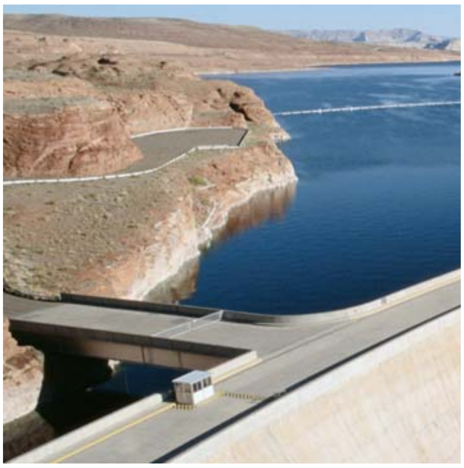

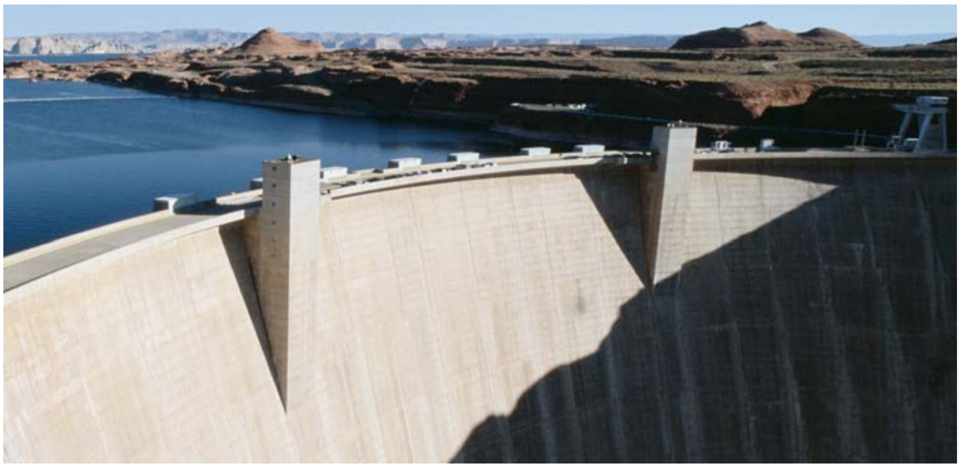

ACCA Insolvency Newsletter

This is the sixth 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 INSOLVENCY RULE 8.6 AND VOLUNTARY ARRANGEMENTS

In Issue 4 of the newsletter, members were reminded about IR 8.6 and the prohibition on the use of chairman's general proxies (i.e. proxies in favour of the chairman where there are no specific voting instructions on resolutions) to vote in favour of resolutions relating to remuneration. This issue has recently been raised in various forums in the context of the approval of voluntary arrangements, and whether a chairman's general proxy can be used to vote in favour of an arrangement.

A voluntary arrangement proposal will contain provisions relating to the supervisor's remuneration. These provisions are integral to the proposal and cannot be separated from it when seeking approval for the arrangement. Consequently, a chairman's general proxies cannot be used to vote in favour of the arrangement.

Continued...

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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.

They should not be treated as votes against the proposal, but rather should be treated as not voting on the resolution, such that they are not taken into account when determining the requisite majorities under IRs 1.19 and 5.23.

The purpose of the meeting of creditors in a company voluntary arrangement and an individual voluntary arrangement is to decide whether to approve the proposed voluntary arrangement. Consequently, it is not possible to take a separate resolution specifically relating to supervisor's remuneration, excluding the chairman's general proxy from such a vote, but using it to vote in favour of the proposal. As indicated above, the supervisor's remuneration is integral to the proposal, with inclusion being a requirement under the Insolvency Rules, and cannot be artificially excluded.

1.2. INSOLVENCY SERVICES ACCOUNT BANKING FEE

Members are reminded that the quarterly banking fee, currently £15 per quarter, will continue to be charged on an estate account held in the ISA until IP Banking Section of The Insolvency Service closes the account. Details on how to close an estate account in compulsory liquidations and bankruptcies is included in Chapter 5, Article 46 of Dear IP, issued as part of Dear IP No. 20 in October 2004.

ACCA's Monitoring Unit recommends that insolvency practitioners acquaint themselves fully with that article, particularly with regard to the information relating to the priority of expenses. The banking fee ranks above office holder's remuneration, such that office holders must take into account both past and future banking fees when calculating the amount of remuneration they intend to draw. The article sets out very clearly The Insolvency Service's stance on office holders drawing remuneration ahead of the statutory banking fee, which they view as a serious conduct issue. The Service's stance will need to be taken into account by the Monitoring Unit when considering any default that arises on a monitoring visit; this is, therefore, an area where insolvency practitioners should take particular care.

The existence of the banking fee is an incentive to insolvency practitioners to close cases without delay once the administration of the estate is complete.

1.3 RECONCILIATION OF ESTATE BANK ACCOUNTS

ACCA's Monitoring Unit considers that insolvency practitioners should have a system in place to ensure that each bank statement they receive in respect of an estate bank account is reconciled to their financial records. Details of the outstanding balance and any reconciling items should be noted.

Similar considerations apply to ISA bank accounts. Where on-line access only is used, such that statements are not received, then the account should be examined and reconciled at intervals appropriate to the case. In determining the appropriate interval insolvency practitioners should have regard to the frequency of transactions.

Where problems or errors are identified by staff undertaking the reconciliation, the Monitoring Unit considers that there should be a system to refer such instances to a manager and/or the insolvency practitioner. In addition, the Monitoring Unit considers that it is important that bank reconciliations are checked periodically by a manager and/or the insolvency practitioner, given that they relate to estate funds.

1.4 INSOLVENCY STATISTICS

In the third quarter of 2004 there were 2,975 liquidations in England and Wales. This is a decrease of 5.6% on the second quarter and a decrease of 12% on the third quarter of 2003. The total included 1,136 compulsory liquidations and 1,839 creditors voluntary liquidations.

In the same period there were 11,967 individual insolvencies in England and Wales. This represented an increase of 6.2% on the previous quarter and 31.1% up on the second quarter of 2003. The total was made up of 9,156 bankruptcies, up 4.2% on the second quarter of 2004 and up 28.5% on the corresponding quarter of 2003, and 2,811 IVAs, an increase of 13.6% on the previous quarter and up 40.6% on the second quarter of 2004.

2. Regulatory Guidance

2.1 ACCA RULEBOOK CHANGES

The ACCA Rulebook 2005 will be distributed to members during January 2005. Insolvency practitioners are advised to bear in mind the following elements of Rulebook 2005 in particular.

Bye-laws

The ACCA bye-law covering the power of the Disciplinary Committee to impose fines on members has been amended. Currently, Council is empowered to make regulations allowing the Committee to levy fines up to a maximum amount. With the change, Council may, if it sees fit, enable the Committee to impose unlimited fines on members. The change has been made to achieve consistency with the approach of other bodies, including the newly-established Accountancy Investigations and Discipline Board (AIDB).

Continuing Professional Development (CPD)

ACCA's CPD regulations have been moved from the Global Practising Regulations to the Membership Regulations, to reflect the fact that compliance with CPD requirements will become a requirement of membership as from 2005. The relevant sections of the Regulations will set out the dates from which the new CPD rules will apply to members. As from 1 January 2005, they apply to those who have been admitted to membership since 2001, as well as all practising certificate and insolvency licence holders.

Retired members will not be required to undertake CPD unless they hold a practising certificate or insolvency licence.

Members who become bankrupt are currently required to notify ACCA of this fact within one month. In future members will be additionally required to notify ACCA in the event of a bankruptcy restriction order being made against them or if they give a bankruptcy restriction undertaking.

Disciplinary Regulations

The Regulations have been clarified in various respects, to reflect what happens in practice.

The maximum amount of compensation which a member can be ordered to pay to a complainant has been raised from £1,000 to £5,000 in line with the recommendations of the Review board (now superseded by the Public Oversight Board for Accountancy (POBA). (In practice, where compensation is ordered, it tends to be around £250).

Acting as witness

Members who are invited to appear in court as a witness against a client or former client should normally decline unless forced to do so by court order, though where the case concerns a criminal offence, members are advised to take legal advice before deciding whether to agree or decline.

The practice of insolvency

These regulations are now common to all the Insolvency Act RPBs. Insolvency practitioners should also have regard to ACCA's other professional conduct regulations, particularly in respect of conflicts of interest and obtaining professional work, to the extent that they are not addressed in the insolvency regulations. Members who conduct insolvency work worldwide should find the principles outlined in the regulations helpful, but should always comply with the requirements of the local regulator.

There are also new regulations which enable ACCA to grant insolvency licences to non-members. Other bodies are introducing similar changes in order to attract individuals currently licensed by the Insolvency Service, which has increased its fees substantially. Care has been taken to ensure that the eligibility requirements for non-members are no less onerous than those for members.

The changes to Regulations and the Rules of Professional Conduct come into effect on 1 January 2005.

The above is a summary of some of the forthcoming changes; a more detailed account of all the changes will appear in Accounting and Business and members are advised to consult that in due course.

2.2 REGULATORY FORUM

ACCA extends its thanks to all those members who attended the Regulatory Forum meeting held recently in Huddersfield. The forum, like the London forum before it, was a great success and the feedback from those who attended has been most encouraging. As a result of members' feedback, ACCA will host three regulatory workshops/seminars in 2005. The seminars will be held in London, the West Midlands and the North and will put a greater emphasis on active participation by delegates. The Monitoring Unit sees these workshops as an opportunity to share with members views on a variety of issues, explore any new or contentious issues and give and receive feedback on matters that can arise on monitoring visits. Details will be published in good time so as to enable members to book places on the workshops of their choice. Both office holders and managers are encouraged to attend.

2.3 INSOLVENCY PRACTICE COUNCIL LEVY FOR 2005

IPR Services Limited has indicated that, in order to fund the running of the Insolvency Practices Council in 2005, a levy of £50.38 per insolvency practitioner will be imposed on each of the licensing bodies. As in previous years ACCA will be passing this levy on to insolvency practitioners. In this regard, an invoice will be issued to insolvency practitioners in January 2005.

2.4 PRESCRIBED PART AND THE INSOLVENCY SERVICE'S EVALUATION OF THE ENTERPRISE ACT 2002

ACCA has previously advised insolvency practitioners about The Insolvency Service's evaluation of the "prescribed part" rules to ascertain where they are appropriately framed so as to bring about the desired outcome. Practitioners are reminded that the evaluation is still continuing, and indeed The Insolvency Service wishes to encourage practitioners to participate by filling in a simple form in respect of formal corporate insolvency appointments they have taken on or after 1 April 2003. The form can be downloaded from The Insolvency Service website at www.insolvency.gov.uk.

3. Legislation

3.1 INFORMATION AND CONSULTATION OF EMPLOYEES

The EU Directive Information and Consultation Directive will begin to take effect in Great Britain in April 2005. As from that date, new Regulations (currently being finalised) will apply to firms with at least 150 employees. The legislation will be applied subsequently to firms with 100 or more employees in April 2007 and those with 50 or more employees in April 2008. The Regulations will require affected employers to negotiate information and consultation arrangements with their staff where a valid request to begin negotiations is made by the workforce. (The employer may initiate the negotiation process independently if it wishes). If negotiations begin, and no agreement is reached within 6 months (or such longer period as may be agreed), standard provisions apply, as to be detailed in the Regulations. These will require the employer to inform the workforce about specified matters, including the probable development of the business's activities and economic situation and to consult the workforce on, inter alia, employment issues, especially where there is a threat to employment.

After the Regulations come into effect, and a company is in receivership or administration, the receiver or administrator will assume responsibility for complying with the employer's obligations under them.

3.2 MONEY LAUNDERING

The Home Office has consulted on a possible change in the law regarding practitioners' obligations under the UK's Money Laundering Regulations 2003.
Under the Regulations, persons in the regulated sector, including licensed insolvency practitioners, are subject to reporting obligations where they acquire, in the course of their work, knowledge or suspicions of money laundering offences. Solicitors, however, benefit from a unique but limited exception from this requirement. Under the Regulations, a professional legal adviser need not disclose if the knowledge or suspicion concerned came his way in 'privileged circumstances', defined as being where he acquires the information in connection with the seeking or giving of legal advice or in connection with actual or contemplated legal proceedings. (The exemption does not, though, apply where either the information is communicated, by either party, with the intention of furthering a criminal purpose).

The unique exemption for solicitors was decided upon by the UK Government as the result of its interpretation of the Second EU Money Laundering Directive. This entitles member states to afford disclosure exemption to named professional advisers (which list includes external accountants and auditors) in respect of information which they acquire in the course of ascertaining their client's legal position or advising or instituting proceedings. The UK decided to extend this exemption only to solicitors, even though the Directive expressly provides that advisers should be treated equally where they offer 'directly comparable services'.

The Home Office has now accepted, provisionally, that the present rules are discriminatory to the extent that solicitors are treated differently from the other classes of adviser referred to. It would appear likely that the current exemption will be extended to accountants and auditors who are members of prescribed professional bodies. There is an issue as to whether any such exemption can be extended to licensed insolvency practitioners, given that this category does not feature in the second EU Money Laundering Directive.

Practitioners are also reminded that R3 has issued guidance to insolvency practitioners on money laundering. Members are reminded that, in respect of compulsory liquidations and bankruptcies, then however they are appointed, whether at a meeting of creditors, by the Secretary, or by the Court, they do not need to take steps to identify their client. Liquidators and trustees can rely on the enquiries made by the Official Receiver and the existence of a Court order.

3.3 DIRECTOR AND AUDITOR LIABILITY

The Government introduced late amendments into the Companies (Audit, Investigations and Community Interest) Act, now enacted, so as to reform the statutory rules on company directors' liability.

The Act relaxes the current prohibition on companies indemnifying directors against liability and permits companies to pay directors' defence costs as they are incurred. The Act requires disclosure in the directors' report by companies that indemnify directors. Shareholders will also have the right to inspect any indemnification agreement. Companies that do not indemnify directors will not have to make any disclosure. The provisional commencement date for these provisions is April 2005.

As regards the liability of company auditors, the DTI decided, consequent to its consultation exercise on this matter earlier in the year, not to include any reforms in the same Bill. It has, however, invited interested parties to submit to it proposals for a formula whereby an auditor and client company could reach bi-lateral agreement on a basis of proportionate liability for the auditor.

4. Cases

4.1 SALE OF COMPANY ASSETS WITHOUT CREDITOR APPROVAL

In re Transbus International Ltd ([2004] 1 WLR 2654

An administrator may validly sell a company's assets without first obtaining either the approval of the company's creditors or an order from the court.

Under paragraph 68(1) of new Schedule B1 to the Insolvency Act 1986, the administrator must manage the company's affairs, business and property in accordance with the proposals approved by creditors and any revision of those proposals which have either been approved separately by creditors or which the administrator does not think are substantial. Separately, the administrator is required under paragraph 68(2) to comply with directions (if any) given by the court.

It was held that the new wording of paragraph 68(2) was intended to imply that the administrator must only comply with court directions if they were in fact given – there was no overriding obligation for the administrator to apply for any such directions. Lawrence Collins J commented that 'there will be many cases where the administrators are justified in not laying any proposals before a meeting of creditors… this is so where they conclude that unsecured creditors are unlikely to be paid in full, or to receive no payment, or where neither of the first two objectives for the administration can be achieved.' He added 'The Enterprise Act 2002 reflects a conscious policy to reduce the involvement of the court in administration, where possible.'

The court in Transbus thus confirmed the essence of the decision in T&D Enterprises [2000] 1 WLR 646, on which interpretation the new wording in paragraph 68(2) appears to have been based.

4.2 DISCHARGE OF ADMINISTRATION ORDERS UNDER NEW TRANSFER PROVISIONS

In re Ballast plc (in administration) (The Times, October 28 2004, judgment given October 21, 2004)

Where a company has been put into administration by court order, its administrator may still take advantage of the new provisions of Schedule B1 of the Insolvency Act 1986 and put the company into either voluntary liquidation or dissolution by means of filing the prescribed notice with the Registrar of Companies. Where the administrator does this, he does not need to first to apply to the court for an order to bring his appointment to an end and to discharge the order.

Under paragraph 83 of Schedule B1, the administrator can send the prescribed notice to the Registrar where he believes that secured creditors have been paid and that there may be sufficient assets to pay a dividend to unsecured creditors.
On registration of the notice, the administrator's appointment comes to an end and the company immediately goes into winding up.

Under paragraph 84, the administrator can send a notice under that paragraph if he thinks that the company has no property which might permit a distribution to creditors. On receipt by the Registrar of that notice, again the appointment of the administrator comes to an end and, after three months, the company is deemed to be dissolved.

The question which fell to be decided in this case was whether these procedures could be followed where the original administration order had been granted by the court (as was the case with all administrations before the implementation of the Enterprise Act 2002). It was held that, even though paragraph 85 provided expressly for the discharge of an administrator who had been appointed by court order, this did not affect the validity of a valid transfer to voluntary liquidation or dissolution under paragraphs 83 and 84. In both cases, the registration of the notice under those provisions had the effect of bringing the appointment of the administrator to an end and discharging the order.

4.3 LIABILITY FOR DEBTS OF PHOENIX COMPANIES

Ad Valorem Factors v Ricketts [2004] 1 All ER 894

The Court of Appeal has ruled on a case involving personal liability for the debts of a 'phoenix company'.

Where a company goes into a creditors voluntary liquidation, and its director/s choose to carry on business with a new company under a corporate name which is a 'prohibited name' within the ordinary and natural meaning of s216(2) IA 86, then the director/s can be made personally liable for the debts of the phoenix company even if they did not deliberately exploit the privileges of limited liability.

In the case in question, the name of the 'first' company was Air Components Co Ltd, and the name of the second, the 'phoenix company', was Air Equipment Co Ltd. The Court of Appeal held, taking into account not only the similarities of the companies' names but their types of product, locations, and nature of the consumers likely to deal with the two companies, that the name of the second company suggested an association with the first under s216.

It was accordingly held that, even in the absence of proof that there had been an express mis-representation, or that anyone had actually been confused or deceived, there was an association which feel within ss216-217 IA 86. The director of the two companies was thereby held liable under s217.

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