SQUIRE PATTON BOGGS

What Are the Duties on an Insolvency Practitioner (IP) When Acting as Nominee or Supervisor of a Company Voluntary Arrangement (CVA)?

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An IP is required to exercise professional independent judgment in deciding whether a proposal for a CVA is feasible, and should make such enquiries as they deem necessary to satisfy themselves that the proposal should be put to creditors.

Aside for obligations and duties set out in the insolvency legislation and SIP 3.2, there are some helpful observations about the role and conduct of an IP that are addressed in the cases. Many of these were made in the judgments handed down in 2021 in the case of *New Look* and *Regis*, but, more recently, in the case of *Mizen*[1], the court made additional comments giving comfort to IPs about the extent of their obligations and role when acting as nominee and/or supervisor of a CVA.

Nominee's Duties Generally

The judge in *Regis* commented that for CVAs involving small companies and uncomplicated arrangements, cost and time constraints will be important factors in limiting the work of a nominee. But where a CVA is used by a large company to implement a complex arrangement of the kind typically implemented via a scheme of arrangement, then more should be expected of the nominee.

It is often the case that an IP will have advised a company pre-CVA, and it is important that the nominee retains clear independence when reporting to the court on the proposal and their duties as nominee will be viewed in the context of their prior engagement with the company.

It is fair to say that the more complex the restructuring, the more that is expected of the nominee in complying with their duties.

Obligation to Respond to Correspondence

In the recent case of *Mizen*, there was criticism of the IP, who had failed to respond to a letter sent by one of the creditors and whether, as a consequence of that, that amounted to a material irregularity.

As the judge commented in *Mizen*: "Nobody has pointed to any duty resting on a nominee to answer correspondence, come what may."

Although *Mizen* rests on its facts, given that there appears to be no obligation on an IP to respond to all correspondence, this may provide comfort to IPs, who are often bombarded with queries at a very busy time that they do not have to respond to everything. That said, that does not in our view give an IP licence to ignore correspondence without applying some commercial sense as to the relevance and importance of the questions raised.

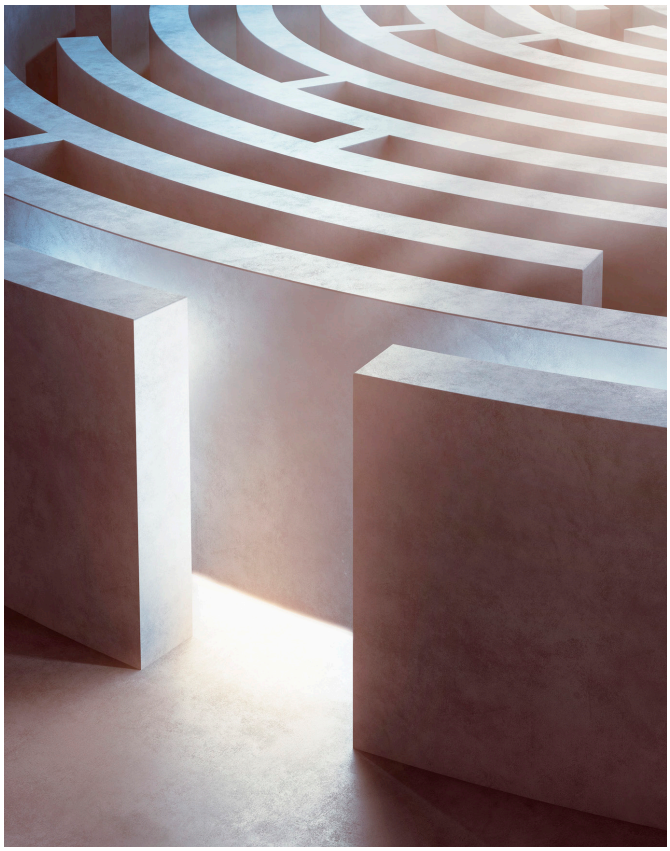
In the *Mizen* case, the letter was sent the day before proxies were due, the nominee knew the creditor was abstaining from voting, and even if the complaining creditor had voted against the proposal, it would have made no difference to the outcome.

Risk to Fees

There is no statutory control over a nominee's or supervisor's fees, which are agreed with the company. In both New Look and Regis, the landlord creditors sought an order (consequential upon a finding of material irregularity or unfair prejudice) that the IP should repay the nominee and/or supervisor fees.

The judge in *Regis* commented, "that one would not expect a professional person acting in the course of their professional duties to be charged with the costs arising out of that exercise".

Although not ruling out the possibility that there may be situations where a nominee should repay fees, and noting that the court has the power to make such an order, IPs can take comfort from *Regis* that it is extremely unlikely that they will be ordered to repay fees where the IP has acted in good faith (and absent any fraud).



1 Re: *Mizen Design Limited* (2023) EWHC 127 (ch)

Disclosure

Both *New Look* and *Regis* asserted that there was material irregularity because the proposal failed to provide adequate disclosure. Neither challenge succeeded.

Nondisclosure will constitute a material irregularity only if there is a substantial chance that the nondisclosed material would have made a difference to the way in which creditors voted at the meeting.

How much is "sufficient" information? Although the answer to this is fact-specific and will depend on the case, an IP should consider whether the creditors have been told enough to make an informed decision. They should be given enough detail to allow them to make a further enquiry if they think that the answer is relevant to their decision as to whether to support the CVA. There are some additional pointers in *New Look* about disclosure:

- Where there is a wider restructuring, it is necessary to view the CVA and the information provided in the CVA in that context
- The position of equity stakeholders is a matter of considerable interest to compromised creditors
- It will always be relevant to know whether anyone promoting a CVA has a particular incentive to do so

Signing the Report

An interesting observation from *Regis* is that the judge made no findings in respect of the joint nominee, noting that they had "played no active role in the preparation for the CVA" and that although the report was signed on behalf of both nominees, it was only signed by one.

It is quite usual on a joint appointment for one office holder to play a more active role, but given the judge's comments in *Regis*, IPs might wish to consider whether, where liability is joint and several, both IPs should sign the report.

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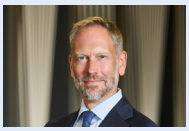

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