NEW RULES AND CHANGES IN THE INSOLVENCY LANDSCAPE

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INTRODUCTION

The purpose of the note is to provide an update on three areas effecting practitioners working in the area of insolvency. The first, is the new Insolvency Express Trial Pilot scheme currently operating in the Bankruptcy and Companies Court in London which is seeking to provide a (comparatively) low cost and speedy means of resolving disputes in Bankruptcy and Insolvency cases. The second, is to look at the most recent amendments to the various Statements of Insolvency Practice and the third, is to provide some background to, and analysis of, the new Draft Insolvency Rules which are likely to come into force later this year.

THE INSOLVENCY EXPRESS TRIAL PILOT

Background

The Insolvency Express Trial Pilot (**"IET"**) is an initiative introduced as part of the Chancery Division's drive to reduce delay and costs.

Provision for the pilot scheme is to be found in Practice Direction 51P (**"PD51P"**) which has been made pursuant to CPR r. 51(2).

Key Features

The scheme has the following key features:

(i) It is only available to applications brought in the Bankruptcy and Companies Court of the High Court before the Bankruptcy Registrars (PD51P [1.1(1)(b)] and [PD51P [1.1(c)]).
(ii) It is a streamlined procedure with reduced case management requirements.
(iii) There are limited disclosure obligations.
(iv) There is limited case management.
(v) There is limited scope for extensions and adjournments.
(vi) The aim is for an early hearing with a fast decision.
(viii) There is a costs cap of £75,000 (excl. VAT and court fees but inclusive of any CFA uplift) (PD51P [3.4]).

Procedure

PD51P provides for a complete, albeit simple, procedure which takes the case from initial application to judgment. The following are the more significant procedural requirements:

(i) The application is to be commenced by form 7.1A which must:
  (a) Be clearly marked IET on the first page of the application (PD51P [2.1(a)])
  (b) State that the application is suitable for the IET list (PD51P [2.1(b)]).
  (c) State that the Respondent is entitled to object to the use of IET procedure (PD51P [2.1(c)]).
(ii) The Applicant should file evidence in support at the time that the application is issued (PD51P [2.3]).
(iii) The Court will order a directions hearing within 45 days of the date of issue with a time estimate of thirty minutes (PD51P [2.5]).
(iv) At the directions hearing, the Registrar will fix the trial date for between 3 and 6 months from that initial (and only) directions hearing (PD51P [3.1(1)]).
(v) The trial date will not be vacated by consent and an adjournment will only be granted in exceptional circumstances (PD51P [4.1]).
(vi) Judgment will generally be given at trial, but if reserved, it will be given within four weeks of trial (PD51P [5]).

Suitability

The IET is likely to be suitable for cases which:

(i) Have limited issues.
(ii) Are likely to last less than two days.

Mechanism for objecting to the use of the IET

If a Respondent objects to the use of the IET, it can rely upon the procedure contained in paragraph 2.6 of PD51P which provides a mechanism for laying that objection before the Court. That procedure consists of three steps which are:

(i) The Respondent must file and serve reasons for its objection14 days before the directions hearing (PD51P [2.6(1)]).
(ii) The Applicant must file and serve a reply to the objection 7 days before the hearing (PD51P [2.6(2)]).
(iii) The matter will then be determined at the directions hearing.

Both the objection and the reply should be no longer than two sides of A4 (including headings) (PD51P [2.6(3)]).

Advantages
The IET has the following intended advantages:

(i) Speedy resolution of the parties' dispute.
(ii) A reduction in expense as the costs cap reduces the need for costs budgeting.
(iii) An increase in the likelihood of settlement due to the limit on costs.

Summary

As has been noted elsewhere, there is nothing which the pilot scheme can achieve that cannot (theoretically) be achieved under existing provision. However, the relative inflexibility of the scheme as envisaged, coupled with the costs cap provide a greater likelihood of its twin objectives being met than if the application proceeded outside of the pilot scheme.

RECENT CHANGES TO THE STATEMENTS OF INSOLVENCY PRACTICE (SIPS)

SIPs 2 and 4

On 6 April 2016, a new version of SIP 2 came into effect. It applies to administrations and insolvent liquidations which commenced on or after that date.

SIP 2 sets out guidance for administrators and liquidators to comply with their investigatory obligations. Whilst much of the content of the pre-existing SIP 2 has been preserved, the new SIP 2 lays out guidance for office holders on how to comply with their duty to report to the Department of Trade Enterprise and Investment (**"DTEI"**).

Formerly, this was covered by SIP 4. However SIP 4 is to be withdrawn on 6 October 2016 although it will continue to apply to insolvencies which commenced before 6 April 2016.

The new SIP 2 takes account of the new reporting requirements found in Insolvent Companies (Reports on Conduct of Directors) (England and Wales) Rules 2016 (SI 2016/180) (**"Report Rules 2016"**). The new SIP 2 does not deal in any great detail with the specifics of the new rules, however the more significant requirements of the Report Rules 2016 include:

(i) The office holder must now submit a report to the DTEI three months (rather than six months as was formerly the case) after the date of the company entering into insolvency.

(ii) The submission will be through the new online portal operated by the Insolvency Service.

(iii) In circumstances were compliance with the three month deadline is not possible, the officeholder will need to apply for an extension of time, again through the portal.

SIP 9

Sip 9 provides guidance on payments to insolvency officeholders and their associates.

On 1 December 2015 the latest version of SIP 9 came into effect which takes into account the changes which flow from the coming into force of the Insolvency (Amendment) Rules 2015 (SI 2015/443) which are themselves a response to the Insolvency Service Consultation on proposals for 'Strengthening the regulatory regime and fee structure for insolvency practitioners'.

The more significant changes include:

(i) An office holder's fees and expenses should be 'fair and reasonable', rather than 'appropriate and commensurate'.

(ii) Officeholder's recording systems should use units of not greater than six minutes for each grade of staff used.

(iii) There is a new emphasis on the qualitative value of the information provided to creditors (and other interested parties) rather than the format in which that information is supplied.

SIP 13

As of 11 May 2016, the consultation on SIP 13 closed. The current version provides guidance on the acquisition of assets of insolvent companies by directors and dates back to 1997.

The consultation canvassed views on whether creditors and other interested parties want information on connected parties generally and not just company directors. With that in mind, the consultation sought the views of consultees as to whether the revised SIP 13 should apply to bankruptcies as well as corporate insolvencies.

The draft revision is also rather shorter than that currently in force having omitted summaries of the legal obligations of directors and officeholders when company assets are sold to directors. It also seeks to use language which is consistent with that used in SIP 16 (Pre-Packaged Sales in Administrations).

The guidance describes the language used as 'proportionate' and acknowledges that SIP 13 will apply to low value transactions.

THE DRAFT INSOLVENCY RULES 2016

Background

English insolvency law's legislative basis lies in the Insolvency Act 1986 (**"IA"**) and the Insolvency Rules 1986 (**"IR"**). Both pieces of legislation owe much to the 1982 Cork Report. However, that report and the legislation which gave effect to many of the Report's conclusions was a product of a different technological era. Electronic communications are now the standard means for businesses and individuals to communicate with email, Skype, virtual meetings and purpose built websites becoming ubiquitous.

In addition, new policy objectives have been identified by practitioners and commentators and adopted by political decision makers, with a reduction in bureaucracy and an increased focus on transparency being prominent amongst them.

Reflecting these changes, there have been in excess of 25 pieces of amending legislation which have sought to maintain (with undoubted success) the currency of the existing legislative framework.

However, this has resulted in a set of rules specifically and a legislative framework generally which is arguably incoherent and difficult to navigate. As Sir Roy Goode has observed, the ordering of the Insolvency Rules 1986 is 'mildly eccentric' with those rules forming part of a 'legislative morass through which even the experienced practitioner cannot pick his way without difficulty'.[1]

On 26 September 2013, the Insolvency Service undertook a consultation on the Insolvency Rules 1986 and issued copies of:

(i) A consultation document entitled: 'Consultation - Insolvency Rules 1986 – modernisation of rules relating to insolvency law'.
(ii) Insolvency Rules (Draft for Consultation).
(iii) Explanatory notes to the draft rules.

The Consultation ran between 26 September 2013 and 24 January 2014, and in response to the feedback received, the initial draft rules were substantially modified. On 22 July 2015, that modified version ("**the Draft Rules"**) was provided to the Insolvency Rules Committee (**"IRC"**).

Between the start of the consultation period and the issuing of the Draft Rules, there have been a number of legislative changes, most notably, the coming into force of the Small Business, Enterprise and Employment Act 2015 (**"SBEEA"**). Accordingly, a number of changes which were originally found within the draft rules have been dealt with by way of other legislation. However, the Draft Rules are still relevant to those changes in that they provide for their procedural basis.

At the time of the Draft Rules being submitted to the IRC (and released to the public), it was envisaged that the rules would be made in the spring of 2016 and come into force on 1 October 2016. However, there appears to be no current guidance as to whether that timetable is likely to be complied with.

Cautionary note

The most recent draft of the rules is just that, a draft. Accordingly, any reference to a specific draft rule in this note should be treated with caution as the rules as made are likely to be different to those as presently drafted. With that in mind, this note will rely upon the letters 'DR' preceding the rule number to denote individual rules within the Draft Rules (e.g. DR 1.1)

Objectives

The Draft Rules seek to do three things, namely:

(i) Consolidate the existing rules and their amendments into a single set of rules.
(ii) Modernise and simplify the language of the rules.
(iii) Incorporate changes in the law which are intended to reduce the burden of red tape.

In so far as the new rules are aimed at achieving the first of those stated purposes, they are not intended to change the law. It is only in so far as they seek to achieve the third purpose, that substantive change is intended.

The third of those purposes seeks to give effect to the responses to the Insolvency Services consultation which ran until 10 October 2013 and which was issued under the Government's insolvency Red Tape Challenge.

Style/drafting techniques

Stylistic changes in the Draft Rules include using gender neutral terminology along with a simpler drafting style which includes reliance being placed on the 'active voice'. In addition, references to the word 'shall' in the current rules have been replaced by the word 'must' to indicate the existence of an obligation in accordance with modern drafting practice.

In addition, the use of the word 'deliver' or 'delivery' replaces references in the existing rules to such words as 'send', 'notify' and 'give'. The draft rules acknowledge that there will be discrepancies between

[1] Principles of Corporate Insolvency *Goode R* (4 edn 2010) [1-29].

the language of the Insolvency Act 1986 (**"the Act"**) and the draft rules, but seek to cure any discrepancy by what is currently DR1.34 which provides:

> **Application of Chapter**
>
> **[DR] 1.34**
>
> (1) This Chapter applies where a notice is required under the Act or these Rules to be delivered, filed, forwarded, given, sent, or submitted in respect of proceedings under Parts 1 to 11 of the Act or the EC Regulation unless
>
> (a) the Act, a rule or an order of the court makes different provision including one requiring service on a person; or
> (b) the recipient of the notice is the registrar of companies.
>
> (2) A notice is delivered, filed, forwarded, given, sent, or submitted if it is delivered in accordance with this Chapter.

In summary, there are a number of stylistic changes to existing rules as well as application of the aforementioned stylistic themes to new provisions. The purpose of these changes is to meet the second of the stated purposes, namely, a modernisation and simplification of the language employed.

Structure

One of the most striking features of the draft rules is their departure from the familiar, albeit frequently criticised, structure of the existing rules.

The Draft Rules are split into 22 Parts. Those Parts are either specific to a given insolvency procedure or are else 'common parts' which apply to a number of different procedures.

Within the specific procedures, it is noteworthy that the old winding up Part – Part 4 has been subdivided into:

(i) Part 5 – Member's Voluntary Winding Up.
(ii) Part 6 – Creditor's Voluntary Winding Up.
(iii) Part 7 – Winding Up by the Court.

The Common Parts are found at Parts 14 to 21 as well as Part 1 which deals with interpretation, time and rules about documents.

The purpose of the structure appears to be to avoid unnecessary duplication and enhance consistency.

Substantive changes

In addition to the stylistic and structural changes, the Draft Rules also introduce a number of substantive changes. Those changes are said to be aimed at removing red tape although there are a number of examples of changes which reflect policy decisions which have no bearing on eliminating bureaucracy. By way of example, DR 18.4(1)(e) requires an office holder to state in the progress report whether the fees estimate is likely to be exceeded, along with similar information in respect of expenses as well as reasons. The purpose of the rule is to enhance transparency, rather than eliminate red tape.

Be that as it may, there are a number of substantive changes. What follows is not an exhaustive analysis of those changes; instead, a number of broad themes are identified and commented upon.

Creditors meetings no longer the default decision making mechanism

The use of meetings as a decision making mechanism is one which stretches back to the second half of the nineteenth century. However, the need to physically attend a meeting is time consuming and given modern communications technology, arguably unnecessary. Further, creditors meetings are frequently used to adopt proposals which are clearly in the best interest of creditors. As a result,

meetings are often poorly attended and are an additional expense which is ultimately borne by the creditors.

In those circumstances the original draft rules provided for an alternative decision making procedure which was in (the case of corporate insolvency) implemented by s. 122 SBEEA which inserted ss. 246ZE and 246ZF into the Insolvency Act 1986 and (in the case of personal bankruptcy) s. 123 SBEEA which inserted 379ZA and 379ZB.

The effect of these provisions when read with the Draft Rules is that the office holder can use a process of deemed consent whereby they write to creditors with their proposal. In the event that less than 10% of the creditors object to the decision and convey that objection in the manner required by the notice, the creditor or the contributory is treated as having made the decision.

However, should the officeholder receive objections which total less than 10%, she will be under an obligation to consider whether deemed consent is the appropriate procedure to use.

In the event that an alternative decision making procedure is used, the nature of that procedure will be at the discretion of the office holder save that a physical meeting can only be called when more that 10% by value of the creditors have requested one. The thinking behind this appears to be that the creditors will only bear the cost of a meeting when it has been requested by them albeit that the request is a minority request.

In addition, there will no longer be a requirement for the officeholder to call a final meeting (see: s. 126 SBEEA). However, the draft rules require that the officeholder send the creditors a final account and the creditors will have the ability to object to the officeholder's release.

Officeholder remuneration

The new draft rules will incorporate the recent changes made by r.2 of The Insolvency (Amendment) Rules 2015 namely that there is now a requirement for officeholders to include in their Progress Report the following information (see: DR 18.4):

(i) Whether the remuneration likely to be charged exceeds the fee estimate.
(ii) Whether the expenses incurred are likely to exceed or have exceeded the details given to creditors.
(iii) The reasons for any such excess.

These changes build upon those introduced by the Insolvency (Amendment) Rules 2010 and (as noted above) appear to be a departure from the stated aim of 'removing red tape'.

Forms

The Draft Insolvency Rules (in their current form) have adopted a new approach to the recording of information. Under the current rules information is recorded and presented in forms which are found in the appendices to the Rules.

The Draft Rules by contrast list the information that is required in the individual rule. The Rules also state that the information should be provided in a given order unless provision in a different order would make it easier to understand.

This approach is open to criticism as: (a) forms make the processing of information easier; (b) the approach has the effect of making the individual rules more detailed; and (c) for those familiar with a given form (e.g. judges) the de-standardisation of the way in which information is presented may make dealing with that information a slower process.

Opting out of correspondence
By operation of ss. 124 and 125 SBEEA, the Insolvency Act 1986 has been amended in such a way that it is now possible for creditors to opt out of receiving information from the office holder.[2] DR 1.37

[2] See: Ss. 246C; 248A; 379C & 383A.

provides the procedural basis to the opt-out provisions in the IA, including the content of any notice to be given by the officeholder informing a creditor of their entitlement to opt-out and also explaining how they can opt back in.

Importantly, any notice given by an officeholder to a creditor informing that creditor of an intended dividend is excluded from the effects of the changes.

The purpose of the opt-out provisions is to reduce red-tape by removing from officeholders the need to provide detailed information to those who have little interest in receiving it, perhaps where the recipient has resigned themselves to the fact that they will not receive a dividend from the insolvent company or the bankrupt.

However, it is open to question whether the new approach will be more efficient. Arguably, it will impose a greater burden upon office holders who will need to ensure that their correspondence lists and associated databases are kept up to date with the wishes of individual creditors. It may well have been more efficient to allow the recipient to undertake the filtration exercise them self by simply pressing delete (or similar) when correspondence is unwanted.

Automatic appointment of the Official Receiver as trustee
Under the original draft rules, there was no provision for Official Receiver being appointed as the trustee in bankruptcy upon the making of the bankruptcy order.

However, under the new draft rules, DR 10.32(f) requires the Court to include in the bankruptcy order a statement that the official receiver has been appointed as trustee in bankruptcy. This change confers power on the official receiver to deal with the bankruptcy estate from the making of the bankruptcy order.

Victims of violence

Under the Rules as they stand, a person who is made bankrupt, enters into an IVA or who has a debt relief order will have their name and address published on the Individual Insolvency Register (**"IIR"**). By relying on existing rules 5.67 and 6.235B a debtor can seek a court order that (*inter alia*) the details entered onto the IIR, do not include details of their current address where publication of that address would put them at risk of violence.

The Draft Rules provide for an application to be made prior to a debtor seeking to enter into one of the aforementioned procedures.

The thinking behind the change is that a debtor who is at risk of violence will not wish to apply to enter into a procedure in circumstances where they do not know that they will be able to avail themselves of the protection granted by the court order.

Concluding Comments

The Draft Insolvency Rules seek to consolidate the existing secondary legislation as applicable to insolvency and bankruptcy whilst at the same time making minor changes to increase efficiency and reduce bureaucracy. Once one gets beyond the unfamiliarity of the new structure, the result is a coherent and intuitive body of rules which successfully consolidate a number of different sources into a single instrument. Only time will tell whether the new rules will meet expectations, however it seems likely that the rules will be a worthy successor to those which have been with us for the last thirty years.