



# Restructuring and insolvency

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## An update on recent changes

### 1 October 2015 – A day of changes to insolvency law

The start of October 2015 brought about important changes in insolvency law, affecting both creditors and debtors alike. The most notable changes are detailed below.

#### Harmonising office holder claims in administration and liquidation

Administrators and liquidators can both now issue proceedings for wrongful or fraudulent trading, after sections 246A & s246B have been added into the Insolvency Act. The tests for wrongful and fraudulent trading in the two insolvency procedures are intended to be exactly the same.

However, Insolvency Practitioners (IPs) must remember that for wrongful trading actions an administration must be an “insolvent administration”. This is when a company enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and expenses of administration.

In addition, wrongful trading provisions will only apply in administration proceedings to a director or shadow director if the company was in insolvent administration, and sometime before the company entered administration, the director “knew or ought to have concluded...[that there was] no reasonable prospect... [that the] company would avoid entering insolvent administration or going into insolvent liquidation”.

#### Assignment of office holders’ causes of action

An important point to note, alongside the harmonisation of office holder claims in administration and liquidation, is that administrators and liquidators now have the power to assign statutory causes of action to third parties. By the addition of section 246ZD to the Insolvency Act the causes of action that can now be assigned are:

- fraudulent trading
- wrongful trading
- transactions at an undervalue
- preferences
- extortionate credit transactions.

Causes of action can now be treated as another asset of the company, and can be assigned to secure funding for the insolvency process or as part of the realisation of the company’s assets.

#### Approved fee estimates required from Insolvency Practitioners

IPs acting as administrators, liquidators or trustees in bankruptcy proposing to charge on a time cost basis must now provide fee information to each creditor before having the basis of their fees approved. IPs will need to provide a written fee estimate at the outset of the procedure to each creditor with a breakdown of anticipated work, time and rates. The IP must also provide creditors with regular updates on fees throughout the case.

#### Any comments or queries?

##### Vivien Tyrell Partner

+44 20 3060 6153  
vivien.tyrell@rpc.co.uk

##### Tim Moynihan Senior Associate

+44 20 3060 6198  
tim.moynihan@rpc.co.uk

Where it is expected that an IP will exceed the cost estimate, an explanation must be provided to creditors and creditor approval obtained to continue. If a creditor believes the remuneration is too high, he may apply to court to have this reduced or for the basis to be changed. However, IPs have been provided with some comfort. If an IP considers the level fixed by the creditors is too low and the creditors do not agree to an increase, the IP may apply to court for the amount to be increased or for the basis to be changed. IPs should be mindful of this important change. Although this places new pressures on IPs, it should be noted that this regulation provides a lighter touch than previously suggested, when there was the thought of preventing IPs from charging by the hour altogether.

#### **Insolvency Practitioners' record-keeping requirements simplified**

IPs' requirements in relation to fee estimates have increased, but those in relation to record keeping requirements have simplified. Previously it was necessary for IPs to maintain specific records relating to insolvency appointments which led, in practice, to the duplication of records.

IPs are now only required to maintain general records explaining the work they undertake as part of the insolvency process, and any changes which "materially affect" the appointment. Further, IPs no longer need to notify the regulatory professional body of the whereabouts of the records in each case. This will lead to a reduction of costs for IPs.

#### **Protection of essential supplies for insolvent businesses**

The existing statutory regime that protects the provision of "essential supplies" to businesses in a formal insolvency process has been expanded, so that in addition to covering supplies of utilities it also now covers IT related goods and services. Terms which allow IT suppliers to withdraw services or demand ransom-style payments from an insolvent company will be void. Full details of this increased protection can be read in [RPC's update by Andrew Crystal](#).

### **Specific changes to bankruptcy law**

#### **The bank's liability for after acquired property**

This was a last minute addition to the 1 October changes, being added to the list by the Government on 29 September, and is therefore being missed out on many updates on these changes. However this is an important point to note for trustees in bankruptcy.

Changes to section 307 of the Insolvency Act 1986 now mean that banks will no longer be liable if after acquired property is withdrawn by bankrupts, unless the bank had received notice that the funds were specifically being claimed by the bankrupt estate. To ensure that banks are held liable, trustees will now need to serve a separate notice on the bank in relation to after acquired property, even when the bank is already aware of the bankruptcy.

This could be a difficult time constraint, as trustees must already act fast to claim funds before they are wired electronically. Trustees must be aware of this change, and upon becoming aware of after acquired property existing, should identify as quickly as possible who at the bank should be served with the notice.

#### **Bankruptcy level increased to £5000**

One of the most notable amendments to bankruptcy law is the change in the amount an individual must owe to be declared bankrupt. The level of debt an individual must owe in order for a creditor, or a group of creditors, to petition for bankruptcy has been set at £750 since 1986. The effect of inflation has made this a progressively lower threshold for creditors to satisfy.

For petitions commencing on or after 1 October 2015, a debtor must now owe at least £5k to one creditor or in total between their creditors. This increase has been implemented to prevent creditors from using the significant threat of bankruptcy as a tool to pursue relatively small debts. It should be noted that this only applies to individuals, not corporate debtors.

### Thresholds for Debt Relief Orders increased

Change to the bankruptcy threshold is complemented by changes to the availability of Debt Relief Orders (DROs) to individuals in financial difficulties. DROs can now be sought where an individual owes less than £20k (previously £15k) and has assets of at least £1k (previously £300). This can be expected to cause an increase in DROs and a decrease in low-value bankruptcy petitions.

### November 2015

#### Pre pack pool revised SIP 16 consultation

Following the Graham Review of pre-pack administration sales last year, the new SIP 16 was brought out on 1 October, with an implementation date of 1 November 2015. This affects administration appointments starting on or after 1 November 2015. The pre-pack pool began operating on 2 November 2015, and has been set up to scrutinise pre-pack administration sales, reviewing cases through an online portal. SIP 16 provides IPs with more guidance on the period pre-appointment, and it is hoped that the pool will promote transparency, instilling more confidence in the pre-pack process with the public and stakeholders alike.

However, section 129 has also now been added to the Small Business, Enterprise and Employment Act 2015. This gives the Secretary of State power to issue regulations limiting or controlling pre-pack disposals to connected persons, and is a reminder to the industry that if SIP 16 is not complied with further legislation may be introduced in the future. Watch this space!

### Looking to the future

Alongside the changes implemented over the last two months further additions and amendments are due to arrive in the future.

#### Enterprise and Regulatory Reform Act 2013 (ERRA 2013)

The ERRA 2013 will move applications for bankruptcy from the courts to an online portal run by the Insolvency Service. The Insolvency Service are currently developing and testing the portal, and this will be accessed via gov.uk.

The idea for this change was first introduced in a consultation in 2007, and whilst this was originally expected to take place at the same time as the Insolvency Rules 2016, it is now likely this change will come in six months before, in April 2016.

#### Insolvency Rules 2016

Notably the Insolvency Rules 1986 are due to be replaced by the Insolvency Rules 2016, and currently this is anticipated to become effective in October 2016. The aim is to modernise the Insolvency Rules, reduce red tape and consolidate all amendments, whilst reordering and restructuring the rules. A table of contents for the Insolvency Rules 2016 was released on 29 July 2015, and as time goes on further details about the Rules will be revealed.

For more information on the recent changes to insolvency law and our Restructuring and Insolvency practice contact Vivien Tyrell or Tim Moynihan.

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- Shortlisted for Law Firm of the Year for two consecutive years
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- Winner – Law Firm of the Year – Halsbury Legal Awards 2014
- Winner – Commercial Team of the Year – The British Legal Awards 2014
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- Winner – Best Corporate Social Responsibility Initiative – British Insurance Awards 2014
- Highly commended – Law Firm of the Year at The Legal Business Awards 2013
- Highly commended – Law firm of the Year at the Lawyer Awards 2013
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