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Response to consultation on the official receiver becoming trustee of the bankrupt's estate on the making of a bankruptcy order and removal of the requirement to file a 'no meeting' notice in certain company winding up cases

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Consultation Paper has been prepared by the CLLS Insolvency Law Committee.

1 Should the official receiver ("OR") be appointed trustee of the bankrupt's estate on the making of a bankruptcy order?

1.1 At present, the assets of the bankrupt do not vest in a trustee in bankruptcy unless either:

(a) a meeting of creditors of the bankrupt has been held[1] on at least 21 days notice to creditors[2] and at that meeting an insolvency practitioner is appointed as trustee in bankruptcy;

(b) a meeting of creditors is held on the notice period set out above and fails to appoint an insolvency practitioner as trustee in bankruptcy, in which case the OR will either refer the matter to the Secretary of State to appoint a trustee in bankruptcy, or will file a notice at court of his decision not to refer the matter to the Secretary of State in which case the OR is appointed trustee in bankruptcy from that date; or

(c) the OR has filed at court a notice setting out his decision not to summon a meeting, in which case he is appointed as trustee in bankruptcy[3].

[1] Section 293 Insolvency Act 1986 ("IA")

[2] Rule 6.79(3) Insolvency Rules 1986 ("IR")

[3] Section 293(3) IA

This means that there is a period of delay between the making of the bankruptcy order and the appointment of a trustee in bankruptcy, during which period the OR is appointed only as receiver and manager of the bankrupt's estate[4], and has limited powers to deal with and no power to dispose of the bankrupt's property. During this period, there is the possibility of the value of assets diminishing[5] or of the assets being dissipated. Further, this hiatus can cause confusion for debtors and creditors alike, where they are not familiar with the bankruptcy regime.

The CLLS notes that the proposals put forward by the Insolvency Service, for the OR to be appointed as trustee in bankruptcy from the making of the bankruptcy order, would lessen these risks as control of all assets of the bankrupt would pass to the OR, and would also clarify the extent of the OR's powers prior to any meeting of creditors. In addition, it would facilitate the process for the OR to apply to the Secretary of State for the urgent appointment of an insolvency practitioner as trustee in bankruptcy in urgent cases.

1.2 The CLLS notes the importance of the appointment of insolvency practitioners as trustees in bankruptcy in cases where there are assets to be realised, particularly using the anti-avoidance provisions set out in the IA. It is noted that the OR will retain the power to call a meeting of creditors under s.293(1) IA, and the right to refer the matter to the Secretary of State for appointment of an insolvency practitioner as trustee in bankruptcy, meaning that the "outsourcing" of such complex bankruptcies should not be affected by the proposals.

1.3 The CLLS also notes that the proposals to do away with the need for the OR to file a 'no meeting' notice where no meeting under s.293 IA is to be called (because the OR has already been appointed as trustee in bankruptcy) would lessen the administrative burden on the OR and create cost savings. While the CLLS would not hold the opinion that changes to the IA or IR should be made with the goal of lessening the administrative burden on the OR or cutting costs, the CLLS notes that, in an economic climate where the number of bankruptcies is rising, these are ancillary benefits of the changes proposed.

1.4 The CLLS is therefore in favour of the proposal that the official receiver should be appointed trustee of the bankrupt's estate on the making of a bankruptcy order.

2 Should the term 'interim receiver' change to 'receiver' to better reflect his or her new function?

2.1 The CLLS has no objection to the change of term of any person appointed the protect the debtor's property under s.286(1) IA from 'interim receiver'. However, the use of 'receiver' may cause some confusion for creditors, receivers also being appointed under the Law of Property Act 1925/security in respect of property. It is suggested that the term used mirrors the corporate approach and that 'provisional trustee' is used.

2.2 The CLLS notes that a proposal to allow the appointment of an insolvency practitioner rather than the OR as an interim receiver on a creditor's petition is the subject of a separate consultation. This note does not deal with that proposal.

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[4] Section 287(1) IA

[5] Although the OR as receiver does have the power under s.287(2) to sell or dispose of "perishable goods … and any other goods … the value of which is likely to diminish if they are not disposed of" under s.287(2) IA

3 Should the need to file the 'no meeting' notice be removed for company cases where a liquidator is appointed by the secretary of state in the period between the making of the order and the time when the OR is required to inform creditors of his/her decision on whether, or not, to call a meeting?

3.1 The CLLS has no objection removing the need to file a 'no meeting' notice in relation to companies subject to compulsory winding up in circumstances where the OR has made a successful application to the Secretary of State for the appointment of an insolvency practitioner as liquidator in his place, pursuant to section 137(1) IA.

3.2 The CLLS notes that the creditors of the company will be informed in any event by the liquidator appointed pursuant to the requirements of section 137(4) IA.

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