



**They think it's all over...**  
**Green v Wright [2017] EWCA Civ 111**  
**Simon Passfield, John Churchill, Guildhall Chambers**

*The Court of Appeal decides when and how an IVA ends, and what happens to the debtor's property when it does*

## **Introduction**

1. The Court of Appeal has recently handed down its long-awaited judgment in *Green v Wright* [2017] EWCA Civ 111. The issue at the heart of the case is whether a trust in favour of creditors constituted by an IVA survives the issue of a certificate of completion.
2. Whilst the case primarily concerns an IVA, the decision is of relevance to the interpretation of voluntary arrangements generally. Practitioners should note that whilst the Court's decision has the potential to protect the interests of creditors after a certificate of completion has been issued, much will turn on the precise language of the voluntary arrangement's terms which will be the predominant consideration of any Court.

## **The Facts**

3. In September 2007 Mr Wright (hereafter "**the Debtor**") proposed an IVA on terms that incorporated the Standard Conditions of the Association of Business Recovery Professionals (R3)<sup>1</sup>. Those terms included an 'all asset' clause<sup>2</sup> and provided for the IVA assets to be held by the Debtor on trust for the purposes of the IVA until realisation thereof. The proposal was accepted by a meeting of creditors in October 2007. The Debtor complied with the obligations incumbent on him under the IVA so that in January 2013 the supervisor of the IVA, a Mr Green (hereafter '**the Supervisor**'), issued a certificate of completion in accordance with the IVA's terms.<sup>3</sup>
4. In September and October 2013, the supervisor received two payments totalling £24,500 from two banks in settlement proceedings in relation to PPI mis-selling claims made by the Debtor after the certificate of completion was issued but in relation to policies taken out prior to August 2007 and

---

<sup>1</sup> Note that this was under the November 2004 IVA Rules whilst R3 now rely on the 2013 Standard Terms. Most of the terms material to the matter in this case remain unaltered however, save that there is now an explicit recognition in Para 11 (Effect of Termination) of the effect of termination upon assets of the IVA which expressly retains rather than returns them as under the 2004 IVA Standard Terms when read with the then Rule 28.

<sup>2</sup> i.e. it was proposed that all the Debtor's assets would be subject to the IVA terms except those specifically excluded in accordance with r.5.3(2)(a)(iii) of the Insolvency Rules 1986.

<sup>3</sup> The IVA had, upon creation, been given a life span of 5 years or if later until the creditors had received 33 pence in the pound.



therefore before the IVA. It was common ground that the claims were property subject to the terms of the IVA and the trusts constituted by it.<sup>4</sup>

5. The question before the Court of Appeal, on an appeal from an ex tempore judgment of HHJ Hodge QC<sup>5</sup> (which was in turn an appeal from DDJ Langley), was whether the funds received in September and October 2013 remained subject to the IVA trust or whether the certificate of completion extinguished the ability of the Supervisor to retain and distribute the property for creditors.

#### **The decisions below**

6. At first instance, DDJ Langley held that the effect of the issue of the certificate of completion was to terminate the Debtor's obligations under the IVA. Thereafter, the IVA was concluded, there was no trust and there were no beneficiaries.
7. That decision was upheld by HHJ Hodge QC, who went on to suggest that it would be open to an IVA supervisor to insist upon a special arrangement with a debtor to the effect that any monies received from a mis-selling claim should be made available to the creditors, notwithstanding the conclusion of the IVA and to withhold the issue of a certificate of completion if the debtor failed to agree.

#### **The Court of Appeal's decision**

8. In overturning the decisions of the lower courts, the Court of Appeal held that it would undermine the spirit and purpose of voluntary arrangements generally if the trusts created by the arrangement came to an end on completion in the absence of express provision to that effect (see para [33]).

#### **Analysis of the Court's reasoning**

9. At the beginning of the sole substantive judgment (delivered by Richards LJ with whom Irwin LJ agreed), the Court analysed the applicable provisions in the Insolvency Act 1986 ("IA") and the basis and procedure of IVAs within the Insolvency Rules 1986 (para [5]-[6]). The Court very much viewed these rules as structuring the framework within which an analysis of the specific rules and terms of the IVA in question were to be construed (see para [7]-[12]).

---

<sup>4</sup> See at [4]. This is consistent with the decision of District Judge Khan in *Ward v Official Receiver* [2012] BPIR 1073 and the Guidance Note on Payment Protection Insurance Mis-selling Claims.

<sup>5</sup> [2015] EWHC 993 (Ch); [2015] BPIR 806



10. The Supervisor, relying heavily on the earlier decision of the Court of Appeal in *Re N T Gallagher & Son Ltd* [2002] EWCA Civ 404, [2002] 1 WLR 2380 argued that, in the absence of any provision expressly terminating the IVA trust upon the issuing of a certificate of completion, the sums received were property to which the IVA trusts continued to apply.
11. In *Gallagher*, the Court considered whether the trust created by a CVA survived the termination of the arrangement when the company entered liquidation. It was held that the trust created by the CVA did survive and the supervisor continued to hold the assets obtained prior to liquidation.<sup>6</sup> The analysis of a *Quistclose*<sup>7</sup> trust was not followed because the effect of liquidation was to render the benefit of the CVA to creditors less effective, whilst on the *Quistclose* facts the benefit and the purpose of the CVA upon liquidation was entirely ineffective.
12. In the court below, HHJ Hodge had treated the decision in *Gallagher* as being of no assistance because the court was there "considering the position on failure of the arrangement, and not upon its completion". In contrast, the Court of Appeal held that *Gallagher* was pertinent authority. In particular, they focused on the substance of the *Gallagher* decision, rather than its context, namely that in order to terminate a properly constituted trust there have to be provisions requiring that it end and specifying what is to happen to the trust's assets (see para [23]). The existence of a specific provision in the IVA as to what would happen in the event that the trust was terminated went to show that similar provision had not been made and therefore was not intended upon the issuing of a certificate of completion (see para [24-25]).
13. The Debtor sought to argue that as "creditor" was defined for the purposes of the IVA as "a person bound by the Arrangement to whom a Debt is owed" and the IVA provided for the Debtor to be released from all Debts upon the issue of a certificate of completion, once the IVA was completed there ceased to be any beneficiaries of the trust. However, the Court rejected this argument: as the creditors were fixed by their position (either by a direct debt or from an obligation accruing after, but incurred, before commencement) at the time the IVA commenced, they remained creditors after completion. The effect of a release upon completion was just that, namely to release the debtor, it was not to extinguish, release or discharge the debt so as to remove the status of the creditors within the terms of the IVA (para [27]-[30]).
14. The Court then explicitly rejected any criticism that holding the debts to still exist (and that the effect of completion was merely that the debtor was released from them) was in any way inconsistent with the moratorium imposed on claims against the debtor upon the completion of the IVA and instead drew an analogy with the position in bankruptcy, where upon discharge "[T]he debts continue to exist for the purposes of proof in the bankruptcy and payment out of the

---

<sup>6</sup> See para [44] and [48] of *Gallagher* cited at para [15] and [16] of *Green*.

<sup>7</sup> *Quistclose Investments Ltd v Rolls Razor Ltd* [1970] AC 567.



realisation proceeds of the assets subject to the bankruptcy”. So with an IVA: the property subject to its terms and the debts on which it exists extend beyond the release of the debtor therefrom.

### Comment

15. The decisions of the lower courts have been the subject of much criticism as failing to give adequate consideration to the broad scheme of IVAs and their inter-relation with the bankruptcy process, as well as promoting considerable uncertainty by encouraging supervisors to withhold the issue of a certificate of completion.
16. In contrast, in interpreting the relevant provisions of the IVA, the Court of Appeal gave particular regard to its intended purpose, so that issue was not viewed in the abstract but rather in light of what the insolvency procedure was designed to achieve. This more purposive approach, which is undoubtedly to be welcomed, is in marked contrast to the more literalist approach adopted by the courts recently in the context of contractual interpretation (see *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, in which Lord Neuberger sought to constrain the relevance of commercial common sense and *Re Globe Motors Inc* [2016] EWCA Civ 396). This may indicate a more contextual approach to interpretation where whilst the obligations are still synallagmatic, the number of parties and the standard approach to the terms means it is less likely that the terms have been deliberately and individually settled upon.
17. However, it should be noted that, at its heart, the case before the Court was effectively an exercise in contractual interpretation. Whilst the decision is of assistance in clarifying the starting position where the IVA incorporates the R3 standard terms, it remains possible for an IVA proposal to expressly provide for the IVA trusts to be terminated on the issuing of a certificate of completion.

Simon Passfield  
John Churchill  
March 2017