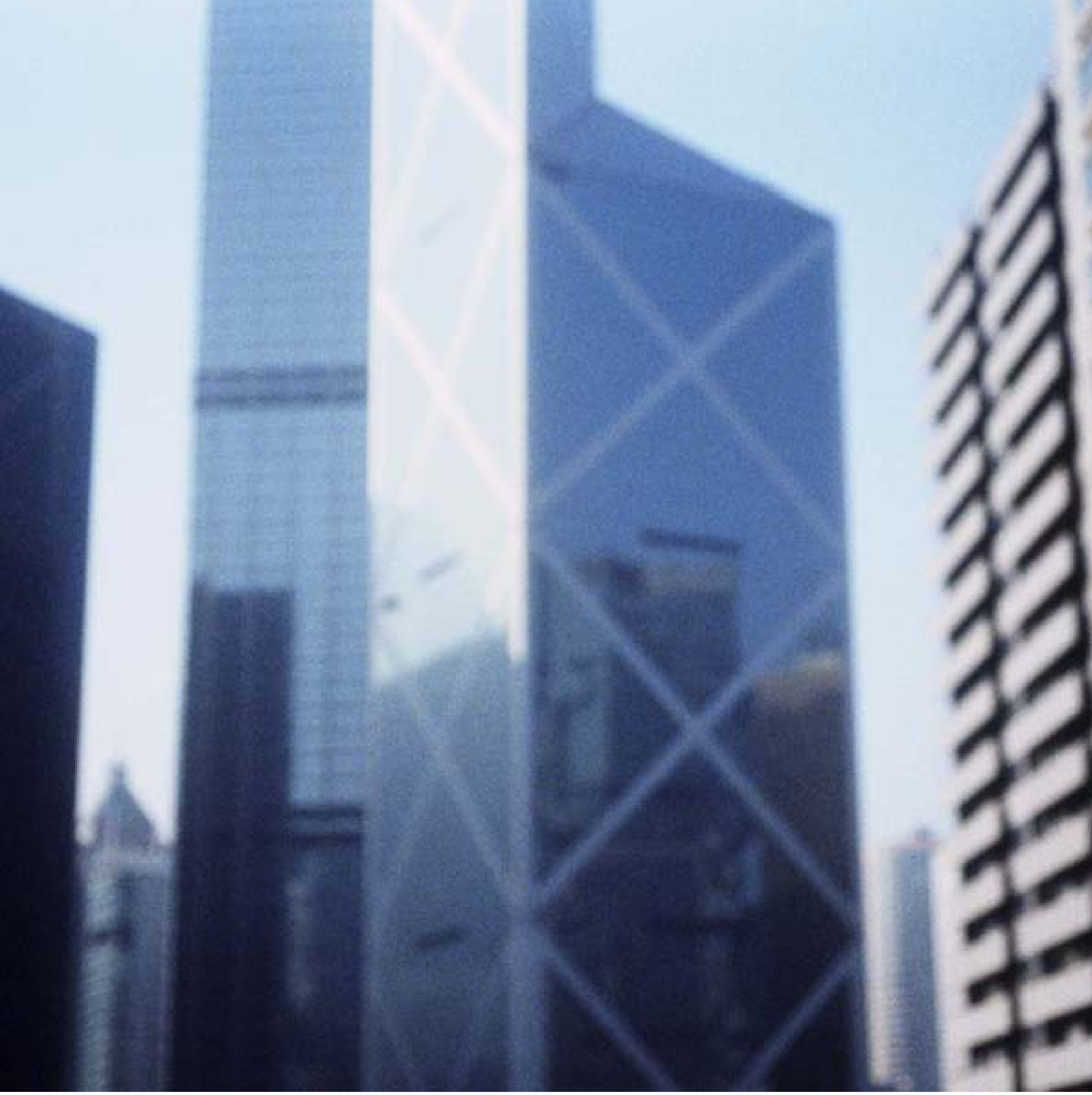

# insolvency newsletter

ISSUE 7 – JUNE 2005

# Contents



Editor: John Davies, Head of Business Law
e-mail: daviesj@accaglobal.com

# 1. Technical guidance

## 1.1 NEW STATUTORY INSTRUMENTS

The following new regulations are now in effect.

**The Insolvency (Amendment) Regulations 2005 (SI 2005/512)**
These regulations make changes to the 1994 Insolvency Regulations.

- A new regulation 3A provides that the last administrator of a company may, after at least a year has passed following dissolution, destroy or otherwise dispose of the company's books, papers and records. But the Secretary of State is given power to require the administrator or former administrator to give him particulars of of any money in his hands or under his control which represents unclaimed or undistributed assets, dividends or other sums owed to a member or former member.

- A revised version of regulation 35 makes changes to the rules governing the services for which the Official Receiver is entitled to claim remuneration. A new regulation 36A provides that any creditor, director or contributory of a company or (in the case of a bankruptcy or IVA) individual debtor may request in writing that the IP supervising the case concerned supply him with a statement containing specified information concerning his fees. The statement will have to include details of the total number of hours spent on the case by the IP and his staff; the average hourly rate charged for each grade of individual on the case; and the number of hours spent by each grade of staff on the case. A request for this information may be made at any time up to two years after the IP vacates office. At all times the statement must be provided within 28 days.

- These regulations come into effect on 1 April 2005. *NB consequential amendments to SIP9 and SIP 15, incorporating the above requirements, are being made: revised versions of both SIPs will be issued shortly*.

**The Insolvency Practitioner Regulations 2005 (SI 2005/524)**
These regulations revoke and replace the Insolvency Practitioner Regulations 1990 and subsequent amending regulations. They contain new provisions on bonding and for the case records to be kept by IPs.

- With regard to bonding, Schedule 2 of the Regulations states that the office holder in an IVA or CVA must now bond for the whole of the anticipated realisations throughout the period of the arrangement. This includes the aggregate of all voluntary payments and any property equity to be introduced at a later stage. The office holder should ensure that he uses a reasonable basis for valuing and reviewing the value of any property interest, that the basis is recorded and that the bond is increased to reflect any revaluation during the course of the arrangement. The same level of bond is required whether the office holder is acting as nominee or as supervisor.

- The changes introduced by Schedule 2, paragraph 13 (requirement to submit cover schedule to one's RPB) mean that if an IP does not have any cases at the end of a month, then he or she no longer needs to submit a monthly schedule to his bond provider or RPB, even if they hold an appointment taker's insolvency licence.

- Regulation 13 and Schedule 3 set out the minimum information that an IP should keep in respect of each case where he or she is an office holder. The wording of the regulation means that this information need not be kept as a separate document, although it must be capable of being extracted from the file and produced separately if requested by the IP's authorising body, or the Secretary of State. ACCA's Monitoring Unit does not intend to routinely ask IPs for the production of separate Regulation 13 Case Records during monitoring visits. The production of separate Case Records may, however, be requested where it appears from an examination of a case file and any electronic case management system that the information contained therein is inadequate and does not meet the requirements of Regulation 13 and Schedule 3.

- IPs are reminded that even though they may have agreed a different basis of remuneration with creditors, such as a percentage of assets realised and/or distributed in all case types, or a flat rate per month or per annum in IVAs, or be relying on the statutory scale having failed to obtain approval of their remuneration on any other basis, they must still maintain time records. Such records are required in order to comply with Regulation 13 and Schedule 3, paragraph 15 of the Insolvency Practitioner Regulations 2005 and Regulation 36A of the Insolvency Regulations 1994 (as amended by SI 2005/512).

- These regulations come into effect on 1 April 2005.

**The Insolvency (Amendment) Rules 2005 (SI 2005/527)**
These regulations make numerous changes to the Insolvency Rules 1986.

- NB in particular that IR 4.1484(1) is amended so as to remove a lacuna in respect of liquidator's powers whereby there was a difference between creditors' voluntary liquidations and compulsory liquidations has been removed by the rules. By making express cross-reference to s165(2) IA 86, the amended rule now provides that any sanction given by the court, the liquidation committee or the creditors for the exercise of the liquidator's powers can no longer be in the nature of a general sanction, but must relate to a specific instance where those powers are to be exercised.

- The regulations take effect from 1 April 2005.

**The Insolvency Proceedings (Fees) (Amendment) Order 2005 (SI 2005/544)**
These regulations amend the Insolvency Proceedings (Fees) Order 2004 (SI 2004/593).

- The changes are that, first, a deposit is now payable where a bankruptcy petition is presented by a temporary liquidator or administrator (under the EC Insolvency Regulation) and, second, that specified functions of the Official Receiver are exempted from the duties in respect of which fees are payable.

- The regulations have effect as from 1 April 2005.

**The Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2005 (SI 2005/523)**
These Regulations make amendments to SI 2003/3363.

- So as to clarify the circumstances where an account relating to monies held in the ISA will no longer be regarded as being 'maintained', thus terminating liability for fees.

- They came into effect on 1 April 2005.

**The Insolvency Act 1986 (Amendment) Regulations 2005 (SI 2005/879)**
These regulations further amend the 1986 Act in the wake of the EC Regulation.

- They clarify which companies may enter into administration or CVA. They provide that a company will only qualify for either of those procedures if it is a company as defined by s735(1) of the Companies Act 1985, if it is incorporated in another EAA state or if it is incorporated in a non-EAA state but which has its 'centre of main interests' (presumed to be the place of its registered office) in an EU state other than Denmark.

- These regulations come into effect on 13 April 2005.

### 1.2 IPC ANNUAL REPORT

The IPC (Insolvency Practices Council) is the public interest oversight body for the insolvency profession. It has recently published its annual report for 2004, a copy of which can be found at www.insolvencypractices.org.uk and also via the ACCA web site at www.accaglobal.com/professionalstandards.

The IPC has made three recommendations in the report:

(i) Correspondence between IPs/RPBs and debtors/creditors – the IPC recommends that the Joint Insolvency Committee (JIC) should set a formal standard of best practice on responding to correspondence, to be followed both by the RPBs and individual IPs in their correspondence with debtors/creditors.

(ii) Statistical information about IVAs – the IPC makes separate recommendations to The Insolvency Service and the JIC relating to statistics on the completion/failure rates and duration of IVAs. The recommendation to The Insolvency Service relates to their consideration of the data collection required about the outcome of IVAs, both in order to assess the effectiveness of IVAs as a vehicle for dealing with individual insolvencies and to meet its obligations of public accountability. In particular the IPC considered that the feasibility and cost of compiling and publishing annual statistics showing the completion/failure rates of all IVAs taken out in, say, the previous five years should be examined. In addition, the desirability of making periodic assessments on a sample basis of the average financial outcomes of IVAs, covering both returns to creditors and administrative costs should be considered.

The IPC's recommendation to the JIC was that the RPBs should make arrangements to regularly collect and analyse sufficient data from each of their members to enable them to monitor the completion/failure rates and average duration of IVAs.

(iii) The giving of best advice to the debtor when an IVA is being considered – the IPC recommends that an IP, or a member of his staff authorised by the IP, should have a thorough discussion with an insolvent debtor and then make a fully detailed assessment of their circumstances. The debtor should be given a copy of the assessment with a full explanation of the pros and cons of the options open to them and a reasoned recommendation as to which option is the most appropriate for the debtor's circumstances. A copy of this assessment and recommendation should be retained as part of the IPs records for the monitors.

The JIC will be considering a formal response to these recommendations. A note of that response will be posted on the ACCA professional standards micro-site in due course at www.accaglobal.com/professionalstandards

## 1.3 A NEW COURT ALTERNATIVE TO BANKRUPTCY

Members are reminded that proposals from The Insolvency Service for a new alternative procedure to bankruptcy are out for consultation until 30 June. The proposed procedure would apply to individual debtors with very few assets and who are genuinely unable to pay their debts. It is proposed that individuals would be eligible for the new procedure if they had total liabilities of less than £15,000, assets of no more than £300 and a surplus income of no more than £50 per month after meeting his reasonable domestic needs. Where a debtor met these criteria, the Official Receiver would make a debt relief order and inform the debtor's creditors. During the twelve month duration of the order, the debtor would be subject to the same restrictions as in bankruptcy.

A copy of the proposals can be found at www.insolvency.gov.uk

## 1.4 STATISTICS

There were 2,900 liquidations in England and Wales during the first quarter of 2005 on a seasonally adjusted basis. This represented a decrease of 1.3% on the previous quarter and a decrease of 7.4% on the first quarter of 2004. The figure was made up of 1.064 compulsory liquidations and 1,835 creditors voluntary liquidations.

There were 13,229 individual insolvencies in England and Wales, and increase of 1.6% on the previous quarter and 27.9% over the first quarter of 2004. This figure was made up of 10,091 bankruptcies, an increase of 2.8% on the previous quarter and 24.5% on the corresponding quarter of last year, and 3,139 Individual Voluntary Arrangements (IVA's), a decrease of 2.1% on the previous quarter and an increase of 40.1% on the corresponding quarter of the previous year.

# 2. Regulatory guidance

### 2.1 IP BANKING FEES FOR THE OPERATION OF THE ISA

The IP Banking section of the Insolvency Service has indicated that they are still receiving numerous requests from IPs to rebate quarterly banking fees that have been charged to ISA bank accounts at around the time the case is being closed. Such requests are refused unless, prior to the quarterly payment date, the IP has fully complied with the process set out in Article 45 of Dear IP issued in February 2004. In summary, the ISA bank account remains open until:

i) IP Banking receive a written request to close the account from a liquidator in a voluntary liquidation where there are no monies in the account and four working days have then elapsed since receipt of that notice; or

ii) the liquidator in a winding up by the court or the trustee in a bankruptcy files a final receipts and payments account with IP Banking, and four working days have elapsed since receipt of that notice.

The quarterly payment dates are 1 January, 1 April, 1 July and 1 October and IPs should bear in mind the liability to pay the banking fees on these dates when commencing closing procedures on a case.

### 2.2 IVAS FOLLOWING ON FROM BANKRUPTCY

IVAs can only be proposed where the debtor is able to present his or her own bankruptcy petition or is an undischarged bankrupt. In view of the ability of the Official Receiver to file a notice of early discharge under section 279(2) of the Insolvency Act 1986, IPs should contact the Official Receiver where they are either the trustee or advising the bankrupt in circumstances where an IVA is being considered. Whilst this is not a ground for objection to early discharge, it is still clearly desirable to do so, and the ACCA Monitoring Unit understands that the Insolvency Service is in th process of agreeing internal procedures on how to deal with such situations.

### 2.3 ALEXANDER FORBES – BOND ONLINE

IPs whose enabling and specific penalty bonds are arranged via Alexander Forbes, other than those using the Glasgow office, will be aware that they now have online access to their bonding information. The ACCA Monitoring Unit also has access to this information, and as part of the monitoring process, a list of open cases is extracted and examined and also compared to the list of cases provided by the IP in advance of a monitoring visit. Whilst this has only been undertaken on the most recent visits, it is clear that there can be discrepancies between the information held by Alexander Forbes and that held by the IP. Consequently, IPs are encouraged to undertake occasional checks on the accuracy of the information held by Alexander Forbes, say at least annually, and to notify Alexander Forbes of any discrepancies found.

### 2.4 MONITORING WORKSHOPS

ACCA is holding a series of three workshops in 2005. These are aimed at IPs and their managers and will cover topics such as:

- key compliance areas
- how to prepare for a monitoring visit
- future developments in monitoring.

They will also provide an opportunity to provide feedback to the Monitoring Unit on the monitoring process and participate in a practical exercise relating to compliance and monitoring.

The workshops are scheduled as follows:

- 29 Lincoln's Inn Fields, London – 4 July 2005
- Cedar Court Hotel, Wakefield – 18 October 2005
- Corus Hotel, Bristol – 17 November 2005

Further details and an application form will be e-mailed to IPs shortly.

## 2.5 PROFESSIONAL INDEMNITY INSURANCE (PII) WAIVERS

IPs are reminded of the need to comply with the requirements of Practising Regulation (PR) 14 of the ACCA Practising Regulations for the United Kingdom, Jersey, Guernsey and Dependencies and the Isle of Man annexed to the Global Practising Regulations in respect of PII. In order to comply with PR 14 an IP must hold sufficient PII to satisfy the higher of two tests, one based on total income and the other on 25 times the largest fee received. Details of these can be found in the 2005 ACCA Rulebook.

The Monitoring Unit's experience is that, if an IP does not comply with PR 14, it is usually as a result of failing the 25 times largest fee test. If an IP does not comply with PR 14, he or she should either increase the amount or apply to the Admissions and Licensing Committee for a waiver. A waiver will only be granted where the required cover is not available to the practitioner or where the cost of any increased cover is so disproportionate as to be unreasonable. Following a recent procedural change, however, PII waivers can now be granted administratively by ACCA staff in respect of practising certificate and insolvency licence holders who are in firms where ACCA is not the lead regulator for the firm.

In order to obtain a waiver administratively, the following criteria must be met:

- the practising certificate or insolvency licence holder must be a partner or director of a firm, practising in the UK or Ireland, where ACCA is not the lead regulator; and

- the lead regulator must be a Recognised Supervisory Body or, in the case of firms undertaking only insolvency work, a Recognised Professional Body in the UK or Ireland; and

- the practising certificate or insolvency licence holder must be covered by the firm's PII; and

- the firm's PII must comply with the requirements of its lead regulator.

If these criteria are not met, or if a PII waiver is sought in other circumstances, then the application will continue to be considered by the Admissions and Licensing Committee.

All requests for PII waivers should be made to Martin Monaghan, Senior Authorisation Officer, Professional Standards, ACCA, 64 Finnieston Square Glasgow, G3 8DT.

## 2.6 INSOLVENCY LICENCES FOR NON-MEMBERS

IPs are reminded that following a rule change, with effect from 1 January 2005 ACCA can issue insolvency licences to non-members. Non-members are eligible for an insolvency licence from ACCA if they meet the criteria set out in PR 10 (1). In summary they must:

- meet the qualifications and experience requirements set out in PR 11 – these are met by either passing the Joint Insolvency Examination and obtaining sufficient practical experience, or being eligible to hold, or already holding an insolvency licence from another authorising body

- be fit and proper persons within the meaning of PR 13 - if the application is to transfer authorisation to ACCA from another body, ACCA must obtain satisfactory fitness and propriety clearance from the current authorising body

- hold sufficient PII cover to comply with PR 14 and

- Have made arrangements for continuity of their practice in accordance with PR 16.

All applications for insolvency licences should be made to Martin Monaghan, Senior Authorisation Officer, Professional Standards, ACCA, 64 Finnieston Square Glasgow, G3 8DT.

## 2.7 MONITORING/COMPLIANCE ISSUES

The following is a summary of relevant issues which have arisen during the course of recent inspection visits.

**(i) Statutory Interest**

Given the increasing number of bankruptcy cases where creditors are paid in full, IPs are reminded that the official rate of interest applicable under rule 6.113 of the Insolvency Rules 1986 is that in force at the date of the bankruptcy order.

**(ii) Resolutions obtained at meeting of creditors in Administrations**

In an administration where the exit route is to be a creditors' voluntary liquidation, IPs are reminded that it is not appropriate to seek a resolution at the meeting of creditors convened in the administration approving the basis of the liquidator's remuneration given that these are two distinct insolvency procedures. Similarly, obtaining other resolutions relating to the conduct of the liquidation is not appropriate.

Paragraph 83 of Schedule B1 to the Insolvency Act 1986 sets out the provisions relating to moving from administration to creditors' voluntary liquidation. Paragraph 83(8) specifically sets out sections in the Insolvency Act 1986 that do, and do not apply. Paragraph 83(8) specifically provides that the creditors' committee formed in the administration continues to act as the liquidation committee, and it will fall to that committee to fix the basis of the liquidator's remuneration under rule 4.127. In the absence of a committee it will fall to the creditors to fix the basis of the liquidator's remuneration at a general meeting convened under rule 4.54 or the final meeting convened under section 106 given that neither of these provisions nor rule 4.127 has been disapplied by paragraph 83(8). The Monitoring Unit has checked with the Enterprise Act team within The Insolvency Service to ensure that this is the correct approach to take.

**(iii) Approval of quantum of remuneration**

An office holder is entitled to be remunerated for his services. The insolvency legislation sets out both the basis on which such remuneration can be approved and by whom it can be approved. SIP 9 expands on the legislation and sets out rules relating to disclosure and reporting to creditors.

In circumstances where a meeting of creditors fixes the basis of remuneration, neither the legislation nor SIP 9 requires the office holder to obtain the subsequent approval of the creditors before remuneration can be drawn. In the absence of such a restriction the Monitoring Unit does not consider that it is necessary to seek the approval of creditors before drawing remuneration. Indeed, if approval was sought from creditors, difficulty could arise for office holders if they did not give approval.

In an administrative receivership, or where the terms of a voluntary arrangement provides for it, then prior approval is required before drawing remuneration. Similarly, a creditors' committee may require the office holder to obtain their approval before drawing remuneration.

**(iv) Pre-appointment time**

Under rules 4.127 and 4.148A, liquidators are entitled to receive remuneration for their services, but clearly that can only be in respect of any services provided following their appointment. Consequently, any time spent by the future liquidator prior to appointment cannot normally be drawn as liquidator's remuneration.

In a members voluntary liquidation any pre-appointment work undertaken by the future liquidator should either be paid by the company prior to appointment, which is preferable, or it ranks as an unsecured creditor to the extent that it remains unpaid. Clearly it is desirable to explain to members the level of pre-appointment costs that will be drawn.

In a creditors' voluntary liquidation Rules 4.38 and 4.62 allow payment of any reasonable and necessary expenses incurred in connection with preparing the statement of affairs and summoning, advertising and holding the section 98 meeting, to be made out of the company's assets. These rules are the only mechanism for the future liquidator to recover pre-appointment expenses.

In order to avoid problems in a liquidation, the Monitoring Unit recommends that a separate time or analysis code is used to record pre-appointment time, or pre-appointment time should be "ruled-off" within the time recording system to ensure that it is not subsequently drawn in error as remuneration.

There are also issues relating to pre-appointment costs in administrations. Rule 2.67(1) sets out the priority of expenses and paragraph (c) permits payment by the administrator post-appointment of:

- the costs of the applicant and any person appearing on the hearing of the application, where an administration order is made by the court; and

- in cases where an out of court appointment is made, the costs and expenses of the appointor in connection with the making of the appointment and those incurred by any other person in giving notice of intention to appoint.

The wording of this rule means that the costs of the future administrator are not, as a general rule, permitted in out of court appointments as they are not the costs of the appointor. If the future administrator's costs have been paid by the appointor, however, then the administrator can subsequently pay the appointor's costs under Rule 2.67(1). The future administrator may prefer instead to considering arranging for any pre-appointment costs to be paid by the company prior to their appointment.

**(v) Closing procedures**

The Monitoring Unit has recently come across several examples of problems with the procedures adopted by office holders when closing cases. In particular:

- issuing receipts and payments accounts to creditors when convening the final meeting that have been prepared to the date of the final meeting. The receipts and payments account should only include transactions that have actually taken place and not those that the office holder intends to make (SIP 7). If the office holder has a balance of funds in hand at the date of convening the final meeting he should indicate in the report to creditors how those funds are to be distributed.

- failing to take funds off an interest bearing bank account (ISA/clearing bank) in order to determine the final amount of interest due to the estate such that the interest received is not disclosed to creditors in the final report (SIP 7).

- the position above is sometimes exacerbated by the office holder drawing that interest against outstanding time costs (remuneration) or expenses. Whilst the office holder may be entitled to such unpaid remuneration or expenses in drawing them in such circumstances he/she is doing so without disclosure to creditors, contrary to SIP 9. While the amounts involved are not normally large, the principle of transparency, since “trust” funds are involved, is important. Consequently, the Monitoring Unit treats such occurrences as significant. The office holder can, in liquidations and bankruptcies, remit undistributed funds to the ISA.

- failing to take into account the quarterly IP Banking fee leading to the office holder having to make payment from the practice account (see section 2.1 above).

- failing to distribute funds prior to release as office holder. Following release, the office holder does not have any locus to act and hence deal with any remaining funds.

- if interest continues to accrue on funds that the office holder has not distributed prior to release, and such interest is drawn by the office holder, then the point made above relating to lack of transparency and failing to comply with SIP 9 also applies.

- problems with the final VAT input tax claim. In order to avoid having to submit ever decreasing VAT claims in respect of say remuneration or expenses drawn, office holders may need to write off the final amount of VAT as irrecoverable. Alternatively, office holders are reminded that the remittance for the final VAT claim can be made payable to the practitioner or his firm by HM Customs and Revenue. This would only be appropriate where the office holder’s remuneration or expenses had been paid from the insolvency estate net of VAT.

# 3. Cases

### 3.1 STATUS OF TRADING NAMES FOR THE PURPOSES OF PERSONAL LIABILITY UNDER S216,217 IA 86

**ESS Productions Ltd (in Administration) v Sully [2005] EWCA Civ 554.**
Judgment given 11 May 2005.

Where a company goes into insolvent liquidation, an individual risks personal liability if, within the following five years, he or she acts as a director or otherwise gets involved with the management of any company which has a name which the liquidating company was known by in the 12 months before its liquidation or which is so similar as to suggest an association. One of the statutory exceptions from liability under these rules is where a company was already in existence at the date of liquidation and had been known by the otherwise prohibited name for a full twelve months at that time. The Court of Appeal has held that, when considering whether a company in liquidation had been previously known by an otherwise 'prohibited name', a name or trading name need not be the only name which the company used during the qualifying period – it was sufficient for the company only to carry on part of its business under the name in question.

In certain circumstances, Rules 4.227-4.230 of the Insolvency Rules 1986 exclude liability under s216 of the Insolvency Act 1986. Rule 4.230, which was the rule at issue in this case, provides that leave of the court to act as a director, and thus to avoid liability, is not required where the 'successor company' has been known by its name for the whole of the period of 12 months ending with the day before the 'original' company went into liquidation and was not at any time dormant within that period.

In the case in question, the director of a company which went into liquidation, ESS Fabrication Ltd, was also the director of another company, originally called Elecronic Sales Services Ltd. Within months of the liquidation of the first mentioned company, the name of the other company was changed to ESS Solutions Ltd, and this name was kept for some 18 months until it changed its name again. Eventually it too went into liquidation. A creditor of the company brought proceedings to make the director liable under s217. The lower court agreed to make the order.

S216(6) of the Act, which the Court of Appeal agreed had to be read in conjunction with Rules 4.227-4.230, says that references to a name which is a company is known by are to encompass not only its corporate name but to any name by which the company carried on business. The director's contention was that, even though the corporate name of his 'other' company did not include the letters ESS, all the companies in his group were known as constituting the ESS group, thus bringing them all within the allowed exception under IR 4.230.

The lower court had held that the successor company had not carried on the whole of its business under the ESS name because, on the evidence, it had not carried out the whole of its business under the claimed brand ESS – this had not formed part of its corporate name and neither had it been presented as a formal trading name, although there was evidence that it was commonly accepted as a familiar group name.

The Court of Appeal held that, to succeed in claiming the exception from liability under IR 4.230, it was not necessary for the disputed name to have been used by a company during the twelve month period as its only name or only trading name. A company could claim the exception if, on the facts of a case, it carried on only part of its business during that period under the disputed name. The director's appeal was therefore allowed.

## 3.2 STATUS OF DIRECTOR FOLLOWING BANKRUPTCY

**Re Witherdale Ltd**
Judgment delivered April 21 2005.

A company had been struck off the register by Companies House following its repeated failure to file statutory documents. Some time later, the company's sole director was made bankrupt. This meant that, in accordance with the dissolved company's articles, which mirrored Table A, the director would have vacated office.

Following the director's discharge, he sought to have the company restored to the register. He argued that, since his bankruptcy occurred after the company's dissolution, his directorship would have revived on his discharge, thus giving him authority to bring the application on behalf of the company.

The court rejected the former director's application. It held that, where a company provided in its articles that a director was to vacate office at the time of his bankruptcy, this was to have effect even where the bankruptcy occurred post-dissolution. Accordingly, the individual's vacation of office would prevent him from acting on behalf of the company for the purpose of applying for the restoration of the company to the register.

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**ACCA**
29 Lincoln's Inn Fields   London   WC2A 3EE   United Kingdom
tel: +44 (0)20 7059 5972  fax: +44 (0)20 7059 5730  www.accaglobal.com

**The Association of Chartered Certified Accountants**