STATUTORY RULES OF NORTHERN IRELAND

# 2008 No. 118

# INSOLVENCY
# COMPANIES

## The Insolvency (Amendment) Rules (Northern Ireland) 2008

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| *Made - - - -* | *12th March 2008* |
| *To be laid before Parliament* | |
| *Coming into operation* | *6th April 2008* |

The Lord Chancellor makes the following Rules in exercise of the powers conferred by Article 359 of the Insolvency (Northern Ireland) Order 1989(**1**), with the concurrence of the Department of Enterprise, Trade and Investment, and, in relation to those rules that affect court procedure, with the concurrence of the Lord Chief Justice under Article 359(1A) of that Order.

In accordance with Article 360 of that Order the Lord Chancellor has consulted the Committee appointed to review Rules.

### Citation, commencement and interpretation

**1.**—(1) These Rules may be cited as the Insolvency (Amendment) Rules (Northern Ireland) 2008 and shall come into operation on 6th April 2008 ("the commencement date").

(2) In these Rules—

"the principal Rules" means the Insolvency Rules (Northern Ireland) 1991(**2**), (any reference to a numbered Rule being a reference to a Rule so numbered in the principal Rules unless the context otherwise requires);

"the Order" means the Insolvency (Northern Ireland) Order 1989 (any reference to a numbered Article being a reference to an Article of that Order).

(**1**) S.I. 1989/2405 (N.I. 19). Section 1282 of the Companies Act 2006 (c. 46) inserted a new Article 150ZA into the Insolvency (Northern Ireland) Order 1989 providing for the payment and priority of general expenses of a winding up subject to exceptions prescribed by rules made under Article 359 of the 1989 Order. Article 359 of the Insolvency (Northern Ireland) Order 1989 was amended by the Insolvency (Northern Ireland) Order 1989 (Amendment) Regulations (Northern Ireland) 2002 (S.R. 2002 No. 223).

(**2**) The Insolvency Rules (Northern Ireland) 1991 (S.R. 1991 No. 364), as amended by the Insolvency (Amendment) Rules (Northern Ireland) 1994 (S.R. 1994 No. 26), the Insolvency (Amendment) Rules (Northern Ireland) 1995 (S.R. 1995 No. 291), the Insolvency (Amendment) Rules (Northern Ireland) 2000 (S.R. 2000 No. 247), the Insolvency (Amendment) Rules (Northern Ireland) 2002 (S.R. 2002 No. 261), the Insolvency (Amendment) Rules (Northern Ireland) 2003 (S.R. 2003 No. 549), the Insolvency (Amendment) Rules (Northern Ireland) 2006 (S.R. 2006 No. 47) and the Financial Services and Markets Act 2000 (Consequential Amendments) Order 2004 (S.I. 2004/355).

**Transitional provisions**

**2.**—(1) The amendments to the principal Rules made by Rules 4, 5 and 6 of these Rules and the references in Rule 10(b) to the insertion of Form 4.74 into Schedule 2 to the principal Rules and in Rule 10(a) to the insertion of an entry for that form in the index of forms in Part 4 of that schedule shall apply—

(a) to a creditors' voluntary winding up—

(i) in respect of which the resolution is passed; or

(ii) where it commenced as a members' voluntary winding up, for which the conversion to a creditors' voluntary winding up under Article 82 takes effect; or

(iii) in respect of which a notice is registered under paragraph 84 of Schedule B1 to the Order;

on or after the commencement date;

(b) to a members' voluntary winding up for which the resolution is passed on or after the commencement date; and

(c) to a winding up of a company by the court where the winding-up order is made on or after the commencement date except where the winding-up order is made following a resolution for a voluntary winding up passed by that company before the commencement date.

(2) Rule 4.238 of the principal Rules as it stood before the commencement date shall, in relation to any arrangements referred to in paragraph (1) of that Rule which have been completed before that date, continue to apply to a person who was the director or shadow director of the insolvent company the whole, or substantially the whole, of whose business is acquired.

**Amendments to the principal Rules**

**3.** The principal Rules shall be amended as set out in Rules 4 to 10.

**4.** In Rule 4.228 (general rule as to priority),

(a) in paragraph (1) for the words "The expenses of the liquidation" at the beginning of that paragraph, to and including the words "by the official receiver" at the end of sub-paragraph (a)(iii), substitute the following—

"All fees, costs, charges and other expenses incurred in the course of the liquidation are to be regarded as expenses of the liquidation.

(2) The expenses of the liquidation are payable out of—

(a) assets of the company available for the payment of general creditors, which shall be taken to include proceeds—

(i) of any legal action which the liquidator has power to bring in his own name or in the name of the company; or

(ii) arising from any award made under any arbitration or other dispute resolution procedure which the liquidator has power to bring in his own name or in the name of the company;

which shall, for the purposes of this sub-paragraph, also include—

(iii) any payments made under any compromise or other agreement intended to avoid legal action or recourse to arbitration or to any other dispute resolution procedure; and

(iv) payments made as a result of a settlement of any such action, arrangement or procedure in lieu of or prior to any judgement being given or award being made;

(b) subject as provided in Rules 4.228A to 4.228E, property comprised in or subject to a floating charge created by the company.

(3) Subject as provided in Rules 4.228A to 4.228E, the expenses are payable in the following order of priority—

(a) expenses which—

(i) are properly chargeable or incurred by the provisional liquidator in carrying out the functions conferred on him by the court;

(ii) are properly chargeable or incurred by the official receiver or the liquidator in preserving, realising or getting in any of the assets of the company or otherwise in the preparation or conduct of any legal proceedings, arbitration or other dispute resolution procedures, which he has power to bring in his own name or bring or defend in the name of the company or in the preparation or conduct of any negotiations intended to lead or leading to a settlement or compromise of any legal action or dispute to which the proceedings or procedures relate;

(iii) relate to the employment of a shorthand writer, if appointed by an order of the court made at the instance of the official receiver in connection with an examination; or

(iv) are incurred in holding an examination under Rule 4.224 (examinee unfit) where the application for it was made by the official receiver;".

(b) Delete paragraph (2).

(c) After new paragraph (3) insert new paragraph (4).

"(4) Sub-paragraphs (a)(iii) and (la) of paragraph (3) shall apply to the costs of a mechanical recording as they apply to the costs of a shorthand writer.".

**5.** After Rule 4.228 insert—

"**Litigation expenses and property subject to a floating charge — general provisions**

**4.228A.**—(1) In this Rule and Rules 4.228B to 4.228E—

(a) "approval" and "authorisation" respectively mean:

(i) where yet to be incurred, the approval; and

(ii) where already incurred the authorisation,

of expenses specified in Article 150ZA(3);

(b) "the creditor" means—

(i) a preferential creditor of the company; or

(ii) a holder of a debenture secured by, or a holder of, a floating charge created by the company.

(c) "legal proceedings" means -

(i) proceedings under Articles 176, 177, 178, 202, 203, 206 and 367 and any arbitration or other dispute resolution proceedings invoked for purposes corresponding to those to which the Articles relate and any other proceedings, including arbitration or other dispute resolution procedures, which a liquidator has power to bring in his own name for the purpose of preserving, realising, or getting in any of the assets of the company;

(ii) legal actions and proceedings, arbitration or any other dispute resolution procedures which a liquidator has power to bring or defend in the name of the company; and

(iii) negotiations intended to lead or leading to a settlement or compromise of any action, proceeding or procedure to which sub-paragraph (i) or (ii) relate.

(d) "litigation expenses" means expenses of a liquidation which—

(i) are properly chargeable or incurred in the preparation or conduct of any legal proceedings; and

(ii) as expenses in the liquidation, exceed, or in the opinion of the liquidator are likely to exceed (and only in so far as they exceed or are likely to exceed), in the aggregate £5000.

(2) Litigation expenses shall not have the priority provided by Article 150ZA over any claims to property comprised in or subject to a floating charge created by the company and shall not be paid out of any such property unless and until approved or authorised in accordance with Rules 4.228B to 4.228E.

**Litigation expenses and property subject to a floating charge — requirement for approval or authorisation**

**4.228B.**—(1) Subject to Rules 4.228C to 4.228E, paragraphs (2) and (3) or (4) apply where, in the course of winding up a company, the liquidator—

(a) ascertains that property is comprised in or subject to a floating charge;

(b) has himself instituted or proposes to institute or continue legal proceedings or is in the process of defending or proposes to defend any legal proceeding brought or likely to be brought against the company; and

(c) prior to or at any stage in those proceedings, is of the opinion, that—

(i) the assets of the company available for payment of general creditors are or will be insufficient to pay litigation expenses; and

(ii) in order to pay litigation expenses he will have to have recourse to property comprised in or subject to a floating charge created by the company.

(2) As soon as reasonably practicable after the date on which he forms the opinion referred to in paragraph (1), the liquidator shall identify the creditor who, in his opinion at that time—

(a) has a claim to property comprised in or subject to a floating charge created by the company; and

(b) taking into account the value of that claim and any subsisting property then comprised in or secured by such a charge, appears to the liquidator to be the creditor most immediately likely of any persons having such claims to receive some payment in respect of his claim but whose claim would not be paid in full ("the specified creditor").

(3) The liquidator shall request from the specified creditor the approval or authorisation of such amount for litigation expenses as the liquidator thinks fit.

(4) Where, in the liquidator's opinion, two or more creditors who are holders of debentures secured by, or holders of floating charges created by the company, meet the conditions in paragraph (2), the liquidator is to seek from each of them ("the specified creditors") approval or authorisation of such amount of litigation expenses as the liquidator thinks fit, apportioned between them ("the apportioned amount") according to the value of the property to the extent covered by their charges.

(5) For so long as the conditions specified in paragraph (1) subsist, the liquidator may, in the course of a winding up, make such further requests to the specified creditor or creditors for approval or authorisation of such further amount for litigation expenses as he thinks fit to be paid out of property comprised in or subject to a floating charge created by the company, taking into account any amount for litigation expenses previously approved or authorised and the value of the property comprised in or subject to the floating charge.

**Litigation expenses and property subject to a floating charge — request for approval or authorisation**

**4.228C.**—(1) All requests made by the liquidator for approval or authorisation pursuant to Rule 4.228B shall be in writing whether in Form 4.74 or otherwise, and shall include the following—

(a) a statement describing the nature of the legal proceedings, including, where relevant, the statutory provision under which proceedings are or are to be brought and the grounds upon which the liquidator relies;

(b) where the power to bring those proceedings is subject to sanction, a statement that the liquidator has sought and been given the relevant permissions or an undertaking that the liquidator will seek the relevant permissions upon authorisation or approval being granted;

(c) a statement specifying the amount or apportioned amount of litigation expenses for which approval or authorisation is sought ("the specified amount");

(d) notice that approval or authorisation or other reply to the request must be made in writing (whether by way of Form 4.74 or otherwise) within 28 days from the date of its being received ("the specified time limit"); and

(e) a statement explaining the consequences of a failure to reply within the specified time limit.

(2) Where anything in paragraph (1) requires the inclusion of any information, the disclosure of which could be seriously prejudicial to the winding up of the company, the liquidator may—

(a) exclude such information from any of the above, provided that it is accompanied by a statement to that effect; or

(b) include it on terms —

(i) that bind the creditor to keep the information confidential; and

(ii) that include an undertaking on the part of the liquidator to apply to the court for an order that so much of the information as may be kept in the files of the court, not be open to public inspection.

(3) The creditor may within the specified time limit apply to the liquidator in writing for such further particulars as is reasonable and in such a case, the time limit specified in paragraph (1)(d) shall apply from the date of the creditor's receipt of the liquidator's response to any such request.

(4) Where the liquidator requires the approval or authorisation of two or more creditors, he shall send a request to each creditor in writing (whether by way of Form 4.74 or otherwise), containing the matters listed in paragraph (1) and also giving—

(a) the number of creditors concerned;

(b) the total value of their claims, or if not known, as it is estimated to be by the liquidator immediately prior to sending any such request; and