ACCA Insolvency Newsletter

This is the fifth 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 CHANGES TO STATEMENTS OF INSOLVENCY PRACTICE

Amendments have been made to SIPs 9 and 15 so as to reflect the provisions made by and under the Enterprise Act 2002, which came into effect on 15 September 2003. The revised statements come into effect on 1 July 2004.

SIP 9

The main changes introduced by the revised SIP 9 are as follows:

i) Section 2 of the SIP is amended to clarify that the statutory rules which govern the treatment of remuneration issues in administrations are determined by whether the administration commenced before or after 15 September 2003. If a case did commence before that date, then the

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About ACCA

The Association of Chartered Certified Accountants (ACCA) is the largest, fastest growing, global professional accountancy body, with nearly 320,000 members and students in 160 countries.

Insolvency Rules as they stood before 15 September continue to apply. Where the case commenced after that date, then the rules to apply are those as amended by the Insolvency (Amendment) Rules 2003 (SI 2003/1730). As far as approval of office holders' remuneration is concerned, the 'revised' rules are for the most part similar in substance to the previous rules, but 'revised' IR 2.106(9) contains special provisions which apply where the administrator has stated in his proposals that the company has insufficient assets to make distributions to unsecured creditors other than out of the fund set aside out of floating charge assets.

ii) Under the new regime, resolutions of creditors in administrations may be taken by correspondence.

iii) Where a bankruptcy order is made on or after 1 April 2004, the relevant statutory scale will be that set out in Schedule 6 of the Insolvency Rules (as inserted by the Insolvency (Amendment) Rules 2004).

iv) As previously notified, Version 2 of SIP 9, which came into effect on 31 December 2002, should be complied with in respect of cases beginning on or after that date. The 'new' version (version 3) should be complied with in respect of all cases to which the new statutory rules apply.

v) The creditors' guides, which accompany the SIP, have all been revised to incorporate the detailed changes contained in the revised legislation.

Where a practitioner seeks to recover category 2 disbursements, SIP 9, paragraph 6.3, states that he may do so provided that such expenses are of an incidental nature and are directly incurred on the case, and "the basis of the proposed charge is disclosed and is authorised by those responsible for approving his remuneration." The SIP does not specifically require details of the basis of the proposed charge for category 2 expenses to be provided to all creditors, as is the requirement with Guidance Notes on remuneration (paragraph 3.1). However, the monitoring unit considers that in the interests of transparency and disclosure it is good practice to do so and recommend that practitioners include a schedule setting out the basis of their category 2 charges whenever they issue SIP 9 Guidance Notes.

Similarly, SIP 9, paragraph 3.3, indicates that the practitioner should provide any creditors' or committee meeting at which approval is sought as to the basis of remuneration, with details of charge out rates of all grades of staff likely to be involved in the case. The monitoring unit considers that where approval is being sought at a creditors' meeting, then in the interests of transparency and disclosure it is good practice to issue details of charge out rates to all creditors, rather than just those present at the meeting. It is recommended that practitioners include details of charge out rates whenever they issue SIP 9 Guidance Notes.

Both these recommendations are good practice, such that failure to do so is not a statutory or best practice breach.

There has been a degree of uncertainty about the treatment of mileage expenses for use of personal or company cars, that is whether they are category 1 or category 2 expenses. The monitoring unit considers that since mileage rates for the use of personally owned cars or "company" cars include an element of shared or allocated costs relating to insurance, car tax and depreciation for example, then these are in the nature of category 2 expenses. The exception to this is where the expense charged only relates to direct petrol/diesel expenses incurred on travel directly incurred on the case, such that it is in the nature of invoiced travel expenses and hence a category 1 expense.

SIP 15

The changes introduced by the revised version of SIP 15 (Reporting and providing information on their functions to committees in formal insolvencies) also reflect the changes to the rules on administrations and administrative receiverships made by the Enterprise Act and recognise a distinction between relevant cases which commenced before and after 15 September 2003. The main changes are:

i) in a case which is governed by the 'new', 2003 regime, where an administrator intends to resign he must give the committee at least seven days' notice of his intention to do this regardless of whether there is a continuing administrator. (Under the former regime, the obligation to notify the creditors committee did not apply if there was a continuing administrator in place). Also, there is no longer a specific requirement to send a receipts and payments account to all committee members since there is a new requirement to send reports, including a receipts and payment account, to all creditors.

ii) in administrative receiverships, the receiver must send an account of his receipt and payments to each member of the committee; if he intends to resign he must give the committee at least seven days notice of his intention; and where he vacates office he must forthwith give notice to the members of the committee.

iii) in cases where there are no statutory requirements for written reports, practitioners are required to ensure that whatever arrangements they make for reporting to a committee are properly documented.

The purpose of SIPs

The introductory section of the revised versions of both SIPs 9 and 15 also incorporate the revised statement of the status of SIPs. The introduction says, in particular, that 'The purpose of SIPs is to set out basic principles and essential procedures with which insolvency practitioners are required to comply. Departure from the standard(s) set out in the SIP(s) is a matter that may be considered by a practitioner's regulatory authority for the purposes of possible disciplinary or regulatory action.'

ACCA and the other regulatory bodies, acting through the Joint Insolvency Committee, have agreed, that for reasons of consistency, this statement of purpose should be taken to apply to all previously issued SIPs, and members should therefore read all previously issued SIPs accordingly.

Hard copies of the new SIPs are being distributed to ACCA licence holders during May. Electronic copies will be available on the ACCA web site http://www.acca.org.uk/practicechannel/publications/sips_index/ before the implementation date of 1 July.

1.2 AUDITOR AND DIRECTOR LIABILITY

The DTI has consulted with interested parties about the possibility of making changes to the law to limit the legal liability for negligence of company directors and auditors. The Government has been encouraged to consult on these issues earlier than it had planned primarily because of i) concerns that fear of liability is hampering companies' ability to recruit the new non-executive directors which last year's Higgs Report called for; and ii) concerns about the effect on competition of any further constriction in the number of audit firms able to service the listed company sector. With respect to auditors, the most likely course of reform would be to amend section 310 of the Companies Act 1985 so as to allow auditors to agree with their company clients a contractual cap on their liability for negligent work. Any reform of this kind would, however, be dependent on the consultation process indicating strong support for it from a range of stakeholder groups. Should there be strong support for any of the options discussed in the consultation paper, new clauses could be introduced into the Companies (Audit, Investigations and Community Interest) Bill which is currently proceeding through Parliament.

1.3 INSOLVENCY STATISTICS

According to the official statistics for insolvencies in England and Wales in the fourth quarter of 2003, there were 3,316 company insolvencies, a decrease of 1.9% on the third quarter and a decrease of 22.5% on the fourth quarter of 2002. 0.9% of active companies became insolvent in the calendar year 2003. There were 10,271 individual insolvencies in the fourth quarter of 2003, an increase of 12% on the third quarter and an increase of 28.9% on the corresponding quarter in 2003.

2. Regulatory Guidance

2.1 EC REGULATION ON INSOLVENCY PROCEEDINGS

As members will be aware, the above Regulation came into force on 31 May 2002 and deals with cross-border insolvencies.

The European Commission is charged with monitoring the effect that the Regulation is having and has already begun this task, working through the Judicial Network in Civil and Commercial Matters. This Network has produced a series of questions, which are set out in an Appendix to this edition of the Newsletter on pages 20 to 22.

Individual members are invited to forward their comments on these issues to Stephen Leinster of the Insolvency Service at stephen.leinster@insolvency.gsi.gov.uk Comments should be submitted by 1 June 2004.

2.2 JIC ANNUAL REPORT

The 2003 annual report from the Joint Insolvency Committee can be accessed via the ACCA web site at www.accaglobal.com/pdfs/miscellaneous/JIC_report_2003.pdf
The report sets out JIC's continuing commitment to reviewing the context of all existing SIPs and states that, following lobbying by JIC during 2003, the Insolvency Service will issue a consultation paper on changes to the bonding regulations later in 2004.

2.3 APPROACH TO MONITORING

The principal purpose of monitoring is to help determine whether an insolvency practitioner is "fit and proper". The main matters usually referred to within monitoring reports brought before ACCA's Admissions and Licensing Committee are breaches of legislation and best practice as set out in the SIPs (i.e. compliance breaches) and breaches of the fundamental principles of ACCA's Rules of Professional Conduct. The fundamental principles include the need to behave with integrity; to only accept work that the person is competent to undertake; and to undertake work with due skill, care, diligence and expedition.

Whilst all compliance breaches found during a monitoring visit are disclosed to the practitioner by inclusion on "query sheets," and are also generally included in the monitoring report, clearly not all breaches carry the same significance. For example, issues relating to bonding, remuneration and SIP 11 are amongst the more significant. In addition, the repeat of a compliance default included in a previous monitoring report increases the significance of the breach.

This dual approach to monitoring reflects the dual approach that a practitioner must have to his or her practice – ensuring compliance with the legislation and the SIPs, but also actually doing the job properly – realising all the assets, maximising recoveries, and doing so without undue delay. If either of those two elements is not being dealt with properly then there will be problems within a practice, usually with regulatory consequences, as they will result in a poor standard of compliance or work.

During a monitoring visit, whilst it may appear that the monitor is solely looking for statutory or best practice compliance breaches, this is not in fact the case. The practitioner's systems are also being considered and tested, and an objective assessment being made about how they actually perform their work. In the vast majority of cases, the problems that are found with the way that a practitioner undertakes his or her work will give rise to comments in the "case progression and other matters" section of the report. Essentially, these are matters of good practice that the monitoring unit cannot require practitioners to adopt, but which are considered to be beneficial to them if they do. Examples of such matters are: noting the practitioner's interest in buildings insurance on properties in personal insolvency proceedings; disclosure of information to creditors in excess of that required by the legislation or SIPs; inaccurate case records, such that the practitioner is not aware of all cases where they are office holder; delays in dealing with assets; delays in closing cases; and the practitioner's lack of control of their cases. On rare occasions, however, the extent of such deficiencies found in a practice means that the practitioner is in breach of the fundamental principles, which then impacts on their fitness and propriety.

Effective regulation is about raising standards, and whilst the principal aim of monitoring is the assessment of fitness and propriety, the monitoring officers can, and indeed do, provide suggestions on solutions to issues found within a practice. They can bring to a practice an external objective view, and use their experience from undertaking numerous monitoring visits. However, practitioners should not just rely on monitoring visits to identify deficiencies in their compliance and practice systems and then provide solutions. They should take responsibility for this themselves, using the monitoring visit to check on the position they have reached. It is particularly important to take prompt steps to remedy the defects found on a monitoring visit given that the monitoring unit attaches a higher significance to repeated compliance defaults.

2.4 BONDING AS NOMINEE

Practitioners are reminded that section 4 of the Insolvency Act 2000 included acting as a nominee in respect of a voluntary arrangement within the definition of acting as an insolvency practitioner. Consequently, since 31 May 2002 it has been necessary for a practitioner to obtain a specific penalty bond whenever he or she is appointed nominee. The monitoring unit has found that there has been some uncertainty as to when a practitioner is appointed as nominee. The monitoring unit considers that a practitioner is appointed as nominee in respect of an individual when he endorses the written notice given to him by the debtor under rule 5.4 of the Insolvency Rules 1986 confirming his or her agreement to act. Similarly, in respect of companies, the relevant date is when the written notice is endorsed under rule 1.4. The date of appointment must be included in the practitioner's bordereau return, or ACCA's Authorisation Department, to whom the bordereau is submitted, will write to the practitioner requesting this information. NB leaving the field blank in IPS results in a default date of 1899 being entered on the bordereau, meaning that the bordereau appears to be rather late!

In the absence of specific reference in the insolvency legislation, the advice of the monitoring unit has also been sought on the level of specific penalty bond that a nominee need obtain. The monitoring unit considers that obtaining a bond for the minimum prescribed amount, £5,000, will usually suffice. However, where funds have been deposited with the practitioner in anticipation of approval of the voluntary arrangement, then the monitoring unit considers that the level of the bond should exceed the level of funds so held, although there is no legislative authority for this.

2.5 PHOENIX COMPANIES AND SIP 13

Insolvency practitioners selling the assets of a company to the directors or a successor company in which they are involved is a very emotive subject. It is understandable for creditors to react negatively when they see the same directors undertaking the same work, using the same equipment, and usually from the same premises. The automatic reaction of the creditors is to cry "foul", even if it is in fact the best, or indeed the only option available for the practitioner. Consequently, it is an area which gives rise to a large number of complaints from creditors.

In view of this, it is an area where practitioners should ensure that they always fully comply with the provisions set out in SIP 13, particularly the disclosure provisions in section 6. Indeed, practitioners should also consider going the "extra mile" and giving a clear explanation of why the assets were sold to the directors or their successor company; what alternatives were considered by the practitioner; and why selling the assets to the directors or the 'successor' company was the best option.

Whilst there are some creditors who will always complain, no matter how much of an explanation is given to them, giving this extra information should help the practitioner avoid becoming the subject of a complaint. It will also assist the practitioner in responding to any complaint received by ACCA. The practitioner will need to weigh up the cost of dealing with a complaint against the cost of providing this extra information, although the monitoring unit suggests that prevention is better than cure.

The monitoring unit will continue to check that practitioners are complying with SIP 13, but will also be recommending that practitioners take the extra steps suggested, although failure to do so is not a statutory or best practice breach.

2.6 HELPING TO AVOID COMPLAINTS IN COMPULSORY LIQUIDATIONS AND BANKRUPTCIES

In many instances the insolvency practitioner is appointed liquidator/trustee of a compulsory liquidation/bankruptcy many months, and sometimes many years, after the original winding up/bankruptcy order. The directors or the bankrupt may well have "forgotten" about the insolvency proceedings and so will often react negatively when they are "re-opened" by the practitioner. That negative reaction can take the form of a complaint, either to the practitioner himself or to ACCA. In order to help minimise problems, the monitoring unit suggests that the practitioner sends an appropriately worded "engagement letter" to the directors/bankrupt explaining why he has been appointed and what his role is.

As with going the "extra mile" in phoenix situations, this is an area where the monitoring unit will recommend the issue of such letters, although failure to do so is not a statutory or best practice breach.

2.7 COMPANY DIRECTORS DISQUALIFICATION ACT 1986 – TIMELINESS OF SUBMISSION OF RETURNS/REPORTS

ACCA draws the attention of insolvency practitioners to the article in the latest edition of Dear IP relating to The Insolvency Service's new regime for chasing disqualification returns/reports. Chapter 20, article 10 indicates that, with effect from 1 April 2004, The Insolvency Service will send out its first reminder to practitioners about the submission of a return/report five months after the date of appointment, assuming one has not been submitted by that date. The Insolvency Service will then issue a further reminder letter if the report/return has not been received one week prior to the 6 month statutory deadline. If the return/report has not been received within 6 months, and no extension of time has been agreed, then a formal complaint about the failure to comply with the statutory deadline will be sent to the practitioner's authorising body.

In order to avoid being the subject of such complaints, practitioners should ensure that they have systems in place, including IPS Diary prompts if appropriate, to ensure that the statutory deadline is met without fail. If necessary, practitioners should submit interim D2 returns rather than risk missing the statutory deadline or relying on an extension of time being granted. The circumstances in which extensions to deadlines for the submission of returns/reports will be granted are set out in Chapter 10, Article 9, and it is clear from this that they will only be allowed in exceptional circumstances.

Finally, practitioners are reminded that failing to submit a return/report within the statutory deadline is in fact a criminal offence. Whilst this is not specifically referred to in the Dear IP article, The Insolvency Service may also decide to prosecute those practitioners against whom they routinely make complaints.

2.8 PROFESSIONAL STANDARDS WEBSITE

ACCA's professional standards department has recently developed a web-site, which contains useful information about regulatory issues affecting both auditors and insolvency practitioners. The site is still being developed, but it currently includes, amongst other matters, the Principles for Monitoring and information about authorisation. In due course the information available on the site will be expanded to include matters such as monitoring checklists. The site can be accessed at www.accaglobal.com/professionalstandards.

3. Legislation

3.1 INSOLVENCY (AMENDMENT) RULES 2004 (SI 2004/584)

The above make further amendments to the Insolvency Rules, over and above those made by the 2003 amendment rules. SI 2004/584 includes the following provisions:

i) the restriction on persons acting on creditors' committees if they are subject to a composition or arrangement with their creditors is dropped. However, persons who are subject to bankruptcy restrictions are added to the list of excluded persons.

ii) a deposit must be paid to the court before a bankruptcy or winding up petition can be filed, unless the Secretary of State has given written notice to the court that the petitioner has made arrangements to pay the deposit to the Official Receiver.

iii) the official receiver, trustee or liquidator will no longer have to send proof of debt forms to creditors unless so requested.

iv) revisions are made to the rules on payment of remuneration. NB these rules are taken into account in the revised version of SIP 9 which takes effect from 1 July 2004.

v) claims of associates are to be disregarded when calculating those creditors voting against an IVA proposal.

The amended Insolvency Rules came into effect on 1 April 2004.

3.2 PENSIONS BILL

The current Pensions Bill contains a number of insolvency-related measures which will impact on practitioners in due course.

i) Insolvency practitioners appointed to sponsoring employers will have new responsibilities with regard to the employer's pension scheme. Whenever an 'insolvency event' occurs in respect of a sponsoring employer, the practitioner will be required to issue a statutory notice to the Board of the new Pensions Protection Fund, the new Pensions Regulator (which will replace the Occupational Pensions Regulatory Authority (OPRA) and the trustees or managers of the scheme. The practitioner will also have to issue an additional notice, to the same addressees, where he is able to confirm either that a rescue of the employer's pension scheme has occurred or that a scheme rescue is not possible.

ii) The new Pensions Protection Fund will aim to compensate members of insolvent defined benefit schemes. Retired members will qualify for 100% of their accrued rights; active members will qualify for 90%. The Board of the new Fund will assume responsibilities in relation to a scheme where, inter alia, a defined 'qualifying insolvency event' has occurred and certain conditions are met, viz the value of the scheme's assets is less than the amount of its protected liabilities, the insolvency practitioner issues a notice confirming that a scheme rescue is not possible, and the Board has not formally ceased to be involved with the scheme under a separate, specific procedure. The Fund will be financed by levies imposed on all defined benefit schemes.

iii) The new Regulator will have the power to apply to the court for an order under s423 of the Insolvency Act 1986 - transactions defrauding creditors - in respect of the sponsoring employer of an occupational pension scheme. This power will be exercisable either where an actuarial valuation indicates that the value of the scheme's assets at that time was less than the amount of its protected liabilities, or where an actuarial valuation indicates that the new statutory funding objective is not met.

iv) The Regulator will have a range of legal powers to protect the assets of schemes which it believes are under threat. It will have powers to wind up occupational schemes where it believes that it is necessary to do so in order to ensure that the scheme's protected liabilities do not exceed its assets. The Regulator will also have power to make so-called 'freezing orders' where it believes such action is necessary to protect members' interests.

The new Bill is expected to become law by Summer 2004 and will come into force in April 2005.

Separately from the Bill, an amendment has been made to the statutory priority order in which the assets of a defined benefit scheme are to be applied towards meeting the scheme's liabilities. The amendment is made via the Occupational Pension Schemes (Winding Up) (Amendment) Regulations 2004 (SI 2004/1140), which come into effect on 10 May 2004.

3.3 MONEY LAUNDERING

Members will be aware that the Money Laundering Regulations 2003 have now come into full effect. The compliance and reporting requirements for insolvency practitioners (and other categories of adviser and business person) became effective on 1 March 2004 and the provisions regarding high value dealers came into force on 1 April. R3 has now issued special guidance on the implications of the Regulations for insolvency practitioners. This supplements the more general guidance for accountants prepared by CCAB (which is available via the ACCA web site at www.accaglobal.com/transparency/moneylaundering).

3.4 ENTERPRISE ACT 2002 – SANCTION TO TAKE ACTION FOR ANTECEDENT RECOVERIES

Practitioners are reminded that section 253 of the Enterprise Act 2002 gives liquidators the power to bring legal proceedings under sections 213, 214, 238, 239, 242, 243 or 423, but only with sanction. In summary, a liquidator in a compulsory liquidation will now need sanction from the creditors' committee or Secretary of State, whether he is bringing an action in his own name or in the name of the company. A liquidator in a voluntary liquidation will need sanction to bring actions in his own name, for example for fraudulent or wrongful trading, but not for actions brought in the name of the company.

A practitioner can be held personally liable for the expenses of the litigation if he fails to obtain the necessary sanction, but retrospective authorisation for payment out of the assets may be given.

4. Cases

4.1 CONSTRUCTION OF FIXED AND FLOATING CHARGES

National Westminster Bank v Spectrum Ltd [2004 BCC 51] (Judgment 15 January 2004)

Where a lender takes a charge over the book debts of a company and the company remains free to deal with the proceeds of those debts, then the charge will normally be construed as a floating charge regardless of whether or not it is described as such in the debenture, said the Companies Court in a test case brought following the Privy Council's Brumark judgment of 2001.

In the Spectrum case, the structure of the charge was identical to that approved by the court in the Siebe Gorman case of 1979. The debenture in the latter case described the charge as fixed and required the proceeds of the book debts received by the company to be paid into its account with the lending bank. There was, however, no constraint placed on the company's ability to use the proceeds of those recoveries. In Siebe Gorman, the company's right to use the proceeds did not invalidate the fixed nature of the charge. The issue for the court to consider in Spectrum was whether, in the light of Brumark, this interpretation could be allowed to stand.

The Companies Court agreed with the Privy Council that the starting point in considering whether a charge was fixed or floating was to ascertain, by reference to the debenture, the nature of the rights and obligations which the parties agreed to with respect to the book debts. In the circumstances of the case, the debts were to be paid into an ordinary current account and there were no express restrictions on its operation. The court found that the proceeds of the debts were to be under the control of and available for use by the company in the ordinary course of its business. Therefore the description of the charge in the debenture as 'fixed' was inconsistent with its effect. The court held that, without a meaningful restriction on the chargor's freedom to deal with proceeds of book debts, a charge on such debts would only qualify as floating.

4.2 PAYMENT OF LIQUIDATOR'S REMUNERATION AND EXPENSES

Re Leyland Daf (Buchler v Talbot) [2004] 2 WLR 582; judgment given 4 March 2004

The House of Lords has ruled that, where a company is in receivership and liquidation at the same time, the liquidator's expenses and remuneration may not be paid out of the assets covered by a floating charge which has crystallised. The decision overturns the 1970 case of Re Barleycorn Enterprises.

The case involved Leyland Daf Ltd, which in 1992 granted a mortgage debenture in favour of a Dutch finance company as security for funds advanced to it. The debenture contained a floating charge over the company's assets. The following year, the chargee appointed an administrative receiver, whereupon the floating charge crystallised into a fixed charge. In 1996, the company went into voluntary liquidation and the joint liquidators' costs and expenses fare exceeded the amount realised in the winding up. The liquidators applied to the court for a declaration that the expenses and remuneration should be paid out of all the assets the company, including the assets subject to the floating charge, in priority to all other claims. The Court of Appeal agreed that s175(2)(b) of the Insolvency Act 1986 allowed the liquidators' expenses and remuneration to be paid out of the assets comprised in a floating charge in priority to the claims of the actual charge holder.

The House of Lords reversed the Appeal Court's decision that s175(2)(b) had the effect of authorising a liquidator's costs and expenses to be paid out of floating charge assets ahead of the charge holder's claims. It also held that, when a company was in both receivership and liquidation, the company's former assets were held in two distinct funds with each procedure bearing its own costs of administration and neither being required to bear the costs of administering the other. Consequently, none of the costs and expenses of winding up the company in question were payable out of the assets subject to the floating charge until the whole of the principal and interest had been paid to the charge holder.

4.3 PRIMARY DUTY OF COMPANY RECEIVER

GE Capital Commercial Finance v Sutton Anglo Petroleum, The Times, 9 April 2004; judgment given 8 April

The Court of Appeal held that the powers conferred upon an administrative receiver under the terms of his appointment or by statute were to enable him to perform his functions of getting in, protecting and realising the mortgaged property for the benefit of the company and its creditors, and not to assist the principal creditor in litigation against a third party. Consequently, it was outside the power of an administrative receiver to demand from the company's solicitor, at the request of the main creditor, documents concerning the company's indebtedness to that creditor and then to forward these to the creditor's legal advisers. The Court allowed an appeal by a company in receivership against an earlier court refusal to restrain the actions of the company's main creditor and its appointee.

The case involved the receivers obtaining information concerning the company's indebtedness from the company's solicitors and then passing them on to the appointing company's solicitors. The information was to be used for the purpose of preparing litigation against a director of the company who was the guarantor of its loan from the lender. The court held that the receiver had no power to disclose the documents to his appointor or its solicitors unless, after examining them, he identified some proper reason why, in the company's interests, disclosure should be made.

4.4 APPROVAL OF COMPANY VOLUNTARY ARRANGEMENT

Re Trident Fashions plc, The Times, 23 April 2004; judgment given 5 February 2004

The courts will only be prepared to use their powers under s6 of the Insolvency Act 1986 to revoke or suspend a CVA if the material irregularity complained of was one which no reasonable practitioner could have made.

The case involved an application made by two creditors.

The court held that, since a practitioner was bound to give fair and balanced explanations to meetings, any misrepresentation made by him or her would constitute an irregularity.

Misrepresentation could occur not only when not telling the truth but when telling only part of the truth. The court's assessment of reasonableness would, however, be based on the material which was available to the practitioner at the time, and would not be influenced by hindsight.

In the case in question, the court agreed that there had been an irregularity since the nominees informed creditors of one formal offer for the company concerned without informing them of other offers which they had received. The court went on to consider whether this was 'material'. It referred to the test established in Cadbury Schweppes v Somji, namely whether, had the full facts been given to the meeting, this would be likely to have made a material difference to the way that the creditors assessed the proposal before them.

In the circumstances of the case, the court found that there was no real prospect that knowledge of the full facts would have affected the approval of the arrangement, and therefore dismissed the application.

Appendix

EC Regulation on Insolvency – Government Consultation

1 SCOPE

1.1 Have any problems been experienced in the application of the Regulation because of decisions made by some member states to include, or exclude, certain types of collective proceedings? The position in Great Britain is that all collective insolvency proceedings come within the scope of the Regulation, but have there been any adverse experiences in other member states?

2 CONFLICT RULES

2.1 Relevant Court

2.1.1 Has the interpretation of the centre of main interest ("COMI") by the courts resulted in the Regulation being applied to group companies, both here and in other member states?

2.1.2 Are social or tax legislation issues factors that the courts have taken into consideration when determining the COMI and whether proceedings are main proceedings?

2.1.3 Can the opening of a secondary proceeding solve possible conflicts of competence for opening main proceedings?

2.1.4 If not, are practitioners and their advisors, aware of existing avenues of appeal where disputes exist on the opening of main proceedings? If so, are they being used?

2.1.5 What difficulties, if any, have been encountered in lodging appeals in other member states?

2.2 Applicable Law

2.2.1 What effect does the opening of proceedings have on third parties' rights in rem on assets located in the state of opening, rather than those located in another member state when Article 5(1) applies?

2.2.2 What is your view on contractual clauses, which provide that the opening of proceedings against the seller can be the cause of sales cancellation?

3 RECOGNITION AND IMPLEMENTATION

3.1 Regulation No. 44/2001 – "Brussels I"

3.1.1 In your view are the provisions of Brussels I, which have abolished any ex ante control, adapted to the recognition of insolvency proceedings?

3.2 Obstacles to Recognition

3.2.2 Have any member states relied on the provisions of Article 26 to refuse to recognise insolvency proceedings or enforce a judgment on the grounds of public policy?

4 COORDINATION OF PROCEEDINGS

4.1 Action in Relation to Secondary or Territorial Proceedings

4.1.1 How have the provisions of Articles 33, 34 and 37 been used in practice?

4..1.2 In your view are they sufficient to safeguard the interests of local creditors?

4.2 Liquidator's Powers

4.2.1 Does cooperation between "liquidators" in different member states work in a satisfactory way?

Appendix (continued)

4.2.2 Does the diversity of the profession of liquidator in the Community (ranging from general practitioner to specialist, with a distinction between restructuring and winding-up) make it more difficult to co-ordinate cross-border proceedings?

4.3 Proving and Admission of Creditors' Claims

4.3.1 What are the conditions, if any, for admission and classification of claims already made in a Member State which are lodged by a liquidator in another Member State, under Article 32(2)?

4.3.2 Is the standard form "Invitation to lodge a claim" (annex I) used as a model by courts and "liquidators"?

4.3.3 Do foreign creditors use the standard form "Lodgement of Claim" (annex II) to lodge claims in cross-border proceedings?

4.3.4 Are foreign creditors given longer deadlines for lodging their claims in insolvency proceedings?

4.3.5 What ranking do foreign creditors (or foreign liquidators) with privileged or priority claims receive when they claim in main proceedings?

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