ACCA

insolvency newsletter

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IVAs

Many of the first visits to volume IVA providers under the Insolvency Service Guidelines have now been undertaken. Members are asked to note the following provisions of SIP 3, which should be of interest to general insolvency practitioners as well as IVA specialists.

SIP 3, paragraph 3.4 requires practitioners to advise the debtor on all the options available to him. The advice must then be set out in full in a letter to the debtor together with a copy of the R3 booklet "Is an IVA right for me?" Paragraph 3.9 requires the practitioner to send a letter of engagement to the debtor setting out their respective duties and responsibilities in relation to the proposal. Additional matters which must be explained to the debtor are set out in paragraphs 3.1 to 3.10.

The timing of the advice is also important; the debtor should be allowed adequate time to consider the information and raise any points with the practitioner that he does not understand. The debtor should confirm that he understands and accepts the course of action that is being proposed.

Where the debtor is a trader, a meeting in person should always be conducted. This includes even the most basic forms of trading, such as window cleaners and taxi drivers.

After the arrangement has been approved by creditors, the supervisor's main duty is to ensure that the arrangement proceeds in accordance with the terms of the agreed proposal. There are two areas where practitioners tend to deviate from the terms of the arrangement.

The first is not following the breach provisions in the arrangement when the debtor breaches the terms of the arrangement. What constitutes a breach is, of course, defined in the arrangement, but the most typical breaches are failure to make monthly contributions in terms of the arrangement. Where the debtor is in breach of the arrangement, the supervisor must follow the breach provisions in the arrangement.

Where the R3 standard terms and conditions are incorporated in the arrangement this includes sending the debtor a notice of breach and allowing the debtor a month to remedy the breach and provide a full explanation of the breach. If the breach is remedied, it need only be reported to creditors. Where the breach is not remedied, the supervisor is required to convene a meeting of creditors to determine the action that should be taken.

Arrangements typically provide that should three months contributions be missed, the arrangement shall be deemed to have failed.

ACCA compliance officers are therefore looking to see that practitioners are employing a graded approach where debtors fall into arrears, with chaser letters for the first and second missed payments and prompt action being taken to fail the arrangement after the third missed payment.

Variations of the arrangement are, of course, in some circumstances preferable to the failure of the arrangement.

Practitioners do have a limited discretion in allowing the debtor time to meet his obligations under the arrangement, but the terms of the IVA ought to be adhered to. An arrangement that goes into arrears, but ultimately succeeds is of course preferable to an arrangement that fails as costs are saved and there is a likelihood that creditors will receive less in a bankruptcy than in an IVA. Where the supervisor chooses to step outside the terms of the arrangement, however, he is at risk of criticism and should hesitate to do so without making the creditors aware of what he is doing and seeking their approval if appropriate.

ADMINISTRATIONS

The general standard of compliance in administrations has improved considerably over the last 18 months and most practitioners have some experience of dealing with the Enterprise Act 2002 administration procedure.

The most frequent breaches of the legislation occur in the exit routes out of the administration procedure. The root of the breach is often in the manner in which the paragraph 49 report is drafted. The statutory purpose needs to be clearly stated and the manner in which it is to be achieved set out.

If the administrator thinks the purpose of administration cannot be achieved in relation to the company, then under paragraph 79 of Schedule B1 the administrator shall make an application to court for the appointment of the company to cease to have effect from a specified time. Under the same paragraph, an application should be made if any of the following apply:

(2)(b) the administrator thinks the company should not have entered into an administration;

(2)(c) A creditors' meeting requires him to make an application under this paragraph;

(3)(a) the administration is pursuant to an administration order; and (3)(b) the administrator thinks that the purpose of the administration has been sufficiently achieved in relation to the company.

The most common purpose for administrations seems to be to achieve a better result for creditors than would have been achieved if the company had gone directly into liquidation without having first been in administration. The natural exit route then is by way of a creditors' voluntary liquidation. A common breach is where the administration is ended by placing the company into creditors' voluntary liquidation where there are insufficient assets to make a distribution to unsecured creditors, contrary to paragraph 83(1).

It is possible that some of the breaches in the administration procedure referred to above occur as a result of companies going into administration that should probably have been placed into creditors' voluntary liquidation. The new section 176ZA of the Insolvency Act 1986 (which reverses the effect of the Leyland Daf decision) which came into force on 6 April 2008 may lead to fewer companies being dealt with in this way, and possibly fewer occasions in which paragraph 79 is applicable.

Breaches of paragraph 79 are treated as serious legislative breaches on insolvency monitoring visits.

PENSION PROTECTION FUND

Members are reminded of the notification requirements which apply to IPs under the Pensions Act 2004. IPs who become aware of an 'insolvency event' in relation to an employer that has an occupational pension scheme are required to notify the Pensions Protection Fund (PPF) and other parties.

An 'insolvency event', in the case of a company, occurs in the following circumstances:

- the nominee in relation to a CVA proposal submits a report to the court under section 2 IA 86 which states that, in his opinion, meetings of the company and its creditors should be summoned to consider the proposal
- the company's directors file or lodge the necessary papers in connection with an application for a moratorium in respect of a CVA in accordance with para 7(1) of Schedule A1 to the Act
- an administrative receiver is appointed to the company
- the appointment of an administrator takes effect
- a resolution is passed to put a company into creditors' voluntary winding up
- a meeting of creditors is held to convert a members voluntary winding up into a creditors' voluntary winding up
- a court order is made to wind up a company.

(Equivalent triggers are contained in section 120 with regard to insolvency events relating to individuals and partnerships).

When an insolvency event occurs, the IP is required to notify the PPF, The Pensions Regulator and the trustees or managers of the occupational pension scheme within 14 days of the insolvency event or the date that the IP becomes aware of the existence of the pension scheme (whichever is the later). Accordingly, an IP should, as part of his initial investigations, establish whether the insolvent employer has an occupational pension scheme and, where it does, make the appropriate notifications.

Further, under section 122 of the Act, where IPs are able to confirm that a rescue of the pension scheme is not possible they must also issue, again to the PPF, the Pensions Regulator, and the trustees or managers of the scheme, a 'scheme failure notice', and where they are able to confirm that a scheme rescue has occurred, they are required to issue (to the same addressees) a 'withdrawal notice'. They must also issue notices where they cease to hold office before they can reach either of these decisions. Such notices must be issued as soon as is reasonably practicable.

Pro-forma forms for notices under both sections 120 and 122 can be found at http://www.pensionprotectionfund.org.uk/index/forms.htm

The PPF has written to ACCA and other RPBs to express its concern about the level of compliance with these requirements. The PPF has in fact submitted 18 complaints to ACCA's Professional Conduct Department since the beginning of the year relating to late notifications under section 120 and regulation 4 of The Pension Protection Fund (Entry Rule) Regulations, 2005. The Professional Conduct Department is investigating these complaints.

In addition to asking the directors about the existence of a occupational pension scheme and reviewing the company's financial records, practitioners can establish whether there is an occupational pension scheme by inspecting the company's accounts (if any have been produced): these should refer to the existence of an occupational pension scheme. The simplest and most effective way of establishing whether there is an occupational pension scheme is to visit the Pension Service's website http://www.thepensionservice.gov.uk/ and use their pension tracing service either by telephone, letter, or online query form.

The PPF has issued special guidance for IPs on these matters: it can be accessed at http://www.pensionprotectionfund.org.uk/index/guidance/guidance_for_insolvency_practitioners.htm

REGULATION ROAD SHOW

The ACCA Regulation road show that was planned for Autumn 2008 has been postponed until next year due to staffing changes in the ACCA monitoring department.

REGULATORY ASSESSOR

The Regulatory Assessor is now in place. What this means for practitioners is that most cases resulting from an unsatisfactory monitoring visit that would previously have been sent directly to the Admissions and Licensing Committee will now be sent to the Regulatory Assessor. The Assessor is a qualified and experienced insolvency practitioner. He has all of the powers of the Admissions and Licensing Committee, other than the power to remove a licence. If he decides that the removal of a licence should be considered then he will refer the case to the Committee. Practitioners have the right to refer their case to the Committee if they disagree with the Regulatory Assessor's decision. Cases that will still be referred directly to the Admissions and Licensing Committee are those which bring the eligibility of the practitioner to hold a licence into question, and those in which the Regulatory Assessor is conflicted.

'IS AN IVA RIGHT FOR ME?'

Members are asked to note that the R3 publication of the above title is being revised. The revised edition will feature contact details of all the regulatory authorities for insolvency practitioners.

ACCA COMPLAINT HANDLING PROCEDURES

Members based in the UK and Ireland are reminded that they are required under paragraph 12 of statement 3.18 of the ACCA Rules of Professional Conduct to adopt internal procedures to handle client complaints in respect of fee, service and contractual disputes. In accordance with this requirement, individuals who are minded to make complaints about ACCA members are now expected to make use of these internal procedures before they submit their complaint to ACCA.

ACCA is shortly to place on its web site a standard letter that complainants will be able to send to members. This standard letter will explain that they (the complainants) have been informed by ACCA that they (the practitioners) are obliged to have complaints-handling procedures in place by virtue of the guidance referred to above, and that such procedures are required to involve consideration of the complaint by a person who was not directly involved in the matter which is the subject of the complaint. The standard letter will expect a prompt acknowledgement and a full response to the letter within 14 days.

It is hoped that bringing these procedures to public attention will allow many matters to be resolved by direct communication between the two parties.

ACCA will therefore not consider a complaint against a member unless the complainant has invoked the member's internal procedures and these procedures have either been exhausted or have stalled. This approach will not be suited to cases where the complainant is another IP or a regulator.

STATISTICS

In the first quarter of 2008, there were 3, 210 liquidations in England and Wales (an increase of 2% on the previous quarter and an increase of 4% on the same period in 2007) This figure included a 22% drop in compulsory liquidations over the equivalent period in 2007 and a rise of 25% in creditors voluntary liquidations over the same period. There were 25,264 individual insolvencies in England and Wales in the first quarter, an increase of 1.7% on the previous quarter but a decrease of 13.2% on the first quarter in 2007. The figure was made up of 15.651 bankruptcies and 9,614 IVAs.

The figures for Scotland for the first quarter are 102 company liquidations (down 38% on the first quarter of 2007) and 3,275 individual insolvencies (down 5.6% on that same period). In Northern Ireland there were 42 company liquidations (up 16.7% on the first period in 2007) and 330 individual insolvencies (down 3.8%).

Meanwhile, research by BDO Stoy Hayward has forecast that the number of companies becoming insolvent over the next two years is likely to be worse than expected. The BDO Industry Watch report predicts a significant increase in the predicted rate of business failure. In December 2007, the firm had forecast business failures would rise by 11.4% between 2007 and 2009. The June report forecasts a increase of 18%, which would be the highest failure rate since the dot.com bubble burst in 2002. BDO puts the projected increase down to a combination of rising energy and food prices, decreasing consumer confidence, falling house prices and the fall-out from the credit crunch. The only sector that BDO predicts will resist this trend is the Technology, Media and Telecoms sector, where the failure rate is projected to remain flat until the end of 2009 when it will start to decrease.

THE INSOLVENCY PRACTITIONERS AND INSOLVENCY SERVICES ACCOUNT (FEES) (AMENDMENT) ORDER 2008 (SI 2008/3)

The formula in accordance with which RPBs are required to calculate and pay the annual Insolvency Service levy is changed with respect to 2008 and future years. Under the new rules, the fee payable is £207 multiplied by the number of persons who at 1 January in that year were authorised by the body concerned to act as IPs.

THE INSOLVENCY (AMENDMENT) REGULATIONS 2008 (SI 2008/670)

These regulations make certain changes to the provisions of the Insolvency Regulations 1994 regarding the treatment of unclaimed funds and dividends.

By virtue of the new regulations 3B and 3C, administrators and administrative receivers of dissolved companies may pay any such funds into the Insolvency Services Account. The same discretion also applies to former voluntary liquidators of dissolved companies under the new regulation 18. It remains mandatory for such payments to be made to the Insolvency Services Account in the case of windings up by the court. References in the previous version of regulation 18 to unclaimed or undistributed assets and undistributed dividends are removed, on the basis that all property of the company on dissolution is considered to be bona vacantia.

These changes take effect on 6 April 2008

THE INSOLVENCY PRACTITIONERS AND INSOLVENCY SERVICES ACCOUNT (FEES) (AMENDMENT) (NO 2) ORDER 2008 (SI 2008/672)

This SI makes two further changes to the principal regulations on this matter. Firstly, the fee for direct SOS authorisations rises to £2,550. Secondly, a new fee (£25) is introduced with regard to the payment of unclaimed dividends or other money into the Insolvency Services Account by administrators and administrative receivers.

INSOLVENCY PROCEEDINGS (FEES) (AMENDMENT) ORDER 2008 (SI 2008/714)

Under this SI, the maximum fee payable to the SOS regarding bankruptcy proceedings is reduced from £100,000 to £80,000 (with transitional provisions for cases already under way on 6 April 2008). It also increases the deposits payable in respect of bankruptcy and windings up by the court and the standard fee payable to an IP appointed under s273 IA 86. The fee for bankruptcy petitions goes up to £415.

THE INSOLVENCY (AMENDMENT) RULES 2008 (SI 2008/737)

This SI makes substantial changes to the rules on priority found in IR 4.218.

Firstly, the current wording at the start of IR 4.218 is replaced by new sub-paras (1), (2) and (3). The new paragraphs provide at the outset that all fees, costs, charges and other expenses incurred in the course of a liquidation are to be regarded as expenses of the liquidation. The new wording also allows for the expenses of a liquidation to be paid out of the proceeds of any legal proceedings that the liquidator has power to bring in his own name or the name of the company, and also for the recovery of expenses and costs relating not only to the conduct but the preparation of any such legal proceedings.

The SI also inserts into the Insolvency Rules new rules 4.218A to E. These address the operation of the new s176ZA of the Insolvency Act 1986 (the ‘Leyland Daf’ clause, which allows for the expenses of a winding up in England and Wales to have priority over property covered by a floating charge, subject to any rules which might impose conditions on the operation of this rule). The new rules in IR 4.218A to E place restrictions on the application of s176ZA in respect of litigation expenses, making payments subject to approval by or authorisation by the debenture holder, any preferential creditor or the court as the case may be. The new rules also set out the procedure for obtaining approval or authorisation for litigation expenses for the purpose of deducting them as liquidation expenses from property subject to a floating charge.

The amendments take effect as from 6 April 2008.

DIRECTORS' PERSONAL LIABILITY UNDER THE PHOENIX RULES

First Independent Factors & Finance v Mountford [2008] EWHC 835 (Ch)

Judgement delivered 23 April 2008

A director of a company which had gone into insolvent liquidation, and who had commenced thereafter to trade through a business with a 'prohibited name', was held to be personally liable for the debts of that company when it too became insolvent.

The individual concerned had acted as a director of Classic Roofs Ltd and Classic Conservatories and Windows Ltd. After two years of trading in the manufacture of conservatory roofs, Classic Roofs went into insolvent liquidation. The owner continued to conduct the same line of business through the other company, Classic Conservatories, which had up to that point been dormant, although none of the business of Classic Roofs was actually continued. Classic Conservatories itself went into liquidation within a few months owing in excess of £250,000. Two of the company's main unsecured creditors sold their debts, at a deep discount, to First Independent Factors, which subsequently sought to recover them from the director personally under s217 IA 86.

The first decision that the court made was to reject the claim by the debtor that assignees of debts, who had never traded with the insolvent company, had no right to sue a former director under s217. It was held that it made no difference whether the debt was acquired before or after the company went into liquidation.

In determining whether there was such an association between the names of the two companies as to establish a 'prohibited name' under s216, the court took the view that all relevant contextual facts had to be taken into account. While there were many companies that included the word 'Classic' in its name, in this particular case the two companies were likely to be closely linked in the minds of customers and suppliers since they both were involved in, specifically, conservatory roofs. The logos of the two companies were similar and both traded from the same business park, though not from the same premises. And while the two companies had different customer bases, their suppliers and creditors were largely similar.

The court therefore held that the director was liable to the factor for the debts of the failed 'phoenix' company.

COSTS OF A FAILED BID TO REMOVE ADMINISTRATORS

Coyne v DRC Distribution Ltd [2008] EWCA Civ 488

Judgement delivered 15 May 2008

The Court of Appeal has held that joint administrators who had been subject to a failed bid to remove them from office should still be personally liable for the creditor's costs.

The two administrators were appointed to an insolvent company by its managing director. Prior to their appointment, the company had transferred its plant and machinery and intellectual property rights to another company and transferred its premises to its director. The administrators initially tried to recover these assets but did not in fact do so. They then tried to sell what remained of the business to the company's director and the company to which its assets had been transferred. On hearing this news, a substantial creditor of the company applied for the removal of the administrators.

The administrators meanwhile formed the opinion that the purpose of the administration could not be achieved and applied for their removal and for the company to be put into compulsorily wound up. Both these applications were successful, but the court awarded the creditors' costs to be paid by the administrators. They appealed, arguing that that summary judgement should not have been given and that they should have been given the opportunity to explain their case.

The Court of Appeal rejected the idea that the lower court should have heard witness evidence on such a matter. It also held that, on the facts of the case, the administrators should not have considered selling the insolvent company's assets before recovering what rightfully belonged to the company. Until its assets were properly recovered, the purpose of the administration could not be achieved. The Court held that the administrators had not acted expeditiously or properly and that this justified the costs order being made against them.

DIS-APPLICATION OF THE 'PRESCRIBED PART' IN ADMINISTRATION

Re Hydroserve Ltd [2008] BCC 175

Judgement delivered June 19 2007

The courts will agree to disapply the 'prescribed part' rules where there would be little or no benefit to unsecured creditors.

Under s176A(5) IA 86, the court may order that the requirement in s176A(2), namely that the office holder must make a prescribed part of the company's net property available for the satisfaction of unsecured debts, should not apply.

Joint administrators applied to the court for the disapplication of the standard requirement on the ground that the cost of agreeing the claims of unsecured creditors and paying a (very small) dividend to them would be disproportionate to the benefit of the distribution.

The Court agreed with the administrators' case and agreed to disapply sub-section (2) in the circumstances. Given, however, that the creditors had previously been informed that the prescribed part rule would be complied with, they were also given the right to apply to set the court's order aside.

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