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Dear Insolvency Practitioner

Attached is the latest edition of Dear IP.

In this issue:

Information/Notes page(s):

**Chapter 3** Authorisation and Appointment of IPs
Article 27 
Guidance to Official Receivers on appointing liquidators and trustees

**Chapter 6** Companies House
Article 26 
New rules, forms and identifiers

**Chapter 11** Employment Matters
Article 59 
The Employment Rights (Increase of Limits) Order 2017

**Chapter 20** Offences and Prosecution
Article 13 
Re-use of a prohibited name and rule 4.228

**Chapter 26** Companies Investigation Branch
Article 4 
Avoidance of National Non-Domestic Rates

**Chapter 27** Working Together
Article 9 
Enforcement Outcomes – Special Mentions
27) Guidance to Official Receivers on appointing liquidators and trustees

Article 25 in Dear IP 72 referred to the re-issue of guidance to the Official Receiver on the appointment of trustees and liquidators. The issue of the revised guidance has been the subject of valuable discussions between the Insolvency Service and R3 and some of the regulatory bodies. This article is intended to clarify some of the points at issue, although it should be noted that the revised guidance reflects practice that had been in place for a number of years and did not seek to alter or amend the position regarding insolvency practitioner appointments in any material way.

The Insolvency Service continues to recognise and value the work that insolvency practitioners carry out in compulsory liquidations and bankruptcies and the contribution that they make to this field of work.

The principle behind the guidance remains that the Official Receiver is appointed as a result of bankruptcy or winding up orders made by the court and will remain as liquidator/trustee unless:

- The majority of creditors by value seek the appointment of an insolvency practitioner to replace the Official Receiver as liquidator/trustee
- 25% of creditors requisition a decision making procedure and the Official Receiver is replaced as office holder
- The Official Receiver thinks the skills of an insolvency practitioner are required

It is a fundamental principle of the guidance that the Official Receiver will follow the wishes of the majority of creditors when they wish to seek an appointment of an insolvency practitioner.

We recognise that there has been some confusion caused by the exceptions in the guidance when the Official Receiver would not seek an appointment, although the majority of creditors requested this. The guidance said that the only circumstances under which the Official Receiver would not follow the request of the majority of creditors for the appointment were where there are sufficient assets for the debts and costs to be paid in full or where all known assets have already been realised and there is no evidence that further assets might be discovered. The guidance has been amended to remove these exceptions and make the process clearer and more transparent for both Official Receivers and insolvency practitioners.

There will be cases where the majority of creditors have not asked for the appointment of an insolvency practitioner but the Official Receiver wishes to apply for an appointment because they consider that the skills of an insolvency practitioner are required. In these circumstances the Official Receiver will seek the appointment of an insolvency practitioner through an application to the Secretary of State or
Dear IP

April 2017– Issue No 75
Chapter 3- Authorisation and Appointment of IPs

through seeking a decision from creditors. This might be done for example in cases where the assets are located abroad and an insolvency practitioner would be better placed to realise these. These applications will be made when in the Official Receiver’s judgement an insolvency practitioner is better placed to deal with a particular case.

The guidance is not intended to in any way question the competence of insolvency practitioners. In particular when the guidance (17.53) refers to an insolvent’s interests being adversely affected by the appointment of an insolvency practitioner; it is not in questioning the competence or professionalism of work that insolvency practitioners carry out. It reflects that there are circumstances where extra cost might be incurred by a further office holder appointment in circumstances when the insolvent might be better to explore an alternative to bankruptcy.

The Insolvency Service can also confirm that the appointment of an insolvency practitioner from the Official Receiver’s rota would only be made out of turn in very exceptional circumstances and this would only be if there were clearly recognisable reasons for doing so.

If the circumstances do change materially between a case being offered to an insolvency practitioner and the appointment being made then the Official Receiver should inform the insolvency practitioner of the changes and give them an opportunity to reconsider the acceptance of the appointment.

If an insolvency practitioner feels there is an issue over an appointment which they cannot resolve with the caseworker in the Official Receiver’s office then they should contact the Official Receiver directly to see if they can resolve the issue. Most issues should be resolved at that stage but if the problems are still not resolved then the insolvency practitioner should contact the Senior Official Receiver with a view to resolving the situation.

Any enquiries regarding this article should be directed towards email: David.chapman2@insolvency.gsi.gov.uk
26) New rules, forms and identifiers

When the new Insolvency (England and Wales) Rules 2016 come into force on 6 April 2017, the Registrar of Companies will introduce new forms. The forms will be in a new format and will contain a new identifier.

For example:

- Company Voluntary Arrangement Moratorium forms will be VAM
  Examples - 1.11 and 1.12 will be VAM1 and VAM2 respectively and so on

- Company Voluntary Arrangement forms will be CVA
  Examples - 1.1 and 1.2 will be CVA1 and CVA2 respectively and so on

- Administration forms will be AM
  Examples - 2.12B and 2.16B will be AM01 and AM02 respectively and so on

- Receivership forms will be REC
  Examples - 3.3 and 3.2 will be REC1 and REC2 respectively and so on

- Creditors/Members Voluntary Liquidation forms will be LIQ
  Examples - 4.68 and 4.48 will be LIQ1 and LIQ2 respectively and so on

- Court Winding Up forms will be WU
  Examples - F4.39 and F9.4 will be WU01 and WU02 respectively and so on

The rule numbers, Act references and form titles will be retained.

The new forms are created in a format which complies with Government Digital Service guidelines and brings them in to line with other Companies Act forms that are delivered to the Registrar. The forms will be provided via Companies House on GOV.UK in PDF format and fields will be enabled so that they can be completed before printing.

**Statement of Affairs schedule (Rules 3.32, 4.13, 6.2, 6.3, 6.5 and 7.41)**

Insolvency practitioners should not send the schedule which includes the particulars of creditors who are consumers, employees or former employees of the company to the Registrar. This is to safeguard personal information from being publicly available on the register.

**Email or telephone number (Rule 1.6 and 1.22)**

The insolvency rules require appointment and termination forms to include contact details (either an email address or telephone number). As this information will appear on the public register, the Registrar advises practitioners to use business contact
details rather than any personal details. The only way to remove any personal details will be by an order of court under section 1096 of the Companies Act 2006.

**Addresses (Rule 1.21/1.22)**
Office holders must provide their address for each insolvency case they are appointed over. For subsequent filings in the same insolvency case, the address should only be given if it has changed.

**More than one insolvency practitioner appointed**
Companies House insolvency forms will provide space for up to two practitioners’ details to be shown. Where there are more than two practitioners, we have created continuation pages to allow for additional details to be provided. Forms relating to the notice of an appointment will include a continuation page (i.e. Notice of appointment of an administrator). There is a continuation page for all other forms, called “continuation page, name and address of insolvency practitioner(s)”, which can be accessed separately.

A separate notice, however, is required for each insolvency practitioner where the notice relates to the cessation of their appointment (i.e. notice of vacation of office).

**IP number**
Where a specific rule includes a requirement for IP number to be provided, this is reflected in the new forms and should be completed.

**Conversion from Administration to Creditors Voluntary Liquidation (Para 83(3), Schedule B1 Insolvency Act 1986)**
When filing the “Notice of move from administration to creditors’ voluntary liquidation” under the new rules, a final progress report must be attached. This is a change from the old rules. Any notices of this type received without the final progress report will be rejected and the conversion will not take effect.

**Notice of liquidator’s resignation in members and creditors voluntary liquidation (Rules 5.6 and 6.25)**
In accordance with the Insolvency (England and Wales) Rules 2016, the Liquidator is released 21 days after delivery of the notice to the Registrar. This is a change to the current practice.

**Transitions (Schedule 2 Insolvency Rules (England & Wales) 2016)**
In many cases the Registrar will not be aware of the event that triggers the transition and therefore will accept filings from insolvency practitioners in good faith whether on old or new forms.

**Limited Liability Partnerships (LLPs)**
The insolvency legislative changes that come into force on 6 April 2017 do not affect LLPs. Current insolvency forms for LLPs will continue with no change.
59) The Employment Rights (Increase of Limits) Order 2017

The Employment Rights (Increase of Limits) Order 2017 will raise the statutory limit on the maximum amount of a week’s pay for the purpose of calculating a redundancy payment from £479 to £489 from 6 April 2017.

The Order is available at the following link:

www.legislation.gov.uk/uksi/2017/175/contents/made

General enquiries may be sent to: redundancy.payments@insolvency.gsi.gov.uk
13) Re-use of a prohibited name and rule 4.228

The Insolvency Service’s Breach Team deal with breaches of section 216 of the Insolvency Act 1986 that are reported to us.

A prohibited name is a name by which the insolvent company was known at any time in the 12 months before liquidation, including a trading style, or any name so similar to that name as to suggest an association with the liquidating company.

Our focus is on the rectification of a breach, but where a breach continues, or there are other public interest factors, we may refer the matter to our Criminal Enforcement Team for further assessment and possible prosecution.

In all cases we consider whether any of the exceptions in rules 4.228 – 4.230 of the Insolvency Rules 1986 apply. Rules 22.4-22.7 of the Insolvency (England and Wales) Rules 2016 will apply from 6 April 2017.

Whilst compliance is a matter for the director, in many cases they will rely on the advice given to them by the insolvency practitioner. Where relevant, we contact the insolvency practitioner to confirm the advice provided to a director prior to determining whether a criminal referral is appropriate.

In a number of cases, directors have stated that they have complied with the exception in rule 4.228; however, we were unable to accept this as not all elements of the rule had been fully complied with, either at all or at the correct time.

For the exception in rule 4.228 (rules 22.4 and 22.5 from 6 April) to apply all the following elements must be present:

- The person was a director, or shadow director, of a company in insolvent liquidation at any time in the twelve months before liquidation,
- the person acts in any of the ways prohibited in section 216(3) in connection with/for the purposes of carrying on the whole/substantially the whole of the business of the insolvent company, and
- that business is acquired from the insolvent company under arrangements made by the liquidator, administrator, administrative receiver or supervisor of a CVA prior to liquidation (the arrangements may be made with the liquidator etc. by that person, a company or other third party).
- The person intends to be a director of, or directly/indirectly be concerned/take part in the promotion, formation or management of a company known by a prohibited name or directly/indirectly be concerned or take part in the carrying on of a business under a prohibited name in connection with the carrying on of the whole, or substantially the whole, of the business of the insolvent company.
For the exception to apply, notice must be given by that person prior to his acting in the above circumstances to:

- Every creditor of the insolvent company known, or reasonably ascertainable, to that person; and
- published in the Gazette.
- The notice may be given and published before completion of the arrangements, but must be published no later than 28 days after completion.

From 6 April 2017, statutory Form 4.73 will be withdrawn. A template that can be used to give notice to creditors and for the Gazette will be published on GOV.UK at Insolvency Service forms: England and Wales (Rule 22.4 – notice to creditors – s216 re-use of a prohibited name). The prescribed content for any notice under rule 22.4 can also be found in rules 22.4 and 22.5.

Whilst not explicit in rule 4.228, Form 4.73 states that notice may not be given under this rule by a person who has already acted in breach of section 216. Rule 22.4 states that notice may not be given under this rule by a person who has already acted in breach of section 216 and this prohibition is further repeated on the template for Rule 22.4.

**The meaning of “completion of the arrangement”**

The meaning of completion of the arrangement has not been defined in the rules.

The Insolvency Service considers that the arrangement is completed at the point at which the agreement is made between the insolvency practitioner and the purchaser to acquire the business.

The date of that agreement triggers the countdown of the 28 day maximum notice and advertising period.

It has become apparent that in some cases the term completion has been taken to mean ‘payment in full’ for the business. Directors have been trading the successor business using a prohibited name, while payment to the liquidator is being made. Notice to creditors and advertising is not being carried out until after payment in full has been made, which has led to the director inadvertently being in breach of section 216 with the consequent personal liability for the new company’s relevant debts. Their only options to rectify the breach are to either change the company/ business name or make an application to the court for permission. Both options may incur significant cost and cannot be applied retrospectively.

The purpose of rule 4.228 is to alert creditors of a company in liquidation to the fact that a person who had been involved in managing that company is also to be involved in managing the successor company or business. To ensure that this purpose is
achieved, notice under the rule has to be given to the creditors before that person becomes involved in the management of the successor company/ business under what would otherwise be a prohibited name. This can be seen from the case of Churchill v First Independent [2006].[1]

Example:

A director of an insolvent company agrees with the liquidator to purchase the business for £120K, which is to be repaid over a 12 month period at a rate of £10K a month. The agreement is made on 1 July 2015, the first instalment is paid on the same date and thereafter the balance is repaid on a monthly basis until the £120K is paid off on 01 June 2016.

The agreement is made between the liquidator and the director to acquire the business. In the example above, this would have occurred on 1 July 2015.

If completion of the arrangement was deemed to occur on receipt of payment in full (1 June 2016 in the example above) then this would mean that a director could trade for a substantial period without having to give creditors any notice, which would clearly defeat the objective of rule 4.228.

General enquiries may be sent to: Breach.Inbox@insolvency.gsi.gov.uk

4) Avoidance of National Non-Domestic Rates

Issue 53 of Dear IP (March 2012) contained an article which outlined the Insolvency Service’s concerns about the operation of schemes that use members’ voluntary liquidations (MVLs) to enable commercial property landlords to avoid the national non-domestic rates (NNDR) that would otherwise be payable on their empty properties. The schemes in question take advantage of the fact that companies in liquidation are exempt from NNDR and the Service was concerned that such arrangements were contrary to the public interest.

The position with regard to this issue has recently been clarified following an investigation undertaken by the Service’s Company Investigations team in Manchester under Section 447 of the Companies Act 1985.

The case in question related to a company, PAG Management Services Ltd (PAGMSL) which operated a NNDR mitigation scheme that was marketed to third part clients (i.e. owners of commercial property). The scheme operated by PAGMSL worked as follows:

- Special purpose vehicle companies were formed under the control and direction of PAGMSL.

- Each special purpose vehicle company signed a number of leases, typically 20 each, relating to the empty commercial properties owned by PAGMSL’s clients. Each lease was for a nominal rent and contained a clause that enabled the property owner to terminate the lease on seven days’ notice.

- Immediately after signing the leases, PAGMSL arranged for the special purpose vehicle company to be placed into MVL with the result that the properties leased to the special purpose vehicle company became exempt from business rates.

- The terms of the lease enabled the owner of the property to remove the property from the scheme in the event that a genuine, rent-paying tenant was subsequently found, at which point the new tenant would become liable for the business rates.

PAGMSL was able to generate a substantial income by charging its clients a proportion of the NNDR savings achieved whilst their property remained in the scheme. The investigation established that, during the 18-month period to March 2013, PAGMSL generated fee income of £1.8million from its clients and that, during the same period, NNDR totalling £6.4million was avoided by the property owners as a consequence of the scheme’s operation.
The investigation concluded in 2013, and the Secretary of State formed the view that PAGMSL was acting against the public interest in the operation of the arrangements outlined above. Consequently, in December 2013, winding-up petitions were issued against PGMSL and two of the special purpose vehicle companies it had used within its scheme (Ashburton Solutions Ltd and Beacon Property Solutions Ltd). The petition against PAGMSL was strongly resisted by the company and a 5-day trial eventually took place in March 2015 before the Vice Chancellor, Mr Justice Norris, sitting at the High Court in Manchester. During the trial of the winding-up petition, the Court heard evidence that the scheme operated by PAGMSL had continued to expand beyond March 2013 and that by March 2015, the NNDR being avoided by use of the scheme was estimated to be in the region of £12million per year.

Mr Justice Norris handed down his judgement on 9 August 2015, and found that the business of PAGMSL lacked commercial probity and should be wound up in the public interest as a result. The winding-up orders were formally made on 9 October 2015 against each of PAGMSL and the two associated companies, Ashburton Solutions Ltd and Beacon Property Solutions Ltd.

The effect of the winding-up order against PAGMSL was initially suspended pending an appeal that was lodged by the company, but that appeal was formally dismissed on 15 November 2016 at the company’s request and the winding-up order took effect on 5 December 2016 when it was drawn up by the Court.

What does this mean for insolvency practitioners?

In reaching his verdict that PAGMSL’s business lacked commercial probity such that it warranted winding-up in the public interest, Mr Justice Norris found that PAGMSL’s business model involved a misuse of the insolvency legislation. In particular, he found that the true purpose of the voluntary liquidations engineered by PAGMSL were to act as shelters for the leases that were created so that PAGMSL could earn fees as a result and that this was a misuse of the insolvency legislation. Mr Justice Norris contrasted this with his view that the proper purpose of liquidation is the collection, realisation and distribution of assets in satisfaction of the claims of creditors and the entitlement of members. In this regard, Mr Justice Norris stated that:

“…there is a clear public interest in ensuring that the purpose of liquidations is not subverted, as I consider it is by treating a company in liquidation as a shelter (and seeking to prolong its continuation as such). This misuse of the insolvency legislation demonstrates a lack of commercial probity. In its own way it also subvert[s] the proper functioning of the law and procedures of bankruptcy.”

Whilst Mr Justice Norris found that, of itself, the promotion of tax mitigation schemes was not an inherently objectionable activity, it is clear from his judgement that such schemes do cross that line when they involve a misuse of the insolvency legislation. Whilst the scheme in this case involved the use of companies being placed into MVL, the Service is of the view that the same principles which underpin the judgement will
Dear IP

April 2017– Issue No 75
Chapter 26 - Companies Investigation Branch

apply to any form of liquidation where the insolvency legislation is being similarly misused. Practitioners should therefore be aware that the Service will act swiftly to investigate any companies that are suspected of operating schemes of this nature and which appear to be abusing and subverting the UK’s insolvency regime. In doing so, we will look closely at the involvement of practitioners who facilitate the operation of such schemes and will have no hesitation in reporting the involvement of practitioners to their Recognised Professional Body where appropriate.

General enquiries may be sent to: intelligence.live@insolvency.gsi.gov.uk
9) Enforcement Outcomes – Special Mentions

Below are details of two recent disqualification cases highlighted by our investigation teams in which they received invaluable assistance from insolvency practitioners and their staff.

Iain Fraser of FRP Advisory LLP in Aberdeen and his team

In the case of Impact Trading Limited, early reporting and ongoing assistance during our investigation from Iain Fraser and his case manager Graham Smith resulted in a quick turnaround in our investigation and an undertaking being obtained promptly.

They assisted greatly by identifying and extracting from the company records at least 49 fraudulent invoices, all of which appeared to relate to £1.1m of credit notes which were raised by the director on 31 May 2016, the date the company ceased trading.

This saved us significant time in having to identify and extract these documents from the company records, enabled us to quickly identify the potential customers as detailed on the invoices and make enquiries to determine whether they had been supplied with the goods specified on the sales invoices and to confirm whether the invoices were valid.

Following our investigation, the director gave an undertaking that he won’t act as a director of a company for a period of nine years effective from 27 March 2017.

Key dates:
Date of administration: 7 June 2016
Date of submission of insolvency practitioner’s conduct report: 13 September 2016
Date disqualification obtained: 6 March 2017

Sarah Rayment and Anthony Nygate both of BDO LLP, London

Sarah Rayment and Anthony Nygate were appointed joint administrators of five companies that operated four hotels and a holding company.

Investigations established that the directors of these companies had operated with a lack of probity which resulted in a bank suffering a loss of over £31million.

Working collaboratively with the administrators and their team greatly assisted our investigation; they accessed the companies’ bespoke computer system and provided analysed information to us. In addition, Mr Nygate provided a witness statement supporting our disqualification application.

Our investigation culminated in the directors of these companies, Novtej Singh Dhillon and his former wife Sarina Thiara Dhillon, being disqualified from acting as a director for eleven years and four and a half years, respectively.
Dear IP

April 2017– Issue No 75
Chapter 27- Working Together

Our full press release on this case can be found here.

General enquiries may be sent to: Business.DevelopmentTeam@insolvency.gsi.gov.uk