



New hope for IVAs

Ranjit Bajjon examines the prospects for the new IVA Protocol and asks whether consumers will finally get the financial safety net they need



A deadline has been set of February 1, 2008 for the introduction of a new Consumer Individual Voluntary Arrangement (IVA) Protocol. It has been designed to overcome the banks' reluctance to accept IVAs (see Atherton Bailey Newsletter summer 2007). So could the new IVA Protocol, created by the IVA Forum under the auspices of the Insolvency Service and signed by the British Bankers' Association, restore access to IVAs for the majority of overstretched debtors? The IVA Forum hopes so and will review its adoption in the months and years ahead. So what exactly does the IVA Protocol set out to achieve?

Five-year scheme

Broadly speaking, a protocol-compliant IVA is a five-year scheme based on the debtor's ability to pay. Contributions will be set by comparing the individual's income to expenditure using the Consumer Credit Counselling Service's guidelines. This monthly sum can be adjusted to reflect any exceptional unavoidable costs (such as special dietary or medical requirements, caring for elderly relatives or above-average work-related travel costs).

Annual review

The debtor's income and expenditure will be reviewed annually and 50 per cent of any net increase paid into the scheme. At the IVA's four-and-a-half year point, homeowners will be required to release equity to a maximum of 85 per cent loan-to-value. This upper limit is subject to the incremental costs of any re-mortgage not exceeding 50 per cent of the monthly contribution. If the debtor is unable to re-mortgage, the IVA will be extended for a further year. If the debtor's financial circumstances adversely change during the IVA, the Supervisor will have

the discretion to agree lower payments if the effect is no more than a 15 per cent reduction in the original dividend calculation.

Independent verification

Insolvency practitioners face increased requirements for independent verification of an individual's income, assets and obligations. In addition, there are new rules on the disclosure of any fees or commissions earned or paid to the insolvency practitioner. For the IVA factories there is a clampdown on some of their excessive and misleading marketing, and a requirement on insolvency practitioners in general to demonstrate debtors have had best advice.

Commitment to accept

For the banks, credit providers and their agents, there is a broad (but not binding) commitment to accept any protocol-compliant IVA proposal. Creditors will have to provide written reasons for rejecting any proposal. In such circumstances, the debtor (and insolvency practitioner) will have the right to make a formal complaint. If they are not satisfied with the outcome, the debtor or their adviser can take it to the banking regulators.

Will it work?

Clearly, this is a major step forward and we hope it works. Some of the requirements threatened by certain banks and credit

providers have been dropped. For instance, there is no longer any reference to 'hurdle-rates' which set out a minimum dividend requirement (commonly 40 per cent). Nor have professional fees been driven down. Instead, the banks have accepted that, as a regulated process, costs are incurred unconnected with the size of the IVA. Obviously, if costs are disproportionately high, creditors may reject the scheme citing this as their reason and it may well be that any complaint made by a debtor or the insolvency practitioner will be rejected – and rightfully so.

While some of these provisions may prove a little woolly, in practice it is hoped that the banks will want to be seen to be playing by the new rules and that more consumers will get the help IVAs were designed to provide. ♦

The cost of rejecting IVAs: see page two for a case study on the consequences of failing to secure an IVA.



I appreciate gentlemen that in the past you may have felt I didn't value the efficacy of IVAs, citing them as grubby, worthless and unscrupulous... that of course was 'before' sub-prime...

2008: Not all doom and gloom

Nigel Paul reflects on developments since the credit crunch started and suggests there might be reason for hope on the horizon



The events which triggered the Northern Rock debacle (see Atherton Bailey Newsletter autumn 2007) have continued as expected. The uncertainty among the banks and financial institutions as to who is holding funny-money packaged investments has made the whole market scuttle back to safety. And so in a few months we have turned from a debt market where money was plentiful, to one where it is barely available even to Grade A borrowers.

Long cold winter

Consumers are being forced to retrench with the lower availability of credit. Consequently, retailers particularly will be having a bad time. While house prices are unlikely to collapse, higher interest on fixed-rate mortgages is hitting a significant number of homeowners

as old schemes mature, resulting in yet further spending cuts elsewhere.

Uncertainty always results in less economic activity. And this inevitably leads to most businesses suffering a drop in revenue and, until they cut costs, lower profits. The credit boom of the last 10 or so years has supported our buoyant economy. Turn off the power source and there are going to be difficulties. More businesses will fail and those that do not will shed staff. A rise in unemployment simply fuels public despondency and this will be accentuated by a lame duck government trying to hang on while the media focuses on one debacle after another.

A better outlook

Longer term, things are not so bad. While for the first time in years the term 'stagflation' is bandied about (economic stagnation plus inflation), it seems unlikely to occur.

Yes, there will be stagnation, but serious inflation seems unlikely. The relatively strong pound means cheap imports and increasing e-commerce trading is keeping costs down. The US economy will inevitably recover in 2008 (it always springs back quickly), while the overblown European economy is likely to decline. Since we generally hang on to the coat-tails of the US economy, we will recover with it and our position as the economic strongman of Europe will be reinforced.

There will be more insolvency and recovery work in 2008, but it will focus on old and tired businesses already in decline. Everything else is likely to bob along until, in the autumn, the lending market will wake up and realise it was not so bad after all. The banks will be able to report mega-profits again by releasing 2007's excessive over-provisions and, come next Christmas, the Government may have finally decided what to do with Northern Rock. ♦

TIX scheme unnecessary

Malcolm Fillmore calls for profession to reject IVA accreditation scheme

On December 12, 2007, commercial consulting firm the TDX Group – known in the industry as TIX – announced it was launching an 'accreditation scheme' for insolvency practitioners (IPs). According to its own literature: "TIX Accreditation is the first non-regulatory scheme in the UK to ensure that consumers receive the best possible service and advice regarding IVAs. It will act as an industry-recognisable benchmark, ensuring that IP companies of all sizes adhere to best practices and standards."

The TDX Group, a 'provider of analytics-based debt management solutions', acts for and receives commission from a number of banks and credit providers to vote on IVA proposals. Why it believes it should run an accreditation scheme when insolvency practitioners are already professionally licensed and regulated is unclear. However, it is not acting out of altruism since it will charge annual fees for the privilege.

TIX says accreditation will give

IPs 'significant', but as yet seemingly unspecified, 'commercial advantages'. So does one assume TIX will authorise higher fees to those they 'accredit'? Or will it only vote in favour of an IVA proposal if you are an 'accredited' IP? Its blurb states that 'accreditation' is designed to ensure consumer debtors receive best advice. However, it is not clear how this gels with the company's history of seeking to use its voting power to drive up debtors' contributions (see for example to the right).

The IVA Forum has done valuable and necessary work in making IVAs accessible to all (see lead article on page one). While the TDX Group claims to have designed the Accreditation Scheme to 'complement and support' the industry agreed IVA Protocol, it is difficult to see why any additional scheme should be necessary. We believe it should be spurned by the profession. ♦

For more information visit www.tdxgroup.com. If you would like to talk to us about it please email info@athertonbailey.com

Rejecting IVAs: the cost to creditors

Mr A was 69 and had been running a home-based chiropody business for 20 years. However, life was hard. His gross fees were £30,000 before trading costs and his net income modest. In recent years, he had survived by borrowing. By the time he came to us, he owed £85,000 on credit cards and £170,000 on his mortgage.

He was tired and wanted to wind down and live on his small pension. His only asset was the remaining equity in his home – about £35,000 – and his family agreed to provide financial support to make an IVA proposal. They could raise £36,000 to be distributed immediately as a once and for all sum to creditors, a likely dividend of 32p in the pound after costs.

TIX, on behalf of the creditors, rejected the proposal. In addition to paying the £36,000, it said he should work for the next five years paying a minimum of £300 a month – a further £18,000. Unable to meet these demands, Mr A was forced to file for bankruptcy. The family's offer to creditors was withdrawn and the eventual dividend to creditors will be a fraction of what was offered.

What's hot in insolvency?

Atherton Bailey's new round-up of legal and practice issues to watch

Bankruptcy and divorce

There has been some recent toing and froing in the conflict between the interests of a bankrupt's creditors and his or her divorced spouse. Can a bankruptcy upset a divorce settlement as a 'transaction at an undervalue'? In *Haines v Hill*, the County Court said: 'No'; the High Court said: 'Yes'; and now the Appeal Court has said: 'No'. Will it go to the House of Lords?

Administrators and business rates

The recent Court ruling on the Trident Fashions case said Administrators must not only pay occupational rates where they occupy premises, but also empty rates on premises

they may have closed or abandoned. Statute always exempted liquidators from paying empty rates. The law is now being changed so that Administrators will also not be liable for empty rates from April 2008. An anomalous issue has been corrected, but no relief is being given on occupational rates which is what the profession requested to assist in business rescue.

Debtor's bankruptcy petitions

Until a few years ago, if a financially distressed debtor wanted to make himself bankrupt, he could fill in some paperwork at the County Court, hand over a few hundred pounds (cash not cheque) and be made bankrupt on

the spot. When consumer debtors began to do this, the courts were overwhelmed and waiting lists sprung up of up to five months. Not very good when the bailiff is at the door and creditors are seeking charging orders to get ahead of the pack. The Government is now proposing that debtors should be able to go to the local Official Receiver who could make the bankruptcy order as a purely administrative matter. ♦

Sign up online for your own copy of the Atherton Bailey Newsletter for further analysis of these and other topical insolvency issues. ♦

CGT: why timing is everything

Clive Purdy explains the changes to Capital Gains Tax

There has been much analysis of the changes to Capital Gains Tax the Chancellor announced in his Pre-Budget Report. Much has been made of his proposed increase to 18 per cent of the '10 per cent tax rate' on capital gains. Then on January 24, 2008, he 'modified' his position following an outcry from entrepreneurs. But by announcing this in advance, he has given an opportunity to avoid the tax rise for those who can distribute company assets to shareholders through a Members Voluntary Liquidation (MVL). But this only applies to trading companies.

If you are a non-trading investment company, the effective tax rate was never 10 per cent, but somewhat higher because the 75 per cent Taper Relief is not wholly available on non-business assets. So, under the new regime, any liquidation of investment

companies should be deferred until after April 5, 2008. For example, a property investment company holding property worth £1million may wish, by using an MVL, to transfer the property itself to shareholders to avoid stamp duty. If the transfer is made prior to April 5, 2008, the shareholder's personal tax bill will be up to £260,000. However, if this is delayed until after April 5, 2008, the tax reduces to £180,000.

The revised rules have brought in a lifetime limit for businesses of £1million of gains taxable at 10 per cent, then 18 per cent thereafter. If you are going to sell or simply cease to trade your solvent trading company and make a personal gain of over £1million, you need to act before April 5, 2008 to avoid the gain counting towards your lifetime limit. If your gain is under £1million and you are unlikely to make further gains in your lifetime, the timing does not matter.

Insolvency practitioners need time to put MVLs in place – so act now.

New staff for 2008

Atherton Bailey has recruited two new senior staff members. Both from the insolvency arm of Haines Watts, Cindy Field joins the Crawley office and Cheryl Brown the Southampton office.

It is a common gripe of insolvency practices that good staff are hard to find. As a result, we have tended to take on trainees and teach them how to do things properly. However, when the insolvency arm of Haines Watts closed a number of offices shortly before the sale of its business to Tenon, there was an opportunity to take on two great people from Fareham. This was too good an opportunity to miss.

Cindy is well-known in the insolvency profession, having spent her earlier years at KPMG, Smith & Williamson and Mazars. She is also a committee member (publications and public relations) with the Insolvency Practitioners Association. Cheryl also has substantial experience, initially at the Insolvency Service, before progressing her career with the south coast practices of Levy Gee (where she worked for Atherton Bailey partner Ranjit Bajjon) and subsequently Fanshawe Lofts. ♦

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Insult to injury

Malcolm Fillmore concludes that the Government's attempt to help phoenix companies off the ground fails to hit the mark



A Court of Appeal judgement last summer effectively prevented directors from trading successor – or phoenix – companies (see Atherton Bailey Newsletter summer 2007). The Department of Trade and Industry (as it was then) was so alarmed by the unexpected consequences of the ruling that it announced an urgent change in the law. But it is with regret we have to say the new rules are not fit for purpose.

While the law on Section 216 of the Insolvency Act changed on August 6, 2007, it has no retrospective effect. As a result, 20 years of business rescue since the 1986 Insolvency Act remains in limbo and thousands of directors theoretically at quite serious personal risk.

A missed opportunity

Prior to last summer's Court of Appeal ruling, the law was interpreted to mean that if a director of an insolvent company was to be director of Newco (the phoenix using

a similar name), a simple explanatory letter had to be sent to Oldco's creditors within 28 days. However, the Court of Appeal threw a spanner in the works by saying a director could not act in successor Newco until after Oldco's creditors had been notified. This made a seamless business sale impractical.

The new rules could simply have said creditors should be notified within 28 days. However, that was too easy. Instead, they provide for notification either to be given in advance of the sale (usually impractical) or within 28 days of the 'completion of the arrangements' (a bit vague). They also add to bureaucracy, cost and delays by requiring directors to place an advertisement of their intention to act in the London Gazette. Directors also have to complete a new form to serve on all creditors.

With business rescues via administration – where liquidation will only take place at a later date to distribute the insolvent company's assets – the new notification procedures are a pain, but perhaps workable. But the process is flawed in the case of smaller business rescues where the rescue process is often done via liquidation.

Creating avoidable delays

The problem is that once Oldco has gone into liquidation, the directors cannot act as directors of the phoenix Newco until after statutory advertisement and notification to creditors. For most small insolvent businesses, the business continuity is simply the owner / director and thus there has to be a lapse of time when essentially no one can manage the rescued business. The Insolvency Service has confirmed our interpretation of the new law. It is unclear how long this limbo period needs to be, but

it seems unlikely that an advert could be published in less than a week. The new rules therefore simply do not provide for seamless liquidation sales.

The Insolvency Service has stated that the directors can still apply to the Court within seven days of liquidation to obtain the Court's permission to act as a director and, if granted, this permission backdates. But this is not a simple formality. To get the judge to exercise this discretion (given that the law was designed to prohibit directors acting in phoenix companies), the director needs to prove that they did not buy the assets too cheaply (even though bought from a liquidator) and that they are a fit and proper person. The hurdles can be high and the risks more so in this process, even ignoring the costs involved.

The name drain

The Appeal Court decision also highlights other Section 216 considerations for directors of parallel companies. If you are a director of a group of similarly-named companies and one goes into liquidation, then unless each of the companies has been actively trading for at least a year, you are committing a criminal offence. A breach also gives you personal liability for the debts of this company.

Further, the process for trading as a Newco set out above only applies where the business is purchased from an insolvency practitioner and is the whole, or substantially the whole, of the business. The remedy is not available if the director remains associated with a Newco that only has part of the old business, for example where a business has been split up and sold to different people. Nor can a director act in a phoenix company in a similar name if Newco did not buy the business from an IP.

The law on the re-use of business names is an absolute mess. As a result, we have to strongly recommend that wherever possible, directors of insolvent businesses dump the old name and rebrand. The goodwill in the business name (often the only asset of value) becomes worthless – so cannot be sold to benefit the creditors. ♦

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Don't you normally fire that in the air?