex v Toll [2009] EWHC 396

The appeal in this case revolved around whether the debt claimed by a solicitor who had advised a client amounted to a debt which counted for the purposes of the statutory demand. The client had retained the services of the solicitor in divorce proceedings. A dispute arose between the two parties as to the quality of advice received. As a result, two fee notices issued by the solicitor went unpaid and eventually a statutory demand was issued for payment. When this was not complied with the solicitor issued a bankruptcy petition. The client gave notice of her intention to set the demand aside on the basis that there was a substantial dispute about whether the money claimed by the solicitor was in fact owed. The issue was complicated by provisions in the Solicitors Act 1974 regarding procedures to apply where there were disputes over fees owing – these included the right for any client, within one month of receiving a bill, to ask for it to be taxed by the court, pending which no legal action in respect of the debt could be taken. In the case in question, the client applied to the court for this to be done but more than one year after the initial receipt of the bill. Shortly after this, a bankruptcy order was made against the alleged debtor, but on the ground that unliquidated sums, such as those in dispute between the two parties, could be converted into a liquidated sum by the conduct or agreement of the parties – the court making the order was satisfied that such a test was valid and had been met at the hearing.

The court reaffirmed that a claim for solicitors' fees not yet taxed did not count as a liquidated sum even if the period for challenge under the 1974 Act had expired. It also held that an unassessed bill could be converted into a liquidated sum for the purposes of founding a banking petition but only if there was some form of binding and irrevocable admission, agreement or acknowledgment between the parties that the debt was owed. This had not been present at the bankruptcy hearing and so the client's appeal against the granting of the order was allowed.

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