ACCA Insolvency Newsletter

This is the second issue of the ACCA Insolvency Newsletter, a twice yearly update for ACCA licence holders on matters of regulatory importance to them.

1. TECHNICAL GUIDANCE

1.1 ACCA SIP BOOKLET

The 2003 edition of the SIP Booklet will be circulated to licence holders in January 2003. It will contain the text of new and amended SIPs up to and including the revised SIP 9 (see below).

1.2 SIP 9

The revised version of SIP 9 is being circulated to licence holders by post. It becomes of standard application as from 31 December 2002.

The main changes effected by the new version of SIP 9 are as follows.

- the presentation of the statement is revised so as to give more focus to individual aspects of information provision by the office holder

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About ACCA

The Association of Chartered Certified Accountants (ACCA) is the largest, fastest growing, global professional accountancy body, with nearly 300,000 members and students in 160 countries.

- when seeking approval from a liquidation or creditors' committee for the basis of his remuneration, the office holder should provide details of the charge out rates of all grades of staff, including principals, which are likely to be involved in the case.

- when agreement is being sought to fees during the course of the administration, the additional information which the office holder should be prepared to provide should include sufficient explanation of what he has achieved and how it has been achieved to enable the value of the exercise to be assessed. A new guide (Appendix D to the statement) sets out a suggested format for the provision of this information. (NB the table set out immediately under the heading 'Suggested Format' in Appendix D is intended to indicate the format of the introductory element of the practitioner's report; the full report should incorporate the information referred to in the succeeding paragraphs of the Appendix). The revised statement acknowledges that the degree of analysis to be provided by the office holder in this connection should be proportionate to the size and complexity of the case.

- office holders are reminded that monies received by a trustee in bankruptcy in relation to the sale of the bankrupt's interest in the matrimonial home constitute realisations which must be paid into the ISA; any fees connected with the realisations should be approved in the usual way.

- more detailed guidance is given on disbursements. The revised statement acknowledges that approval is not required for the drawing of necessary disbursements, but adds that not all costs properly chargeable may necessarily be regarded as disbursements. In the absence of any statutory definition of disbursements, the revised statement suggests breaking down case-related expenditure into category 1 disbursements (where approval is not required) and category 2 disbursements (where approval is required); guidance is given on what items fit into the two categories. Specifically, payments to outside parties in which the office holder or his firm or associates have an interest are to be treated as category 2 disbursements.

1.3 CVLs AND THE INTERACTION BETWEEN SIP 8, IR 4.38 AND IR 4.53

The following is intended to be the first in a series of articles on issues that commonly arise during monitoring visits and on which the Monitoring Unit thinks it desirable to offer advice.

SIP 8 sets out the information that should be given to the creditors at the meeting convened under section 98 IA 86. It covers, amongst other matters,
information on the costs paid by the company or on its behalf, or proposed to be paid, in connection with the preparation of the statement of affairs, the arrangements for the creditors' meeting, and advice to the company or its directors since the insolvency practitioner was first consulted. The SIP requires that the name of the recipient and the amount and the source of the payment are disclosed to creditors. Indeed, IR 4.38(2) requires that the expenses of preparing the statement of affairs, if paid before the commencement of the winding up, are disclosed to the section 98 meeting.

IR 4.38(4), however, states that a liquidator can only pay money to himself for the statement of affairs fee with approval from the liquidation committee, the creditors or the court. This goes beyond the SIP 8 disclosure requirements, requiring specific approval of the fee, not just disclosure.

IR 4.53 sets out the resolutions that can be taken at first meetings of creditors, and states that no resolutions shall be taken other than those set out in the rule. Paragraph (g) permits "any other resolution which the chairman thinks it right to allow for special reasons".

The Monitoring Unit considers that resolutions of a general nature, such as those giving the liquidator power to compromise with creditors or debtors, are both inappropriate and not covered by paragraph (g), meaning that they are not permitted under IR 4.53. Resolutions of this kind should be specific, dealing with a particular compromise, and provide creditors or the liquidation committee with sufficient information to enable them to make an informed decision on whether to sanction the liquidator's exercise of the power.

The Monitoring Unit also considers that resolutions such as those giving the liquidator power to destroy the company's accounting records, to appoint solicitors, and to appoint agents are both unnecessary and not covered by paragraph (g), again meaning that they are not permitted under IR 4.53. The powers sought under such resolutions are either covered under Part III of Schedule 4 (powers exercisable without sanction) or covered elsewhere in insolvency legislation, e.g. Regulation 16(2) of the Insolvency Regulations 1994 regarding destruction of accounting records.

It is important, however, that while trying to eliminate unnecessary or inappropriate resolutions members should ensure that they take the difference between IR 4.38(2) and IR 4.38(4) into account. If the statement of affairs fee has been paid before appointment by the company, the directors or the shareholders, it is governed by IR 4.38(2) and a separate resolution is not required; it is only necessary to follow SIP 8 in disclosing the details of the fee. On the other hand, if the statement of affairs fee has not been paid before appointment, IR 4.38(4) applies and approval for the payment of the fee from asset realisations must be obtained from the liquidation committee, the creditors or the court. It is still necessary to follow the SIP 8 disclosure requirements in addition to obtaining approval for the fee.

IR 4.49 requires the liquidator to send to creditors and shareholders, within 28 days of the section 98 meeting, a copy or summary of the statement of affairs and a report of the proceedings at the meeting. Given that the fee for preparation of the statement of affairs and convening the meeting must be disclosed to creditors at the meeting, details should also be included in the report to creditors in order to ensure that it reflects the proceedings at the meeting. The same applies in respect of other information required to be disclosed to creditors under SIP 8.

2. Regulatory Guidance

2.1 INSOLVENCY PRACTICES COUNCIL LEVY

The Insolvency Practices Council (IPC) is the public interest body set up in 2000. It was formed as part of the changes introduced to the regulation of the insolvency profession following the report prepared by the '10 Years On' Working Party. When the IPC was formed, the intention was for it to be funded by the insolvency profession, in the form of a levy on all insolvency practitioners collected by their authorising body. In fact, its first two years of operation were funded by a grant received from the Barbican Trustees (the trustees distribute funds generated by one of the bond insurers). However, full funding from this source is no longer available to IPC. Consequently, the body that oversees the funding of the IPC has requested that the Recognised Professional Bodies themselves fund the IPC, with a recommendation that they charge a levy of £32 per head from their licence holders for 2003. This levy will cover approximately 50% of the IPC's costs the remainder being covered by grants from the Barbican Trustees. It is unlikely, however, that such grants will be available in future years, meaning that the practitioners levy is likely to increase in due course. ACCA will shortly be sending an invoice for this levy to each insolvency practitioner it licences.

2.2 FIXED CHARGE RECEIVERSHIP SCHEME

This is a voluntary registration scheme operated by ACCA, the Royal Institute of Chartered Surveyors and the IPA. Practitioners are reminded that if they want to join the scheme then they must now pass a qualifying examination. The closing date registration for the June 2003 examination is 31 March 2003. Application forms for membership of the scheme and examination entry can be obtained from Pat Delbridge, Practice Sector Adviser, ACCA, 29 Lincoln's Inn Fields, London, WC2A 3EE, telephone 020 7396 5954.

2.3 CENTRAL ACCOUNTING UNIT (CAU) USER GROUP MEETING

At the recent six monthly meeting of CAU's User Group, various issues were discussed that were of interest to practitioners generally.

First, CAU stressed again that it was looking to increase the use of the BACS payments service by practitioners. BACS payments are quicker, easier, and more secure than cheque payments.

They are particularly suited to high value payments and payments to creditors, or agents employed by the practitioner, who are regularly recipients of funds. To encourage practitioners to make payments using BACS, multiple BACS request forms to will shortly be made available on CAU's web-site at www.insolvency.gov.uk. This means that practitioners can make several BACS requests from the same estate account at the same time, rather than having to complete separate forms for each payment as at present.

Secondly, a four week trial of the system for on-line access to BACS started on 4 November. When this has been completed, and any problems resolved, practitioners who originally signed up for the scheme will be contacted and advised of their e-mail addresses and passwords to gain access to the system. CAU will also be carrying out a further check with practitioners to ensure that their database of cases is completely accurate.

Finally, monitoring officers are frequently asked whether it is possible for a bankrupt to make payments directly into the ISA by standing order. The answer to this is yes. The standing order should be set up in favour of the Insolvency Services Account at the Bank of England, with the case identification number (supplied by the OR on hand-over) included as a reference in the standing order. The reference then appears on the statements received by CAU from the Bank of England and enables them to ensure that the funds are credited to the correct estate account. Without a reference there will be a considerable delay before the funds reach the estate account, and the possibility that they may never be traced and credited to the account. For practitioners to monitor payments by bankrupts CAU are able to arrange for a statement to be issued whenever a standing order payment is received into an estate account. To arrange this, practitioners should contact CAU Customer Services on 0121 698 4266/8/9.

2.4 PRINCIPLES FOR MONITORING OF INSOLVENCY PRACTITIONERS

The Insolvency Service is required to regulate the various Recognised Professional Bodies (RPBs); part of this responsibility includes ensuring that they effectively monitor the practitioners that they license. Fort some years, the RPBs were required to comply with the Standards of Monitoring document issued by The Insolvency Service, but this has recently been replaced by the 'Principles for Monitoring'. This new document sets out general principles regarding monitoring, together with guidance on the aspects of an insolvency practitioner's work that that should usually be examined during a monitoring visit. The full text of the Principles for Monitoring document is set out as an Appendix to this newsletter.

2.5 THE MONITORING PROCESS

ACCA has recently reviewed its monitoring process, both as part of a regular review process, and to ensure compliance with the new Principles for Monitoring. This article is designed to give practitioners an overview of the monitoring process and ACCA's approach to monitoring.

Principles of good regulation

In its monitoring process ACCA adopts the principles of good regulation:

- **Openness** - ACCA is open about the way it works. ACCA discusses general issues or specific compliance failures or problems during monitoring visits. Although it is not possible to give legal advice, ACCA draws the attention of insolvency practitioners to the requirements of the legislation in specific circumstances, when consulted.

- **Helpfulness** - ACCA believes that prevention is better than cure and that its role therefore involves actively working with insolvency practitioners on monitoring visits to advise on and assist with their compliance with the regulations. ACCA ensures that, wherever practicable, monitoring visits are effectively co-ordinated with those of other recognised professional bodies and the Secretary of State, so as to minimise unnecessary overlaps or time delays. ACCA provides a courteous and efficient service.

- **Proportionality** - ACCA minimises the costs of compliance for insolvency practitioners by taking enforcement or regulatory action which is proportionate to the risks involved. If there is non-compliance, the action ACCA takes depends on the seriousness of the breach, the number of breaches involved and whether the existence of breaches has previously been advised to the insolvency practitioner but insufficient remedial action undertaken. This is considered in more detail below in the section headed "Three Strikes Approach".

- **Consistency** - ACCA carries out its duties in a fair, equitable and consistent manner. ACCA has arrangements in place to promote consistency, operating to a defined "insolvency monitoring programme", using checklists on monitoring visits, and subjecting reports to scrutiny and review prior to issue.

'Three Strikes' approach

Since July 1999, ACCA has operated insolvency monitoring on a 'three strikes' approach to repeated breaches of insolvency legislation, best practice or ACCA Rules. This approach is also adopted in respect of Audit Regulation.

A first unsatisfactory visit will result in a warning from the monitoring unit. An early follow up visit may take place, the timing of which will depend on the seriousness of the deficiencies and the insolvency practitioner's willingness and ability to rectify matters.

If, however, the breaches identified during this first visit are considered to be fundamental, or where dishonesty or an actual or perceived risk to creditors and/or the public has been identified, such that immediate regulatory action is required, the insolvency practitioner will immediately be referred to the Admissions & Licensing Committee for regulatory action.

The second visit will determine whether the insolvency practitioner has made significant improvements since the previous visit. If the outcome is satisfactory, then monitoring of the insolvency practitioner will continue in accordance with ACCA's routine three year insolvency monitoring cycle. Where there has been little or no effective improvement, however, the insolvency practitioner will be referred to the Admissions & Licensing Committee.

To ensure that the insolvency practitioner makes the necessary improvements, the Committee may be asked, according to the particular circumstances of the case, to consider making orders:

- setting out the time scale in which the monitoring unit will undertake a follow-up (third) visit, and for the insolvency practitioner to pay the costs of that visit;

- warning the insolvency practitioner that failure to make the necessary improvement prior to the third visit will jeopardise eligibility to hold an insolvency licence.

Where sufficient improvement has been made at the third visit the insolvency practitioner will continue to be monitored in accordance with the routine three year cycle. In most cases the insolvency practitioner can expect to have restrictions removed and his/her insolvency licence reinstated fully by the Committee at its consideration of the report on the third visit.

Where the insolvency practitioner has proved unable or unwilling to effect the necessary improvements to achieve an acceptable level of compliance, the Committee will consider his/her continuing eligibility to hold an insolvency licence. This may result in the Committee making an order suspending the licence, or withdrawing the licence altogether, as it thinks fit. Any order made by the Committee may also provide for its action to be publicised.

Principles for Monitoring

The Principles for Monitoring document *(see previous item)* sets out general principles with regard to monitoring, together with guidance on aspects of an insolvency practitioner's work that that should be examined on a monitoring visit. ACCA ensures that, wherever possible, it fully complies with the Principles for Monitoring, both the general principles and the specific requirements, during the course of a monitoring visit.

With regard to the general principles of monitoring, ACCA's approach is as follows:

- **Monitoring cycle** - ACCA operates a 3 year monitoring cycle. This is a rolling programme of monitoring visits working on the general principle that the usual duration between monitoring visits is 3 years. The actual duration between visits depends on the outcome of the last monitoring visit, together with any matters identified through desk top monitoring. Exceptionally, where the last monitoring visit showed that the insolvency practitioner was undertaking work to a high standard and had a high level of statutory and best practice compliance, then the duration between visits can be extended to 4 years.

- **Desk-top monitoring** - ACCA undertakes desk-top monitoring to assist in determining the frequency between monitoring visits, using information that comes into its possession. This includes default information regarding enabling bonds and bordereaux, information regarding proven complaints, and default information provided by the Insolvency Practitioner Compliance Unit.

- **Notice of monitoring visits** - insolvency practitioners should receive sufficient notice to ensure that they are able to provide a written response to a pre-visit questionnaire (PVQ), provide case details, and make arrangements to accommodate the monitoring officers.

Practitioners should generally receive 4-6 weeks notice of a monitoring visit. A PVQ is always sent where the insolvency practitioner has not been visited before. Where an insolvency practitioner has already been visited by ACCA, however, consideration is given to asking for an update on the information provided in the last PVQ.

- **Sample size/selection of cases** - ACCA monitoring officers examine sufficient cases to enable them to report accurately and fairly on the fitness and propriety of the insolvency practitioner. Monitoring officers take into account a number of factors when determining the sample of cases, and try to ensure that the case selection satisfies all of the following factors :
  - the different types of insolvency appointment undertaken by the practitioner, to ensure that they examine a case of each type;
  - the ages of the cases, to ensure that they examine opening procedures, statutory compliance, progression, and closing procedures;
  - the value of funds held in cases;
  - open cases and those closed within the 12 months prior to the monitoring visit, to ensure that they examine both categories of case;
  - the case administrators and managers involved on cases to ensure that they examine the work of all staff;
  - cases examined on earlier monitoring visits are not re-examined wherever possible. If they are re-examined, say as a result of a lack of viable alternatives, or to check on progression, then the monitoring officer should only examine and report on work undertaken since the earlier monitoring visit;
  - during a visit, once the monitoring officer has examined sufficient cases of each particular case type to enable an objective decision to be made on the fitness and propriety of the insolvency practitioner no further cases need be examined;
  - during a visit, if it is not possible for the monitoring officer to make an objective assessment of the fitness and propriety of an insolvency practitioner from the cases selected, they will select and examine further cases;
  - the monitoring officer will examine a total sample representing approximately 5% of open cases and those closed in the 12 months prior to the monitoring visit.

The monitoring officer will try and select the fewest number of cases that will satisfy the selection criteria.

Insolvency Monitoring Programme

ACCA has devised an “Insolvency Monitoring Programme” (IMP), which sets out the practical operation of its insolvency monitoring policy. Whilst ACCA had regard to the Standards for Monitoring in devising this programme, it has not been fettered by them, and where appropriate it has extended the scope of its monitoring to consider aspects of an insolvency practice not covered by the Standards document but on which ACCA’s own Rules and Regulations impose obligations on the insolvency practitioner.

Underpinning ACCA’s insolvency monitoring policy is the object of ensuring that an insolvency practitioner complies with The Fundamental Principles. These are obligations that are placed on all members and are set out in Rule 3.1 of the Rules of Professional Conduct:

- Members should behave with integrity in all professional, business and personal financial relationships. Integrity implies not merely honesty but fair dealing and truthfulness.
- Members should strive for objectivity in all professional and business judgements. Objectivity is the state of mind which has regard to all considerations relevant to the task in hand but no other. It presupposes intellectual honesty.
- Members accept or perform work which they are not competent to undertake unless they obtain such advice and assistance as will enable them competently to carry out the work.
- Members should carry out their professional work with due care, skill, diligence and expedition and with proper regard for the technical and professional standards expected of them as members.
- Members should behave with courtesy and consideration towards all with whom they come into contact during the course of performing their work.

There are various areas where ACCA’s Rules of Professional Conduct and The Chartered Certified Accountants’ Practising Regulations 1998 impose additional obligations on the insolvency practitioner beyond those required by the Standards for Monitoring. These areas, which are examined during a monitoring visit to ensure that the insolvency practitioner meets such obligations, are as follows:

- money laundering;
- adequacy of Professional Indemnity Insurance;
- sufficiency of Continuing Professional Development; and
- adequacy of successor practitioner arrangements.

Format of monitoring visits

All monitoring visits take the following format, unless there are exceptional reasons for not doing so.

- **Initial interview with the insolvency practitioner** - where the monitoring officer will outline the format of the monitoring visit; seek explanations on issues arising from the PVQ and the last monitoring visit; raise general practice issues; and provide the insolvency practitioner with a list of case files and documents they require.
- **Practice review** - this involves:
    - *Case file examination* - where the monitoring officer examines the selected cases for statutory and best practice compliance, and considers the general standard of the work undertaken by the insolvency practitioner. This forms the bulk of the work on the monitoring visit.

The general principle is that the monitoring officer raises every instance of statutory and best practice non-compliance. The monitoring officer records on “query sheets” instances of non-compliance. He/she will also use the “query sheets” to clarify issues and seek information. When the monitoring officer has completed a case examination the case files and “query sheets” are passed to the insolvency practitioner for them to respond in writing, to the queries raised. The monitoring officer considers the insolvency practitioner's responses to the queries and discusses them with the practitioner. During the discussion, which will take place during the monitoring visit, the monitoring officer will advise the insolvency practitioner which of the queries will appear in the report. He/she will similarly indicate that on the query sheet. Practitioners should take copies of the final query sheets so that they are aware of the issues that are being raised on a case by case basis and which will appear in the report.

Insolvency practitioners are encouraged to respond to the queries raised as quickly as possible, as the monitoring visit cannot be completed until the monitoring officer has examined them and discussed them with the practitioner.

– *Systems examination* - where the monitoring officer obtains information about financial, control, review, bonding, complaint and other systems operated by the practice. The monitoring officer will usually be able to undertake this as part of the case review process.

– *ACCA continuing obligations* - where the monitoring officer verifies the insolvency practitioner's continuing eligibility to hold an insolvency licence under the Chartered Certified Accountants' Practising Regulations 1998 and compliance with the Rules of Professional Conduct. The monitoring officer undertakes this through the PVQ, examining case files and through direct questioning of the insolvency practitioner. This includes examining professional indemnity insurance policies, arrangements for continuity of practice, CPD records, the operation of office and clients accounts, the financial accounts of the practice, and questioning the practitioner recording obligations with regard to money laundering.

– *Exit interview* - where the monitoring officer discusses the findings of the monitoring visit with the insolvency practitioner. This does not involve identifying every compliance default, since the practitioner is aware of these from the query sheets, but rather the monitoring officer will raise the serious issues and those that recur.

  The monitoring officer will usually also indicate to the insolvency practitioner whether the outcome of the monitoring visit is "satisfactory" or "unsatisfactory". There will be occasions, however, where the outcome is marginal, and it is not appropriate for the monitoring officer to indicate the outcome in such circumstances. Instead, just the report will indicate the outcome. If it is clearly an unsatisfactory outcome, the monitoring officer will also indicate the likely time-scale of the next monitoring visit. If it is a second unsatisfactory monitoring visit he/she will indicate whether the practitioner is to be referred to the Admissions & Licensing Committee in accordance with the 'Three Strikes' approach set out above.

Report

As a general principle, the report only includes matters drawn to the insolvency practitioner's attention during the course of the monitoring visit. Occasionally, however, it is unavoidable that additional matters are raised in the report. In such instances, the additional matters are specifically drawn to the insolvency practitioner's attention in the letter accompanying the report.

The monitoring officer prepares the report from the query sheets and the information he/she has recorded in the IMP. Each report is then subject to a review by another member of staff within the monitoring unit. In the event that the report is to be presented to the Admissions & Licensing Committee, then it will be subject to a second review.

The report is issued as soon as practicable after the conclusion of the monitoring visits, i.e. after the exit interview has been undertaken, and within 30 working days wherever possible.

The report issued to the insolvency practitioner is a "final" as opposed to a "draft" report. Notwithstanding this, the insolvency practitioner should respond to practitioners' comments on the report both with regard to the accuracy of the factual content of the report and their proposals for rectifying the deficiencies found. If the report is found to be significantly inaccurate then it will be amended and then reissued.

3. Legislation

3.1 ENTERPRISE ACT

The Enterprise Bill received the Royal Assent on 7 November 2002.

In addition to the well-publicised reforms to the period of bankruptcy, Crown preference and administrative receivership, the Act makes significant changes to the provisions of the insolvency Act concerning the bankrupt's home.

A new section 283A is to be added to the Insolvency Act 1986. Under this new section, a home which, at the date of the bankruptcy order was the sole or principal residence of the bankrupt, his/her spouse or former spouse, will cease to be part of the bankruptcy estate after three years from the date of the order. (This period may be extended in circumstances to be prescribed and at the court's discretion). If by that time, the trustee has not taken steps to realise or possess the property, it will once more vest in the bankrupt.

Where a trustee has applied for a charging order in respect of the property in question, and it is dismissed, then, unless the court orders otherwise, the property concerned forthwith ceases to be part of the bankrupt's estate and vests once more in the bankrupt.

Another new section, s313A, will apply in relation to 'low value homes'. Again in relation to a property which, at the time of the bankruptcy order was the sole or principal residence of the bankrupt, his/her then or former spouse, any application by the trustee for the sale, possession or charge of the property must be dismissed if the value of the property is below an amount to be prescribed.

The provisions on corporate insolvency and Crown preference are likely to be brought into effect by statutory instrument early in the 2003 financial year. Those provisions relating to personal insolvency, and the changes to the Insolvency Service's financial regime, are not likely to come into effect until 2004, partly due to the internal arrangements which will need to be put in place to accommodate new procedures for investigating the circumstances of individual bankruptcies.

3.2 COMPANY LAW REFORM

The DTI's White Paper on company law reform was published in July 2002. As part of the DTI's plan to codify, in the forthcoming Companies Act, the common law duties of company directors, the White Paper proposes to extend to the generality of directors' actions the 'objective test' of skill first set out in s214 of the Insolvency Act 1986: directors will at all times be required to act in accordance with both a 'subjective' test of skill and an 'objective' test. Although the Final Report of the Company Law Review Steering Group had proposed that any new statutory Code should incorporate a specific duty to the company's creditors, in line with the principle established in *West Mercia v Dodds*, this has so far been rejected by the DTI.

Given the on-going Governmental inquiries into Non-Executive Directors and post-Enron issues (such as the role of audit committees and the provision of non-audit services), it now seems likely that the presentation of the planned Companies Bill to Parliament will be deferred until the 2003-04 session.

The European Commission has meanwhile completed its own, parallel, review of company law in the EU. The report of the 'High Level Group of Company Experts' published its report and recommendations in November 2002. Among the recommendations made are the following:

- There should be an EU-wide 'wrongful trading' rule based on the UK model
- The European Commission should consider the feasibility of EU-wide disqualification for company directors who are found guilty of specified instances of misconduct
- Company registration agencies in the various member states should be linked to facilitate ease of access to information by searchers
- Listed companies should be required to publish all their legal and regulatory disclosures on a specific part of their web site
- There should be a new, cross-border business format called the European Private Company.

The report was discussed at a meeting between the Commission and the European Parliament's Legal Affairs Committee on 27 November; there will be further discussions with member states over the coming months before the Commission makes a decision on how to take matters forward early in 2003

3.3 EC REGULATION ON INSOLVENCY

A number of statutory instruments have been issued to make amendments to the Insolvency Act 1986, the Insolvency Rules 1986 and other secondary legislation in order to reflect in UK law the EC Regulation on insolvency proceedings (1346/2000).

The instruments are as follows:

The Insolvency Act 1986 (Amendment) Regulations 2002 SI 2002/1037
The Insolvency Act 1986 (Amendment) (No 2) Regulations 2002 SI 2002/1240
The Insolvency (Amendment) Rules 2002 SI 2002/1307
The Insolvent Partnerships (Amendment) Order SI 2002/1038
The Administration of Insolvent Estates of Deceased Persons (Amendment) Order 2002 SI 2002/1309

All are now in force. Each of these documents can be accessed and downloaded from the HMSO web site: http:/www.hmso.gov.uk

3.4 INSOLVENCY ACT 2000

The statutory provisions relating to the new CVA moratorium procedure for small companies, including modifications to who may act as nominee of a voluntary arrangement, come into force on 1 January 2003, thereby ensuring that the whole of the Insolvency Act 2000 will be in force by that date.

The various instruments giving effect to the new provisions are as follows:

Insolvency Act 2000 (Commencement No 3 and Transitional Provisions) Order 2002 (SI 2002/2711)

Insolvency Practitioner (Amendment) (No 2) Regulations 2002 (SI 2002/2748)
Insolvency Practitioner (Amendment) Regulations 2002 (SI 2002/2710)
Insolvency (Scotland) Amendment Rules 2002 (SI 2002/2709)
Insolvency Act 2000 (Commencement No 2) Order 2001 (SI 2001/1751)
Insolvency Act 1986 (Amendment) (No 3) Regulations 2002 (SI 2002/1990)

The moratorium provisions are also extended to partnerships via the Insolvent Partnerships (Amendment) Order 2002 (SI 2002/2708)

Following the case of Lewis v Commissioners of Inland Revenue, IRs 4.218 and 6.224 are also amended, with effect from 1 January 2003, to provide that liquidators and trustees in bankruptcy will be able to recover property incurred costs in the relevant order of priority out of the assets of the estate. The changes are made under the Insolvency (Amendment) Rules 2002 (SI 2002/2712).

4. Recent Cases

4.1 LIABILITY TO CORPORATION TAX

The House of Lords has ruled on the liability to tax of post-liquidation profits.

Joint liquidators had applied for directions in the case of a company whose sole realisable asset was a debt owed to it by another group company. When paid, the debt amounted to the principal only, without the interest which the company was in any case deemed to have received by the ICTA 88. The point at issue was whether the interest counted as an expense of the winding up and therefore fell to be paid in priority to provable debts. The Appeal Court had overturned the lower court's ruling that the tax payable was not a 'necessary disbursement' under IR 4.218(m) and that corporation tax arising other than on the sale of assets did not count as an expense.

The Lords upheld the Appeal Court's ruling. It was clear that companies were chargeable to corporation tax on profits and gains arising in the winding up. It followed from this that tax was a post-liquidation liability which liquidators were bound to discharge and was therefore a 'necessary disbursement' under IR 4.218.

Re Toshuku Finance plc v Inland Revenue (BCLC [2002] UKHL 6)

Judgement given 21 February 2002

4.2 APPLICATIONS OUT OF TIME

Under s262 IA 86, specified parties may apply to the court for the revocation or suspension of an individual voluntary arrangement previously approved at a meeting held under s257. Applications must be made within 28 days of the meeting decisions being reported to the court under s259.

The liquidator of Warley made an application under s262 in respect of an IVA already approved in the name of Mr Johal, one of the directors of Warhal, claiming material irregularity. The agreement had been approved on June 26 and the required report was filed on July 2; the liquidator's application was lodged on 12 September, beyond the time limit set by s262.

Under s376 IA 86, the court may extend statutory time limits imposed by the Act. The court has total discretion as to whether or not to grant any application made.

It was held that the exercise of this discretion should involve the balancing of considerations such as the length of the delay, the merits of the underlying complaint, prejudice to the parties, as well as other relevant considerations.

In this case, it was decided that although the application was considered to be well founded, its merits were held to be outweighed by the significant delay for which there was no justification.

Warley Continental Services Ltd (in liquidation) v Johal (*The Times*, 28 October 2002)

Judgment given 7 October 2002

4.3 REMOVAL OF LIQUIDATORS

Under s108(2) IA 86 the court may remove and replace a liquidator 'on cause shown'.

To be successful in showing cause, the application must have good grounds and it is the responsibility of the individual applicant to establish those grounds. It was inappropriate to specify in advance what constitutes appropriate grounds for a successful application.

In general, the courts should be reluctant to grant applications simply because a liquidator's conduct has proved to fall short of the ideal in isolated respects, since to do so would encourage applications from creditors who were, for whatever reason, dissatisfied with a liquidator.

AMP Enterprises Ltd v Hoffman (*The Times*, 13 August 2002)

4.4 GAMBLING AND BANKRUPTCY

The Court of Appeal has rejected a plea that the statutory offence of materially contributing to one's own bankruptcy by gambling, under s362(1)(a) IA 86, was affected by the Human Rights Act. The Court upheld the lower court's ruling that the offence was one of strict liability and did not require *mens rea.*

R v Muhamad (*The Times*, 16 August 2002)

Judgement delivered July 19 2002

4.5 SECURED ASSETS IN A LIQUIDATION FOLLOWING RECEIVERSHIP

The Court of Appeal has ruled on the entitlement of a liquidator to recover expenses from assets which were secured by a floating charge.

The High Court had ruled that the assets out of which joint liquidators were entitled to be paid expenses and remuneration, under s115 IA 86, included those assets which were subject to a floating charge which had crystallised before the commencement of the liquidation in priority to the claims of the chargee. The receivers and the chargee appealed against the ruling.

The Appeal Court confirmed that the liquidator may look to assets subject to a crystallised charge to fund expenses properly incurred in priority to the claims of the chargee so far as such property remains undistributed.

The receiver is required under s40 IA 86 to pay the receivership preferential creditors out of the charged assets in priority to the chargee. Where this is done, the assets concerned no longer constitute secured property for the purposes of s175(2)(b) IA 86, out of which preferential creditors in the liquidation need to be paid. But assets which have not come into the hands of the receiver by the start of the winding up do count as secured property for the purposes of s175(2)(b). So far as the available assets are insufficient to meet the liquidation preferential debts, those debts stand to be paid out of the charged property.

Leave for appeal to the House of Lords was refused in this case.

Re Leyland Daf Ltd ([2002] ECWA Civ 228)

Appendix: Principles of Monitoring

1. INTRODUCTION

The Insolvency Service as an authorising body and the Professional Bodies recognised by The Secretary of State for the purpose of authorising insolvency practitioners (together referred to herein as "the Bodies") have agreed a Memorandum of Understanding which has been signed by all the Bodies. The Memorandum of Understanding requires the Bodies to subject authorised practitioners to monitoring in accordance with a Standard for Monitoring to be agreed between the Secretary of State and the Bodies.

2. PURPOSE OF MONITORING

The purpose of monitoring is to enable each of the Bodies to make an objective assessment of the conduct and performance of practitioners authorised by it and to ascertain whether the practitioner is, and continues to be, fit and proper.

3. ACHIEVING THE PURPOSE

3.1 Responsibility

It is the responsibility of each of the Bodies to ensure that the practitioners authorised by it are monitored in accordance with this Standard. This responsibility will remain even if the monitoring is carried out by a third party.

3.2 Desktop Monitoring

Reasonable steps should be taken to obtain all available information from Insolvency Practitioners and from sources independent of practitioners to assist in achieving the purpose of monitoring. Information so obtained shall be considered on the renewal of authorisations and when determining the frequency of monitoring visits.

3.3 First Appointments as an Office Holder

When an authorised practitioner begins to accept appointments as an officeholder, the authorising body should arrange an early monitoring visit unless it is satisfied that such a visit is unnecessary.

3.4 Monitoring Visits

Every practitioner holding at least one appointment as an insolvency officeholder shall be subject to monitoring visits. The frequency of visits shall be determined by each of the Bodies having regard to the following:-

3.4.1 The period between monitoring visits is normally expected to be 3 years.

3.4.2 If satisfactory risk assessment measures are employed, the gap between visits may be extended but must not exceed 6 years.

3.4.3 Targeted interim visits should be made if a Body becomes aware of concerns about a practitioner's activities. Such concerns may arise from previous monitoring visits, from desktop monitoring, from complaints or otherwise.

A practitioner who does not hold any appointments as an insolvency officeholder, and has not held such appointments in the relevant period will not normally be subject to monitoring visits. However such a visit may be undertaken if the authorising body considers it is appropriate to do so. The relevant period for this purpose is the period since the issue of the authorisation or the previous monitoring visit, whichever is the later.

4. KEY MONITORING ISSUES

4.1 Compliance

Steps should be taken to check satisfactory levels of compliance with all relevantaspects of insolvency law and practice including the following legislation:

- England & Wales
    - The Insolvency Act 1986 and all subsidiary legislation including the Insolvency Rules 1986, the Insolvency Regulations 1994 and The Insolvency Practitioners Regulations 1990 (all as amended). The Company Directors Disqualification Act 1986 (as amended).
    - Other relevant legislation.

- Scotland

  - The Bankruptcy (Scotland) Act 1985 and the Bankruptcy (Scotland) Act 1993, the Insolvency Act 1986 and all subsidiary legislation, including the Insolvency (Scotland) Rules 1986 and The Insolvency Practitioners Regulations 1990 (all as amended). The Company Directors Disqualification Act 1986 (as amended).

  - Other relevant legislation.

- Northern Ireland

  - The Insolvency (Northern Ireland) Order 1989 and all subsidiary legislation including the Insolvency Rules (Northern Ireland) 1991, the Insolvency Regulations (Northern Ireland) 1996 and the Insolvency Practitioners Regulations (Northern Ireland) 1991 (all as amended)

  - The Companies (Northern Ireland) Order 1989 (as amended)

  - Other relevant legislation

Together with:-

- Common Law

- The bye-laws, rules, regulations and continuing professional education requirements of the Body.

- Bonding requirements.

4.2 Professional Competence

Checks on professional competence should include, but not necessarily be restricted to, a review of the following:-

4.2.1 The systems and controls employed by the practitioner to ensure the proper conduct of his work.

4.2.2 The ability of the practitioner to carry out the work which he undertakes. This should include an examination of the facilities available to the practitioner, and the competence and suitability of his partners, fellow principals, staff and sub contractors and the suitability of professional advisers, agents and contractors.

4.2.3 The level of control exercised by the practitioner in cases where he is the office holder.

4.2.4 The financial systems employed by the practitioner including a check on the way in which remuneration and disbursements are authorised and drawn and receipts and payments are handled and accounted for.

4.2.4 Whether there are regular occurrences of undue or unwarranted delays in dealing with the officeholder's duties or with correspondence.

4.2.5 The procedures for and manner of dealing with complaints.

4.2.6 Any undue influences to which the practitioner is exposed including financial, emotional, professional or those exerted by significant work providers.

5. PRACTICES WITH AUTHORISATIONS FROM MORE THAN ONE AUTHORISING BODY

It is not unusual for a firm or practice to include partners and staff who are authorised by different authorising bodies. In these circumstances the following will apply:-

5.1 Wherever practical the authorising bodies or their monitoring agents should liase with a view to undertaking a combined monitoring visit.

5.2 If there is no joint visit and a monitoring visit to one practitioner highlights shortcomings in the work undertaken on cases by a practitioner authorised by a different Body, a note of those shortcomings should be provided to that Body whether or not the practitioner is an office holder.

6. JOINT APPOINTMENTS

Where a monitoring visit to a practitioner highlights shortcomings in the work undertaken on cases by a joint appointee who is licensed by another Body, a note of those shortcomings should be provided to that Body as soon as possible.

7. MONITORING REPORTS

A written report should normally be provided to the practitioner and the Body within 30 working days of the conclusion of the monitoring visit. Any serious matter for concern shall be reported to the Body as soon as possible.

Reports should be sufficiently detailed to assist each of the Bodies to make an objective assessment of the conduct and performance of the practitioner authorised by it and to ascertain whether the practitioners are, and continue to be, fit and proper.

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