

# Appointment by the Secretary of State under Sections 137 and 296 of the Insolvency Act 1986

## 1. GENERAL PRINCIPLES

Sections 137 and 296 of the Insolvency Act 1986 ("the Act") provide for the appointment by the Secretary of State of an Insolvency Practitioner as a liquidator or trustee as an alternative to holding a meeting of creditors in certain circumstances.

Such application can only be made when the Official Receiver is liquidator or trustee and Insolvency Practitioner Unit ("IPU"), Birmingham act on behalf of the Secretary of State in making such appointments.

As a matter of policy (and subject to the exceptions detailed below) the creditors' views must have been sought in appropriate cases prior to an application for an SoS appointment being made and their wishes, where possible, adhered to. The Secretary of State's power to make an appointment will be used in accordance with the principles set out in this guideline and will not be exercised simply for the convenience of the Official Receiver.

If there is the possibility of any contention, dispute or conflict then there is a strong presumption that a meeting of creditors should be held. That presumption may be overcome but the issue needs to have been considered and the basis for a decision to seek an appointment fully recorded.

**Insolvent's interests:** In cases where the insolvent's interests might be adversely affected by the early appointment of an IP (for example in cases where there is a surplus), it is of equal importance that the insolvent is fully informed of the consequences of any appointment and of any failure on his part to take his own steps to remedy the situation (for example by applying for an annulment or a voluntary arrangement).

## 2. Instances where application may be made

a) Cases requiring agreement in principle of the appointment from IPU before submission of application – (see paragraph 3).

b) Cases where application may be made without agreement in principle – (see paragraph 4); [Note: where an urgent appointment is required in a case which would not otherwise require agreement in principle, the appointment date should be sought by telephone in accordance with paragraph 5.].

## 3. Cases requiring agreement in principle of the appointment before submission of an application

a) All cases in which there is actual or potential public interest, regardless of the age of the case;

b) Cases where there is, or could be perceived by any parties involved in the insolvency to be, a potential conflict of interest between the IP's duties to the insolvent estate and other matters;

c) Cases where there is contention or dispute, either relating directly to the appointment of an IP or to the case generally;

d) Cases where the proposed IP is not the next IP on the OR's rota, except in situations where the appointment of the IP has been agreed by the majority in value of creditors or meets the criteria in paragraphs 4 h) or i).

e) All cases which do not fall into any of the categories in paragraph 4 below;

Examples of circumstances, which may justify a Secretary of State appointment under this paragraph, are:

i. assets are in jeopardy and will be better protected if an early appointment is made;

ii. the insolvent is trading at the date of the order, and significant value in the estate will be lost if trading ceases;

iii. an IP was appointed as provisional liquidator or interim receiver and the OR was appointed liquidator or receiver and manager on the making of the order.

The OR will be expected to provide particular justification for appointment by the SoS rather than by a creditors' meeting and to confirm that the major creditors have been consulted. **Exceptionally, if an urgent appointment is required and creditors are unavailable or cannot immediately deal with the query, an appointment may be made at the discretion of IPU.** Full notes of any contact and attempted contact with creditors must be retained on the OR's file.

#### **4. Cases where application may be made without agreement in principle**

Application for a SoS appointment may be made without agreement in principle if:

a) a notice of no meeting and the OR's report to creditors has already been issued and sent to creditors, there is good reason for the assets not having been dealt with earlier and the majority of creditors have approved the appointment. **Note:** The reasons for the assets not having been dealt with and for not calling a first meeting should be stated in the "General Remarks" section of the application;

b) there is no known creditor or public interest, a notice of no meeting has already been issued and sent to creditors and a creditor has requested the appointment of a particular IP who has agreed to take the case;

c) a meeting of creditors has been held but no appointment was made;

d) the case is a summary bankruptcy;

e) a meeting would be an unnecessary formality and cost to the estate because a majority of known creditors by value, with undisputed claims, who would be entitled to vote at a meeting (or one creditor, if it has a clear undisputed majority in value) have indicated that they would appoint a particular IP, or have otherwise agreed to the appointment of the next IP on the OR's rota. The OR must retain a file note of the creditors consulted and their views. **Note:** ORs should avoid putting themselves in the position of having to arbitrate between competing nominations from different creditors, or effectively holding "telephone" meetings in order to effect an appointment; in these cases, unless there is serious risk of loss to the estate without an early appointment, it will almost certainly be the case that a meeting should be called.

f) there is a charge, no surplus is expected for unsecured creditors, and the charge holder is unwilling to appoint a receiver or take action itself;

g) the available assets of whatever description are, in the opinion of the OR, unlikely to attract a nomination at a meeting. **Note:** The OR's opinion will be based upon his knowledge of the 'local market' and assets in such cases might consist of antecedent recoveries, income payment orders, ageing book debts or equity in the matrimonial home. However, it cannot automatically be the case that these types of asset cases are appropriate for a SoS appointment – the OR must be able to justify the decision not to call a meeting and to seek a SoS appointment on a case-by-case basis.

h) the case is a bankruptcy, the spouse or former business partner of the debtor has previously been adjudged bankrupt, both debtors have similar creditors and the OR is of the view that it would be beneficial to the estate for the same trustee to act in both cases;

i) an IP has previously acted as trustee in bankruptcy or compulsory liquidator for the case in question and obtained his release; new assets have come to light or existing assets have increased in value and it would be beneficial to the estate to re-

appoint the same IP. **Note:** The OR must be satisfied that he knows of no reason why creditors might object to the re-appointment of the same IP and, in this regard, the IP must be asked to confirm whether any complaints were made against his/her conduct in relation to his/her previous administration of the case (if yes – agreement in principle must be sought). In liquidation cases, a check must also be made to ensure that the company has not been dissolved.

j) the case is 2 or more years old and the principle asset to be realised is an interest in a dwelling house which at the date of the bankruptcy order was the sole or principal residence of the bankrupt, their spouse/civil partner or former spouse/civil partner.

## **5. Effective date of appointment**

If an urgent appointment is needed in a case within paragraph 4 above, then the effective date of appointment should be agreed with IPU, Birmingham. If the OR does not seek an urgent appointment the effective date of appointment will be three working days after the day that IPU process the application.

## **6. Matters for general consideration**

### **The IP to be appointed**

a.) Before an application is made, the OR must ensure that the proposed IP is not only prepared to act but is qualified (i.e. is authorised to act as an IP and holds an insolvency bond), particularly if the proposed IP is not taken from the OR's rota, or is not known to the OR. However, an IP is not required to provide a written consent to act in connection with a SoS appointment.

b.) The OR should not lead the proposed IP to believe he/she will be appointed until the appointment has been agreed by the SoS, but following agreement the OR must promptly inform the IP of the date of the appointment so that appropriate action may be taken as regards assets for which the IP has responsibility.

c.) The OR has a duty to provide the proposed IP with complete and accurate information about the insolvent's estate and any other matters relevant to the administration of the case.

## **7. Crown Debts**

HM Revenue & Customs has indicated that the OR may assume it is agreeable to a rota appointment subject to the following. The OR need only contact the Revenue in cases where the Revenue is not the petitioner but is a

substantial or major creditor and there are issues surrounding the appointment which, in the OR's judgement, the Revenue ought to be aware. Where the Revenue is the petitioning creditor it will contact the relevant OR directly should it have information relevant to the case or a preference as to the IP to be appointed. The contact names and telephone numbers are Jon Bennett on 01903 701181 or, in his absence, Kathy Alexander on 01903 701085.

**Note:** The OR cannot assume the agreement of HM Revenue & Customs to a non-rota appointment.

The DSS has indicated that they expect to be consulted like any other creditor.

## **8. Joint Appointments**

In a few cases it may be desirable to appoint joint office holders. For example, a joint appointment might be necessary because of size, complexity or geographical location(s) of the insolvent business. Additionally, some firms favour the appointment of joint IPs for practical purposes. This can have a positive benefit to the case by allowing the appointment of local staff as joint office holder rather than the single appointment of a non-resident partner.

Consequently, applications for joint appointments may be made when requested by the creditors or where the circumstances of the case warrant it or where there is unlikely to be a negative effect in terms of costs. Such a negative effect is unlikely to arise where the proposed joint appointees are from the same firm.

In liquidations, section 231 of the Act requires the appointment to include a declaration as to whether the joint office holders are to act together or separately. The IPs concerned should be consulted on this point and an appropriate paragraph should be added to the certificate of appointment.

"Any act required or authorised under any enactment to be done by the liquidator is to be done by one or more of the above named persons;

**or**

"Any act required or authorised under any enactment to be done by the liquidator is to be done by the above named persons together"

Similar provisions apply to the appointment of joint trustees by virtue of section 292(3) of the Act and one of the above paragraphs (suitably adapted) should be added to the certificate of appointment.

## **9. Partnership Cases**

ORs should be aware that in some Article 8 partnership cases, it may be the case that bankruptcy orders are made against the partners before the winding

up order has been made against the partnership. There is no power for the Secretary of State to appoint an IP in any of the estates until the winding up order has been made. This is because the OR must be the responsible IP of the partnership before he can apply to the Secretary of State, and he does not become so until the winding up order is made.

## **10. Batching of cases**

ORs who wish to pass small cases to IPs in batches should ensure a consistency of approach both with the size of cases and the number of cases batched working to a defined written policy. That policy may vary from office to office, is dependent on local circumstances and must be agreed by the Regional Manager.

ORs may also wish to consider using a separate rota for batch appointments.

## **11. Making an application**

Requests for agreement in principle for the appointment of trustees and liquidators by the SoS and for advice generally should be made by calling IPU, Birmingham on **0121 698 4441**. Callers should state that they require agreement in principle for an SOS appointment and will be put through to an appropriate person. Calls should not be directed to individual members of staff.

The "General Remarks" section of the application must adequately explain the reasons for the appointment. If the grounds are not properly made out, the application may be returned to the OR unprocessed.

If a member of IPU has given agreement in principle, the name of the person who has agreed the appointment must be stated in the application.

Applications based on agreements in principle should be sent to IPU by no later than the working day following the day the agreement in principle was given.

**The completed application should be sent to IPU, 4th Floor, Ladywood House, Birmingham.**

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