insolvency

ACCA

18

insolvency newsletter

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1. TECHNICAL NEWS

REVIEW OF SIPS – JOINT INSOLVENCY COMMITTEE SURVEY

Members are reminded of the consultation process being undertaken by JIC relating to its proposed review of the body of SIPs. JIC is interested to hear the views of insolvency practitioners on, in particular, its proposal to re-frame the SIPs on a principles basis and the priorities it should adopt in tackling the existing body of statements.

As previously indicated, JIC is inviting responses from members to this survey by 19 June. E-mail responses should be sent to Jic_sip_consultation@icaew.com. Any member wishing to receive another copy of the consultation paper itself should contact John Davies on daviesj@accaglobal.com

FIRE SAFETY – PROTECTION OF PREMISES UNDER ADMINISTRATION

The London Fire Brigade has written to ACCA and the other RPBs to bring the attention of practitioners to a number of fires at business premises which have apparently occurred while the businesses concerned have been in administration.

The LFB takes the view that, where a company enters into administration, the IP becomes the responsible person for ensuring compliance with the requirements of the Regulatory Reform (Fire Safety) Order 2005. The responsibilities of the person in this position include ensuring the safety of all relevant persons, including staff, visitors, others who may lawfully be on the premises and persons in the immediate vicinity of the premises who may be at risk by a fire there.

Under the Order, even where premises have ceased to trade, consideration must still be given to the safety of those in the immediate vicinity, such as neighbours and other occupiers of the building (if any).

The LFB reiterates that vacant premises are vulnerable to arson, vandalism, trespass/squatting and an associated heightened risk of accidental fire. It urges IPs to ensure:

- any significant quantities of flammable materials (eg stock or rubbish/waste) are removed from the premises as this will reduce the risk of significant fire
- vacant premises are properly secured against unauthorised entry and checked on a regular basis for signs of break-in or attempted break-in
- gas and electricity supplies are turned off (taking into account any fire or burglar alarm system)
- the local fire authorities are informed that the premises are vacant, whether combustible materials have been removed and whether any dangerous substances or materials are still in the premises (eg gas cylinders or chemicals)
- where requested, the opportunity is provided for local fire crews to visit the premises to assist in familiarisation and incident planning – this will be mainly for larger and more complex premises and those where it is not reasonably possible to remove significant combustible materials.

CONSULTATION ON CHANGES TO INSOLVENCY LAW

The Government has announced that it will consult during the Summer on changes to the law regarding CVAs and Administrations. Both measures are intended to help companies in difficulty during the recession.

The first measure would extend to medium-sized and large companies the moratorium procedure currently available to small companies within CVAs.

The second would give absolute priority to new money lent to companies that are in CVAs or Administrations. The aim would be to improve the position of trade creditors in the period leading up to insolvency, thus making it safer and more attractive to conduct business with them in this period.

It is likely that the Government's proposals will be issued in July.

MONITORING OF 'SIP 16 INFORMATION'

As from July, the Insolvency Service will be publishing periodic reports based on the information it should now be receiving from practitioners in respect of pre-pack Administrations they undertake.

In advance of the first of these reports, the Service has issued a statement setting out its reactions to and concerns about the SIP16 information it has been receiving to date. Practitioners are asked to note the following points:

- The Service only requires copies of information disclosed on pre-pack administrations in line with SIP 16, as outlined in the Dear IP article in March 2009 and the letter sent to IPs on 28 January 2009. It is receiving numerous notifications of administration appointments and proposal documents for cases which are not pre-pack administrations. This has the effect of clogging up the system and will only serve to increase the cost of the SIP 16 monitoring.

- At this stage, the Service does not know whether it is receiving SIP statements in all pre-pack cases. A recent R3 survey on pre-packs indicated that a higher number of pre-packs were being undertaken by practitioners than is apparent from the number of SIP 16 statements being received. This is of concern.

- It appears that the majority of IPs are sending out SIP 16 information with the first notification to creditors, though some are only providing the disclosures within the proposals. The Service believes that the early provision of the information prescribed by SIP16 is vital in ensuring that the process is as transparent as possible. It is writing to IPs in respect of inadequate disclosures made and will refer matters to RPBs where appropriate.

- The information being disclosed generally appears to be in line with what was intended. Clear areas for improvement would be to provide details of valuations i.e. the date, the assets valued, and the valuations given; and also fully detailing the consideration paid including a breakdown of apportionment to assets where material. In relation to deferred consideration, the Service says that it generally sees little detail as to whether the practitioner has obtained any security or guarantees for any deferred amount. While such security is not a requirement, it would clearly provide some comfort to creditors that the deferred payments will be honoured.

- The Service is concerned that insufficient information is being provided about the timing and extent of practitioners' prior involvement with companies, and that on occasion instructions appear to be being taken from directors without proper consideration being given as to how a proposed transaction might achieve one of the purposes of administration.

- Very little effort appears to be being made to consult with or disclose what consultations may have taken place with major creditors who do not hold security.

- The Service is concerned that on occasions the identity of any directors connected with the purchaser is not always fully disclosed.

- Where new floating charges have been taken shortly prior to a pre-pack, the Service says it would expect full details of the circumstances surrounding the granting of the security and the identity of the charge-holder to be disclosed.

Members are reminded that the initial meeting of creditors should be held as soon as possible after appointment where there has been a pre-pack sale. Where no initial meeting of creditors is to be held, and the information cannot be provided with the first notification to creditors, it should be provided in the statement of proposals of the administrator which should be sent as soon as practicable after his appointment.

INSOLVENCY STATISTICS

In the first quarter of 2009 there were 4,491 compulsory and creditors' voluntary liquidations in England and Wales. This was an increase of 7.1% on the previous quarter and an increase of 56.1% on the same period in 2008. There were 1,783 other corporate insolvencies – 316 receiverships, 1,311 Administrations and 156 CVAs: in total this amounted to an increase of 54% on the first quarter of 2008.

There were 29.774 individual insolvencies in England and Wales, made up of 19,062 bankruptcies (up 23.4% on the first quarter of 2008) and 10,713 IVAs.

In Scotland, the number of corporate liquidations rose 57.8% over the same quarter in 2008 and individual insolvencies rose by 71.3% (including a rise of 157.8% in sequestrations). In Northern Ireland, liquidations rose by 35.7% over the same period and individual insolvencies by 38.8%.

2. REGULATORY NEWS

ACCA REGULATION CONFERENCE

ACCA will be presenting an insolvency regulation conference in January 2010 which all members are invited to attend. The details of the conference will be circulated to our members as soon as they have been finalised.

VAT AND SIP 7

Members are reminded that paragraph 29 of SIP 7 states that where a company or individual is or was registered for VAT, the office holder's receipts and payments account may either be shown net of VAT with the amount to/from HM Customs and Excise, at the date of the account, included in the account separately or may be stated gross. The treatment adopted should be made clear either in the narrative to the account or by way of note.

Paragraph 30 states that if the insolvent entity has not been registered for VAT, payments should be shown inclusive of VAT and the fact that VAT is not recoverable stated by way of note. Paragraph 30 ensures that for each case, the full costs are correctly categorised in office holders' accounts and the practice monitoring department will be looking at this in future visits.

ADVICE TO DEBTORS AND SIP 3

Paragraph 3.4 of SIP 3 states that an insolvency practitioner should exercise his professional judgement to ensure that a debtor has received appropriate advice on his position and that the options available to him and the consequences of his decision to propose a voluntary arrangement have been fully explained to him.

Practitioners are reminded that prior to their appointment as nominee, they are providing advice to and are acting for the debtor. In these circumstances, practitioners should offer appropriate advice given the circumstances of each case, setting aside any other considerations.

The appropriate debt solution for the debtor may lead to creditors receiving a smaller or even no distribution when compared to a voluntary arrangement. Where an IVA imposes a greater financial burden on the debtor then, for example bankruptcy would this should be unambiguously explained to debtors.

INSOLVENCY CODE OF ETHICS

A reminder that the ACCA Insolvency Handbook 2009 provides the revised Insolvency Code of Ethics which came into effect in January 2009. Our newsletter issued in February 2009 highlighted the major changes and additions to the code.

COMMUNICATION WITH JOB CENTRES

As members of R3 will be aware, that body has written to its members to request that, upon appointment as Administrator to a business with over 20 employees, they contact Regional Job Centre Plus Rapid Response Units, or in the case of businesses with national reach the offices of National JobCentre Plus to inform them of the appointment. The purpose of making this notification is to inform the agencies concerned before redundancies have been made rather than after, so as to allow JCP to target its resources more effectively and ensure that employees facing redundancy are offered the greatest level of protection and support.

This initiative follows the tabling of an Early Day Motion in the House of Commons in January 2009 criticising the lack of consistency shown by Administrators in allowing Jobcentre Plus (JCP) access to employees when a company entered into Administration. The Motion called on Ministers to ensure that Administrators worked with JCP to protect the welfare of employees. To date it has been signed by over 90 MPs from all parties. R3's initiative aims to improve links between practitioners and JCP offices without the need for any new government intervention.

A list of the contacts at JCP is below for information.

National 07976 017598	Anne Pavey anne.pavey@jobcentreplus.gsi.gov.uk	0121 452 5295
East of England Region 07824 518288	Adrienne Deller adrienne.deller@jobcentreplus.gsi.gov.uk	01233 884679
East Midlands Region 07800 676958	Colin Leach colin.leach@jobcentreplus.gsi.gov.uk	0115 989 5980
London Region 07971 994420	John Land john.land@jobcentreplus.gsi.gov.uk	0207 348 3104
North East Region	June Ferguson june.ferguson@jobcentreplus.gsi.gov.uk	0191 211 4313
North West Region 07966 556788	Andrea Gorstridge andrea.gorstridge@jobcentreplus.gsi.gov.uk	0161 873 1302
Scotland 07971 994518	Francis Brady francis.brady@jobcentreplus.gsi.gov.uk	0131 221 4141
South East Region	Sam Beck samantha.beck@jobcentreplus.gsi.gov.uk	07891 682626
South West Region	Louise Cavell louise.cavell@jobcentreplus.gsi.gov.uk	0117 945 6639
Wales 07971 996261	Roz Norris roz.norris@jobcentreplus.gsi.gov.uk	01970 653125
West Midlands Region	John Davis john.davis3@jobcentreplus.gsi.gov.uk	0121 452 5340
Yorkshire and Humberside	Gill Green gill.green@jobcentreplus.gsi.gov.uk	0113 307 8187

3. LEGISLATION

HEALTH AND SAFETY (OFFENCES) ACT 2008

Members are reminded that the above Act came into force on 16 January 2009 and affects the penalty framework set out in section 33 of the Health and Safety at Work etc Act 1974 and the Health and Safety at Work (Northern Ireland) Order 1978.

Increased fines and penalties will be imposed on those found to be in breach of the legislation. This may have an impact on whether an insolvency practitioner will consider taking an appointment where there could be health and safety issues. The insolvency practitioner will not be able to rely on the company health and safety officer. The insolvency practitioner will become personally liable for any offence committed since the date of his appointment.

Members will have to ensure their professional indemnity insurance covers this area sufficiently.

ADVERTISEMENT OF APPOINTMENTS

The Legislative Reform (Insolvency) (Advertising Requirements) Order 2009, SI 2009/864, came into force on 6 April 2009.

The order amends sections 95 and 98 of the Insolvency Act 1986 as they apply to England and Wales by:

1. removing the requirement on a liquidator of a company in members' voluntary liquidation and on a company in creditors' voluntary liquidation to advertise notice of the creditors' meeting, which is required to be summoned under those sections, in a newspaper in addition to the London Gazette;

2. replacing it with a discretion to undertake additional advertising; and

3. in cases where that discretion is exercised, enabling the advertisement to be effected by means other than an advertisement in a local newspaper.

The requirement to advertise in the London Gazette remains.

COMPANIES ACT 2006

Members are reminded that the remaining provisions of the Act come into affect on 1 October 2009. These changes will affect the following.

1. **Company formation procedures (sections 7-16 CA 2006)**

   New standard formation procedures will apply in respect of new companies formed after the implementation date. There will be a new standard application form, a much-slimmed down version of the memorandum of association, and no requirement for any new company to disclose a figure for authorised share capital.

2. **New default model articles of association**

   These new models, replacing those made under the 1985 Act, will apply automatically where new companies opt not to file their own, customised versions. Separate models will exist for private companies limited by shares, private companies limited by guarantee and public companies. Each provide for new streamlined procedures for the making of decisions by company directors, including the capacity for directors to make binding decisions outside formal meetings, and for the giving of notice. The rules on formal meetings of directors recognise that meetings may take place on a virtual basis provided that each director can communicate with the others. The new articles will not replace the adopted articles of existing companies automatically.

   The statutory instrument containing the new model articles is SI 2008/3229, which can be found on www.opsi.gov.uk

3. **Directors' details (s162-167 CA 2006)**

   As from 1 October, no company director need file his or her personal residential details on the public record at Companies House. As from that date, companies will need to maintain two registers of directors – the register of directors and the register of directors' residential addresses. In the former, a company need only record a service address for each director – that address may be the address of the company's registered office. It is this register which, henceforth, will need to be made available for inspection by shareholders and the general public. The latter register must record the residential details for each director but will remain confidential. That being said, the details in it, and any changes to them, must be reported to Companies House for maintenance on a separate, secure register. Access to the information on that secure register will be available to insolvency office holders under the Companies (Disclosure of Address) Regulations 2009 (SI 2009/214).

4. New powers for the Registrar of Companies (Part 35 CA 2006)

The new Act contains powers for the Registrar to intervene in respect of inappropriate information being filed at Companies House. He will be entitled to send a document back to a depositor if the information in it appears to be inconsistent with associated information already held on file, he will be able to remove superfluous information from a company's file, and he will be able to remove from the record any material filed which appears to be forged or filed without the authority of the company – in either case on application by a person recognised for the purpose. It also becomes a criminal offence to knowingly or recklessly file any document at Companies House which is misleading, false or deceptive in a material particular.

5. Trading Disclosures (s82-s85 CA 2006)

Members will wish to note an amendment to the Companies (Trading Disclosures) Regulations 2008 which comes into effect on 1 October. Under the original regulations, companies are obliged to display their corporate name at their registered office or at any other place where they make their records available for inspection. The new amendment means that the statutory requirements for companies to display their registered names at their business premises will not apply if a liquidator, administrator or administrative receiver has been appointed to a company and the registered office or business premises of that company is also a place of business of the office holder. Thus, the requirements to display do not apply where the registered office of the company is changed to the address of the practitioner.

EMPLOYEE RIGHTS

As from 1 February 2009, the Employment Rights (Increase of Limits) Order 2008 (SI 2008/3055) raises the weekly amount payable under Part XI of the Employment Rights Act 1996 from £330 to £355.

DEBT RELIEF ORDERS

Debt Relief Orders (DROs) came into effect on 6 April 2009 and apply to England and Wales. The details can be obtained from the Insolvency Service website. The main details can be summarised as follows.

DROs are applicable to debtors with low liabilities, little surplus income and few assets who must apply online through an authorised intermediary.

In simple terms, to be eligible for a DRO the debtor must have liabilities of less than £15,000, assets of under £300 and a disposable income of less than £50 per month. Those creditors whose debts are included in the DRO cannot take any enforcement action against the debtor for a period of one year and at the end of this period, those debts are written off. An application for a DRO cannot be made more than once in six years. Details of DROs will appear on a register.

4. CASES

EMPLOYEE RIGHTS IN ADMINISTRATION

Oakland v Wellswood (Yorkshire) Ltd [2008] UKEAT 0395080511)

This case concerned the TUPE-related rights of an employee who was dismissed within a year of his being taken on by a company which took on the assets of a company which went into administration: the employee concerned had previously worked for the company that went into (pre-pack) administration. Regulation 4 of TUPE covers the transfer of employment contracts in the context of a transfer of business or undertaking. Regulation 8(7) of TUPE, though, disapplies that rule where the transferor is the subject of bankruptcy proceedings or analogous proceedings, in other words 'terminal' insolvency proceedings. The official BERR guidance on this matter had originally suggested that regulation 8(7) would not have effect in administration since that was not a terminal insolvency proceeding.

The EAT held, however, that, in deciding whether 8(7) applied to a case, account needed to be taken of the course of the administration. Where administrators continue to trade the business with a view to its sale as a going concern, those employee contracts that have been transferred will be protected under TUPE. Where, as in the Wellswood case, the administrators concluded quickly that the going concern route was not feasible, and that the administration was conducted with a view to entering into liquidation, the proceedings were analagous to bankruptcy. Therefore the TUPE protection did not apply and the employee did not have one year's continuous employment with the second company. In the light of this decision, members will need to advise potential purchasers of a business that they should seek legal advice where they intend to take on the workforce of the distressed company.

COURT'S POWER TO REPLACE A TRUSTEE

(Donaldson v O'Sullivan [2008] EWCA Civ 879)

The Court of Appeal has heard an appeal against an order approved by a lower court to approve a block transfer of appointments in the case of a practitioner approaching retirement. In one of the cases, a bankruptcy case, the order had long since been discharged although liabilities were still outstanding. The replacement trustee decided to seek an order for the sale of the discharged bankrupt's home, giving rise to the litigation in question. The bankrupt had disputed the right of the court to appoint a replacement following the removal of the previous trustee, contending that the statutory power to do so did not apply when removal had taken place by court order. The Court of Appeal confirmed that s303(2) IA 86 allowed the court to appoint a new trustee and this could be exercised so as to replace a trustee removed under section 298. The specific provisions of sections 292 and 297 did not preclude the court from using its general powers in relation to bankruptcy (or compulsory windings up).

DISAPPLICATION OF THE PRESCRIBED PART

Re International Sections Ltd [2009] EWHC 137 (Ch)

The High Court has held that, when hearing applications by liquidators to disapply the prescribed part under s176A(5) IA 86, disapplication should be the exception rather than the rule.

In the case in question, the balance of the prescribed part after deduction of the liquidator's costs, was less then £3,500. This would have resulted in a dividend to unsecured creditors of 1.48p in the pound. 46 of these unsecured creditors would have received less than £15 each; the largest creditor would have received £906. These circumstances notwithstanding, the court held that, for it to disapply the prescribed part, it must be satisfied that the cost of making a distribution would be disproportionate to the benefits to creditors as a group. It should not be too ready to disapply just because the dividend was likely to be small. In this case, the court was not convinced that the cost of making the distribution would be disproportionate to the benefit that would accrue to the creditors concerned.

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