ACCA

insolvency

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insolvency newsletter

ISSUE 22 – JUNE 2012

This newsletter is prepared for and aimed at insolvency practitioners licensed by ACCA. It contains information relevant to their work and to their regulation by ACCA.

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Previous issues of this newsletter are available from the ACCA website at http://www.accaglobal.com/en/technical-activities/technical-library/insolvency-newsletter.html

1. THE INSOLVENCY RULES

Amendments to the Insolvency Rules amend the definition of 'excluded debt' in Rule 5A.2 so as to exclude from the scope of a debt relief order any obligation arising from a payment out of the social fund by way of crisis loan or budgeting loan. They also amend Rule 6.223 so as to include such an obligation in the list of debts that survive a bankruptcy, and Rule 12.3 so as to prevent an obligation being included as a 'provable debt' in a bankruptcy. These changes took effect on 19 March 2012 (*The Insolvency (Amendment) Rules 2012 (SI 2012/469*).

Members are reminded that the Insolvency Service is working on a project to re-write the secondary insolvency legislation and a draft is planned to be issued in 2013, for consultation.

2. NEW CHIEF EXECUTIVE FOR THE INSOLVENCY SERVICE

Dr Richard Judge has been appointed as the new Chief Executive of the Insolvency Service.

Dr Judge joins the Insolvency Service from Cefas (Centre for Environment, Fisheries & Aquaculture Science, an agency of the Department for Environment, Food and Rural Affairs) where he has been Chief Executive since February 2007. He formally takes up the post on 30 July.

3. INSOLVENCY SERVICE REPORTS ON REGULATION AND COMPLIANCE WITH SIP 16

Members are invited to access the official reports on these two issues from the Insolvency service web site.

- 2011 report on IP regulation (www.bis.gov.uk/insolvency/insolvency-profession/Regulation/review-of-IP-regulation-annual-regulation-reports)
- 2011 SIP16 monitoring report (www.bis.gov.uk/insolvency/insolvency-profession/Regulation/statements-of-insolvency-practice/SIP-16-Reports-pre-packs)

With regard to the latter, the report's conclusion is that, in 2011, of the cases reviewed by the Insolvency Service, 68% were found to be fully compliant with SIP 16 and supplementary guidance in Dear IP. Of those cases, only 7% were referred to RPBs for regulatory consideration. The results prompted the Insolvency Service to reaffirm that pre-packs can offer a flexible and speedy means of rescue and can help preserve economic value, benefit creditors and save jobs.

Members will note that JIC is currently reviewing guidance contained in SIP 16.

4. RECOVERY OF ATE PREMIUMS AND CFA FEES

The Legal Aid, Sentencing and Punishment of Offenders Act received the Royal Assent on 1 May 2012 and will come into effect in April 2013. The Act will abolish the recoverability of conditional fee agreement success fees and after the event insurance premiums.

In response to concerns about how these changes will affect the recovery rights of creditors in insolvency cases, the Government has announced that they will not apply to such cases for at least two years, so will now only apply from 2015.

The Justice Minister Jonathan Danogly said in a written statement to the House of Commons that 'insolvency cases bring substantial revenue to the taxpayer, as well as other creditors, and encourage good business practice which can be seen as an important part of the growth agenda with sider benefits for the economy.'

The two year moratorium has been announced in order to 'allow time for those involved to adjust and implement such alternative arrangements as they consider will allow these cases to continue to be pursued.'

5. CONSULTATION ON REFORM OF EU INSOLVENCY LAW

Following a motion by the European Parliament in 2011, the European Commission has been consulting on the future of EU insolvency law. The consultation focuses primarily on whether the EU Regulation on cross-border proceedings needs to be amended, but it also invites input on the issue of whether harmonisation of national laws on insolvency and, in particular, business rescue, is desirable.

The interventions of the Parliament and the Commission on this issue are happening in the context of the action plan to implement the Stockholm programme of action, which in turn is heavily focused on encouraging growth and the creation and saving of jobs.

Given that the Regulation as currently framed concentrates on jurisdictional matters, the consultation invites feedback on technical matters associated with that theme. The central issue of the definition of the centre of main proceedings is reviewed – this has of course been the subject of extensive litigation.

One specific recommendation made by the Parliament concerned the insolvency of groups of companies with cross-border structures. It called for the introduction of a flexible procedure in such cases, whereby a single insolvency practitioner could be appointed to deal with the insolvency of the various group companies. The Commission puts forward no proposal on this issue but invites suggestions on whether any change is desirable to the administration of group insolvencies.

The consultation also invites feedback on the dissemination of information on cross-border insolvencies: under the Regulation, a liquidator is under no obligation to ensure that notice of the proceedings and/or his appointment is published in any other member state. This poses the question of how creditors and other stakeholders are expected to become informed about the insolvency and how they are able to protect their rights. The Commission invites feedback on whether this should become mandatory, perhaps via some form of EU-wide portal that brings together national registers, and whether further moves are desirable to make the lodging of cross-border claims more effective.

Of most relevance to the growth and jobs agenda, the consultation addresses the question of whether the scope of the regulation might be expanded to encompass forms of procedure that are currently not covered: primarily the equivalent of the UK's voluntary arrangements. The fact that such arrangements might not bind debtors in respect of cross-border creditors is viewed as being a potential impediment to preserving jobs in SMEs in particular.

The Parliament's recommendation that all insolvency practitioners be required to hold specialist qualifications to conduct insolvency work is not consulted on.

6. MONEY LAUNDERING

The Financial Action Task Force (FATF) has updated its Recommendations on combating money laundering and terrorist financing. These updated Recommendations now fall to be incorporated into law or regulations by national and trans-national authorities: the EU is already planning to do this via a Fourth Money Laundering Directive, which in due course will be transposed into law in the UK and other member states. While insolvency practitioners as a group are not a designated class of regulated person under the Directive, they are under UK law, and so the changes made under UK law in due course will inevitably apply to IPs.

The only slight change proposed by FATF to the steps that regulated persons should be required to take when taking on new clients or appointments is that they should expressly 'understand' the nature of the prospective business relationship (currently the Recommendations – and the UK law - only contain a requirement for them to obtain information about the purpose and intended nature of the relationship). There is no change to the range of circumstances in which they are required to take those steps. There is no change either to the rule which says that due diligence may be deferred until after the commencement of the business relationship where this is essential not to interrupt the normal conduct of businesses and where the money laundering risks are effectively managed.

The main elements that are likely to mean changes to UK law in due course, and applied to IPs, are as follows.

- There is no change in respect of 'politically exposed persons' (PEPs) from abroad: the standard set of due diligence procedures should be followed in respect of them and their family members and close associates. There is however a new focus on domestic PEPs. Carrying out the procedures will not be routinely mandatory for domestic PEPs, but regulated persons will always be required to take 'reasonable measures' to determine whether either a client or a beneficial owner is a domestic PEP (or a person who has been entrusted with a prominent function by an international organisation). Where the client or beneficial owner meets these criteria, the regulated person will be required to consider whether the business relationship would be of a higher risk: if so, the standard diligence steps should be taken.

- Banking groups will be required to adopt group-wide programmes against money laundering and terrorist financing, to include policies and procedures for sharing information within the group. These policies and procedures should be consistent with the requirements of the parent company's home country. National authorities will be entitled to view such group arrangements as providing sufficient basis for allowing group companies to rely on due diligence carried out by other entities in the group.

- There is a strengthened emphasis on the application of risk-based measures to the various procedures. For example, where the current Recommendations provide that regulated persons may determine the extent of CDD measures they should carry out on a risk basis, the new Recommendations say that that is what they should do.

- More attention is called for into the money laundering and terrorist financing risk associated with charities and non-profit making organisations.

- Regulated parties will be required to apply enhanced due diligence in respect of parties from specified countries where this is called for by FATF.

7. MONITORING UPDATE

Members are asked to note the following advice and reminders on specific practice issues.

RECORDING TIME: IP REGULATION REQUIREMENTS

Under the Insolvency Practitioners Regulations 2005, time records should be maintained even if practitioners are intending to charge fees on a fixed fee basis. The time records may be needed in case a creditor makes an appeal in court concerning the level of fees drawn.

FORM 600

Members are reminded that a liquidator who is appointed as a result of a conversion from an Administration to a CVA is still required to notify the Registrar of Companies of his appointment on Form 600 in accordance with section 109 IA 86.

ADMINISTRATION EXIT ROUTE WHERE OBJECTIVE NOT MET

It is possible for a company to go straight into a CVL using the provisions of paragraph 83 of Schedule B1 IA 86, or into dissolution under paragraph 84, and there is no need for the Administrator to apply for an order under paragraphs 79 or 85 where the objectives have not been met. Members are referred to Dear IP issue no. 22 (March 2005) and the case of **re Ballast plc [2004] EWHC 2356 (Ch).**

ANTI-MONEY LAUNDERING CHECKS

Insolvency practitioners are required to carry out due diligence checks in respect of transactions involving assets amounting to 15,000 euros or more. As it is more usual for an IP to sell assets through a solicitor or agent, to ensure that they comply, it is suggested that the best way to achieve this would be through the Terms and Conditions of Engagement.

UNCLAIMED DIVIDEND CHEQUES AND RELEASE FROM OFFICE

As of 1 October 2011 the Insolvency Services Account is no longer available in new voluntary liquidation cases. The ISA can now only be used for bankruptcies and compulsory liquidations. Unclaimed dividend cheques in other types of cases will eventually become **bona vacantia**. Any unclaimed dividends should not be transferred to the ISA prior to the expiration of six months from the issue of the cheques. In most cases, the IP would be able to deal with dividend monies after the closure of a cases as a Trust authority.

FEES IN ADMINISTRATIONS WHICH BECOME CVAS

If in an Administration there are sufficient funds to pay a prescribed part and it moves to CVL, the approval of fees already obtained rolls over to cover the liquidator's fees. If the Administration moved to CVL simply in order to distribute the prescribed part, the costs should be apportioned fairly so the simple move to CVL does not mean that unsecured creditors should suffer the whole costs.

CDDA DUTIES FOR PARTNERSHIPS

Members are asked to note that IPs have a duty to submit a D return or report for a partnership (as opposed to an LLP). The Insolvent Partnership Order 1994 specifically applies the CDDA to partnerships (Schedule 8, paragraph 6(2)(a), meaning that a D report needs to be submitted.

NOTICE OF NO DIVIDEND

The notice of no dividend can be sent at the same time that the final draft report to creditors is sent.

LATE PAYMENT OF COMMERCIAL DEBTS (INTEREST) ACT 1988

IPs may wish to include this issue in their checklists to show that it has been considered.

ESTIMATED OUTCOME STATEMENTS IN IVAS

Estimated outcome statements should be separate for both parties where there are interlocking IVAs (Dear IP 32, published in June 2007).

BANK ACCOUNTS FOR CLIENT MONIES

Page 324 of the ACCA Rulebook for 2012 addresses the issue of which banks may hold client monies in a client account.

APPOINTMENTS AS ADMINISTRATOR

IPs are reminded that the company must be served notice where an appointment as administrator was not made by the company.

8. LEGAL UPDATE

In the case of Chandler v Cape plc (EWCA Civ 525) the Court of Appeal has held that a parent company, Cape plc, was directly responsible for the health and safety of an employee of its subsidiary, Cape Building Products Ltd.

The case was brought by an employee of the subsidiary, who had been diagnosed with asbestosis as a result of a short period of employment over 50 years previously. During that period he had been exposed to significant quantities of asbestos dust. The subsidiary's liability insurance excluded claims of this type; the company had in any case since been dissolved. The employee thus brought an action for negligence against the parent. The High Court had held that Cape Plc did have actual knowledge of Mr Chandler's working conditions, and so the risk of his suffering asbestosis disease was foreseeable. Further, it had employed scientific and medical officers responsible for health and safety issues, including those of the subsidiary companies, to ensure they were not exposed to harm.

Cape Plc argued on appeal that it should not be liable, as it did not have complete control of the subsidiary company. This argument was rejected; it had effectively extended its duty of care to the subsidiary by the provision of group-wide occupational health provisions. In other words, the appeal decision rested on the finding that the parent had assumed responsibility. While Cape was not responsible for the actual implementation of the health and safety measures at the subsidiary, it had assumed a duty of care to advise Cape Products on what steps it had to take and to ensure those steps were taken.

It has held that, through its knowledge of the circumstances at the time, and by its actions, Cape plc had assumed a direct duty of care for the health and safety of the subsidiary's employees. Specifically, the parent was aware of the health dangers of asbestos and would have known that the subsidiary was carrying out its business in a way which risked health and safety, and would have known or ought to have foreseen that the subsidiary or its employees would rely on its knowledge. Another relevant factor in the Court's decision was that the parent exercised a high degree of control over its subsidiaries by virtue of its general management structure.

The Court emphasised that its decision should not be viewed as making major inroads into parents' responsibility for the liabilities of their group companies. It stated that the parent and its subsidiaries will remain separate entities, and there will be no assumption of responsibility of the kind that drove the Court's decision by reason only that a company was the parent of the other company.

9. DISINCORPORATION

While not an insolvency matter, members may wish to note that the Office of Tax Simplification is proposing that the UK introduce a new tax relief to encourage 'micro' level limited companies to disincorporate and operate instead as sole traders or partnerships. The relief will allow the business of a company, including its goodwill, to pass to an unincorporated business with no tax charge. The relief will probably also extend to property and plant and machinery that is used wholly in the trade of the business. The recommendation on this matter will in due course pass to the Government to decide on.

While these proposals will apply generally, the Treasury is conscious of the interactions between many of the mechanisms which will be relevant for solvent dissolution of a small company prior to the transfer of a continuing trade or part trade to an unincorporated trader(s), and those which would be used in an insolvency. The Treasury is keen to ensure that there are no unintended side effects of provisions enacted to try to ensure tax neutral treatment of disincorporation where there is an intention for the business to continue to trade.

A link to the consultation paper on this proposal can be found here:

http://www.hm-treasury.gov.uk/consult_fullindex.htm

10. STATISTICS

In the first quarter of 2012 there were 4,303 compulsory liquidations and creditors voluntary liquidations in England and Wales. This was an increase of 0.2% on the previous quarter and an increase of 4.33% on the equivalent period in 2011. Of the total figure, compulsory liquidations were up 11.1% on the same period in 2011 and CVLs up 1.8%. Receiverships, administrations and CVAs were all down on the same period in 2011.

There were 28,723 personal insolvencies in England and Wales in the period, a decrease of 4.7% on the same period a year ago. This was made up of 9,132 bankruptcies (down 27.2%), 7,897 DROs (up 16.3%) and 11,694 IVAs (up 8.1%.

In Scotland, the first quarter saw an increase of 35% in the number of company liquidations (of which a 49.5% rise in compulsory liquidations), and a 13.6% increase in individual insolvencies. In Northern Ireland, there was an 18% rise in company liquidations and a 15% increase in personal insolvencies.

TECH-INS-022

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