insolvency newsletter

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1. Technical Update

NEW SIPS

Members are reminded that a number of revised SIPs have come into force over recent months. The main changes are summarised below.

SIP 2 – Liquidator's investigations

The revised SIP 2 re-structures the text of the guidance. Few substantive changes are made but the company's professional advisers are added to the list of those who may have relevant information concerning the company's progress to liquidation. The new SIP came into effect on 1 April 2007.

SIP 3 – Voluntary Arrangements

The revised SIP 3 came into force on 1 April 2007. The major changes relate to the period leading up to the proposal of the arrangement. IPs should offer the debtor a face-to-face meeting but if the debtor declines the meeting may be conducted by telephone. IPs should insist on meetings in person where the debtor has not fully disclosed his financial circumstances or does not fully understand:

- the practitioner's different roles during the course of the arrangement,
- the need for third parties who are injecting funds into the arrangement, or who may be adversely affected by the arrangement to be independently advised,
- the options available to him and the consequences of his proposing an IVA, and
- the practitioners duty to perform an independent, objective review and assessment of the proposal for the purposes of reporting his opinion to the court and generally balancing the interests of the company/debtor and the creditors.

IPs must now keep a full and contemporaneous file note of all matters which have been discussed with the directors/debtor. A copy of this note or a full letter confirming the advice (including the matters set out above and additional issues arising if a moratorium is intended) should be sent together with the Association of Business Recovery Professionals' booklet 'Is a Voluntary Arrangement Right for me?'

SIP 9 – Remuneration of insolvency office holders

The revised SIP 9 also came into force on 1 April 2007.

When seeking a fee resolution, IPs no longer have to send a copy of the fee guidance notes to creditors. They are now required to ensure that information on how to access the explanatory note appropriate to the type of insolvency proceedings concerned or the equivalent information in some other suitable format, is made available to creditors before any resolution is passed to fix or approve the office holder's remuneration.

This new change may be seen as a welcome change for creditors, some of whom may already be familiar with the SIP 9 guidance notes and no longer feel the need to be burdened with additional paperwork.

SIP 11 – Handling of monies in insolvency appointments

The revised SIP 11 came into force on 1 June 2007.

The most significant change made is that the prohibition on intermingling different estate funds has been lifted.

The new SIP 11 words this as follows: "Members should ensure that records are maintained to identify the funds and other assets of each case for which they have responsibility as insolvency office holder. Such

funds and other assets must be maintained separately from those of the office holder or his firm."

This update was felt appropriate by the JIC given the advances in information technology since the previous version of SIP 11 came into force in August 1996. It allows for the use of accounts designed by some banks for use by insolvency practitioners where funds are cleared through a single account and maintained in a distinct sub-account.

Where such accounts are used, ACCA's Practice Monitoring Department will be reviewing the use of the accounts to ensure that funds are regularly transferred through to sub accounts and that adequate records are maintained.

The SIP also sets out provisions for the type of accounts that may be used to ensure the trust status of the funds is maintained.'

REVIEW OF THE INSOLVENCY ETHICAL STATEMENT

Members are reminded that the draft revised ethical statement prepared by the JIC Ethics Working Party was circulated for comment earlier this year with an invitation to comment on it by 2 July. The draft sets out five fundamental principles with which IPs would be obliged to comply – these are integrity, objectivity, professional competence and due care, confidentiality and professional behaviour – and expands the text dealing with the threats which IPs may come across in the course of their work which may have a bearing on their compliance with the fundamental principles. The draft statement is still posted on he Professional Standards section of the ACCA web site.

CHANGES TO THE IVA PROCEDURE

Following proposals developed by an ad hoc working group in 2005, the Insolvency Service has now issued a formal consultation paper on the re-structuring of the Individual Voluntary Arrangement (IVA).

The centrepiece of the document is the proposal to introduce the simplified voluntary arrangement (SIVA). This will be available to debtors who have uncontested debts of less than £75,000: the Insolvency Service estimates that 80% of IVAs will qualify to use this new procedure on this basis. The logic behind the SIVA proposal is that it will reduce costs – there would be no requirement to summon the physical meeting of creditors under section 257 of the Insolvency Act 1986. Instead, the nominee – if he thought the proposal had a reasonable chance of being approved and implemented - would invite creditors to vote on the proposal by correspondence. A further cost saving would come via the proposal that creditors should lose the right to propose modifications to the proposal – they would only be asked to vote for or against the proposal as it stands.

In respect of all IVAs, including SIVAs, it is suggested that there should in future be no requirement for the routine filing of papers in court: again, this is presented as a cost-saving measure.

The Insolvency Service also proposes that it should in future be possible for bodies to be authorised by the Government to issue licences to act as office holders in respect (only) of IVAs, CVAs or both. The Insolvency Act 2000 already allows bodies to apply for authority to issue insolvency licences in respect of both IVAs or CVAs but the negligible response so far is thought to be linked to the comparatively low interest in the CVA procedure – the Insolvency Service considers there will be more interest from bodies which wish to issue IVA licences only.

The consultation document can be found on the Insolvency Service web site at www.insolvency.gov.uk. Responses to the proposals are invited by 3 August 2007. If members have any views on this matter which they believe ACCA should submit formally they are invited to contact John Davies at daviesj@accaglobal.com.

STATISTICS

In the first quarter of 2007 there were 3,113 insolvent company liquidations in England and Wales, 2.8% down on the fourth quarter of 2006 and 11% down on the first quarter of 2006. The total included 1,392 compulsory liquidations and 1,721 creditors voluntary liquidations. In the same period there were a total of 30,075 individual insolvencies, an increase of 23% on the first quarter of 2006. The figure comprised 16,842 bankruptcies and 13,233 IVAs – the latter figure showing only a slight rise on the previous quarter but a 47% increase on the first quarter of 2006.

In Scotland a strong increase in the number of insolvent liquidations was reported, up 26% from the last quarter of 2006 and 29% against the first quarter of 2006. Individual insolvencies rose 11% over the first quarter of 2006. Northern Ireland bucked the trend by recording significant drops in the numbers of both bankruptcies and IVAs.

Figures published by the Registry Trust in May showed that 247,187 debt-related judgements were issued against individuals in the first three months of 2007, an increase of 9.5% on the same period in 2006. This is the highest quarterly figure for ten years.

2. Regulatory Update

VOLUME IVA PROVIDERS

There has been a lot of recent press coverage about an IVA forum in January 2007 which was attended by, among others, by a number of volume IVA providers and the British Bankers Association. Following on from the initial meeting several working parties were formed to deal with various aspects of the relationship between the creditors and the volume IVA providers. These working parties reported back to the forum on 31 May 2007 where a voluntary "code of conduct" was agreed in principle. Given that the source of most contention has been the up-front nature of supervisor's fees, at the meeting the banks and the IVA providers agreed to look at ways in which more of the latters' fees can be spread out over the usual five year period of the IVA. The parties also agreed in principle on the need to give more information to customers on the differences between an IVA and more informal debt management plans. The meeting did not cover the level of IVA fees.

Any agreement on this issue will not have any effect on the regulation of IVAs, but insolvency practitioners in volume IVA providers and general practitioners will need to take note of the "code of conduct" as it will affect the voting behaviour of the large creditors. Information on the "code of conduct" will be available on the Insolvency Service website in due course.

The monitoring of volume IVA providers will be directly affected by guidelines to be agreed between the Recognised Professional Bodies at the Meeting of Monitors: these are currently in draft form. When the final version of the guidelines is available, ACCA's Practice Monitoring Department will send a letter to all practitioners who hold more than 100 IVA appointments setting out its approach to monitoring volume IVA providers in more detail. In summary however, the main differences are that for the next two to three years, ACCA will be looking to visit volume IVA providers every year. The visits will be aimed at understanding the mechanisms and procedures used by different volume IVA providers to "process" an IVA. The Practice Monitoring Department will then look at key areas such as whether appropriate advice is being given to debtors and the meeting of creditors. We anticipate that the initial visits under the new guideline will take longer than subsequent visits; the first visit will allow us to form an understanding of the volume IVA provider's "systems" while subsequent visits will have a greater focus on case samples. One of the key differences on visits to volume IVA providers is that the Practice Monitoring Department will listen in on live and recorded conversations with debtors. Practitioners who have less that 100 IVA appointments who regard themselves as volume IVA providers and who wish to be included on the circulation list to volume IVA providers should email mike.dollar@accaglobal.com. The definition of a volume IVA provider is one which is being applied within the insolvency monitoring team at ACCA and has no application elsewhere.

ACCA WEBSITE

All of the new SIPs referred to under Technical Update above are posted on the Professional Standards section of ACCA's website. The updated Practice Monitoring Department checklists will also be available on the website by the end of June.

NEW SENIOR COMPLIANCE OFFICER

Yin Lie Wan joined the Practice Monitoring Department in January 2007. Yin is a solicitor with insolvency knowledge, having previously worked as a litigator in law firms in London.

3. Legislation

FRAUD ACT 2006

The Fraud Act 2006 obtained the Royal Assent on 8 November 2006. The Act brings in a new triple statutory definition of fraud and repeals corresponding provisions of the Theft Acts. Under the new Act, the criminal offence of fraud can be committed by dishonest false representation, by dishonestly failing to disclose

information and by dishonest abuse of position with the intention of making a personal gain or causing loss to another. It is considered that the latter definition could have particular application to company directors.

INSOLVENCY PROCEEDINGS (FEES) (AMENDMENT) ORDER 2007 (SI 2007/521)

This Order makes certain amendments to the terms of the Insolvency Proceedings (Fees) Order 2004. Among the changes made, the fee for preparing a debtor's report under s274 of the Insolvency Act rises to £335 and small increases are made to the 'appropriate deposits' in relation to bankruptcy and winding up petitions. The definition of 'bankruptcy ceiling' for the purposes of determining fees payable by the official receiver is amended by the inclusion of interest payable under s329(2)(b). The revised fees came into effect on 1 April 2007.

INSOLVENCY PRACTITIONERS AND INSOLVENCY SERVICES ACCOUNT (FEES) (AMENDMENT) ORDER 2007 (SI 2001/133)

This Order increases the IP authorisation fee payable to the Secretary of State from £2,100 to £2,500 and provides for a fee of £10 to be paid in respect of transfers made electronically via the CHAPS system in respect of funds held in the Insolvency Services Account. The changes took effect as from 1 April 2007.

BANKRUPTCY AND DILIGENCE (SCOTLAND) ACT 2007

The Act makes changes to Scottish bankruptcy law so as to bring it into line with the changes made by the Enterprise Act 2002 and modernises the law on Scottish floating charges. The period of bankruptcy is reduced to one year and Bankruptcy Restriction Orders and Undertakings are introduced.

CROSS-BORDER INSOLVENCY REGULATIONS (NORTHERN IRELAND) 2007

These Regulations, which came into effect on 12 April 2007, give effect to the terms of the UNCITRAL Model Law on insolvency in Northern Ireland – this already applies in Great Britain.

BANKRUPTCY FEES (SCOTLAND) (AMENDMENT) REGULATIONS 2007

This SI amends the fees payable to the Accountant in Bankruptcy for services carried out. It came into effect on 1 April 2007.

THIRD MONEY LAUNDERING DIRECTIVE

Regulations to implement the Third Money Laundering Directive are expected to be laid before Parliament by July in order to meet the implementation deadline of December 2007. The new Regulations will introduce no changes to the rules governing the reporting of suspicious transactions but will require changes to the process of carrying out client due diligence. A new category of 'Politically Exposed Person' – a person who has been entrusted with high political or military responsibilities in a non-EU country – is introduced and wherever a client or prospective client fits this definition enhanced due diligence procedures will need to be conducted. Further, the Regulations make clear that due diligence should be carried out on an on-going

basis by reference to risk. From the regulatory perspective the biggest changes is that all regulated persons will, in future, have to be supervised in respect of their compliance with their ant-money laundering responsibilities. It is envisaged that ACCA will assume the supervisory responsibility in respect of its members. CCAB is in the process of revising its 2004 guidance to accountants; it is expected that R3 will do likewise in respect of its additional guidance for IPs.

EU SIMPLIFICATION PROJECT

The European Commission is expected to publish proposals this Summer which could have a radical effect on the accounting and reporting rules which apply to small and medium sized companies. The announcement, which forms part of a broadly-based anti-red tape initiative, is likely to encompass the following proposals, among others:

- the introduction of a new category of 'micro' company which member states would be allowed to exempt from all accounting and reporting obligations contained in the 4th and 7th directives
- the exemption of small companies from the requirement to file their annual accounts on the public register
- the extension of audit exemption to medium sized companies
- the increase in the 'adaptation' period – which regulates qualification for the small or medium sized category for accounting purposes – from two years to five. Accordingly, a 'new' medium sized company, for example, would have to meet the qualification criteria for this category for five years before being obliged to follow the rules for medium sized companies.

4. Cases

STATUS OF PROPERTY TRANSFERRED FOLLOWING DIVORCE

Hill & Anor v Baines [2007] EWHC 1012(Ch)
Judgement delivered 3 May 2007

A transfer of property to an ex-spouse following divorce can be set aside on application by an insolvency practitioner under the recovery provisions of the Insolvency Act 1986.

The case, heard by the High Court, involved the aftermath of contested divorce proceedings. As part of the settlement, a court had ordered the husband, under ancillary relief provisions of the Matrimonial Causes Act 1973, to transfer to the wife all his interest in the property where they had lived together. Twenty two months after the court order transferring the husband's interest, he was declared bankrupt. The husband's joint trustees in bankruptcy applied to a district judge for an order that the property transfer amounted to a transaction at an undervalue under section 339 of the Insolvency Act 1986, on the alternative bases that the wife had given no consideration for the transfer of the asset or the value of the wife's consideration had been significantly less than the value of the property transferred, and the transfer being caught by the two year period applicable under section 339. The judge dismissed the application but the trustees appealed to the High Court.

The wife's case was that, following Re Abbott (1983) – a case decided under the Bankruptcy Act 1914 – transfers of property pursuant to matrimonial legislation can be deemed to constitute consideration if they are accompanied by undertakings on the part of the transferee to give up additional claims against the transferor. But the court stressed that the terminology used in the 1986 Act differed materially from that of the 1914 Act and could not be relied upon: the test contained in section 339(c) refers to consideration being in the form of money or money's worth, rather than the former term 'valuable consideration'.

In its ruling, the court accepted that, in accordance with precedent, it had the residual power to use its discretion so as to impose no order for restitution even where a transaction had been proved to have met the test of section 339 (or sections 238, 239 or 340). But such discretion was intended to be used extremely rare and the circumstances of the case under review did not justify resorting to it.

If the decision is not reversed on appeal, it is likely to have significant implications for the assets available to creditors following divorce settlements and the responsibilities of insolvency practitioners to pursue those assets.

RIGHTS OF TRUSTEES IN RELATION TO UN-CO-OPERATIVE BANKRUPTS

Hickling v Baker [2007] EWCA Civ 287
Judgement delivered 4 April 2007

The court's powers to order the arrest and committal of bankrupts' following their failure to comply with their obligations to trustees were consistent with the Human Rights Act 1988.

An undischarged bankrupt had been arrested following an order made by the court under s364 IA 86 and sent to prison on the grounds that he had not co-operated with his trustee, specifically on the basis that he was about to conceal or destroy papers and records material to the bankruptcy. An appeal was made against the order, arguing that the procedure whereby the bankrupt was committed was defective, specifically that no notice had been given and that some of the evidence presented to the court in support of the application was not made available to the bankrupt.

These issues were considered in the light of the provisions of the Convention on Human Rights, which forms part of the Human Rights Act 1998, in particular in the light of article 5 (right to liberty and security).

The court determined, on the facts of the case, the following:

i) arrest under s364 IA 86 can be justified under article 5(1)(b) of the Convention – arrests are permissible in the event of non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law.

ii) Article 5 does not require notice of a petition for a committal order under s364 in all cases. (However, evidence should be presented to the court spelling out why departure from the usual rule was necessary).

iii) Where an order is made on an application without notice, the person arrested should still be brought before a court at the earliest practical opportunity.

iv) A court's order under s364 did not have to specify any particular obligation whose fulfilment needed to be secured.

v) While the point did not fall to be decided in the case in question, the court expressed serious doubts as to whether the withholding of evidence could ever be justified on an application under s364.

FACTORS IN FIXING REMUNERATION BY THE COURT

Simion v Brown
Judgement delivered 14 March 2007

The debtor had been made bankrupt on the petition of his major creditor. His total debts were under £50,000. The bankrupt's only material asset, a houseboat, had realised £43,000. Against this, the total costs and expenses of the bankruptcy, excluding the trustees' remuneration, came to £24,000 while the trustees claimed remuneration of some £21,000.

There being no creditors' committee, the trustee put a resolution to approve his remuneration on a time basis before the final creditors' meeting. The only creditor attending, the original petitioner, objected and defeated the resolution. The trustee then applied for an order under IR 6.141 allowing him to charge his remuneration on a time basis. The creditor brought his own action before a county court seeking to limit the trustee's remuneration to £8,000. This latter application was dismissed, but not before the trustee's solicitor has asked that his own application be stayed until the outcome of the creditors' application was determined. This led to an unsatisfactory outcome for the trustee since though the court had dismissed the creditor's petition it had not ruled on the trustee's claim.

When eventually the trustee's application was heard by the High Court, it found it inevitable that regard should be had to the factors listed in IR 6.138(4) but also to the court practice statement 'The Fixing and Approval of the Remuneration of Appointees', which calls on remuneration of court appointees to be fair, reasonable and commensurate with the nature and extent of the work properly carried out'. This statement also contains a number of 'guiding principles' which should inform the determination of applications. .

While sympathising with the creditor's position that the sale proceeds had been entirely taken up by expenses and remuneration, the court stressed that the trustee had statutory duties to perform and that costs were always likely to be proportionately greater in smaller estates. This being said, the court critically evaluated the details of the trustee's claim in the light of the guiding principles of the practice statement and eventually fixed the remuneration at £13,600.

The court added that the trustee had made the mistake, earlier on in the process, of applying to stay his application – the correct course of action would have been for both his own application and the creditor's application to have been heard together.

WINDING UP OF INSOLVENT PARTNERSHIP WHERE BOTH DEBTORS ALREADY BANKRUPT

Official Receiver v Hollens [2007] EWHC 753 (Ch)
Judgement delivered 4 April 2007

The powers of intervention available to the court under s303 IA 86 in respect of the conduct of a bankruptcy can be used to address cases where the bankruptcy of individual partners holds up the winding up of the partnership.

The Official Receiver had sought orders under s303(2A)-(C) IA 86 on the basis that two bankrupts had been members of an insolvent partnership.

Both debtors applied for their own bankruptcy and the orders were given the same day. The Official Receiver assumed control over the affairs of both individuals. Their bankruptcies meant that neither could initiate the formal winding up of the partnership. But neither did the Official Receiver have any authority to do so. The only possibilities, other than to wind up the partnership as an unregistered company or by getting the two bankrupt partners to present a joint bankruptcy petition under the Insolvent Partnership Order 1994, was to resort to s303(2A)-(C) IA 86. This allows the court to make an order with respect to the future conduct of an insolvency involving insolvent individuals and an insolvent partnership.

The High Court overturned the refusal of the district judge to grant the orders. It agreed that s303 provided wide powers to a court to allow the application of any provisions of the Insolvent Partnerships Order and that, on the facts of the case, the court should accede to the request in the interests of the partnership's creditors.

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