

## BRIEFING

# Update: Changes to Insolvency Law

The Small Business Enterprise and Employment Act 2015 (the “Act”) received Royal Assent on 26 March 2015, and certain parts of it came into effect on 26 May 2015. Part 10 of the Act comprises a number of provisions set to make significant changes to the law and practice of insolvency ahead of the forthcoming review of the Insolvency Rules.

### The following provisions are now in force:

#### Liquidation

Section 120 of the Act removes the requirement for sanction when exercising the powers contained in schedule 4 of the Insolvency Act 1986 (“IA86”). Previously sanction was required of either the court or a creditors’ committee (or where there is none, the Secretary of State or a meeting of creditors).

#### Voluntary winding up – progress reports

Section 136 amends sections 92A and 104A to clarify that a progress report must be issued if the liquidator changes within the first year of the liquidation.

#### Administrations

Section 127 provides that creditors may consent to an extension of an administration from the existing six months to a period not exceeding one year.

Section 128 now enables an administrator to make a prescribed part distribution without the need for court permission.

Section 129 provides that the administrator’s power to hire, sell or dispose of property to connected parties will be subject to regulations. No regulations have yet to be made but this is clearly the base from which there will be further tightening of pre-pack sales beyond the guidance contained in Statement of Insolvency Practice (SIP) 16.

Section 130 provides for our Scottish colleagues and in relation to companies subject to Scottish floating charges that what is known as the “attachment of floating charges” may now happen by permission of the court on an application to that effect.

#### Bankruptcy

Section 121 serves the same purpose for trustees as a 120 for liquidators; in respect of the trustee’s powers contained in schedule 5 and section 314(2) of IA86, there is no longer a requirement for sanction.

#### Individual Voluntary Arrangements (IVAs)

The Fast Track Voluntary Arrangement was an Enterprise Act innovation. It was to have been used by undischarged bankrupts. In 2012/13 there were none reported and, unsurprisingly, the process is now dead, having been axed by s 135 of the Act.

Section 134 amends section 262(3) of the IA86 to clarify the running of time for a challenge where no report is required to be filed at court; the 28 days’ time limit (in cases where there is no interim order) now runs from the date that creditors decided to approve the IVA. Previously, because the starting point was the filing of the report at court, it was arguable that there was no time-limit for a challenge where no report had been filed.

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## General : Creditors

Sections 131 and 132 create powers for an office holder to pay a dividend to a creditor with a "small debt" without the need for that creditor to prove the debt. The debt will need to have been identified in the debtor's statement of affairs.

Although the provision is now in force, there is as yet no regulation made as to what is meant by "small debt". There is speculation that it might be around £1,000.00.

## Still to come

Having foreshadowed the change to pre-pack sales, the remaining provisions to catch the eye in company administrations concern the administrator's ability to commence proceedings for fraudulent and wrongful trading, closing perhaps the loop-hole by which directors sought administration and dissolution as a means of hoping to avoid investigation and claims. Whether this has a bearing on the number of administrations is an open question.

Administrators and liquidators will also have the ability to assign those causes of action that vest in them as a function of their office. At present, whilst the liquidator might sell a claim or the proceeds of a claim that had already arisen in the company's hands, he is unable to assign a fraudulent or wrongful trading claim or a preference claim that only comes into being on the company's insolvency. This distinction is now to be removed and a new market will no doubt arise in which hedge funds will shift their model from funding office holder claims to buying such claims, profiting from the office holder's lack of funding or aversion to risk.

In personal insolvency, the official receiver will become the "first trustee" on the making of the bankruptcy order, although the court will have the simplified ability to appoint the supervisor of any IVA in force as the trustee, rather than having to suffer an application to that effect. Schedule 10 will end the official receiver's status as interim receiver and manager, and makes detailed appointment provisions that will no doubt become a further schedule to IA86.

The administration of insolvent estates is to be simplified by the removal in most cases of the need for a physical meeting. With the notable and understandable exception of the first creditors' meeting in voluntary arrangements, meetings are thought too 20th century to survive and are to be replaced by a "qualifying decision procedure" or deemed consent to be decided upon by the person requiring the decision to be made. No doubt the methodology will become clear in time.

On the regulatory front, there is provision for the creation of a single regulator with, perhaps in the interim, a renewed set of regulatory objectives for the remaining seven recognised professional bodies. How long before the professional associations retire from the regulatory field?

Turning to Part 9 of the Act, there are significant provisions to come into force by which the directors disqualification regime is to be amended to include compensation awards against disqualified directors. With applications to be made by the Secretary of State for the benefit of one or more named creditor, questions arise as to what this will mean for office holders' rights of action and the pari passu principle applicable to insolvency and the collective procedures in the IA86.

## Contact details

If you would like any further information or to discuss any of the issues raised in this topic, please contact a member of the Insolvency & Restructuring team.



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