

17. INSOLVENCY

17.1 INTRODUCTION

This is a general guide to insolvency and related proceedings encountered on a daily basis in the county courts. It sets out the law as it is at 1 September 2006. You should check to see that the court you are sitting in has jurisdiction. Reference should be made to Chapter 2 that deals with the jurisdiction of the circuit and district judge.

Note that the following applications must only be dealt with by a circuit judge:

- applications to commit
- applications for injunctions or modification or discharge of them (including to restrain advertisement or presentation of a winding up petition)
- applications for administration orders
- applications to appoint a provisional liquidator.
- Interim applications and applications for directions after proceedings have been adjourned to the judge (except where liberty to apply to the district judge has been given)

(Practice note on the Hearing of Insolvency proceedings 23 May 2005 [2005] BPIR 688 White Book Vol 2 3E-119)

As to jurisdiction to hear applications under the Company Directors Disqualification Act 1986, see the guidelines as to the criteria determining the level at which they should be heard set out in *Lewis v Secretary of State for Trade and Industry* [2001] BCLC 59 (broadly, the length of the trial, likely complexity and public interest), but note that the first hearing shall in any event be before the District Judge when directions will be given: *Directors Disqualification Proceedings* CPR PD 10.2.

17.1.1 Companies

Applications concerning companies and partnerships made under the Insolvency Act 1986, the Insolvency Act 2000 and the Insolvency Partnerships Order 1994 (SI 1994/2421) may be dealt with by the High Court or a county court. Section 117(1) of the Insolvency Act 1986 provides that the High Court may wind up any company registered in England and Wales, and section 117(2) gives concurrent jurisdiction to the county court of the district in which the company's registered office is situated where the amount of the share capital paid up or credited as paid up does not exceed £120,000. Every court having winding up jurisdiction has for that purpose all the powers of the High Court (s. 117(5)). 'Company' means a company formed and registered under the Companies Act 1985 or under the former Companies Acts (i.e. the Joint Stock Companies Acts, the Companies Act 1862, the Companies (Consolidation) Act 1908, the Companies Act 1929 and the Companies Acts 1948 to 1983) but excluding those in what was

Ireland (s. 735(1) Companies Act 1985). Do note however that that replacement of an Insolvency Practitioner as Liquidator, Administrator, Trustee or Supervisor, through retirement, death, or otherwise unwilling or unable to continue must be ordered by a Judge of the Chancery Division and the application should be transferred for this purpose.

17.1.2 Individuals

Section 265(1) Insolvency Act 1986 provides that certain jurisdictional conditions have to be satisfied in respect of a debtor before a bankruptcy petition can be presented. The debtor must be domiciled in England and Wales, or personally present in England and Wales on the day on which the petition is presented, or at any time in the three year period ending with that day, have been ordinarily resident or had a place of residence in England and Wales or carried on business in England and Wales. Section 265 is now subject to Article 3 of the EC Regulation on Insolvency Proceedings (see s. 265(3)).

17.1.3 The law

The relevant law is to be found primarily in the Insolvency Act 1986 (as amended) and the Insolvency Rules 1986 (SI 1986/1925 as amended). The Insolvent Partnerships Order 1986 (SI 1986/2412 as amended) deals with the insolvency of partnerships (specifically by reference to Parts I, II and V Insolvency Act 1986 by applying the various corporate provisions on voluntary arrangements, administrations and winding up). Limited liability partnerships are governed by the Limited Liability Partnerships Act 2000 section 14 which, together with the Limited Liability Partnerships Regulations 2001 (SI 2001/1090), applies Parts I, II, III, IV, VI and VII Insolvency Act 1986 to their insolvency. The Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999 as amended) governs the administration of the insolvent estates of deceased persons.

The EC Regulation on Insolvency Proceedings 2000 (OJ L 160, 30 June 2000), which came into force on 31 May 2002, has had a substantial impact on jurisdiction in relation to insolvency proceedings in the EU member states (see below).

The disqualification of directors is governed by the Directors Disqualification Act 1986 and the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 (SI 1987/2023 as amended).

You may still encounter bankruptcies governed by the Bankruptcy Act 1914 and the Bankruptcy Rules 1952 or corporate insolvencies governed by the Companies Act 1948 and the Companies (Winding Up) Rules 1949, although these are now very rare. Note, however, that deeds of arrangement under the Deeds of Arrangement Act 1914 and the Deeds of Arrangement Rules 1925 (SR and O 1925/795) remain possible, although these too are very rare, having been replaced in practice by voluntary arrangements under Part VIII Insolvency Act 1986.

You should also be aware of the provisions of the principal practice directions, the Practice Direction: Insolvency Proceedings and the Practice Direction: Directors Disqualification Proceedings.

17.1.4 Procedure

The CPR apply save where inconsistent with the Insolvency Rules and thus where the Acts and Rules do not make a procedural provision, recourse may be had to the CPR (r. 7.5(1) Insolvency Rules 1986).

Insolvency proceedings are multi-track (r. 7.51(2) Insolvency Rules 1986).

Part 7 Insolvency Rules 1986 deal with a range of matters relating to procedure in insolvency proceedings, including rules as to the form and content of applications (r. 7.3). Generally, applications in insolvency proceedings (other than those made by petition) must be made by originating application or ordinary application. An originating application is one made to the court where there are no pending proceedings, and an ordinary application is any other application (i.e. where there are pending proceedings) (r. 7.2(1) Insolvency Rules 1986). Thus, where there is a bankruptcy and the trustee makes an application, it will be an ordinary application (because the bankruptcy is an existing proceeding), but where a liquidator in a voluntary winding up seeks to apply to the court for the first time, he should do so by originating application (as there will generally be no pending proceedings before the court). Rule 7.3 Insolvency Rules makes specific provision as to the form and content of applications.

Since the CPR came into force, evidence may generally be given by witness statement except where specifically otherwise provided in Rule 7.57(6), where evidence must still be given by affidavit being:

- a bankrupt's statement of affairs
- further information given by a bankrupt to the Official Receiver amplifying, modifying or explaining any matter in his statement of affairs
- accounts submitted by a bankrupt to the Official Receiver
- a creditor's proof of debt or claim of debt if required by the Official Receiver or trustee
- a respondent's evidence on private examination

17.1.5 The EC Regulation on Insolvency Proceedings

The Council of the European Union Regulation on Insolvency Proceedings No 1346/2000 (OJ L 160, 30.6.2000) came into force on 31 May 2002 and has direct application as domestic law. It applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator' (art. 1(1)). Such proceedings are: winding up by the court, creditors' voluntary winding up with confirmation of the court (as to which see below), administration, voluntary arrangements and bankruptcy (art. 2(a) and Annex A), and the

term ‘liquidator’ includes the relevant office holder in relation thereto (art. 2(b) and Annex C). The Regulation does not apply to insurance and certain other financial undertakings (art 1(2)), nor does it apply to members’ voluntary winding-up, schemes of arrangement, winding-up on the just and equitable ground or winding-up in the public interest (see *Re Marann Brooks CSV Ltd* [2002] All ER (D) 42 (Dec), [2003] BPIR 1159).

The Regulation provides for insolvency proceedings to be main proceedings or secondary (or territorial proceedings (art. 3(1) and (2)). Jurisdiction is founded by reference to the debtor’s centre of main interests, which in the case of a company is presumed (in the absence of proof to the contrary) to be its registered office (art. 3(1)) and in the case of an individual is likely to be the place of the debtor’s business or his place of ordinary residence (in the absence of evidence to the contrary). Main proceedings are proceedings brought in the place of the debtor’s centre of main interests and are universal in scope. Secondary or territorial proceedings may be brought in a country in which the debtor has an establishment, i.e. a ‘place of operations where the debtor carries out a non-transitory economic activity with human means and goods’ (arts. 2(h) and 3(2)). Such proceedings are limited to assets within the territory. The court is thus obliged to consider whether it has jurisdiction before making an order, and when making an order, to state whether the Regulation applies and if so whether the proceedings are main or secondary. For examples of the court’s consideration of the jurisdictional issue see: *Re a Company (No 6394/2002)* [2002] All ER (D) 223 (Oct); *Re Marann Brooks CSV Ltd* [2002] All ER (D) 42 (Dec), [2003] BPIR 1159; *Geveran Trading Co Ltd v Skjevesland* [2003] BPIR 73 and 924, *Re BRAC Rent-a-Car International Inc* [2003] EWHC (Ch) 128, [2003] 1BCLC 470 and *Shierson v Vlieland-Boddy* [2005] EWCA Civ 1624 CA [2005] B.C.C 416 ChD.

The place where proceedings are opened (usually by the making of an order (art. 2(f)) determines the law applicable to the insolvency (art. 4(1)), but subject to various exceptions set out in detail in the Regulation.

The Regulation provides for automatic recognition of insolvency proceedings in member states (arts. 17 and 25). A creditors’ voluntary liquidation requires ‘confirmation of the court’ for such purposes (Annex A).

In most cases, for example, where you make a winding up order or a bankruptcy order or make an order following an interim order where a voluntary arrangement has been approved (“opening” proceedings within the meaning of the EC Regulation) you will have to make a declaration as to whether the Regulation applies and if so whether the proceedings are main, territorial or secondary proceedings.

17.2 BOOKS

In every county court there should be access to the following:

- The Civil Procedure Rules

- At least one of the Law Publishers' books on Civil Procedure; i.e. Butterworths, Sweet and Maxwell, Jordan's and Blackstone's
- Muir Hunter on Personal Insolvency
- Butterworths Insolvency Handbook
- Palmer's Company Law or the equivalent.

If you are sitting as a deputy district judge, then at least one of the first three and the Handbook above should be available in chambers. A book on company law should be found in the court library.

Muir Hunter is a loose-leaf publication. It is comprehensive and is authoritative on personal insolvency. It contains all the material that you should need to refer to on this subject including Practice Directions, statements of good practice and forms.

17.3 COMPANIES

17.3.1 Company Voluntary Arrangements

In the following guidance, reference to sections are to the Insolvency Act 1986 ('the Act').

Where there is no order in force for the winding up or the administration of the company, the directors may propose a voluntary arrangement (s1(1)). Where there is an administration order in relation to the company or it is being wound up, the administrator or liquidator may make such a proposal (s 1(3)).

Where the nominee is not the liquidator or administrator and the directors do not intend to take steps to obtain a moratorium (see 17.3.2 below) the proposal should be made to a nominee qualified to act. The proposal must contain the information required by rule 1.3 and the directors must deliver to the nominee a statement of the company's affairs within seven days of delivery to the nominee of their proposal.

The nominee, if he is of the opinion that that the voluntary arrangement has a reasonable prospect of being approved and implemented, must within 28 days submit a report to the court and, unless the court otherwise directs, summon meetings of the members and of the creditors of the company (ss. 2 and 3).

The procedure then follows that set out at 17.3.2 below. The court's involvement will be limited to applications concerning the removal of the nominee/supervisor and review of decisions taken at the meeting(s) summonsed by the nominee.

17.3.2 Moratorium

Where the directors seek to enter into a voluntary arrangement under Part I of the Act they may seek a moratorium (s. 1A(1)). The procedure is that set out in Schedule A1 of the Act.

To be eligible for a moratorium the company must in its last financial year be a small company as defined by section 247(3) Companies Act 1985 (s. 1A and Schedule A1 para. 4). It is not eligible if:

- it is in administration
- it is being wound up
- there is an administrative receiver appointed
- it is subject to a voluntary arrangement
- there is a provisional liquidator
- there has been a moratorium for the same company in the previous 12 months before applying, or
 - i. no voluntary arrangement had effect at the time at which the moratorium came to an end, or
 - ii. the voluntary arrangement came to end prematurely,
- a voluntary arrangement proposed by a liquidator or administrator has come to an end prematurely and during the previous 12 months the court has stayed the winding up or discharged the administration order
- it is not a company subject to the provisions of Schedule A1 para 2(2) Act (insurance companies, banks and the like).

To obtain the moratorium the directors must make a proposal to the nominee setting out the terms of the voluntary arrangement (rule 1.3), and a statement of the company's affairs containing:

- the particulars of its creditors and of its assets and liabilities set out in rule 1.5(2) of the rules, and
- any other information necessary for the nominee to make a formal statement (Form 1.5) to the directors whether or not the voluntary arrangement has a reasonable prospect of being approved and implemented, and whether the company will have sufficient funds during the moratorium to carry on its business, and the meetings of the company and its creditors should be summoned (para 6(1) Schedule A1).

Should the nominee favour a voluntary arrangement, then the directors must file in court within 3 working days of receipt of the nominee's statement the following documents para.7 Schedule A1):

- a document setting out the terms of the voluntary arrangement
- a statement of the company's affairs corresponding to that given to the nominee above (Form 1.6)

- a statement that the company is eligible for moratorium (Form 1.7)
- the nominee's consent to act (Form 1.8)
- a statement from the nominee with his opinion and comments on the proposal as above and that a meeting of the company and its creditors should be called to approve the arrangement (Form 1.5)
- four copies of a schedule (Form 1.9) listing the documents above.

The effect of the moratorium is set out in detail in para.12(1) of Schedule A1 of the Act, but the main provisions may be summarised as follows.

- No winding up petition, or petition for an administration order may be presented, nor may any resolution for the winding up of the company be passed.
- No meeting of the company may be called without the consent of the nominee or leave of the court upon such terms as it may impose.
- No administration application may be made and no administrator may be appointed.
- No administrative receiver may be appointed.
- No landlord may exercise any right of forfeiture or peaceable re-entry except with the leave of the court.
- No goods subject to HP agreement may be seized nor any steps taken to enforce any security without leave of the court.
- No other proceedings and no execution or other legal process may be commenced or continued nor any distress levied without leave of the court.

The moratorium is effective from the date of the filing in court of forms 1.5 to 1.9 above. The court endorses three copies of the schedule (Form 1.5) with the filing date, seals them and returns them to the person who filed them.

The moratorium continues to the date of the meeting of the company and its creditors or the later date if the meetings are held separately. The duration of the moratorium may be extended under para. 32, but not beyond two months from the later of the meetings, and this may be determined by the meeting(s) upon such terms as they may resolve, including removal or replacement of nominee for which application must be made to the court under rule 1.45 of the Rules and paragraph 28 Schedule A1 of the Act. Where the moratorium is extended the nominee should forthwith inform the court and the Registrar of Companies (Forms 1.12 and 1.13).

The nominee must withdraw his consent to act where he forms the opinion that any of the criteria for a moratorium no longer exists whereupon (subject to challenge by any creditor or director) the moratorium ceases to have effect (see Part IV Schedule A1 the Act).

If the nominee fails to summon either meeting within the period specified (28 days) the moratorium ceases on the last day of the period specified (para. 8(4) Schedule A1).

Whenever a moratorium comes into force this must be advertised forthwith in the Gazette and in an appropriate newspaper and notified to the Registrar of Companies by the nominee. He must also notify any person seeking to enforce a court order by execution or who has distrained on the company's property without leave of the court, and any petitioning creditor. When a moratorium comes to an end the nominee must advertise this in the Gazette and an appropriate newspaper and notify any creditor of whom he is aware.

If a winding up petition has been presented before the moratorium comes into force then section 127 of the Act voiding any disposition after commencement of winding up does not apply during the moratorium save in the case of an excepted petition (para. 12 (2) (4) and (5) Schedule A1).

During the moratorium the company may apply under paragraph 20 Schedule A1 of the Act to dispose of property that is charged or subject to HP agreement where the chargee or owner does not consent.

Notice of the application must be given to the chargee or owner. If the order is made then the company must forthwith give notice to the chargee or owner by sending on a copy of the court's sealed order, and an office copy must be sent by the company to the registrar of companies within 14 days of leave being given (para. 20 (8) Schedule A1 and Rule 1.43).

The granting of such an order appears to be a matter of discretion but under paragraph 20(6) and (7), Schedule A1 it must be a condition of the sale that the net proceeds, or if less than the value of the goods given to the court to be realised the net proceeds and the shortfall, must be applied to reduction of the charge over those goods, or any sum payable under the hire purchase agreement. If more than one charge is involved then the proceeds must be applied in order of the priority of the charges.

Where a debenture holder has the benefit of a floating charge then, for the purpose of ascertaining his priority the proceeds of sale become the subject of the charge.

Failure to observe the above does not void the transaction or make it unenforceable against the company but renders the company liable to a fine (paras. 15 and 22 Schedule A1).

17.3.3 The meetings

The convening and conduct of the meetings and issues concerning entitlement to vote and requisite majorities are governed by rules 1.48 to 1.53. In simple terms:

- the meetings must be convened within 28 days on at least 14 days notice and may be adjourned, but a moratorium may not be extended on such an adjournment longer than two months later than the date of the first meetings,

- if the chairman thinks fit, the creditors' meeting and the company meeting may be held together,
- every creditor who has notice of the meeting is entitled to vote and his vote is calculated according to the amount of his debt at the date of commencement of the moratorium (less any amount received after that date),
- the chairman may admit or reject a creditor's claim in whole or in part and his decision is subject to appeal to the court. If in doubt it should be marked as 'objected' and allowed for voting purposes. An appeal must be made within 28 days after filing the chairman's report.
- at the creditors' meeting, the requisite majority is the sum in excess of three quarters in value of the creditors present in person or by proxy and voting on a resolution to approve or modify the proposal and in excess of one half voting on any other resolution,
- at the company meeting, the members vote according to the rights attaching to their shares and the requisite majority is a figure in excess of one half in value of the members present in person or by proxy and voting on any resolution,
- the decision of a creditors' meeting prevails over a contrary decision of a company meeting (subject to challenge to the court).

17.3.4 Approval of the arrangement

Once the meetings have approved the proposal for the voluntary arrangement then, unless a challenge is made by application to the court within 28 days of the filing of the chairman's report, the arrangement comes into effect. The approved arrangement binds every person who in accordance with the rules was entitled to vote at that meeting (whether or not he was present or represented), or would have been so entitled if he had notice of it, as if he were a party to the voluntary arrangement (para 37 Schedule A1).

The court will dismiss any pending petition seeking the winding up of the company after 28 days from the date of receiving the report or at the end of any proceedings challenging a decision made at the meeting or appeal against determination of that application.

Persons entitled to challenge a decision of the meeting are those bound by its decision (see above) and the nominee on grounds that a decision unfairly prejudices the interests of a creditor, shareholder or contributory of the company or on grounds of material irregularity in the conduct of the meeting(s) (see paras. 36 and 37 Schedule A1).

The court on determining such an application may revoke or suspend a decision of the meeting(s) or give directions for the summoning of another meeting or such other directions as to the management of the arrangement as it thinks fit, or things done or not done during the moratorium.

17.3.5 Administration Orders (Part II Insolvency Act 1986)

Applications for administration orders are invariably dealt with by the judge: a district judge has no power to make such an order (see para 17.1 above). Nonetheless, it is important that judges of all levels have some understanding of the administration process, since it has effects on other proceedings and the rights of parties other than those directly involved, and because district judges may be called upon to deal with applications arising out of administrations.

Section 248 of the Enterprise Act 2002 substituted in place of Part II Insolvency Act 1986 a new statutory regime for administrations the details of which are to be found in Schedule B1 of the Insolvency Act 1986. The Insolvency (Amendment) Rules 2003 substituted a new Part 2 in the Insolvency Rules 1986 dealing with the rules governing the new forms of administration. The new regime permits an administrator to be appointed by the court or out of court.

It is no longer necessary to show that the administration is likely to achieve one of four specified objectives. Instead, paragraph 3(1) of Schedule B1 provides that the administrator must perform his functions with the objective of:

- rescuing the company as a going concern, or
- achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
- realising property in order to make a distribution to one or more secured or preferential creditors. Paras. 3(3) and (4) make it clear that the objectives rank in order of priority.

The administration reforms of the Enterprise Act 2002 go hand in hand with the virtual abolition of administrative receivership. Holders of 'qualifying floating charges' will no longer be able to block the appointment of an administrator but will instead themselves be able to seek the appointment of an administrator of their choice.

Administration by court order

An administrator may still be appointed by order of the court. The application may be made by:

- the company
- the directors of the company
- one or more creditors of the company
- the justices' chief executive for a magistrates' court (in relation to a fine) or
- any combination of the above (para. 12(1)).

It is made by a new prescribed form of application (Form 2.1B) rather than by petition and must be supported by an affidavit containing:

- details of the company's financial position (including assets and liabilities)
- details of any security held
- details of any existing insolvency proceedings
- (where more than one administrator is to be appointed) details of which functions are to be carried out by them jointly or separately (para. 100(2) Sch. B1)
- any other relevant matters
- (where the application is made by the holder of a qualifying floating charge) details to satisfy the court of the charge holder's entitlement to appoint an administrator
- a statement as to the application of the EC Regulation on Insolvency Proceedings and whether the proceedings are main or territorial (r. 2.4 Insolvency Rules 1986).

Notice of the making of the application must be given to:

- any person who has appointed an administrative receiver
- any person who may be entitled to appoint one
- the holder of any qualifying floating charge (para. 12(2) Sch. B1);

In addition the application must be served on:

- any administrative receiver who has been appointed
- any person who has presented a winding up petition
- any liquidator appointed in main proceedings in a member state
- the proposed administrator
- the company (unless it is the applicant)
- the supervisor of a voluntary arrangement under Part I Insolvency Act 1986 (r. 2.6 Insolvency Rules 1986).

Before making an administration order the court must be satisfied that the company is or is likely to become unable to pay its debts and that the administration order is reasonably likely to achieve the purpose of the administration (para. 11 Sch. B1).

On the hearing of the application the court may:

- make the administration order
- dismiss the application
- adjourn the hearing conditionally or unconditionally

- make an interim order
- treat the application as a winding up petition and make any order it could make under section 125 Insolvency Act 1986
- make any other order it thinks appropriate (para. 13(1) Sch B1).

Where a qualifying charge holder applies for an order (as opposed to appointing out of court) there is no obligation to satisfy the court that the company is or is likely to become unable to pay its debts, but the application must state that it is being made under paragraph 35 of Schedule B1.

Administration out of court

The holder of a qualifying floating charge may appoint an administrator out of court (paras. 14-21 of Sch. B1 Insolvency Act 1986 and rr. 2.15-2.19 Insolvency Rules 1986). A floating charge 'qualifies' if it is created by an instrument which:

- states that para. 14 Sch. B1 applies to it
- purports to empower the holder to appoint an administrator
- purports to empower the holder to make an appointment of what would otherwise be an administrative receiver (para. 14(2)).

The appointment becomes effective when a notice of appointment in the prescribed form accompanied by the administrator's consent to act and a statement by him that in his opinion the purpose of the administration is likely to be achieved have been filed in court. Rule 2.19 makes special provision for filing notice of appointment by fax out of business hours.

Similar provisions (but excluding that relating to appointment out of hours) are made for the appointment of an administrator by the company or its directors (paras. 22-34 of Schedule B1 and rr. 2.20-2.26).

The effects of administration are set out in paras. 40-45 of Schedule B1. On the making of an administration order:

- any petition to wind up the company (except in the public interest or under the Financial Services and Markets Act 2000) must be dismissed or (in the case of an appointment by the holder of a qualifying charge) suspended;
- any administrative receiver must vacate office (paras. 40 and 41).

Both court and out of court administrations create a statutory moratorium during which:

- no resolution to wind up the company may be passed

- no winding up order may be made (save in the public interest or under the Financial Services and Markets Act 2000)
- no steps may be taken to enforce any security or repossess goods subject to HP except with the consent of the administrator or the permission of the court
- no landlord may forfeit except with such consent or permission (paras. 42 and 43)
- no legal process (including legal proceedings, execution and distress) may be instituted or continued against the company or its property except with such consent or permission.

An application for an administration order creates an interim moratorium which has the same effect as paragraphs 42 and 43, save that the proviso relating to the consent of the administrator does not apply (para. 44).

The administrator must summon a meeting of creditors as soon as is reasonably practicable after the company enters into administration and in any event within 10 weeks (para 51(2) Schedule B1). His appointment ceases to have effect at the end of one year from the date on which the administration takes effect (para 76(1) Schedule B1).

The administrator's functions are set out in paras 59 – 75 of Schedule B1. He must perform them in the interests of the company's creditors as a whole (para 3(2) Schedule B1).

Note that an administration ceases to have effect at the end of the period of one year beginning with the date on which it takes effect (Sch B1 para 76(1)). Para 76 of Sch B1 provides mechanisms to extend time but the court has no power to extend after the expiry of the administrator's term of office (para 77(1)).

17.3.6 Receivership (Part III Insolvency Act 1986)

Applications relating to receiverships are rare, although you may occasionally encounter relatively uncontroversial applications, for example, to extend the receiver's time for complying with certain obligations set out in the Insolvency Act 1986 and the Insolvency Rules 1986. The principal effect of Chapter IV Insolvency Act is to prohibit the holder of a qualifying floating charge from appointing an administrative receiver after an appointed date (s. 72A Insolvency Act 1986). The holder of such a charge will in future be compelled to use the new administration procedure described above. This does not affect the right to appoint a receiver under the Law of Property Act 1925 or to apply to the court for the appointment of a receiver under CPR Part 69.

Company winding up proceedings

17.4.1

The following is an outline guide of the proceedings you will come across in defended and undefended proceedings for winding up of a company and which fall under Parts IV and V of the Insolvency Act 1986.

Under section 73 the Act a company may be wound up voluntarily or compulsorily by the court.

17.4.2 Winding up by the court (Part IV)

This is covered by Chapter VI of the Act and Part 4 of the Rules as amended.

17.4.3 How may a company be wound up?

A company may be wound up in the county court where the amount of the company's paid up or credited share capital does not exceed £120,000 (see para 17.1.1). The appropriate court will be where the company's registered office has been situated for the six months preceding the presentation of the petition. However you should note that if the proceedings are taken in the wrong court this will not invalidate them. If sitting in the county court you will have all the powers exercised by the High Court in winding up proceedings (ss. 117 and 118).

You may transfer proceedings commenced in the county court to the High Court for determination of any point arising in the proceedings by stating a case on the facts, if the parties or one of them requests, and you consider this is merited (s. 119).

17.4.4 Grounds for winding up by the court

Under section 122, a company may be wound up by the court if:

- the company has resolved by special resolution that it should be wound up by the court,
- if it is a public company, it has not been issued with a certificate under section 117 of the Companies Act 1985 (share capital requirements) and more than a year has expired since it was registered,
- it is an old public company, within the meaning of the Consequential Provisions Act,
- the company does not commence its business within a year of incorporation, or suspends business for a year,
- except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two,
- the company is unable to pay its debts,

- on the petition of one or more creditors, at the end of a period of moratorium a company voluntary arrangement has not been approved,
- the court is of the opinion that it is just and equitable that the company should be wound up.

You are unlikely to encounter grounds other than the first and the last three. That the company is unable to pay its debts is proved (s.123) by one of the following:

- A creditor with a debt exceeding £750.00 then due has served a statutory demand for payment at the company's registered office and the company has failed to pay within three weeks.
- Execution has been returned unsatisfied in whole or in part on a judgment decree or order of the court.
- You being satisfied either that the company is unable to pay its debts as they fall due or that the value of its assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

The Secretary of State may petition for a company to be wound up on the ground that it is expedient in the public interest that it be wound up (s. 124A). You are unlikely to encounter such a petition because the Secretary of State almost invariably presents such a petition in the High Court in London. Similarly the Financial Services Authority may petition (s. 367 Financial Services and Markets Act 2000) but again it is unlikely will encounter this in practice.

17.4.5 How to apply and by whom?

The application is by petition filed by all or any of the following (s. 124):

- the company or its directors,
- any present or prospective creditors,
- contributory(s) provided that the number of members is reduced below two and that the shares have been held by him for at least 6 months in the preceding 18 months, or been inherited by him,
- clerk to the justices by section 87A Magistrates' Courts Act 1980 for non-payment of fine imposed on the company,
- the Secretary of State as above where he considers it expedient in the public interest as set out in s. 124A of the Act and the court considers it just and equitable,
- the Financial Services Authority (see above),
- the supervisor of a voluntary arrangement under section 7(A)(b) of the Act,
- an administrator.

Following presentation of a petition you may stay proceedings against the company in another court, on such terms as you think fit on the application of the company, a creditor, or a contributory, in any court but you may not stay proceedings in the High Court or Court of Appeal. The company must apply there if it wants those proceedings stayed (s. 126). Note that an application to restrain presentation of a winding up petition must be made by issue of an originating application in Form 7.1 to a circuit judge (PDIP para. 8.1).

The winding up is deemed to commence from the date of presentation of the petition to the court. You should note that if the petition follows a resolution for a voluntary winding up by the company, the winding up is deemed to commence from the resolution. Any proceedings taken following the resolution are valid unless the court is satisfied by evidence that there has been fraud or mistake (s. 129). The court should not make a winding up order on such a petition unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories (s. 124(5)).

17.4.6 Form of petition

The petition must be in Form 4.2 and state whether the proceedings will be main or secondary proceedings for the purpose of the EC Regulation. It must be verified by affidavit or witness statement under rule 4.12. Each debt due to a different creditor must be verified. The affidavit must be made by:

- the petitioner or one of them, or
- an office holder in the company or solicitor, or
- some authorised responsible person who has knowledge of the matters.

17.4.7 Service of the petition

By rule 4.8 the petition must be served at the company's registered office, on a director, or a person authorised to accept service, or otherwise deposited there so as to come to the notice of such a person. If this is not practicable service may take place at the company's last known principal place of business, or as you may direct upon application. If your order is sought the application to you is made without notice and verified by evidence stating why it has not been possible to serve by the methods prescribed.

Proof of service (in the form of affidavit or witness statement) must be filed immediately following service, exhibiting a sealed copy of the petition and, if applicable a copy of the order permitting substituted service (rule 4.9).

You should check that all persons entitled to be served have been. Their identity can be checked by reference to 4.10 and you should note that if the EC Regulation applies and there is a member state liquidator appointed in another member state in main proceedings then, if he is not the petitioner, service must be effected upon him.

Where the petition is presented by the company (see para 17.4.5 above) service may be, and generally will be, dispensed with.

17.4.8 Advertisement of the petition

The petition must be advertised. The provisions of rule 4.11 are mandatory for the purposes of giving a class remedy of winding up to all creditors. If the petitioner is the company then the petition should be advertised not less than seven business days before the hearing. Otherwise it must be advertised not less than seven business days after service on the company, and not less than seven business days before the hearing.

Failure to comply without good reason may lead to dismissal of the petition, and if in the discretion of the court the hearing is adjourned for advertisement you should not allow more than one adjournment.

The advertisement should comply with rule 4.11(4), and a copy should be lodged not later than 5 days before the hearing with the certificate of compliance under rule 4.14 (see, however, paras. 2 and 3 of PDIP). If it does not comply in form, or the creditor does not wish to proceed the certificate must still be filed.

The certificate of compliance must show:

- the date of presentation of the petition,
- the date fixed for the hearing, and
- the dates when the petition was served and advertised to comply with the rules.

You have discretion to dismiss the petition for non-compliance with the above provisions.

17.4.9 Can a petition be withdrawn?

Yes, with your permission on such terms as to costs as the parties may agree, if at least five days before the hearing on an application without notice the petitioner satisfies you that the petition has not been advertised, there have been no notices opposing or supporting the petition, and the company consents to the order (r. 4.15). Permission should not be given after the first hearing of the petition.

17.4.10 Rights to appear and your powers on hearing petition

Before a person may appear as a supporting or opposing creditor notice must be given to the petitioner to arrive by 16.00 hours on the business day before the hearing, and comply with rule 4.16. The petitioner should prepare a list for you of those who have given notice to attend either to support or oppose the petition. If no notice has been given then a person may only appear with your permission (r. 4.17). If the company wishes to oppose the petition its affidavit in opposition must be filed not less than seven days before the hearing, and a copy sent by the company forthwith to the petitioner (r. 4.18).

If the company has failed to file evidence in accordance with rule 4.18 but you are satisfied that it appears to have a good defence to the petition you should give directions. These will generally be for:

- ‘the company to file and serve evidence in opposition by []’, and for
- ‘the petitioner to file and serve evidence in reply by []’,
- followed by the directions appropriate to get the petition listed for final hearing.

As a general rule you should not give directions for disclosure or oral evidence, since if disclosure and oral evidence are needed the matter is more suited to trial following the issuing of a claim form.

You will then conduct the hearing in open court, and may do so whether it be defended or undefended, but if you feel the hearing, if defended, would be better conducted by a circuit judge on grounds of complexity, then you should adjourn for this purpose.

The issue with which you will generally be concerned when you hear a contested petition is whether or not the company is insolvent in that it cannot pay its debts when they fall due. A company is deemed unable to pay its debts:

- if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving at the company’s registered office, a written demand in the prescribed form (a statutory demand) requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, or
- if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part, or
- if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due (other than by reason of its failure to satisfy a statutory demand), or
- if it is proved to the satisfaction of the court that the value of the company’s assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities (s. 123(1) and (2)).

As to the form of a statutory demand for the purpose of section 123(1)(a), see rulesJ 4.4-4.6 Insolvency Rules 1986.

Note that the minimum level of indebtedness (£750) applies only to proof of inability to pay by service of a statutory demand. It is open to a creditor to petition for a lesser sum, relying on the fourth ground above.

Service of a statutory demand is not a necessary prerequisite to presentation of a petition. Inability to pay may be established without service of a statutory demand (see *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44), since the creditor may demonstrate inability to pay by the company's failure to pay an undisputed debt (see *Taylor's Industrial Flooring Ltd v M and H Plant Hire (Manchester) Ltd* [1990] BCLC 217).

A creditor with a debt which is not disputed is entitled to a winding-up order as a matter of right (*Bowes v Hope Life Insurance Co Ltd* [1895] All ER 1383). However, the court will not make a winding-up order where the petition has been issued improperly or simply as a debt collecting exercise, for some private purpose, or to put pressure on a solvent company to pay a debt (*Re Lympne Investments Ltd* [1972] 1 WLR 523; *Re a Company* [1983] BCLC 492) nor will it make an order on the basis of a debt which is disputed on genuine grounds (see, for example, *Re London and Paris Banking Corporation* (1874) 19 Eq 44; *Re Richbell Strategic Holdings Ltd* [1997] 2 BCLC 429). The dispute must be genuine: a bare allegation that the debt is in dispute will not suffice to establish that the dispute is genuine (*Re a Company No 006685 of 1996* [1997] BCC 830). A winding-up order will not be made on a debt which is time barred (*Re Karnos Property Co Ltd* [1989] 5 BCC 14).

A company which has been served with a statutory demand or is otherwise made aware that it is intended to present a petition may apply with or without notice for an order restraining presentation of a petition or advertisement of any petition which has already been presented. The application should be supported by full written evidence in support setting out in detail why the petition should not be presented or advertised (usually because the petition debt is disputed). Since the application is for an injunction it should be made direct to the circuit judge. There is no provision to apply for a statutory demand to be set aside as there is in bankruptcy.

The court will not restrain a creditor from prosecuting a petition where the company can demonstrate solvency but has failed to pay a debt that is due (see *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114).

You have wide discretionary powers to dismiss, adjourn conditionally or adjourn unconditionally. You may make an interim order but what you cannot do is refuse to make a winding up order on the ground only that the company's assets are mortgaged to an amount equal to or exceeding the value of those assets, or that the company has no assets (s. 125).

Where the petitioner does not wish to proceed, or where he has failed to advertise within time, or not complied with the rules you may substitute a creditor, including a member state liquidator on such terms, as you think just. The terms of your order should provide for 'X' to be substituted as petitioning creditor in place of 'Y' and order that the petition be amended, reverified and reserved (and advertised if necessary). It should then be adjourned to a date allowing those steps to be taken.

If you make the winding up order it will be in form 4.11, but the obligation is on the petitioner to lodge all documents by the next business day for the order to be drawn.

Where a company has been struck off the Register of Companies, the petition should include a prayer for restoration of the company to the register as well as for making the winding up order. If the petitioner is not the Crown, notice of the amended petition should be served on the Treasury Solicitor. Evidence of service and of a bona vacantia letter (confirming that the Crown has no objection) from the Treasury Solicitor on behalf of the Crown or appointed solicitors on behalf of the Duchies of Lancaster and Cornwall should be produced except where the petitioning creditor is the Crown. If the petition is granted, the order will include a provision that the company's name be restored to the register.

Where the petition is presented by the supervisor of a failed company voluntary arrangement it is treated as a petition by a contributory (rule 4.22 et seq) and is founded on the ground that it is just and equitable that the company be wound up as a result of that failure. The supervisor may apply to be appointed as the liquidator and you may so appoint if he has complied with rule 4.7(10).

You have a general discretion to extend time where time limits have not been complied with, or extensions are sought (r. 4.3).

If the petition is presented by its members or contributories on the ground that it is just and equitable to do so, you may refuse to do so if you do not share that view, and they are behaving unreasonably and it appears that some other remedy is available to them (s. 125(2)).

17.4.11 Anything else?

It is worth noting that the court can correct errors in a petition on application following a winding up order being made where the company name is incorrect (PDIP para. 4).

A winding up order may be rescinded on application made within seven days of the winding up by any director or member of the company showing that the petition was not served at the registered office.

If you discover that prior to making the winding up order the company has been struck off the Register of Companies, you may rescind the winding up order to enable the petition to be restored and amended so as to make an order for restoration of the company to the register as well as making the winding up order. If the petitioner is not the Crown, notice of the amended petition should be served on the Registrar of Companies and evidence of service and of a bona vacantia letter from the Treasury Solicitor on behalf of the Crown or of the Duchies of Lancaster or Cornwall should be produced.

17.4.12 Validation orders

Section 127 Insolvency Act 1986 has the effect of rendering void transactions entered into by the company after the commencement of the winding up (by presentation of the petition) in the event of a winding up order being made. Thus, a company's bank will frequently freeze its customer's account when the petition has been advertised. The company may apply for relief from the effect of section 127 in the form of an order 'validating' a transaction or certain types of transaction. The application is most frequently made to enable the company to pay the petition debt. It should be supported by evidence of the company's financial position and made on notice to the petitioner and any supporting or opposing creditor.

The form of order will be along the following lines:

'Upon hearing []

And Upon reading []

It is ordered that:

Notwithstanding the presentation of the petition herein the payment by the company to [] of the sum of £x to satisfy the petition debt shall not be void by virtue of the provisions of section 127 Insolvency Act 1986 in the event of an order for the winding up of the company being made on the said petition.'

17.5 Applications following the winding up of a company

The Insolvency Act 1986 provides a wide range of remedies available to liquidators, creditors and others in the winding up of a company. These include applications for directions in the winding up (s. 112 Insolvency Act 1986), applications relating to void transactions (s. 127), fraud (ss. 206-207), misfeasance (s. 212), fraudulent and wrongful trading (ss. 213-214), transactions at an undervalue (s. 238), preferences (s. 239), extortionate credit transactions (s. 244) and so on. Such applications will be made by originating or ordinary application and should generally be supported by written evidence. The nature of the directions you will make, the way in which you will manage such cases, and whether you decide to deal with them yourself or refer them to a circuit judge will depend on the nature and complexity of each case.

Public examinations of company officers (ss. 133-134) and private examinations of officers or others able to give information about a company's affairs (s. 236) should generally be dealt with by the district judge. Public examinations should be conducted in public and you should be robed, as should any advocates who appear, although not, of course, the Official Receiver or liquidator if acting in person. Private examinations should be conducted unrobed in private (although see Part 9 Insolvency Rules 1986 as to who may attend and as to procedure generally).

The case law relating to private examinations is voluminous and complex. The making of an order is a matter for the discretion of the court, but the discretion will generally be exercised

in favour the liquidator (*Joint Liquidators of Sasea Finance Ltd v KPMG* [1998] BCC 216) provided the application is made to enable him to carry out his proper functions (*British and Commonwealth Holdings plc v Spicer and Oppenheim (Re British and Commonwealth Holdings plc (No 2))* [1993] AC 426, [1992] BCC 977).

The formation of the liquidator of an intention to bring proceedings against the proposed examinee may be a factor weighing against the exercise of the discretion to make an order (*Re Castle New Homes Ltd* [1979] 1 WLR 1075, [1979] 2 All ER 775; *Re Cloverbay Ltd* [1991] Ch 90, [1990] BCC 414, [1990] BCLC 449); an order will not be made to give the office holder a litigation advantage (*Re Atlantic Computers plc* [1998] BCC 200); however an order may be made for the purpose of obtaining information other than for the administration of the liquidation (e.g. for the purposes of disqualification proceedings (*Re Pantmaenog Timber Co Ltd* [2003] UKHL 49, [2004] 1 AC 158)).

The court must seek to balance the office holder's reasonable requirements for information against any oppression which the order might cause (*Shierson v Rastogi and others* [2003] 1 WLR 586).

If a witness summoned to a public or private examination refuses to co-operate and answer questions properly put to him you should adjourn the matter to the judge who has power to deal with contempt. The district judge may not impose penalties for contempt. He does, however, have power to issue a warrant for the arrest of a witness who fails to appear at a public or private examination (ss. 134 and 236(4)-(6) of the Act, and rr. 7.19-7.24 Insolvency Rules 1986) for the purpose of bringing that person before the court

17.6 PERSONAL INSOLVENCY

17.6.1 Individual Voluntary Arrangement ('IVA')

IVAs are covered by Part VIII of the Insolvency Act 1986 ('the Act') and part 5 Of the Insolvency Rules ("the rules").

17.6.2 What is it?

It is an arrangement entered into voluntarily between a debtor and his creditors whereby the debtor makes proposals for settlement of his debts, or a percentage of them over a period of time, usually producing more than the creditors would expect to receive in the event of bankruptcy. By doing so the debtor normally seeks to avoid the disadvantages of bankruptcy. Under the provisions introduced by the Insolvency Act 2000 and the amendments to the Rules a voluntary arrangement may be made with or without an interim order.

17.6.3 How is it done?

The debtor makes a proposal to his creditors for a composition in satisfaction of his debts or for a scheme of arrangement of his affairs (see generally *March Estates v Gunmaile Ltd.* [1996] 2 BCLC 1; *Commissioners of Inland Revenue v Adam and Partners Ltd* [2001] 1 BCLC 222);

and *Commissioners of Inland Revenue v Bland and Sergeant* [2003] BPIR 1274. In so doing he may if he wishes (but does not have to) apply for the protection of an interim order from the court. Once his proposal is accepted by his creditors he is protected from them, subject to fulfilling his obligations under the arrangement, whether or not the creditors were present at, or had notice of the meeting at which the proposal was accepted (s. 260 of the Act).

The proposal must provide for a nominee to act either as trustee or otherwise in relation to the voluntary arrangement to supervise its implementation. The nominee must be a person qualified to act as an insolvency practitioner, or authorised to act as a nominee in relation to a voluntary arrangement (s. 253(2)).

Rule 5.1 of Part 5 of the Rules makes provision, dependant upon the procedure adopted, as follows:

- Chapter 2 (Preparation of the debtor's proposal) applies in all cases but
- Chapter 3 applies only where an interim order is sought and made,
- Chapter 4 applies where no application for an interim order is made, and
- Chapters 5 (Creditors' Meetings), 6 (Implementation of the arrangement) and 7 (EC Regulation: Conversion of voluntary Arrangement into Bankruptcy) apply in all cases.
- Chapter 8 applies where bankrupt makes application under s 261(2)(a), and
- Chapter 9 applies where official receiver applies under s 261(2)(b).
- Chapters 7,10,11,12 of Part 5 of the rules only apply where debtor applies as an undischarged bankrupt under s.263A of the Act , and the Official Receiver is the proposed Nominee and no interim order is sought.

17.6.4 The debtor's proposal

Whether an application is made for an interim order or not the debtor must prepare for his intended nominee a proposal on which the nominee must report under section 256 (interim order) or section 256A (no interim order) of the Act (r. 5.2).

The required contents of the proposal are set out in rule 5.3 (1) and (2) of the rules, which provides as follows.

- Why in the debtor's opinion a voluntary arrangement is desirable and why the creditors should agree with it.
- The debtor's known assets and their value.
- Details of charges over assets in favour of creditors.
- Whether and to what extent assets are to be excluded from the voluntary arrangement.

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- Particulars of property being other assets not the property of the debtor to be included, the owner of those and the terms on which to be made available to the arrangement.
 - The nature and extent of debtor's liabilities, so far as within his immediate knowledge, and how to be met, modified, postponed or otherwise dealt with by the arrangement, in particular:
 - How to deal with preferential creditors (defined in s.258(7) the Act) and those who are or claim to be secured creditors.
 - How associates of the debtor (being creditors of his) are proposed to be treated.
 - In any case where debtor undischarged bankrupt, whether to debtor's knowledge, there are any claims made under s. 339 (transactions at undervalue), s. 340 (preferences) and s. 343 (extortionate credit transactions), or where the debtor is not an undischarged bankrupt, whether there are circumstances which would give rise to the possibility of such claims if debtor became bankrupt, and where such circumstances are present, whether, and if so how, it is proposed under the voluntary arrangement to make provision for wholly or partly indemnifying the insolvent estate in respect of such claims.
 - Whether any, and if so what guarantees have been given of the debtor's debts, and if so specifying if any of the guarantors are associates of the debtor.
 - The proposed duration of the voluntary arrangement.
 - Proposed dates of distributions to creditors, with estimates of their accounts.
 - How is it proposed to deal with the claim of any creditor bound by s. 260(2)(b)(ii).
 - Amounts proposed to be paid to the nominee by way of remuneration and expenses.
 - The manner in which the supervisor is to be remunerated, and his expenses defrayed.
 - Whether, for the purposes of the arrangement, any guarantees are to be offered by any persons other than the debtor and (if so) whether any security is to be given or sought.
 - How funds are to be banked, invested or otherwise dealt with pending any distribution to creditors, and how the funds due to creditors at the end of the arrangements not distributed are to be dealt with.
 - If debtor has business how that is to be conducted during the arrangement.
 - Whether credit to be arranged for debtor and how that credit is to be paid.
 - The functions which are to be undertaken by the supervisor.
 - The qualifications of the Supervisor and that he is suitable to act.

- Whether the EC Regulation will apply and, if so whether the proceedings will be the main proceedings or territorial proceedings.

The proposal can be amended at any time before the nominee reports to the court (r. 5.3(3)). The debtor must also prepare a statement of affairs (r.5.5) within 7 days of his proposal unless Nominee allows a longer period.

17.6.5 Procedure where an interim order is sought

In order to apply for an interim order a debtor must not have made a previous application for an interim order within the previous 12 months (s. 255(1)(c)) and must be in a position to petition for his own bankruptcy, or be an undischarged bankrupt (s. 255(1)(b)). In the latter case the application may be made by the debtor, his trustee in bankruptcy or the Official Receiver (s. 253(3)).

The application should be made, except in the case of an undischarged bankrupt, to the court where the debtor could present his own Bankruptcy Petition (r. 5.8(1)). An undischarged bankrupt should apply to the court having conduct of his bankruptcy (r. 5.8(3)). The application should contain sufficient information to enable you to establish jurisdiction (r. 5.5A(2)).

The application is made by originating application in Form 7.1 where the applicant is not an undischarged bankrupt, or by ordinary application in Form 7.2 where he is, and must be supported by affidavit or witness statement setting out the following (r. 5.7(1)):

- the reasons for making the application,
- particulars of any execution or other legal process of levying of distress to his knowledge commenced against him,
- that he is bankrupt or could petition for own bankruptcy,
- that no previous application for interim order within last 12 months ending with date of affidavit,
- that the nominee named is willing and qualified or authorised to act as such for him and that he has not submitted to the Official Receiver the terms of the Voluntary Arrangement or a statement of his affairs.

Notice to the nominee and his consent to act together with a copy of the proposal given to him must be exhibited to the affidavit (r. 5.7(2)). Two days' notice of the hearing of the application must be given to the persons set out in rule 5.7(4), but no other notice need be given. Any of the persons given notice may appear at the hearing, and the court should take into account any representations made by those attending (r. 5.9(2)) especially where the debtor is an undischarged bankrupt as to whether any order should be made as to the conduct of the bankruptcy or should there be a stay of bankruptcy proceedings.

Applications for an interim order will come before you in one of two ways: either as boxwork, where the application is made by a debtor who is not a bankrupt and no bankruptcy petition is pending against him, or at a hearing, where the application is made by a debtor who is facing a petition or a debtor who is an undischarged bankrupt. In either case, the making of an interim order is a matter of discretion. In order to exercise that discretion **it is essential that you read the application, the evidence in support, the proposal and (where appropriate) the nominee's report.** Under no circumstances should you make an order on a 'rubber stamp' basis.

Your primary concern will be to ensure that the evidence and the proposal contain the basic information required by the Insolvency Act and the rules (see paras. 17.6.4 above). In addition to the matters prescribed, you will need to consider the terms of the proposal itself and whether they are likely to be approved by the requisite majority of creditors. You may decline to make an interim order if you think that the proposal is not viable (see *Cooper v Fearnley* [1997] BPIR 20; *Hook v Jewson Ltd* [1997] BCC 752) or, if it is clear that it cannot achieve the requisite majority (*Re Cove* [1990] 1 All ER 949). See also *Davidson v Stanley* [2004] EWHC 2595(Ch): [2005] BPIR 279.

You may also refuse an order on the basis that the nominee's fees are excessive (*Re Julie O'Sullivan* [2001] BPIR 534). Note that whilst the supervisor's fees may be calculated on a time cost basis, the nominee's fees (and any disbursements) must be stated as amounts. However, as a general rule you should avoid substituting your judgment for that of the creditors unless the proposal is obviously bad, not serious, or plainly unviable. Generally you should endeavour to see that the proposal is 'characterised by complete transparency and good faith' (*Somji v Cadbury Schweppes plc* [2001] BPIR 172).

You should not make an interim order where the proposal includes provisions purporting to oust the jurisdiction of the court (e.g. under ss 262 or 263 of the Act). There is no power to make an interim order on the application of a discharged bankrupt unless the application relates to post-bankruptcy debts (*Wright v Official Receiver* [2001] BPIR 196).

The use of a check sheet of the kind attached at Annex 1 will assist you in considering the papers.

PDIP para 16.1 provides that the following orders may be made without attendance provided there is no bankruptcy order in existence, or pending petition:

- An interim order for 14 days and adjourning to that date for consideration of the nominee's report.
- A standard order on consideration of the nominee's report extending the order for seven weeks after the proposed meeting, directing the meeting to be summoned and adjourning to a date about three weeks after the meeting.
- A 'concertina order' which combines the interim order and standard order where the nominee's report accompanies the application for the interim order.

- A final order following filing of the Chairman's report, recording the effect of the Chairman's report (usually approving the arrangement with or without amendment) and the status of the proceedings for the purpose of the EC Regulation, which may discharge the interim order.

The form of interim order is in Form 5.2. It should be noted that the court is responsible for drawing the order following the making of an interim order, and therefore any draft should be carefully checked and completed. The order is sent to the applicant who is responsible for serving the nominee and any person given notice of the hearing who was not present or represented (r. 5.10).

Where an interim order has been made the nominee must submit to the court not less than two days before the interim order ceases to have effect, unless the court has extended the time on application of the nominee, two copies of his report on the debtor's proposal, stating whether or not, and if the latter giving reasons why not:

- the proposal has a reasonable prospect of being approved and implemented and,
- whether a meeting of the creditors should be summonsed giving the time and date of the meeting – s. 256 the Act and rule 5.11.

As to nominee's duty in reporting to the court, see *Greystoke v Hamilton – Smith* [1997] BPIR 24.

The court should endorse one copy of the report with the date of filing and return it to the nominee. The court may replace the nominee with another, who has consented to act, on application by the debtor, giving the nominee at least seven days' notice of the application where:

- the nominee has failed to file his report in time,
- the nominee has died, or
- it is impracticable or inappropriate for him to continue to act.

Where the nominee has failed to file his report the court may extend the interim order or renew it, if it has expired, for such further period as it considers necessary (s. 256 and rr. 5.11 to 5.13).

Note that if you do not approve the proposed arrangement, or have questions on it you should adjourn the application to allow for amendments or attendance. If you dismiss the application then no further application can be made for 12 months (s. 255).

Where any application for interim order is pending, any court may, on proof that it is pending, stay other proceedings or allow them to continue on such terms as it thinks fit (s. 254).

17.6.6 Where no interim order is to be obtained

The procedure introduced by section 256A(1) of the Act allows a debtor to make a proposal without first obtaining an interim order. The papers are filed in court but you will not generally be involved. It applies where the debtor intends to make a proposal or, if an undischarged bankrupt, has given notice of his proposal to the Official Receiver or his trustee. If his own petition for bankruptcy is pending and the court has appointed an insolvency practitioner to investigate his affairs the procedure does not apply (s. 273). By section 256A(2) and (3) the debtor must submit to the nominee a document setting out the terms of the proposal and a statement of his affairs.

If the nominee is satisfied that the debtor is an undischarged bankrupt or could petition for this own bankruptcy he must, within 14 days of receiving the information (or such longer period as is permitted by the court) submit two copies of his report to the court, where the debtor could present his own petition for bankruptcy or, if already bankrupt, where the bankruptcy proceedings are being conducted (r. 5.15). In his report the nominee should state whether or not in his opinion the proposal has a reasonable prospect of being approved and implemented. If it does he should also state that a meeting of the creditors should be convened; if it does not he should give his reasons (r.5.14(3)).

The nominee must also deliver:

- the debtor's proposal with any authorised amendments,
- a copy or summary of debtor's statement of affairs,
- a copy of his consent to act as above,
- two copies of Form 5.5 containing a statement that no interim order is sought – rule 5.14.

The nominee must also send the same documents to the Official Receiver or trustee where the debtor is an undischarged bankrupt, or to any person who has presented a bankruptcy petition against the debtor (rr. 5.14(6) and (7)).

The court endorses one copy of Form 5.5 with the date of filing and returns it to the nominee (r. 5.14(4)). The filing of the report constitutes proceedings under the rules, and any application relating to the proposal or the voluntary arrangement shall be made to that court (r. 5.16(1)).

The court has the same powers and for the same reasons described above to replace the nominee on application of the debtor as in an application for an interim order (s. 256A(4) and (5), see paragraph 5.7.4 above). The debtor must give at least seven days' notice to the nominee of any such application and any replacement nominee must consent to act (r. 5.16(2) and (3)).

17.6.7 The meeting of creditors

This is summoned:

- where no application for an interim order is made, not earlier than 14 days and not later than 28 days after filing of the report by the nominee, and
- where there is an interim order not less than 14 days from the date the report is filed nor more than 28 days after consideration of the report by the court – rule 5.17.

Every creditor who has had notice of the meeting is entitled to vote and this entitlement to vote is calculated as follows:

- Where the debtor is not an undischarged bankrupt and an interim order is in force, by reference to the amount of the debt owed to him at the date of the interim order,
- Where the debtor is not an undischarged bankrupt and there is no interim order in force by reference to the amount of the debt owed to him at the date of the meeting, and
- Where the debtor is an undischarged bankrupt by reference to the amount of debt owed to him at the date of the bankruptcy order – rule 5.21(2).

If the creditor has an unliquidated debt for the purpose of voting the value of his debt shall be £1.00 unless the Chairman (who is normally the Nominee) agrees to a higher amount (r. 5.21(3)).

To pass any resolution approving the proposal or any modification there must be a majority in excess of three-quarters in value of creditors present in person or by proxy and voting on the resolution. Any other resolution requires a majority in excess of one half in value (r. 5.23(1) and (2)).

Note that any resolution is invalid if those voting against it include more than half in value of the creditors who have had notice of the meeting, who are not associates of the debtor and are not to be left out of account (r. 5.23(3) and (4)).

The meeting may be adjourned but any final adjournment may not be to a date later than 14 days after the date on which the meeting was originally held (r. 5.24(1)-(3)). If following any final adjournment the proposal is not agreed to, it is deemed rejected (r. 5.24(5)).

17.6.8 The Chairman's report

Following the meeting the Chairman must report to the court within 4 days (s. 259 and rule 5.27). The report should state:

- whether the EC Regulation applies, if so whether the proceedings are main or secondary,
- whether the proposal was accepted or rejected, and if approved with what modifications,

- set out the resolutions taken together with the decision,
- and list the creditors with values, and how they voted.
- Include such other information as the Chairman of the meeting might consider relevant.

On hearing any appeal this may become apparent and therefore you will have to decide whether to refer the papers on to the DPP or the Secretary of State who are the prosecuting authorities.

The court should endorse a copy of the report with the date of filing. If there was an interim order and the proposal was approved, you should make an order discharging the interim order and declaring the status of the proceedings for the purpose of the EC Regulation. If it was not approved you should make no further order, thus allowing the interim order to expire by effluxion of time (28 days from the consideration of the Chairman's report – s. 260(4)) during which period the debtor will continue to be protected from the creditors' claims and he may mount any challenge to the decision.

At the hearing to consider the chairman's report you should read the report carefully. In particular you should ensure that the meeting of creditors was summoned and held in accordance with the order made and that any adjournment was within the time limits prescribed by rule 5.24. If any adjourned meeting did not take place within 14 days of the date originally fixed the proposal will be deemed rejected (r. 5.24(5)).

If the proposal was purportedly approved at a meeting held other than in accordance with the order made after consideration of the nominee's report the voluntary arrangement is of no effect since the statutory binding under section 260(2) of the Insolvency Act 1986 is only effective where a meeting summoned under section 257 has approved the arrangement (s. 260(1) – see *Re N (a debtor)* [2002] BPIR 1024). If there was no interim order, the court should not read the chairman's report unless an application is made concerning it (r. 5.27(5)).

By section 261 of the Act, if the debtor is an undischarged bankrupt you may do one or both of the following:

- annul the bankruptcy order but not until at least 28 days after the date of the chairman's report, or the disposal of any objection to be heard or any appeal; a formal application is required – rule 6.212.
- give directions with regard to the bankruptcy, and its administration to facilitate the implementation of the approved voluntary arrangement.

17.6.9 Challenge to a decision of the meeting

A person entitled to vote at the meeting of creditors, the nominee or the debtor (or his trustee or the Official Receiver if he is a bankrupt) may challenge the decision of the meeting of creditors on the grounds that:

- the voluntary arrangement unfairly prejudices the interests of a creditor, or
- there has been some material irregularity at or in relation to the meeting (s. 262).

The application may not be made after the end of 28 days beginning with the day on which the chairman's report was made (s. 262(3)), although the period may be extended (see *Tager v Westpac Banking Corp* [1998] BCC 73).

In addition, an application may be made by a creditor or the debtor to appeal the decision of the chairman of the meeting of creditors to admit or reject a claim for voting purposes (r. 5.22(3)). Such application should also be made within 28 days (r. 5.22(6)). Again there is power to extend time, although the court is unlikely to do so unless good reasons can be shown for any delay (see *Warley Continental Services Ltd v Paul Johal* [2004] BPIR 353 (2002) *The Times*, 28 October).

The initial hearing of such applications will generally be for directions only. It is essential that you ensure that any creditor whose vote or claim is called into question is made a party as well as the nominee and/or chairman (although these may choose not to take any active step in the application). The directions should generally provide for an exchange of witness statements and may also provide for disclosure and cross-examination; in complex cases you may wish to order an exchange of pleadings (points of claim, defence and reply).

At the final hearing, where an application has been made under section 262 you may:

- revoke or suspend approval of the voluntary arrangement,
- give a direction to any person for the summoning of a further meeting of creditors to consider any revised proposal, or
- (in a case where there has been a material irregularity at or in relation to the meeting) give a direction for the summoning of a meeting to reconsider the original proposal (s. 262(4)).

At the final hearing of an appeal under rule 5.22(3) you may:

- reverse or vary the chairman's decision,
- declare any vote invalid,
- order another meeting to be summoned,
- make such other order as you think fit (r. 5.22(5)).

but only if you consider that the circumstances giving rise to the appeal give rise to unfair prejudice or material irregularity.

You may also make costs orders (as the court did against the nominee in *Re a Debtor (No 222 of 1990) ex parte Bank of Ireland* [1992] BCLC 137 and [1993] BCLC 233), but note that the chairman is not personally liable for any costs incurred in respect of an appeal under rule 5.22 (r. 5.22(7)).

Frequently an application for relief under section 262 will also include an appeal under rule 5.22 so that the two are heard together. The application may also run alongside a petition presented under sections 264(1)(c) and 276 (*Re Tack* [2000] BPIR 164). Where that is the case you should remember that directions may also have to be given in the petition or that the petition should be adjourned to come on at any return date of the application.

Note that if the debtor makes a false representation or acts fraudulently to obtain approval of his proposal he commits an offence making him liable to a fine and/or imprisonment (s. 262A and Schedule 10). Where such conduct comes to your attention you may consider (once the application or petition have been heard) drawing such conduct to the attention of the DPP or the Insolvency Service who are the appropriate authorities to consider any prosecution.

Directions

Section 263 of the Act enables the supervisor, the debtor, any creditor or any person dissatisfied by any act, omission or decision of the supervisor to apply to the court for directions or other relief.

17.6.10 The EC Regulation: Article 37

By rule 5.62 a member state liquidator of main proceedings opened in another member state may apply by originating application supported by affidavit sworn by him, or on his behalf containing the information in rule 5.63 under Article 37 of the EC Regulation to convert the arrangement to bankruptcy. The application must be served on the debtor and the supervisor.

By rule 5.63 the affidavit should contain information:

- the member state where main proceedings have commenced,
- that conversion to bankruptcy would be in the interests of creditors in the main proceedings,
- such other information in the opinion of the member State liquidator that would assist the court.

You have discretion to make such order as you think fit on the application (r. 5.64).

If you do convert the arrangement into a bankruptcy you should make such consequential provisions as you think necessary, but you must provide for the properly incurred administration expenses of the arrangement to be a first charge on the bankrupt's estate.

17.7 THE STATUTORY DEMAND

17.7.1 The rules

The rules governing statutory demands may be found in Part 6 Chapter 1 Insolvency Rules 1986.

17.7.2 The purpose of the statutory demand

A statutory demand is one of two ways to demonstrate that a debtor is unable to pay or has no reasonable prospect of paying his debts either at present or if payable in the future, when they fall due. If these debts exceed £750.00 failure to satisfy the demand will enable a creditor to serve a bankruptcy petition (s. 268).

The demand must be in the prescribed form and contain the matters set out in Rule 6.1 and 6.2. The prescribed Forms 6.1–6.3 can be found in the Rules. Which form to use will depend upon the following circumstances:

- if a liquidated sum payable immediately – Form 6.1.
- if a liquidated sum payable immediately following judgment of a court - Form 6.2.
- if debt payable at a future date – Form 6.3.

17.7.3 Requirements as to service

As the demand is not a court document, there is no requirement for permission to serve out of the jurisdiction – PDIP 10.1, or to serve by substituted service.

The creditor is under an obligation to do all that is practicable to bring the demand to the debtor's attention. If practicable personal service should be effected, but where this is not possible promptly service may be effected by other means including letter-box service or by first class post (r. 6.11 and PDIP 11.1). Where a demand has been served other than personally the papers will be referred to you and you will have to adjudicate upon proper service before any bankruptcy petition is filed (r. 6.11(9)).

Service by advertisement is now provided for in the circumstances set out in PDIP 11.2 which gives the form of advertisement that is acceptable to the court.

Where the creditor serves by substituted service he must first have taken all the steps that would satisfy you to make an order for substituted service of a petition. Such steps are set out in PDIP 11.4, and failure to take such steps may result in the court declining to file the petition (r. 6.11(9)).

17.7.4 Setting aside the demand.

If the debtor disputes the demand he may within 18 days of service apply to set it aside (r. 6.4). The application should be supported by written evidence setting out the grounds and exhibiting a copy of the demand. This is necessary otherwise you will not know what the

demand says, and whether it conforms to the rules. Forms 6.4 (the application) and 6.5 (evidence) are prescribed forms.

If the debtor wishes to apply after the expiration of the 18 days he must apply to extend time, and can do so in the application to set aside the demand giving reasons for the delay (s. 376). If the debtor seeks to restrain the issue of a bankruptcy petition by injunction then the application is to a judge (PDIP 12.5).

The demand must state the court to which an application to set it aside should be made which should normally be that where the debtor could present his own bankruptcy petition. Note however that if the debt is claimed by the Crown or a Government department, and results from a judgment, and the demand states an intention to file a bankruptcy petition in the High Court then the application must be made to the High Court (r. 6.4(2)).

Do note that technical defects in the demand may not be sufficient to set it aside unless the defect causes substantial injustice (see *Re A Debtor (Lancaster No 1 of 1987)* [1989] 1 W.L.R. 271 CA; *Re A Debtor (190 of 1987)* [1989] 2 W.L.R. 8 CA *Oben v Blackman* [2000] BPIR 302). In the case of *Re A Debtor (190 of 1987)* the court held that service of a statutory demand is not an insolvency proceeding, but the application to set it aside is. Thus rule 7.55 (covering formal defects in insolvency proceedings) does not apply to a demand.

If the application discloses no grounds to set aside the demand you may dismiss it summarily (r.6.5(1)). You should specify a date on which the creditor may present a petition (r.6.5(61)).

Generally you should dismiss an application if the demand is based on a judgment or order, even if there is an application to set the judgement or order aside (PDIP para. 12.3), unless the applicant raises some other defence, (e.g. set-off or a defence based on security).

If the application is not dismissed summarily, a date should be fixed.

The first hearing should have a short time estimate (normally 5 minutes.). If the application cannot be dealt with summarily on the evidence filed then you should give suitable directions to lead to a full hearing normally for evidence from the creditor in answer, and evidence in reply. If the parties are represented a skeleton argument would be useful.

Rule 6.5(4) of the rules provides the grounds where you 'may' set aside the demand:

- the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand, or
- the debt is disputed on grounds which appear to the court to be substantial, or
- it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt, or

- the court is satisfied, on other grounds, that the demand ought to be set aside.

Although 'may' implies discretion if grounds exist then it should be read as 'will' in the absence of exceptional circumstances.

If the demand is disputed, you should consider whether there is a genuine triable issue, and if there is set aside the demand. Do not discount a counterclaim, set-off or cross demand simply because it could have been raised in action leading to judgment if these exceed the demand (PDIP 12.4, see also *Re Debtors (Nos 4449 and 4450 of 1998)* [1999] All ERD 149; *Hofeer v Strawson* [1999] BPIR 501, and *Re Bayoil* [1999] 1 WLR 147). However, any counterclaim must be properly quantified. Similarly a bare assertion of a dispute will not suffice to set aside a demand (*Re a Company No. 006685 of 1999* [1999] BCC 830). See also *Hurst v Bennett* [2001] EWCA Civ 182; 2 BCLC 290 and *Penwith DC v VP Developments Ltd* [2005] EWHC 259 Ch; [2005] BPIR 607

A statutory demand will not be set aside on the basis that part of the debt is disputed unless the undisputed part is paid. Nor will a demand be set aside on the basis that the debtor has made an offer to secure or compound for the debt; this is an argument to be raised at the hearing of the petition.

Take care in respect of secured debts, or if any security is relied upon to ensure that the full value of the security is disclosed, as the true value of the security may exceed the demand.

If the application is dismissed you should in your order authorise when a bankruptcy petition may be presented, either forthwith, or on or after a date to be specified (r. 6.5(6)).

17.8 THE CREDITOR'S PETITION FOR A BANKRUPTCY ORDER

17.8.1 Grounds

A creditor may present a bankruptcy petition if the debtor is unable to pay unsecured liquidated debts of at least £750.00 and there is no outstanding application to set aside a statutory demand (s. 267).

17.8.2 Proof of inability to pay

Either at least three weeks have expired since service of statutory demand and it remains unsatisfied, and no application to set aside made, or there is failure to satisfy execution or other process issued in respect of debt (s. 268(1)(a) and (b)).

If the petition is based on unsatisfied execution you should ensure that you inspect the return, that a genuine attempt was made by the bailiff or Sheriff to levy execution, and that the return sets out the manner of execution (see *Re A Debtor (No 340 of 1992)* [1996] 2 All ER 211 CA).

For a Petition based on statutory demand for payment of Solicitors' fees consideration should be given to *Thomas Watt & Co v Smith* [1998] 2 Costs LR 59CA a decision approved by the court in *Turner & Co v O'Palomo SA* [2000] 1 WLR 379.

17.8.3 What petition must contain

You should refer to rules 6.7, 6.8 and 6.9(5) of the Rules and PDIP 15.1 to 15.7 but the following should be noted:

- if following statutory demand, then only the debt in the demand may be relied on,
- proof of service of the demand must be shown in the manner prescribed (rule 6.11),
- if the petition based on unsatisfied execution the court from which execution was issued and particulars of non-return should be included.

You should check jurisdiction (ss. 264 and 265) and whether the debtor has his centre of main interests or an establishment in the UK or another EC member state (now r.7(1)(e)).

17.8.4 Which court?

Rule 6.9 of the Rules states in the High Court:

- if the petition is presented by a Minister of Crown or Government Department and where indicated in statutory demand that a petition is to be presented in the High Court or where issued execution in that court,
- where debtor has resided or carried on business for six months or more in the Greater London insolvency district,
- if the debtor not resident in the jurisdiction,
- if the whereabouts of the debtor unknown.

Otherwise, the petition should be presented in the county court where the debtor carried on business (if more than one then principal business) or resided (if not had business) for (longest period) in previous six months.

Notwithstanding any of the above, if there is in force for the debtor a voluntary arrangement the petition must be presented to the court where the nominee's report was filed.

17.8.5 How proved?

The petition must be verified by affidavit or witness statement that must exhibit the petition, and be in form 6.13 as set out in rule 6.12 of the Rules (r. 6.10(1)).

If the petition is based on a demand and more than four months have elapsed since service of the demand then the reasons for delay should be stated (r. 6.12(7)).

17.8.6 Service of petition.

Rule 6.14 of the rules provides that there must be personal service unless court satisfied on evidence that personal service is not possible in which case may order substituted service (as to requirements of which, see PDIP para. 11.4-5). As to the form of evidence of service, see rule 6.15; it must exhibit a copy of the petition, and if substituted service ordered, a copy of the order in Form 6.15 or 6.16 (advertisement in the Gazette). If an extension order has been made a copy of the order should also be exhibited.

Do note now that if there is a member state liquidator appointed under the EC regulation in main proceedings in another EC country then the petition must be served on him by the petitioner (r. 6.14(5)).

Extension orders

A petition may not be heard until at least 14 days have elapsed since it was served (r. 6.18(1)). It follows that if the petitioning creditor has not been able to serve there can be no hearing. In such a case the petitioning creditor should apply for an extension of the hearing date (r. 6.28(3)). The application may come to you as boxwork (if made in time before the hearing date) or at the hearing of the petition (if made late). Paragraph 14 PDIP sets out the manner in which such applications should be dealt with.

17.8.7 The hearing of the petition

The petition cannot be heard until at least 14 days after service on debtor unless you feel should expedite hearing on the grounds that the:

- debtor is likely to abscond, or
- debtor consents to an early hearing – rule 6.18 of the Rules.

Any of the following are entitled to attend and be heard:

- the debtor
- the petitioning creditor
- any other creditor who has given notice under rule 6.23 of the rules or otherwise is given permission by you
- supervisor of the debtor's voluntary arrangement.

You can adjourn the hearing of the petition for a short period where there is an offer to pay the creditor, but you should be satisfied that 'there is a reasonable prospect of him (the creditor) being paid within a reasonable time' (see *Re Gilmartin (A Bankrupt)* [1989] 1 WLR 513 and s. 271 of the Act). You should not allow repeated adjournments (*Re Gilmartin (above)* and *Judd v Williams* [1998] BPIR 88). Do note that your discretion is otherwise unfettered, and a Petition should be adjourned if there would be injustice caused to the debtor, if provided a

good reason for not attending the hearing, *Commissioners for Inland Revenue v Lee-Phipps* [2003] BIR 805

You may dismiss a petition without attendance and by consent where there is a list of supporting or opposing creditors in Form 6.21, or a statement from the petitioning creditor stating there are no supporting or opposing creditors. You may give permission to withdraw a petition where it has not been served without attendance with no order for costs (PDIP 16.3(2)). PDIP 16 sets out other circumstances where you may make consent orders without attendance. Reference should be made to it but the rule states that it is not exhaustive and therefore care should be exercised in making such orders.

If the petition is unopposed, and you have the following and they are in order:

- petition
- evidence of service
- evidence verifying the petition
- evidence of service of the statutory demand, or copy unsatisfied return on execution
- certificate of continuing debt
- list of supporting creditors (see below)

then you may make a bankruptcy order.

If the debtor intends to oppose he must file and serve notice seven days before hearing setting out grounds (r. 6.21).

You should then use the first hearing to give directions for the filing of evidence in answer by the debtor and in reply by the petitioning creditor, and any other person entitled to be heard, and then appoint a hearing with a realistic time estimate. If there is representation it may be useful to order skeleton arguments, and bundles.

In dealing with an opposed petition you should consider the following.

- As a general rule the debtor should not be allowed to argue the same grounds that he used in an unsuccessful application to set aside a statutory demand (*Brillover v Hachette Magazines Ltd* [1996] BPIR 522). However, see Muir Hunter para 3-414:

‘In *Turner v Royal Bank of Scotland* [2000] BPIR 518, 520 Chadwick LJ was of the view the debtor could not reargue; but in *Eberhardt and Co Ltd v Mair* [1995] 1 WLR 1180 Evans-Lombe J held, following previous authority, that no issue estoppel arises, the court’s duty being to ensure that justice is done.’

The debtor is not precluded from defending the Petition, and making arguments where he did not apply to set aside the statutory demand – *Barnes v Whitehead* [2004] BPIR 693.

- If the debtor has made an offer to secure or compound for his debts and the creditor has unreasonably refused the offer (s. 271(3)) then you should dismiss the petition.
- When considering whether a creditor has unreasonably refused an offer to secure or compound debts, ‘unreasonableness’ has been defined as ‘beyond the range of any possible reasonable reactions’ and is not the same as acting justly, fairly or kindly (*Re A Debtor No32 of 1993* [1994] 1 WLR 899 and *IRC v A Debtor* [1995] BCC 971, [1995]BPIR 271).
- The debt must be a provable debt. Note rule 12.3 that an order made in matrimonial proceedings is not a provable debt except for a lump sum and costs order made in the proceedings provided the order is made after 1st April 2005 - . A lump sum order may be sufficient to lead to bankruptcy but may not be provable therein. For consideration of the position, see *Russell v Russell* [1998] 1 FLR 936 (lump sum order could form the basis of a petition, but not much point in making order on that basis as debt not provable). See also *Levy v Legal Services Commission* [2001] 1FLR 435 (costs order in matrimonial proceedings not provable) and *Cartwright v Cartwright and ors* [2002] EWCA Civ 931 CA (Hong Kong periodical payments order not provable, but in any event not registered here for enforcement anyway).
- If you dismiss a petition then you should order vacation of the registration of the petition at HM Land Charges Registry as a pending action.

17.8.8 Supporting creditors

Where petitioning creditor does not wish to proceed, or fails to appear at the hearing but another creditor who has given notice of intention to appear, and who could have presented his own petition at the date of presentation of the petition before you, does, he may be substituted (r. 6.30). The order will be in form 6.24A.

Alternatively, a creditor may take over carriage of the petition without amendment, and rely on the petitioner’s debt provided that his debt has not been paid, secured or compounded for (r. 6.31 and order in form 6.24B).

You should note that the reason why a creditor might want to be substituted or to seek carriage of the petition is to ensure that any payment that might be made to the original petitioning creditor may then be void under section the Act, and form part of the bankrupt’s estate.

17.8.9 Withdrawing a petition

If this is referred as an application in box-work before the date appointed for the hearing you should not deal with it as permission cannot be given until the hearing date(r. 6.32(3)).

An application to withdraw should be supported by written evidence the content of which is set out in rule 6.32. However, as you cannot force the creditor to proceed if the rule not complied with, if there is no other reason for keeping the petition on foot then you should dismiss it and dispense with written evidence.

17.9 THE DEBTOR'S PETITION

17.9.1 Grounds

The only ground is that debtor is unable to pay his debts (s. 272(1)).

17.9.2 Without appointment!

The debtor will be brought to you without any listed appointment, and should be seen as soon as you can accommodate in your list. It is noted from Felix that some judges do not consider it necessary to see the debtor and because of the increasing number of debtors' petitions this is now becoming the norm. If the debtor is present at court it is considered that the order is significant, and should be made in the debtor's presence, perhaps with a few words as to the importance of co-operating with the Official Receiver/trustee and the possible consequences of not doing so. It is a matter for you.

No notice of the hearing need be given to anyone unless the debtor is subject to an individual Voluntary Arrangement when at least 14 days notice must be given to the supervisor.

Your court must be the court of the district where the debtor resides or has carried out his principal business within the previous six months, but where there is in force a voluntary arrangement for the debtor it must be the court where the nominee's report was filed (r. 6.40(2)).

17.9.3 Procedure at hearing

You will be given by the bankruptcy clerk the file containing:

- the petition
- the debtor's statement of affairs verified by affidavit.

Note section 273 of the Act - that if the debtor's unsecured debts do not exceed £20,000 and his assets exceed £2,000 then you should consider appointing an insolvency practitioner to report to the court within time specified by you with a view to a voluntary arrangement being entered into by the debtor. This will not happen often.

The insolvency practitioner is obliged to respond. The court will have a list of practitioners.

If you are satisfied that the debtor is unable to pay his debts then you should make the bankruptcy order and announce the time when you do so. The order commences on the day it is made and continues until discharged one year from that day (see below)

The court will then put the debtor in touch with the Official Receiver, but it is useful to tell the debtor this is to happen (if you see the debtor), and that the debtor should accompany the bankruptcy clerk for this purpose.

17.9.4 Petitions presented in connection with voluntary arrangements

A petition may be presented by the supervisor of an individual voluntary arrangement or by a creditor bound by such an arrangement (s. 264(1)(c) Insolvency Act 1986). The petition does not require service of a statutory demand but may be presented on the grounds that:

- the debtor has failed to comply with his obligations under the arrangement or
- information which was false or misleading was contained in the debtor's statement of affairs or other documents supplied by him under Part VIII of the Act or was otherwise made available to the debtor's creditors at or in connection with the meeting of creditors summoned under Part VIII of the Act (s. 276(1) Insolvency Act 1986).

The petition must be presented to the court to which the nominee's report was submitted (r. 6.9(4A) Insolvency Rules 1986).

If a bankruptcy order is made s. 297(5) enables an order to be made appointing the supervisor as trustee provided:

- the petition contains a request for his appointment and
- he has filed in court not less than two days before the hearing a report that he has given written notice of his intention to seek appointment to the creditors bound at least 10 days before the report is filed and which gives details of any responses from creditors, including any objections to his appointment (r. 6.10(6) Insolvency Rules 1986).

17.9.5 Petitions by the Financial Services Authority (FSA)

The Financial Services Authority has power to present a petition pursuant to s. 372 Financial Services and Markets Act 2000 and s. 264 Insolvency Act 1986 on the ground that the debtor appears to be unable to pay, or has no reasonable prospect of being able to pay, a 'regulated activity' debt within the meaning of s. 22 Financial Services and Markets Act 2000. This is proved by service of a demand under s 268 of the Act. The rules relating to a demand are contained in the Bankruptcy (Financial Services and Markets) Rules 2001 (SI 2001 No. 3634), and see also s 374 of the Financial Services and Markets Act 2000 as to the right of the FSA to participate in Bankruptcy proceedings.

There is no requirement to serve a statutory demand before presenting the petition.

17.10 THE BANKRUPTCY ORDER – rule 6.45 of the Rules and Form 6.30

17.10.1 The order is the court's responsibility

Do not forget the effect of the EU Regulation (see above). You should declare that the regulation applies and whether the proceedings are the main proceedings, or other.

17.11 BANKRUPTCY RESTRICTIONS ORDERS – Section 281A and Schedule 4A Act.

The court is able, on application by the Secretary of State, or the Official Receiver at his direction, to make a bankruptcy restriction order (BRO) if it considers it appropriate any time before the date of discharge if the court considers the public require protection from the bankrupt as a result of his conduct both before and during his bankruptcy provided the conduct alleged occurred after the 1st April 2004. **But note the application may be made in respect of a person made bankrupt before the 1st April 2004.** The effect of the order limits the activities of the bankrupt for a minimum of 2 and a maximum of 15 years, as follows:

- Inability to obtain credit over £500.00 without disclosing the BRO.
- Being involved as a director of a company or involved in the promotion, formation or management of it without the permission of the court.
- Trading in a name other than the name other than that in which made bankrupt without disclosing the name.
- Acting as receiver or manager of the property of a company on behalf of debenture holder unless appointed by the court, or
- Acting as an insolvency Practitioner.

There are other disadvantages such as being disqualified from sitting or voting in both Houses of Parliament or being a member of a Local Authority - S268 Enterprise Act enables Secretary of State to impose further restrictions by delegated legislation.

The transitional provisions provide that no conduct can be taken into account before 1st April 2004, but the power to impose a BRO apply to any bankrupt whether made bankrupt before or after that date.

The application is made in the bankruptcy following the procedure set out in PDIP para. 16A and rules 6.240-6.244, the following to be noted:

- To be made within one year from the bankruptcy order unless the court gives permission beyond but the period will cease to run while the period of discharge is suspended under s 279(3).
- The application must be supported by a report that is treated as an affidavit and is prima-facie evidence of conduct alleged – rules 7.9(2) & (3).

- The application may be supported by evidence from others in affidavit or by statement supported by statement of truth.
- The date for the first hearing shall be not less than 8 weeks from the date fixed for the final hearing with venue –
- The application shall be heard in public – rule 6.241(5).
- Notice of the application, report, any other evidence and form of acknowledgement of service together with notice of venue of hearing must be served on bankrupt within 14 days of making application.
- Bankrupt must file the acknowledgement of service not later than 14 days after service indicating whether intends to oppose or not, and if he fails to do so he may be heard at the hearing without the court's permission.
- If bankrupt wishes to oppose the application he must within 28 days of service, unless longer period allowed by the court, file his evidence in the court and within 3 days thereafter serve it on the Secretary of State by statement verified by statement of truth.
- The Secretary of State may then within 14 days, or such longer period as allowed by the court, file evidence in reply, and as soon as practicable thereafter serve the bankrupt with that evidence.

The hearing will be before a Registrar or District Judge who may:

- Adjourn the application
- Adjourn the application and give directions
- Adjourn the application having given directions for hearing before the judge (presumably on grounds of exceptional complexity) or
- Make an order whether or not the bankrupt appears or has filed evidence, if satisfied that order should be made (on the civil standard of proof).
- Dismiss the application if grounds not proved (although the Act and Rules do not say so).
- If order is made it is effective from date is made.

The court must send 2 sealed copies of the order to the Secretary of State who must send one to the Bankrupt.

When considering conduct of the bankrupt by Schedule 4A para. 2(2) & (3) the court shall in particular take into account the following behaviour of the bankrupt and should also consider whether the bankrupt was an undischarged bankrupt at some time within 6 years to the date of bankruptcy to which the application relates:

- a) Failing to keep records which account for loss of property by the bankrupt or any business of his where loss occurred in period commencing 2 years before issue of petition and date of the application.
- b) Failing to produce records on demand of official receiver or trustee.
- c) Entering into transaction at undervalue.
- d) Giving a preference.
- e) Making an excessive pension contribution.
- f) A failure to provide goods and services which were wholly or partly paid for which gave rise to a claim provable in the bankruptcy.
- g) Trading at a time before the bankruptcy that the bankrupt knew or ought to have known that he was unable to pay his debts.
- h) Incurring before the bankruptcy a debt that the bankrupt had no reasonable expectation of being able to pay.
- i) Failing to account to the court, the official receiver or trustee for loss of property or for insufficiency of property to meet bankruptcy debts.
- j) Carrying on gambling or rash or hazardous speculation or unreasonable extravagance which may have materially contributed to or increased the extent of the bankruptcy or which took place between presentation of the petition and commencement of the bankruptcy.
- k) Neglect of business affairs of a kind that may have materially contributed to or increased the extent of the bankruptcy.
- l) Fraud or fraudulent breach of trust,
- m) Failing to cooperate with the official receiver or the trustee.

There are guidelines issued by the Insolvency Service to assist in the interpretation of “behaviour” that will be brought to your attention if an application is opposed.

17.11.1 Interim Bankruptcy Restriction Orders:

At any time between the making of the application for a Bankruptcy Restriction order, and the making of the final order, by ordinary application the official receiver or Secretary of State may apply in the bankruptcy for the court to make an interim order which the court may make if it

considers that there are prima-facie grounds for making a Bankruptcy Restriction Order, and it is in the public interest to make the order – Schedule 4A para. 5 of Act and see PDIP 16A.16 -24.

Notice of the application must be given to the bankrupt at least 2 business days before the hearing unless the court otherwise directs, and the hearing will be in public. The bankrupt may appear, file evidence and be heard on the application – rules 245 - 247.

The order has the same effect as a full order, coming into force when made and continues until determination of the application for a full order, the acceptance of a bankruptcy restriction undertaking given by the bankrupt, or until the interim order is discharged on application of the bankrupt.

Do note that if the court makes an interim order followed by a final order then the period of the final order runs from the date of the interim order – Schedule 4A para. 6(2) of Act.

The bankrupt may apply to set aside the order by application supported by affidavit stating the grounds and shall send the application and supporting affidavit with notice of hearing and venue not less than 7 days before the hearing to the Secretary of State who may attend the hearing and draw the court's attention to any relevant matter and may give evidence or call witnesses - rule 6-248.

If the court sets aside the order it must send 2 copies of the order to the Secretary of State, and as soon as reasonably practicable thereafter he must send a sealed copy to the bankrupt.

17.11.2 Bankruptcy Restrictions Undertaking:

In place of an order if the grounds exist for the making of an order the Secretary of State may accept a bankruptcy restriction undertaking that shall continue for a minimum of 2 years and shall not continue beyond 15 years unless annulled or the court orders it to cease before the expiry date on application of the bankrupt – Schedule 4A para. 9 of Act and PDIP 16A.25-29.

If the bankrupt gives an undertaking then the Secretary of State as soon as practicable file a copy in the court.

The undertaking has the similar consequences for the bankrupt as an order.

If the bankrupt seeks an order for annulment then he must serve his application with his affidavit evidence in support together with notice of hearing and venue on the Secretary of State at least 28 days before the hearing. The Secretary of State may attend the hearing, call the attention of the court to any relevant matters, give evidence or call witnesses.

17.12 DISCHARGE OF BANKRUPTCY

17.12.1 Automatic discharge: s.279 of the Act.

The transitional provisions provide that an undischarged bankrupt on 1st April 2004 will be automatically discharged on 1st April 2005 unless his automatic discharge has been suspended.

If order made on or after 1st April 2004 in ordinary circumstances a bankrupt is discharged at the end one year from the commencement of the order – s 279(1).

Except in the case of a Criminal Bankruptcy order however, if the official receiver files in court a notice that investigation of the bankrupt's conduct and affairs under s.289 is unnecessary or concluded the bankrupt is discharged when the notice is filed. The official receiver must notify the bankrupt's creditors and his trustee of the intention to file the notice, and they may object within 28 days of the notice – rule 6.214A. If they object, and the objection is rejected by the official receiver the objector can appeal to the court within 14 days of notification by the official receiver under rule 7.50(2). The notice cannot be filed until the timetable for objections has expired and any appeal against rejection of an objection has been heard – rule 6.214A.

The official receiver or trustee can apply for an order that the period of one year should cease to run until a specified period, or the fulfilment of specified conditions, when the court may make such an order if the court is satisfied that the bankrupt has failed to meet his obligations – s 279(1) – (3).

S 279(4) specifies a "condition" includes a condition that the court be satisfied that the bankrupt has complied with, and can suspend his discharge to a date, or compliance with the condition.

The application by the official receiver or trustee is under rule 6.215 unless the application is made at an adjournment of the public examination when the application is made under rule 6.176(4). The application and official receiver's report must be served on the bankrupt and his trustee, if not the official receiver giving at least 21 days notice of the hearing. If the application is made by the trustee then his supporting evidence must be served on the official receiver and bankrupt at least 21 days before the hearing.

The bankrupt may not less than 7 days before the hearing file a notice, that must be served on the official receiver and/or his trustee not less than 4 days before the hearing giving particulars of any statement by the official receiver or trustee that he intends to dispute.

If the court make an order suspending the discharge then copies shall be sent by the court to the official receiver, trustee and the bankrupt.

Should the court make an order saying that the period of 12 months shall cease under s 279 the bankrupt may apply for the order to be discharged under rule 6.216. The bankrupt shall serve the application giving not less than 28 days notice of the hearing to the official receiver and/or trustee.

The official receiver or trustee may appear and be heard on the application, and whether or not they do appear they may file evidence drawing the court's attention to any matter, and if the court imposed any condition to be fulfilled by the bankrupt before discharge the court can ask for a report from the official receiver or trustee as to performance by the bankrupt.

If a report is requested this must be served on the bankrupt not less than 14 days before the hearing. The bankrupt may file in the court not later than 7 days, and serve it not later than 4 days before the hearing a notice specifying the statements in the report that he intends to deny or dispute.

If the court grants the application, and thus discharges its order so that the period of 12 months recommences, it shall issue a certificate to the bankrupt to this effect from that date and send copies to the official receiver and trustee.

17.12.2 Discharge by court order:

Under s 280(1) where there is a criminal Bankruptcy order application may be made for discharge at any time after 5 years from the date of the order.

Under rule 6.217, if an application (in form of ordinary application) is made the bankrupt must give notice of it to the official receiver and deposit with him such sum as he may require to cover his costs, and when the court is satisfied this has been done it shall fix the hearing date and give at least 42 days notice of it to the official receiver and the bankrupt.

The official receiver shall give notice, of not less than 14 days before the hearing to the trustee and any creditor whose claim in the bankruptcy has not been satisfied.

The official receiver shall file a report at least 21 days and serve it on the bankrupt and trustee not less than 14 days before the hearing. It shall contain the following information:

- Any failure of the bankrupt to comply with obligations under Parts VIII to XI of the Act.
- Circumstances of the bankruptcy and any previous bankruptcy.
- The extent in this bankruptcy and any previous bankruptcy his liabilities have exceeded his assets.
- Particulars of distribution made or to be made to creditors, if any in the bankruptcy, and
- Any other matters considered relevant.

The bankrupt may not less than 7 days before the hearing file and not less than 4 days before the hearing serve on the official receiver and trustee a notice specifying any statements in the report he intends to deny or dispute.

The official receiver and trustee may appear at the hearing, and may make representations, and if the court allows, question the bankrupt.

The court on the application:

- May refuse it.
- Make an order discharging the bankrupt absolutely, or
- Make an order discharging the bankrupt conditionally with respect to any income that may become due to him, or in respect of property that may vest in him following his discharge that may be specified in the order.

But if the court grants discharges the order absolutely or conditionally as above it may order it to take immediate effect or suspend it upon those conditions or being satisfied that the conditions imposed have been fulfilled– s 280(2) & (3).

If an order for absolute discharge or discharge subject to conditions is made it shall take effect when drawn by the court but be dated the date made, and then is effective retrospectively, and copies shall be sent by the court to the official receiver, trustee and bankrupt – rule 6.219.

15.12.3 Effect of discharge – s 281:

Under s 281 of the Act discharge releases the bankrupt from all his bankruptcy debts (defined in s 382 of the Act), but has no effect –

- (a) on the functions (so far as they remain to be carried out) of the trustee of his estate, or
- (b) on the operation, for the purposes of the carrying out of those functions, of the provisions of part IX of the Act;

In particular discharge does not affect the right of any creditor to prove in the bankruptcy for any debt from which the bankrupt is released.

Discharge does not:

- affect the right of any secured creditor from enforcing his security in respect of any debt from which the bankrupt is released, or
- release the bankrupt from any debt which he incurred in respect of, or forbearance in respect of which was secured by means of fraud or fraudulent breach of trust to which he was a party.
- Release the bankrupt from any liability for a fine (as defined in Magistrates' Courts Act 1980) for an offence or recognisance, and any confiscation order under Parts II - IV Proceeds of Crime Act 2002, except in respect of a fine or penalty imposed for a revenue offence or recognisance entered into with the consent of the Treasury.

- Release the bankrupt from any bankruptcy debt relating to liability for damages for negligence, nuisance or breach of statutory or contractual duty, or to pay damages under Part I of Consumer Protection Act 1987, being damages in respect of personal injury (defined as death and any disease or other impairment of a person's physical or mental condition), subject to any conditions that the court may direct.
- Release the bankrupt from any orders made in family proceedings (defined as proceedings under Magistrates' Courts Act 1980, and those within Part V of the Matrimonial and Family Proceedings Act 1984) or under maintenance assessment under the Child Support Act 1991.
- Release the bankrupt from any prescribed debts not provable in the bankruptcy.

17.13 ANNULMENT OF BANKRUPTCY ORDER

A bankruptcy order may be annulled:

- on the ground that, on any grounds existing at the time the order was made, it ought not to have been made (s. 282(1)(a)), or
- on the ground that, to the extent required by the rules, the bankruptcy debts and any expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court (s. 282(1)(b)), or
- where the debtor is an undischarged bankrupt and his creditors have approved a voluntary arrangement at a meeting summoned under s. 257 (s. 261(1)(a)).

You should note the following:

- The bankruptcy order may only be annulled under s. 282(1)(a) on a ground existing at the time the bankruptcy order was made. However, evidence may be adduced after the making of the order as to the position at the time the order was made (*Royal Bank of Scotland v Farley* [1996] BPIR 638). The ground may be interpreted liberally: failure to attend because of a misunderstanding may suffice in some circumstances.
- Before annulling under s. 282(1)(b) you must be satisfied that the debts and expenses *have been paid*: an arrangement that they will be paid is not sufficient. The rules provide that the applicant must have paid all the debts which have been proved (r. 6.211(2)); he may only give security in relation to debts which are disputed or where a creditor who has proved cannot be traced (r. 6.211(3)). The Official Receiver or trustee must file a report not less than 21 days before the date fixed for the hearing dealing with the matters set out in rule 6.207 and must attend the hearing (r. 6.210), although in practice you may dispense with attendance if it is clear from the report that all the debts and expenses have been paid and there is no reason for the bankruptcy to continue. It follows, that an application for annulment under s. 282(1)(b) should be fixed so as to allow the Official Receiver or trustee enough time to prepare and file his report.

- Rules 6.206-6.212 apply to an application to annul under s. 261(1)(a). It follows that a formal application supported by evidence must be made. The order may not be made before the end of 28 days beginning with the date of the chairman's report being made to the court. In some circumstances you may wish to hear from the supervisor, before making the order, that the debtor is complying with his obligations under his voluntary arrangement.
- The application may be made at any time, even after discharge.
- There appears to be no restriction as to who may apply for an order (see, for example, *F v F* [1994] FLR 359, in which the wife of the bankrupt applied on the ground that her husband had made himself bankrupt in order to defeat her claim for ancillary relief).
- You have a discretion whether or not to annul. There is no point in annulling a petition, for example, if the debtor is going to be unable to pay an undisputed debt when the petition is heard again following a restored hearing or is otherwise hopelessly insolvent. Similarly, you may decline to annul if the debtor has failed to cooperate with the Official Receiver or his trustee.
- Where a debtor is unable to make out a ground for annulment, it may be possible to obtain an order reviewing or rescinding the bankruptcy order under s. 375(1).

Review, rescission and variation

Section 375(1) of the Insolvency Act 1986 allows the court to review, rescind or vary its orders. The jurisdiction is wide and flexible but it has been said that it should be used only in exceptional circumstances (*Re a Debtor (No 32/SD/1991 (No 2))* [1994] BCC 524) and not as a back door appeal (*Re Debtors (No VA7 and VA8) ex parte Stevens* [1996] BPIR 101). It may be used as an alternative to annulment where the statutory requirements to annul cannot be met and there has been a material change in circumstances (*Fitch v Official Receiver* [1996] 1 WLR 242).

17.14 INSOLVENT PARTNERSHIPS

17.14.1 The legislation

The law governing insolvent partnerships is to be found in the Insolvent partnerships Order 1994 as amended most recently by the Insolvent Partnerships (Amendment) Order 2006.

The order is self-contained. However, it applies provisions of the Act (with modifications) to insolvent partnerships. The law is detailed and complex, but it will help you to understand it if you bear in mind that the general scheme is to apply the corporate provisions of the Insolvency Act to the partnership and the individual provisions to the individual partners.

It is necessary to consider the definitions in Article 2 to understand the terms of the Order. In particular a 'corporate member' means an insolvent member that is a company and an 'individual member' means an insolvent member who is an individual.

A full treatment of the topic can be found in Part IV of Muir Hunter.

17.14.2 Voluntary arrangement of insolvent partnership

Article 4 Insolvent Partnerships Order 1994 (as amended) applies Part I and Schedule A1 of the Insolvency Act 1986 so that the provisions as to company voluntary arrangements are applied to partnerships with the modifications to be found in schedule 1 to the Insolvent Partnerships (Amendment) (No2) Order 2002.

Schedule A1 provides for a moratorium (as for companies) where the partnership is eligible. A partnership is eligible if the following qualifying conditions are:

- its annual turnover in the last financial year has not exceeded £5.6 million.
- its assets do not exceed £2.8million, and
- it has no more than 50 employees (modified para 3(3) sch.A1).

See also the exclusions imposed by article 4 Schedule A1 of the Order itself.

Where the nominee for the arrangement is not the liquidator, administrator or trustee, and a moratorium is not being sought, the nominee must submit to the court within 28 days, or such longer period allowed, his report on the proposed terms of arrangement and a statement of partnership affairs, and indicate whether a meeting of the creditors and the members of the partnership should be called. Application may be made for the nominee to be replaced.

It is for the nominee to convene the meeting which decides whether to approve the arrangement, and the nominee must report the outcome to the court, and immediately thereafter to those given notice of the meeting. The person appointed to administer the proposal is known as the supervisor who may apply for directions from the court as to the administration.

The arrangement binds all those who were or are entitled to vote at the meeting, whether represented or not, or would have been entitled if they had had notice. If a resolution taken at the meeting of creditors differs from that of the partnership, the members of the partnership may apply to the court within 28 days from the date of the decision. The following, provided they were qualified to vote, or would have been if given notice, within 28 days of being aware meeting has taken place, may also challenge a decision or the arrangement:

- a creditor who alleges is unfairly prejudiced
- a person alleging there has been a material irregularity at or in relation to the meetings
- the liquidator, administrator or trustee involved in the administration or liquidation of the partnership.

The court may revoke or suspend any decision approving the arrangement or give such directions as it thinks fit for the summoning of another meeting to approve an amended proposal or reconsider the original proposal.

If for the purpose of securing approval of an arrangement an officer or member of the partnership or corporate member is guilty of false representation or fraudulent act then commits an offence liable to imprisonment or fine or both.

28 days after approval of the arrangement the court may by order stay all proceedings for winding up or administration of the partnership, or for any related proceedings against an individual as a partner. The court may also discharge an administration order or make such directions concerning any proceedings as it thinks appropriate to facilitate the implementation of the arrangement.

17.14.3 Voluntary arrangements of members of insolvent partnership

Article 5 Insolvent Partnerships Order 1994 provides that Part I of the Insolvency Act 1986 shall apply to corporate members of a partnership and Part VIII (individual voluntary arrangement) to individual members.

17.14.4 Administration order in relation to insolvent partnership

By Article 6 Insolvent Partnerships Order 1994 the provisions of the Insolvency Act 1986 (company administration) and the Insolvency Rules 1986 relating to companies apply to partnerships with the appropriate modifications.

17.14.5 Bankruptcy orders of partners and winding up of partnership

The order provides for five situations that may occur:

- Article 7 provides for Part V of the Insolvency Act 1986 (as modified by Part I of Schedule 3) to apply to the winding up of a partnership as an unregistered company where no concurrent petition has been presented against member. Forms 2 and 3 (Schedule 9) apply.
- Article 8 provides for Part V of Act (except for ss. 223 and 224, and as modified in Schedule 4) to apply to winding up a partnership as an unregistered company where there are concurrent petitions against members. Form 5 (Schedule 9) applies.
- Article 9 provides for ss. 117 and 221 of the Act (as modified by Schedule 5), and Part V of the Act (as modified by Part I of Schedule 3) to apply to the winding up of a partnership as an unregistered company on a member's petition where there is no concurrent petition against a member. This article can only apply if the partnership has not less than 8 members unless leave given by the court in circumstances set out in s. 221A of Act (schedule 5).
- Article 10 provides that the various provisions of the Act set out therein as modified in Schedules 4 and 6 apply to the winding up of partnership as an unregistered company

on a member's petition where concurrent petitions have been presented against all members. Forms 11 – 13 apply.

- Article 11 applies to the situation where the individual partners present petitions for their own bankruptcy in their capacity as members of the partnership. The personal insolvency provisions of the Act apply as modified in Schedule 7. Forms 14 and 15 apply.

17.14.6 Petition against individual who happens to be partner

Where a petition is presented against an individual for a debt that is not a partnership debt, but the individual happens to be a partner in a business, the petition is not affected by the partnership legislation. The matter proceeds as a creditor's petition against an individual (above).

17.14.7 Application of Company Directors Disqualification Act (CDDA):

For the general application of CDDA see below. Article 16 applies sections 6–10, 15, 19(c), 20 and Schedule 1 of CDDA as modified by schedule 8 where partnership wound up as an unregistered company, and enables the court to disqualify an 'officer of a partnership' who is unfit.

17.15 INSOLVENT ESTATES

17.15.1 General

Section 421 Insolvency Act 1986 gives the Lord Chancellor power to regulate the administration of a deceased person's insolvent estate by order. The relevant order is the Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986 1999). It can be found in Part V of Muir Hunter. The order came into force on 29 December 1986. It has been amended to give effect to the EC Regulation on Insolvency proceedings. It applies provisions of the Insolvency Act 1986 with modifications set out in the schedules. The relevant forms are prescribed by Schedule 3.

The estate of a deceased person is insolvent if, when realised, it will be insufficient to meet in full all the debts and other liabilities to which it is subject (s. 421(4) of the Act).

The Order contemplates the following situations, all of which are dealt with by the court by means of a procedure that is closely akin to the procedure for dealing with a bankruptcy petition.

17.15.2 Deceased dies insolvent but before petition presented

A petition for an insolvency administration order may be presented by one or more of the deceased person's creditors or by the supervisor of a voluntary arrangement or by any creditor bound by a voluntary arrangement. The petition of a creditor must be in Form 1 and a supervisor's in Form 2. No statutory demand is served. It must, unless the court otherwise directs, be served on the debtor's personal representatives but an order may be made to serve

on others (e.g. relatives of the deceased); the court may even dispense with service where there are no personal representatives.

A petition for an insolvency administration order may not be presented after proceedings have been commenced in any court for the administration of the deceased debtor's estate (art 3 Schedule 1 Part II para 5 of the Order). The court in which such proceedings are pending may transfer them to the court with bankruptcy jurisdiction.

- You may make an insolvency administration order if:
- the debt, or one of the debts for which the petition is presented is a debt which, having been payable at the date of the petition or having since become payable, has neither been paid nor secured or compounded for, or
- has no reasonable prospect of being able to be paid when it falls due, and
- that there is a reasonable probability that the estate will be insolvent.

Note that if the petition is based on a debt or debts the aggregate must be £750 or more.

Note that the order made is an insolvency administration order, not a bankruptcy order.

In the case of a petition presented by a supervisor or a creditor bound by a voluntary arrangement the same considerations apply as would apply to a petition presented against a living person in default.

17.15.3 The personal representatives present a petition

The procedure is analogous to that of a debtor presenting his own petition. The petition is in Form 6 and must be accompanied by a statement of affairs in Form 7. An insolvency administration order may be made only on the ground that the deceased's estate is insolvent: prospective insolvency does not suffice.

The order is again an insolvency administration order, not a bankruptcy order.

17.15.4 Debtor dies, a bankruptcy petition having been presented before death

The proceedings continue as if the debtor were still alive (art 5(1) and the modifications set out in Schedule 2 of the Order). If the debtor dies before service you may order service on the personal representatives or such other persons as you think fit. The order will be a bankruptcy order.

The reasonable funeral and testamentary expenses of the deceased have priority over the preferential debts set out in Schedule 6 of the Act.

Schedule 2 of the Order imposes an obligation on the personal representatives or any other person on whom the court may impose the obligation to submit a statement of affairs.

17.15.5 Effect of death on interim orders and voluntary arrangements

As to the presentation of a petition by a supervisor of a voluntary arrangement or a creditor bound see paragraph 17.15.2 above.

If a debtor in relation to whom an interim order has been made dies before he has submitted to his nominee the documents referred to in s. 256(2) of the Act, the nominee must give notice to the court and the court must discharge the interim order (para 1 Schedule 1 Part III of the Order). If the debtor dies before the creditors' meeting has been held the meeting may not be held and the personal representatives must give notice of the death to the trustee and the official receiver if the debtor was an undischarged bankrupt (para 2 Schedule 1 Part III of the Order).

If a debtor dies after his proposal has been accepted by his creditors, the creditors cease to be bound (para 4 Schedule 1 Part III of the Order).

17.15.6 Insolvent estates – joint tenancies

Section 421A of the Insolvency Act 1986 as inserted by the 2000 Act applies where the petition was presented on or after 3 January 2003, and within five years after date of death the deceased was beneficially entitled to any property as joint tenant with others (s. 421A(1)).

The trustee of the administration order may apply for an order that the surviving joint tenants (or their personal representatives if they have died after the making of the administration order (subs. (7))) pay to the estate an amount not exceeding the value of the deceased's interest.

In determining the application you should have regard to all the circumstances of the case, including the interests of the deceased's creditors and of the surviving joint tenant, **but unless the circumstances are exceptional the court must assume that the interests of the creditors outweigh all other considerations** (ss. 2, 3 and 8). Your order may be made on such terms and conditions as you think fit –ss. (4).

17.15.7 Validation orders

Section 284 of the Insolvency Act has a similar effect in relation to bankruptcy as section 127 does in relation to winding up. An application to validate a disposition after presentation of a bankruptcy petition is dealt with in the same way as an application after the presentation of a winding up petition. The form of any order you make will be in the same form as that in paragraph above save that it will refer to section 284 instead of section 127 and to a bankruptcy order instead of a winding up order.

17.16 APPLICATIONS FOLLOWING THE MAKING OF A BANKRUPTCY ORDER

17.16.1 *Transactions at an undervalue*

As in company insolvency, the Insolvency Act provides a wide range of remedies available to trustees to set aside transactions at a undervalue (s. 339), preferences (s. 340) and so on. Such applications will be made by ordinary application in the bankruptcy and supported by written evidence. The nature of the directions you give and the way in which you manage such cases will depend very much on their nature and complexity, as will whether you dispose of them finally yourself or refer them to the judge.

17.16.2 *Applications for possession and sale*

By reason of section 306 of the Insolvency Act 1986, the bankrupt's interest in any property will vest in his trustee (who may be the Official Receiver). You will frequently encounter applications for possession and sale of the bankrupt's property under section 14 of the Trusts of Land and Appointment of Trustees Act 1996. The application will be made by ordinary application and should be supported by written evidence that should:

- prove the appointment of the applicant as trustee,
- prove the bankrupt's (and thus the trustee's) interest in the property,
- indicate the value of the property and the amount outstanding in respect of any mortgages
- indicate the amount required to pay the debts of the bankrupt's creditors and the costs of the bankruptcy,
- set out details of any persons other than the bankrupt who are in occupation of or claim some interest in the property (such persons should be joined as respondents).

Section 335A of the Insolvency Act 1986 provides that on such an application the court may make such order as it thinks just and reasonable having regard to:

- the interest of the creditors,
- (where the property has been the home of the bankrupt or the bankrupt's spouse/former spouse) the conduct of the spouse/former spouse, the needs and financial resources of the spouse/former spouse and the needs of any children,
- all the circumstances other than the needs of the bankrupt.

Where the application is made after a year from the date of vesting of the bankrupt's estate in his trustee, the court must assume, unless the circumstances of the case are exceptional, that the interests of the creditors outweigh all other considerations. For examples of exceptional circumstances see *Re Holliday* [1981] Ch 405, *Re Mott* [1987] CLY 212, *Re Gorman* [1990] 1 All ER 717, *Judd v Brown* [1997] BPIR 470 and *Re Bremner* [1999] BPIR 185.

Generally you will be asked to make a declaration as to the interests of the parties in the property or the proceeds of the sale and orders providing for possession of the property, sale, conduct of the sale, and the distribution of the net proceeds of sale.

Section 283A Insolvency Act 1986 makes important restrictions on the right of a trustee to realise the home of the bankrupt. Under the provision, where the bankrupt had interest in a dwelling-house which was the sole or principal residence of the bankrupt, the bankrupt's spouse or former spouse at the date of the bankruptcy order, the interest ceases to be comprised in the bankrupt's estate at the end of three years beginning with the date of the bankruptcy and re-vests automatically in the bankrupt unless the trustee makes an application within the three year period or takes other steps set out in the section. The three year period may be extended (s. 283A(6)). You should also note 313A, which provides that the court must dismiss an application made in respect of a 'low value home'.

17.16.3 Income payments orders

Section 310 Insolvency Act 1986 gives the court power to make an order that the bankrupt pay a sum of money out of his income for the benefit of his creditors. The application must be made by the Trustee before discharge. Many such applications are made by consent. If the bankrupt has not consented to an order you should fix the application for hearing and give directions for the filing and service of evidence in the usual way. As a general rule you should not make an order if the sum claimed is less than £50 per month since in reality that sum will be eaten up by the costs of collection and administration and will produce no real benefit for the creditors. The order should be made having regard to the reasonable financial needs of the bankrupt and should not continue after discharge, or 3 years after it is made - (s. 310(6)) save in the circumstances specified in the Act.

S 310A of the Act allows the bankrupt to enter into an income payments agreement with the official receiver or his trustee. The terms are much the same as in s 310 save that the court cannot vary the terms or alter the terms of an agreement beyond the terms that could be contained in an order.

17.16.4 Postal redirection orders

Section 371 of the Insolvency Act 1986 gives you power to make an order providing for the redirection of a bankrupt's post for a period not exceeding three months. Such an order is not a breach of article 8 of Schedule 1 Human Rights Act 1998 (*Foxley v UK* [2000] BPIR 1009, see also, *Singh v Official Receiver* [1997] BPIR 530), but would be in respect of privileged communications between solicitor and client.

17.16.5 Applications for directions, etc.

Section 303 of the Insolvency Act 1986 allows the trustee to apply to the court for directions and allows the bankrupt, a creditor or any other person dissatisfied with the trustee's conduct to apply to the court. The nature of such applications is wide (see, for example *Re a Debtor (No 26A of 1975)* [1985] 1 WLR 6, *Port v Auger* [1994] 1 WLR 862, *Osborn v Cole* [1999] BPIR

251, *Re Cook* [1999] BPIR 881), but the court will generally be slow to interfere with the conduct of a trustee unless he is behaving manifestly unreasonably (*In re A Debtor ex parte the Debtor v Dodwell (the trustee)* [1949] 1 Ch 236).

17.16.6 Private examinations

As to private examinations in bankruptcy (s. 366), see the notes in relation to winding up in paragraph above and *Re Murjani* [1996] 1 WLR 1498 and *Re Ouvaroff* [1997] BPIR 712.

17.16.7 Public examinations

Section 290 of the Act permits the public examination of a debtor after a bankruptcy order has been made, and before its discharge on application of the Official Receiver (the application will usually be made if there is a failure by the bankrupt to co-operate with the Official Receiver), unless you otherwise order following notice given to the Official Receiver by over half in value of the creditors demanding he apply for it. (If the Official Receiver supports the application it is difficult to see how you would otherwise order.)

The request is made infrequently now, but you should note that the failure of a bankrupt to attend for examination without reasonable excuse constitutes contempt of court, and may result in the issue of a warrant.

The procedure is set out from rule 6.172 to 6.177 of the rules, but the following should be especially noted:

- The Official Receiver must send the order in **Form 6.55** immediately to the bankrupt.
- Not less than 14 days' notice of the hearing should be given by the Official Receiver to the trustee, special manager, every creditor, and if the Official Receiver thinks fit he may advertise the order in the newspapers. (In fact the Official Receiver will often apply for dispensation of these obligations.)
- You must conduct the examination in open court – PDIP rule 9.3(1).
- If you are satisfied the bankrupt is suffering from mental or other disability making him unfit to attend you may stay the examination or give such directions for its conduct (i.e. venue, interpreter) as you think fit. Affidavit evidence is required if the bankrupt is not a patient under the Mental Health Act to prove the disability. Furthermore, the Official Receiver may seek payment of additional expenses by deposit before an order is made for an examination in these circumstances. You can order a proportion or all of the additional expenses to be met from the deposit rather than the estate.
- Examination will be on oath. The bankrupt **shall** answer all questions you put or allow to be put to him.
- The bankrupt may be legally represented.

- Do be aware that the proceedings **must** be recorded in writing, that shall be read to or by the bankrupt, signed by him and verified by affidavit. This record may be used as evidence against the bankrupt in other proceedings, but if there are criminal proceedings current that might cause prejudice to a fair trial then the hearing may be adjourned (r. 6.175). Do not forget that Article 6 Schedule 1 Human Rights Act 1998 will make this inevitable.
- You can adjourn an examination from time to time or generally, but in the latter case the Official Receiver may make application under section 279(3) of the Act for suspension of the automatic discharge.
- You cannot order costs of the examination against the Official Receiver personally (r. 6.177(2)).

17.17 APPEALS

17.17.1 Procedure

The procedure for appeals will be found in the PDIP paragraph 17. It may be summarised as follows.

- Under s. 375(2) of the Act, appeals from the county court (district judge and judge) and from a Registrar of the High Court are treated as a first appeal and must be made to a High Court judge and not the circuit judge. Permission is not required.
- The procedure and practice for a first appeal are governed by rule 7.49 and paragraph 17 of the PDIP
- With effect from 2nd October 2006 a first appeal requires the permission of the court in accordance with CPR Part 52 and the time for any appeal is 21 days rather than 14 days. Please note for the purpose of appeals, proceedings under the Company Directors Disqualification Act 1986 are treated as Insolvency Proceedings – see PD Directors Disqualification Proceedings para. 35.
- Except as provided in paragraph 17 PDIP, CPR Part 52 and its PD and forms do not apply to first appeals.
- The forms are those set out in the Schedule to the PDIP.
- An appeal may be filed at the RCJ in London or if from the county court in one of the Chancery District Registries of the High Court approved for the circuit concerned.
- If no direction is made for the time for appeal then the appeal must be filed within 21 days after the decision appealed.
- The appeal does not operate as a stay on the court's decision unless you order.

- If there is an application for an injunction pending appeal, expedition or vacation of a hearing, for striking out of all or part of the appeal, or for a final order on paper that application must be made to the appeal judge. All other applications will be to the Registrar of appeals who will be a Bankruptcy Registrar in London or a district judge where the appeal is proceeding in one of the High Court District Registries.

The other provisions are procedural and can be easily referred to. You will have little to do with appeals, and should ensure that you do not become embroiled in applications that you do not have power to deal with.

17.18 DISQUALIFICATION OF DIRECTORS

17.18.1 Applications for a disqualification order

Under the provisions of the Company Directors Disqualification Act 1986, the application may be made in the High Court or in the county court. Before dealing with an application you should check that you have jurisdiction. Jurisdiction is governed by sections 2(2)(a), 3(4), 4(2), 6(3) and 8(3) of the Act. Broadly, you will have jurisdiction in the county court in proceedings where the company is being or has been wound up by your court. Such cases will be brought under s. 6 of the Act. Note that in 'investigation cases' under section 8 of the Act only the High Court has jurisdiction.

Apart from the Act itself, you will need to be familiar with the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987 (SI 1987/2023) (as amended) and the Practice Direction: Directors Disqualification Proceedings.

The application is commenced by claim form supported by written evidence, which must be served by the claimant together with an acknowledgement of service. Rule 6 of the Disqualification Proceedings Rules provides a timetable for the filing and service of evidence, but you should generally use the first effective hearing to give directions, bearing in mind that the claimant may have had months or even years to prepare the case, whilst a defendant may need access to documents held by the Official Receiver or a liquidator before being able to file and serve evidence in answer. The Official Receiver may adduce evidence by report, but otherwise evidence must be given by affidavit. You should generally make an order for deponents to attend the final hearing for cross-examination (on being given 21 days' written notice to do so) failing which their evidence be not read without the permission of the court. As a general rule you should rarely accede to applications to adduce expert evidence (e.g. on solvency, trading prospects or accounting issues) since the issues you will have to determine are largely factual and for you or the judge hearing the case to decide.

17.18.2 Procedure

An application for a disqualification order may be disposed of in a number of ways:

Alternatives to trial

An application may be disposed of before trial:

- Summarily. If the defendant indicates that he does not wish to defend or fails to file an acknowledgement of service or evidence (following a final or debarring order), the application may be disposed of on an uncontested basis. Note, however, rule 7(4)(a) of the Disqualification Proceedings Rules, the effect of which is that you should not make an order for a period longer than five years on the first hearing of the application, although there may be exceptions (for example, when a defendant agrees to waive the protection afforded by the rule). If a defendant is not represented at the first hearing and the claimant indicates that an order for longer than three years is ought, it is customary to direct that a letter be sent warning the defendant of that.
- By *Carecraft* procedure. The parties may invite the court to dispose of the application by way of a *Carecraft* settlement (*Re Carecraft Construction Co Ltd* [1994] 1 WLR 172). Since the introduction of undertakings (see below) this is now relatively rare. The *Carecraft* procedure allows the parties to submit an agreed statement of facts specifying a period or bracket of disqualification which the parties consider appropriate. A *Carecraft* statement should be clear as to what the agreed facts are: it should not mince words or leave the court to draw inferences (*Secretary of State for Trade and Industry v Banarse* [1997] 1 BCLC 653). If you agree that the period is appropriate you may make an order; if you do not agree that it is appropriate you should give further directions, including a direction that any final hearing should be before a judge other than you.
- By undertaking. The Insolvency Act 2000 has amended the Company Directors Disqualification Act by allowing the Secretary of State to accept a disqualification undertaking instead of seeking a court order (s. 1A). The result of the introduction of undertakings has been a substantial reduction in the number of cases coming to court. You will not be concerned with such undertakings, but where they are given after proceedings have been commenced you may be asked to make an order providing for the proceedings to be discontinued, usually on terms that the defendant pays the Secretary of State's costs (a condition generally insisted on where an undertaking is to be accepted after proceedings have commenced). Note that nothing can compel the Secretary of State to accept an undertaking.

Trial

- Disposal at trial. Before you fix an application for trial you should consider whether it should be dealt with by a district judge or judge. In *Lewis v Secretary of State for Trade and Industry* [2001] 2 BCLC 597 Neuberger J identified the following factors for consideration:
 - the likely length of the hearing
 - the complexity of the issues of fact or law

- the profile of the case, i.e. the degree of public interest
- the likelihood of obtaining an early hearing date.

The purpose of disqualification is public protection by keeping unfit directors ‘off the road’, deterring the repetition of misconduct and deterring other directors from misconduct (*Re Westmid Packing Services Ltd* [1998] 2 All ER 124). Schedule I of the Act contains a list of matters of conduct to which you should have regard, but it is not exhaustive. The Act has spawned an enormous amount of case law on the nature of conduct that may render a director unfit and on a range of technical issues. You should have regard to any case law to which you are referred, but you should also bear in mind that whether or not conduct renders a defendant unfit is largely a matter of the facts of each individual case.

‘The test laid down in section 6 [of the Act] is whether the person’s conduct as a director of the companies in question ‘makes him unfit to be concerned in the management of a company’. These are ordinary words of the English language and they should be simple to apply in most cases. [...] The result [of judicial attempts to give guidance as to what makes a person unfit] is to obscure that the true question to be tried is a question of fact – what used to be pejoratively described in the Chancery Division as ‘a jury question’.

Re Sevenoaks Stationers (Retail) Ltd [1991] Ch. 164, CA.

In the majority of cases there will be no doubt that a defendant was a director of the company or companies concerned. However, an application may also be made to disqualify a person who has been a de facto or shadow director of a company (the allegation is generally framed as seeking an order against a person who has ‘acted as a director within the meaning of the Act’). The question whether a defendant has been a de facto or shadow director is also largely a question of fact (see *Secretary of State for Trade and Industry v Tjolle* [1998] BCC 282). As to the nature of shadow directorship, see *Secretary of State for Trade and Industry v Deverell* [2000] 2 BCLC 133.

Before reaching your decision and giving judgment you need to ask yourself the following questions:

- What are the allegations and have they been proved? (The applicant must prove the case on the civil burden of proof.)
- Do they warrant a finding of unfitness?
- If they do, do I have a discretion whether or not to make an order (you do not if the application is made under s. 6 but you do if it is made under s. 8)?
- For what period should I make an order?

17.18.3 Period of disqualification

If you make a finding of unfitness on an application brought under section 6 of the Act you must make a disqualification order for a minimum period of two years and you may make an order for up to 15 years. On an application made under section 8 of the Act there is no minimum period. In *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch. 164, CA Dillon LJ established three 'brackets':

- top bracket (over 10 years) for particularly serious cases;
- middle bracket (6 -10 years) for serious cases not meriting the top bracket;
- lower bracket (2 - 5 years) for less serious cases.

For further guidance, see the guidelines set by Lord Woolf MR in *Re Westmid Packing Services Ltd* [1998] 2 All ER 124, a case in which he urged the courts to adopt a broad brush approach.

17.18.4 Permission to act as a director

Section 17 of the Act allows a person who is subject to a disqualification order or a disqualification undertaking to apply to the court for permission to act as a director or to take part in the promotion, formation or management of a company. If possible the application should be made at the end of the hearing of the disqualification application or as soon as possible thereafter (see *Re Dicetrade Ltd* [1994] BCC 371). It should be supported by affidavit.

Again, there is a great deal of authority, much of it difficult to reconcile, but whether or not to grant permission will turn on the circumstances of each application. The starting point will always be that, *prima facie*, the applicant is unfit and that protection of the public must be the overriding concern. There must be consistency as between the reasons why the disqualification order was made and the grant of permission (see *Re Barings plc (No 4)* [1999] 1 All ER 1017).

To that end you may have to consider a wide range of factors including:

- the need to protect the public
- the likelihood of a repetition of the conduct which gave rise to the order
- the needs of the applicant
- the needs of the company
- the constitution of the board of the company
- the financial position of the company.

You may give permission to act subject to conditions, on an interim basis, or for a specified period of time following which the application must be renewed. You may also limit the scope of permission (e.g. to acting in the management of the company without being a director). The application must be served on the Secretary of State for Trade and Industry who has a duty to appear to assist the court (s. 17(5)), although you may accept a letter where the application is uncontroversial and the Secretary of State has no matters to draw to the attention of the court.