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How Might the First Review of the Insolvency (England and Wales) Rules 2016 Impact Mid-market Insolvencies?

UK – April 2022

On 5 April 2022, the UK government published the first review of the Insolvency (England and Wales) Rules 2016 (the Rules) (the Report). It is evident from the Report that many respondents took the opportunity to raise issues faced in practice, not just with the Rules, but with the operation of the insolvency legislation in general.

In this alert, we have selected a few points from the Report that we think are of interest to practitioners. In particular, we will discuss the proposed changes to the Rule on timing and dating notices of appointment of administrators, the practice of swearing statutory declarations remotely, the impact of the decision in *Manolete Partners Plc v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch)* on bringing insolvency proceedings, the engagement of secured creditors in approving fees and consent to the extension of an administrators' appointment, and the monetary limit on winding-up petitions against companies.

Time and Date on Notices of Appointment

Historically, Rule 3.24(1)(j) and 3.25(2)(k) of the Insolvency Rules has caused confusion about what (if anything) should be included on a notice of appointment of administrators about the date and time of their appointment.

The information is prescribed information, and failure to include it or questions over the wording to use, led to a number of applications that required the court to consider whether the administrators' appointment was valid.

In *Re Spaces London Bridges* the judge suggested that best practice was to include wording to the effect that "*this appointment will take effect at the date and time specified below as the date and time when the notice is filed*", and since that case, it has largely become common practice to do that.

However, as the Report identifies, practitioners thought that the requirement to specify the time and date of appointment was superfluous and led to confusion. As such, the government says that it is considering removing this requirement, and, instead, the time and date endorsed on the notice by the court will be sufficient.

If changed, this would help remove the uncertainties created by the case law, avoids debate on the correct wording to use and answers questions about whether an administrators' appointment is defective.

Remote Swearing of Statutory Declarations

A statutory declaration must be signed in the physical presence of an authorised person. This became largely impossible during the COVID-19 pandemic due to work from home mandates, but given the requirement in the insolvency legislation for notices of intention and appointment of administrators to be sworn by statutory declaration, a solution was needed.

This was provided with the introduction of the first temporary insolvency practice direction that set out a procedure for remote swears, which if followed, meant that this would not invalidate the appointment of an administrator. Respondents to the review suggested that these temporary changes should become permanent.

Although remote swears are helpful when parties are situated in different locations, particularly given the rise of hybrid and remote working practices, as well as allowing for swears to be completed when people are self-isolating, unfortunately, this will not become a permanent feature of the insolvency regime. This is because it requires an amendment to primary legislation, which is outside the scope of the review. Disappointing yes, but not surprising.

However, provided that the current practice direction (MIPD 2021) is not withdrawn, for the time being at least, the ability to swear notices of intention and notices of appointment of administrators remotely, remains on the cards.

The Decision in Manolete Partners Plc v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch)

The case of *Manolete Partners Plc v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch)* was a particularly unwelcome decision for insolvency practitioners and assignees of insolvency claims, given its impact on insolvency litigation and the requirement to bring two sets of proceedings arising out of the same facts.

Our previous blog post, which covered why this decision was such a blow to practitioners, reflects many of the concerns raised by respondents to the Report, including that it is inefficient and undesirable to have separate courts with different procedures deciding the case, increased costs, lengthier proceeding and an administrative burden on the courts.

The Report helpfully acknowledges these concerns and the Insolvency Service will evaluate the position with a view to potentially amending the scope of insolvency applications. This is great news for practitioners and as a consequence, we may see a return to previous practice where only one set of proceedings was required.

However, as with many of the suggested areas for improvement/review, further detail will be provided in due course and there is no time scale on change; therefore, until then, in light of the findings in *Manolete Partners* two sets of proceedings may be required.

Secured Creditor Approval of Insolvency Practitioner's Fees and Consent to Extension of Administrations

One of the issues encountered by insolvency practitioners when it comes to fee approval or consent to administration extensions is obtaining approval from secured creditors.

It is difficult and sometimes impracticable to get consent from secured creditors when these have been (or will be) paid in full, as they have no interest in engaging with the administration process.

A number of respondents called for the rules to be changed given that lack of engagement creates difficulty in practice.

Though acknowledging that engagement can sometimes be difficult, the Insolvency Service says that there are no plans to change these rules. Instead, it confirms its (apparent) long-standing view that the classification of creditor is set at the point of entry into a procedure, meaning that secured creditors, even if paid, but must be included in the decision process- a point that has been debated for some time.

The Report goes on to say that rule 15.11(1) will be amended; to make it clear that where a decision is required from creditors who have been paid in full, notice must be sent to them.

Although the statement in the Report about classification of creditors, is only in relation to approval of administrators' fees, it is likely to also extend to any decision that requires secured creditor consent, including consent to extend an administration.

This position is problematic for insolvency practitioners, who often cannot get consent from paid secured creditors (and preferential creditors), leaving the only option to apply to court, but given the government's stance on this matter, the industry is stuck with this frustration.

Winding-up Petitions

Due to the pandemic, the threshold for presenting winding-up petitions was temporarily increased to £10,000 but, with effect from 1 April 2022, has now returned to £750 (see our previous blog).

There had been murmurings that the increase to £10,000 would become permanent and although it has not, the Insolvency Service has indicated that it will reflect on experiences during the pandemic and give further consideration as to whether to increase the threshold to provide greater protection to companies against creditors with small debts. If increased, it would bring petitions more in line with the threshold for bankruptcy petitions.

Concluding Thoughts

Overall, there are some helpful pointers in the Report and some positive changes suggested, but nothing seismic and it may be some time before some of the even minor corrections to the Rules are made due to pressure on parliamentary time.

To review the Report in full, see here.

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