

Challenges to IVAs and Re Rossi

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Plan of Action:

1. What is an IVA and why use one?
2. Process of IVA approval (or rejection)
3. Challenges to IVAs
 - a. S.262 IA 1986
 - i. Unfair Prejudice
 - ii. Material Irregularity
 - b. Insolvency Rule 15.35
4. Re Rossi
 - a. Facts
 - b. Decision

What is an IVA?

- Contractual arrangement between debtor and creditors to be overseen by a third-party supervisor;
- Set out in written proposal with terms as to payment, source of payment, compliance issues;
- Binds creditors of the debtor to the agreed haircut in debts (eg. 80% of debts);
- Written into statute: Insolvency Act 1986 and Insolvency Rules 2016;
- Supervisor an insolvency practitioner who oversees distributions to creditors and compliance with IVA terms;
- If fails, then usually a duty on supervisor to present bankruptcy petition.

Why an IVA?

- If before bankruptcy, then avoid Bankruptcy!
- If already bankrupt, and an IVA approved, then mandatory annulment under s.261.
- For creditors: Often a better return than in a bankruptcy

Process for Approving an IVA (or not)

- Proposal prepared by an IP (usually the proposed supervisor of the IVA – the ‘Nominee’)
- Notices sent to all creditors of a creditors decision procedure:
 - Not deemed consent, but a creditors’ decision procedure (not physical meeting).
 - A proposal sent to the creditors setting out:
 - Full details of the debtor’s financial position, ie. Assets and debts
 - The financial proposal, eg. all creditors to receive 80% of their debts through sale of a property or provision of funds by a spouse, etc
 - A comparison with the equivalent financial provision in a bankruptcy (reality is will show little return in a bankruptcy)
- Notices must set out the time and place of the meeting, how to join, how to provide a proof of debt with supporting documents to prove debt and/or a proxy

Creditor Voting on an IVA

- Nominee has power to admit or reject (in full or in part) all proved debts for voting
 - Unliquidated debts are to be valued at £1 (eg. a claim for damages)
- Approval requires 75% (of the total value) of the voting creditors 15.34(6)(a),
 - Associates can vote on IVAs
 - But, if more than 50% of non-associate creditors vote against the IVA then it will fail (protection against packing the vote with associates)

Process of IVA

- IVA proceeds according to the Proposal with distributions to creditors at various stages until full sums are completed and the IVA ends;
- If the terms of the IVA are breached (and not remedied), then the Supervisor will terminate the IVA;
- Supervisor is then (likely) to present a supervisor's bankruptcy petition against the Debtor (and is usually required to do so under the terms of the IVA);
- Supervisor can be appointed as trustee (must give consent in writing at the bankruptcy hearing).

Routes of Challenge to an IVA

- By the nature of a 75% approval binding creditors of the debtor there might be a significant minority who are displeased with the IVA terms and results;
- This potential 'prejudice' to the minority is covered by two routes of challenge:
 - S.262 Insolvency Act 1986 – challenges to IVAs
 - (1) Unfair prejudice to a creditor(s) if approved
 - (2) material irregularity as to the procedure
 - R15.35 Insolvency Rules 2016 – challenges to decisions of nominees in admitting or rejecting votes.

S.262 Insolvency Act

- Two different aspects of challenge
 - Unfair Prejudice and Material Irregularity
- Unfair prejudice only applies where the IVA is approved, and is concerned with a creditor (or class of creditors) being unfairly prejudiced by the IVA terms.
 - Prevents majority screwing over a minority.
 - (in CVAs) reducing the rights of landlords to forfeit or terminate leases
 - Give one creditor a higher percentage as a 'critical' creditor without good reason
 - Reduce Crown creditor without affecting other creditors
- Material Irregularity: what it says on the tin
 - Must be 'material' and 'likely' to have affected vote
 - 'Likely' is not defined on balance of percentages, but 'substantial chance' (*Re Trident Fashions*)
 - Failure of disclosures or false material in Proposal; failure to give notice to all creditors; mistakes in calculating voting rights (tied to IR 15.35) / fabrication of debts / allowing or disallowing votes, etc.

The Court's Power under s.262

- Revoke the IVA
- Invoke a further creditor decision procedure taking into account the issue which gave rise to the appeal (eg. a recalculation of voting rights or proper notice to creditors or an amended proposal)

Insolvency Rules r15.35

- Concerns the admission / rejection of a creditor's claim and/or the quantum of the claim.
- Not a review of the decision ala a court appeal, but the Court must decide the matter of the proper quantum. The Court can (and usually will) review evidence not before the Nominee at the meeting.
- Balance of probabilities as to whether the debt was owed, and if so what amount owed (*Re McNally*)
- Court can order a new meeting or make such order as thinks just – The Court can approve an IVA if re-values the votes of a failed IVA (unlike in s.262)
- Will only exercise power where the voting rights amounted to an unfair prejudice or material irregularity (similar to s.262)

Time Limits

- For both s.262 and IR 15.35 the challenge must be brought within 28-days of the decision of creditors.
- For IVAs, the Court has the power under s.376 IA 1986 to extend time limits.
 - Will apply the *Denton* to any application for an extension;
 - The longer the delay the less likely an extension will be given
 - 2 months approved in *Tager* ; 9 months dismissed (*Re Timothy*)

Karapetian v Duffy & Foster (Re Rossi)

- Facts:
 - Rossi proposed an IVA. Karapetian and Foster were creditors. Duffy the Nominee and proposed supervisor.
 - Mr Karapetian a Russian businessman who did not speak English and was in Russia at material times. Claimed to have a debt of around £1.7million.
 - Mr Foster a Ukrainian businessman with a claim for roughly £1.1million and had an outstanding bankruptcy petition against Mr Rossi.
 - 17 June 2021, Mr Rossi proposed an IVA. Initial notices sent on 5 July (first meeting adjourned), and on 16 July further notices, a blank proof, and instructions (in English) sent to Mr Karapetian for meeting.
 - Russian Translation in Google Translate gave Moscow time not BST.
 - 19 July 2021, Meeting of creditors at 10am:
 - Mr Karapetian sends three emails to Nominee between 9:51 – 9:57 detailing a debt of £500,000 under a loan in favour of the IVA.
 - Mr Rossi attempts in meeting to convince Nominee to value Mr Karapetian's debt higher and to show further documents for a larger debt arising from a personal guarantee.
 - At 11:15am the Meeting ended. The Proposal was rejected by 72.3% for (£2,896,993) and 27.7% against (Mr Foster's debt of £1,106,954).

Re Rossi

- Appeal under s.262 and r15.35
 - Dispute on facts of the claimed Guarantee debt not admitted (Mr Foster disputed the debt's existence with the Nominee neutral on the factual issue);
 - Allegation of material irregularity arising from provision of notice to Mr Karapetian (said to be that the incorrect time was given in a google translation of the notice), and that the Nominee should have had regard to documents Mr Rossi tried to provide him regarding Mr Karapetian's claimed debt during the meeting.
- Judge held:
 - On facts, found no debt was owing under the Guarantee.
 - [56 -57] No obligation to translate documents from English. The giving of the wrong time was an irregularity, but it was not 'material.' Mr Karapetian could have provided proof of his debts in detail at any point prior to the meeting, but only gave partial information minutes before it was to start.
 - [59] Not an irregularity for Nominee to not accept documents from Mr Rossi. It is for the debtor to provide proof of their debt, and cannot accept the debts in the proposal at full value if not claimed by the creditor.

Re Rossi – Takeaway

Big Point: A creditor must provide proof of their debt before the meeting.

At the very least, a summary of what is owed must be provided. A nominee cannot accept a debtor's word for a debt or rely simply on the proposal. The creditor must act before and at the meeting, and not wait till afterwards to claim a debt.

Any Questions?

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