

In Practice

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The Temporary Insolvency Practice Direction: preparing for the side-effects of COVID-19

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KEY POINTS

- The Temporary Insolvency Practice Direction came into force on 6 April 2020 and will apply until 1 October 2020 unless amended or revoked in the meantime.
- It provides for remote hearings to be the default position when it comes to insolvency matters, and provides the mechanics for how this will work.
- It also contains important provisions concerning the appointment of administrators.

It is a sad but inevitable fact that shutting down large sectors of the economy will lead to more insolvencies, both corporate and individual. The Insolvency and Companies Court certainly envisages that it is going to be busy, and this inevitably coincides with corresponding constraints on the court's ability to deal with the influx.

Hence the need for the Temporary Insolvency Practice Direction ('the Temporary IPD'), which came into force on 6 April 2020: www.judiciary.uk/publications/temporary-insolvency-practice-direction-approved-and-signed-by-the-lord-chancellor/

This supplements the Practice Direction – Insolvency Proceedings, which came into force in July 2018, and has been introduced to: *'provide workable solutions for court users during the current COVID-19 pandemic. Its intention is to avoid, so far as possible, the need for parties to attend court in person, and to take into account the likelihood of the Court needing to operate with limited staff and resources.'* It will remain in force until 1 October 2020 unless amended or revoked in the meantime.

The Temporary IPD deals with the following as far as company insolvency is concerned:

- Filing of notices of intention to appoint an administrator and notices of appointment of an administrator.
- The adjournment of all pending

applications and petitions listed for hearing prior to 21 April 2020.

- The listing of urgent hearings.
- The arrangements for remote hearings.
- The temporary listing procedure for winding up and bankruptcy petitions.
- Statutory declarations.

The Temporary IPD is a helpful and practical document, and is indicative of the impressive way in which the higher civil courts have moved from an almost exclusively in-person style of justice, to an almost exclusively remote system. The judges and the court staff deserve huge credit for making this work, and in such a short time frame. At times the courts could be accused of taking a *'computer says no'* or *'unexpected item in bagging area'* approach to the practicalities of litigation and listing. However, for the time being this has been replaced with a flexibility and can-do attitude which it is hoped will survive the pandemic.

That said, the drafting of the Temporary IPD raises a few issues for practitioners. This provides encouragement to us mere mortals, given the eminence of those who were involved in its drafting (Zacaroli J, Chief ICC Judge Briggs, Snowden J, Marcus Smith J and the Chancellor, Sir Geoffrey Vos).

The purpose of this article is to summarise the Temporary IPD's content as concerning company insolvency and to put it into context,

while at the same time attempting to provide an explanation where the drafting of the Temporary IPD may seem a little opaque.

REMOTE HEARINGS THE DEFAULT POSITION

Section 6 of the Temporary IPD provides for hearings to take place remotely *'unless ordered otherwise'* and that such hearings shall take place via *'Skype for Business or such other technology as the parties and the court agree in advance of the hearing'*. Section 4 (hearings due to take place before 21 April 2020), s 5 (urgent hearings), s 7 (winding up and bankruptcy petitions) and s 8 (all other insolvency hearings) provide the procedural mechanics for such remote hearings. Section 8 envisages that all hearings (other than bankruptcy and winding up petitions for which bespoke arrangements are made) which are already listed to take place after 21 April 2020 will happen at their allotted date and time *'wherever possible'*. This will be by way of a video hearing via Skype for Business or telephone hearing via BT MeetMe, organised by the court. If the parties disagree with the court's proposed hearing method, then they can make submissions via email or CE File, following which the court will make directions. Provision is also made for the court to fix a *'short remote case management conference'* to make directions in relation to a particular hearing if required.

ADJOURNMENT AND RE-LISTING OF PENDING APPLICATIONS AND PETITIONS DUE TO BE HEARD BEFORE 21 APRIL 2020

Section 4 deals with hearings which are listed to take place prior to 21 April

2020, and is somewhat opaquely drafted. Essentially, it provides that all applications, petitions and claim forms which were due to come on for hearing prior to 21 April 2020 stand adjourned, and will be re-listed for a later date. That re-listing will take place in one of three ways:

- (1) As an urgent application pursuant to s 5 of the Temporary IPD upon application of one of the parties.
- (2) If it is a winding up or bankruptcy petition, in accordance with the listing procedure for winding-up and bankruptcy petitions found in s 7 of the Temporary IPD.
- (3) In accordance with guidance notes applicable to each hearing centre to be issued by the supervising judge for that hearing centre. Once these are finalised, they will be posted here: <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/insolvency-and-companies-courts/>

WINDING UP AND BANKRUPTCY PETITIONS

All winding up petitions due to be heard in the Rolls Building on 25 March 2020 were adjourned by ICC Judge Mullen. This was on the basis that, having considered the Protocol for Remote Hearings dated 20 March 2020 and the Lord Chief Justice's Review of Court Arrangements due to COVID-19 dated 23 March 2020, the list 'cannot presently be conducted remotely' and that 'satisfactory arrangements to ensure safety cannot be put in place'. However, by the following week, the winding up list was back up and running remotely, and one of the purposes of the Temporary IPD appears to be to put those arrangements on a formal footing, and seek to roll them out to hearing centres outside London.

It was mentioned earlier that the drafting of s 4 of the Temporary IPD is a little opaque. The opacity of s 4's drafting appears in relation to winding up and bankruptcy petitions before an ICC judge in the Rolls Building. Paragraph 4.1 would appear to exclude such petitions from its ambit entirely, as would the initial part of para 4.1.2.

However, the second half of para 4.1.2 then appears to make provision for such petitions. The position that appears to emerge is that winding-up and bankruptcy petitions due to take place before 21 April 2020 in front of an ICC judge in the Rolls Building will not be adjourned, but rather the temporary listing procedure for winding-up and bankruptcy petitions set out in s 7 of the Temporary IPD will apply to such petitions immediately. This is what has happened in practice. Winding up and bankruptcy petitions due to be heard at hearing centres other than the Rolls Building before 21 April 2020 will be adjourned and relisted via the method set out in s 7 when the supervising judge of the particular hearing centre in question brings that section into effect for that hearing centre via further guidance. It appears to be envisaged that s 7 of the Temporary IPD will be brought into force in those hearing centres before 21 April 2020, otherwise there is a potential lacuna in the provisions as to how winding-up and bankruptcy petitions in hearing centres other than the Rolls Building will be listed following that date. Guidance has been issued for the North and North Eastern Circuits (www.ilauk.com/docs/TIPD-North-Guidance_copy.pdf) and for Manchester (www.ilauk.com/docs/GUIDANCE_FOR_HEARING_THE_WINDERS_LIST.pdf), but the author is unaware of any guidance issued for other circuits or hearing centres. Further, as practitioners will know, a significant amount of insolvency work is conducted in the County Court at Central London. HHJ Dight CBE and HHJ Johns QC issued a Protocol on 24 March 2020 for insolvency and company work in that court, which does not as at the time of writing appear to have been updated since; however, practitioners should keep an eye out as that may happen in the coming days or weeks (www.chba.org.uk/news/protocol-for-insolvency-company-work-in-cccl).

Section 7 provides for virtual winding up and bankruptcy petition lists, where '2 or more petitions' will be allocated a time slot and sent a link to dial into the relevant hearing, or appropriate telephone dial-in details. The details will be published on the daily cause list. It therefore appears to be envisaged that

the winding up and bankruptcy petitions will be listed much as they were before, with groups of petitions being heard 'not before' a particular time, and a link provided so that the parties can attend the particular session relevant to them. Representatives who are appearing on more than one petition may therefore need to have a number of links to hand so that they can join different sections of the list. Practitioners should keep an eye on the Companies Court Winding Up list published online, which gives relevant details.

URGENT HEARINGS

Section 5 of the Temporary IPD provides for the listing of urgent hearings. Chief ICC Judge Briggs has issued a guidance note dated 7 April 2020 for hearings before ICC Judges in the Rolls Building which has the effect of 'deeming' the following hearings to be urgent hearings (www.ilauk.com/docs/ILA.Listing_guide_for_hearings_before_an_ICCJ_London_copy_.pdf):

- Applications made pursuant to s 17 Company Directors' Disqualification Act 1986 (application for leave under an order or undertaking).
- Applications made pursuant to s 216 of the Insolvency Act 1986 (IA 1986) (restriction on re-use of company names).
- Public interest winding up petitions.
- Applications to convene a meeting for a members' scheme of arrangement.
- Capital reduction claims.
- Cross-border merger claims.

For those claims which require meetings (eg schemes of arrangement), it would be worth bearing in mind the approach adopted in *Re Castle Trust Direct plc* (unreported, 3 April 2020, [2020] 4 WLUK 63) where the court accepted arrangements made for meetings to take place remotely.

THE APPOINTMENT OF ADMINISTRATORS

The appointment of an administrator has profound consequences for a company and its creditors. The administrator takes over all powers of management of the company from the directors. The company's creditors are prevented from bringing proceedings against

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the Company and the administrator has the power to deal with property subject to a floating charge as if it were not so charged. The UK is unique in the EU in allowing the appointment of an administrator, and therefore the introduction of these profound changes, without a court order, by simply filing the appropriate papers at court (*Re SJ Henderson & Co Ltd* [2020] BCC 52 per ICC Judge Burton at [73]). This is done via the delivery of a Notice of Appointment of an Administrator ('NAA') (para 18 (if the appointment is carried out by a qualifying floating charge holder) or para 29 (if by the company or its directors) of Sch 1B IA 1986). The NAA itself must be preceded by a Notice of Intention to Appoint an Administrator ('NoIA') (paras 26 and 27 of Sch 1B IA 1986) if it is the company or its directors which intend to appoint an administrator and there is a qualifying floating charge holder (which, among other things, brings about an interim moratorium on proceedings against the company for ten days) (para 44 of Sch 1B IA 1986).

Given the effects that these notices bring about, it is of vital importance that all are aware of when they take effect. Section 3 of the Temporary IPD deals with this question when it comes to e-filing. It does so as follows:

- All NAAs (regardless of whether the appointment is by the company, its directors or a qualifying floating charge holder) can be e-filed during court hours. If e-filed during court hours (10:00 – 16:00), then all NAAs and NoIAs are deemed delivered on the date and time recorded in the court's automatic email acknowledging receipt (paras 3.1 and 3.2).
- If a NAA filed by the company or its directors or a NoIA is e-filed outside court hours, then it will be deemed to have been delivered at 10am on the next day that the courts are open for business.
- A NAA filed by a qualifying floating charge holder cannot be e-filed outside court hours. If a qualifying floating charge holder wishes to appoint an administrator outside court hours, then they must do so via the procedure set out in rr 3.20 to 3.22 of the Insolvency Rules 2016, namely by fax or email.

This is essentially a codification of the recent decision of ICC Judge Burton in *Re SJ Henderson & Co Ltd* [2020] BCC 52.

Provision is also made in s 9 of the Temporary IPD as to how the production of Statutory Declarations required by Sch B1 of IA 1986 can be made remotely. ■