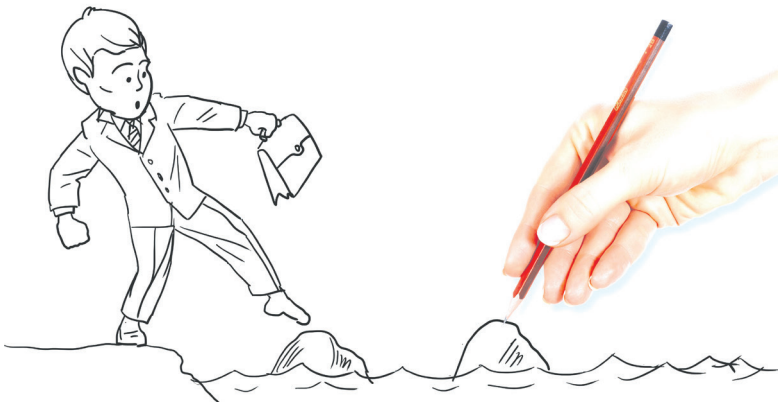
ITB12 Deemed Consent



new decision procedures

introduction

On 6 April 2017, a completely new set of insolvency legislation was introduced in the form of the Insolvency (England And Wales) Rules 2016.

As you may be aware, the Insolvency Act 1986 sets out the relevant legislation for dealing with insolvent businesses, companies and individuals. The various Insolvency Rules set out how to apply that legislation. The old Insolvency Rules had existed, largely in an unchanged form, for the last 30 years. The introduction of the 2016 rules is therefore a radical overhaul of insolvency legislation.

With the previous legislation, decisions required from creditors were either obtained via a correspondence vote by a certain date or by a meeting of creditors held on a certain date at which creditors could either attend in person or by proxy and vote on the decision required. Now, however, there are five different procedures that can be applied for obtaining decisions from creditors:

1. Deemed Consent;
2. Correspondence;
3. Electronic Voting;
4. Virtual Meeting; and
5. Physical Meeting

In this ITB we will be looking at "deemed consent".

creditor engagement

Creditor engagement (where creditors actively took part in a case) has dwindled gradually over the last 30 years down to a point where creditors effectively had no interest whatsoever in what happened to an individual, business or company that entered into a formal insolvency process. This, I suspect, is basically down to the fact that most insolvency cases result in little or no money being returned creditors. This is the nature of the vast majority of cases where there are in fact little or no assets to start with to turn into cash to return to creditors.

However, an office holder (such as a Liquidator or Administrator) still needs to obtain decisions from creditors to carry out their job. If creditors do not engage in the process and indicate is whether they would vote "yes" or "no" on a decision in the case, it was necessary for the office holder to make an application to Court to obtain the answer on a decision. This would then incur additional time and, in particular, cost which would have to be suffered in the case.

It remains the case that most creditors do not wish to engage in the insolvency process. However, the spirit and letter of the insolvency legislation requires the office holder to inform creditors of what is going on, so that they can then choose to engage or not. I am a great believer in making sure that creditors can at least make an informed decision on whether to engage in a case, particularly if such a decision may affect dividend prospects (i.e. what money may be returned to them).

If creditors then have all the information at their fingertips, they can decide whether to engage and if they choose not to do so then under the new legislation this will not prevent the officeholder from continuing to carry out his duties and do his job effectively.

what is "deemed consent"?

The "deemed consent" procedure for obtaining a decision from creditors has evolved from this lack of engagement. It is effectively where an officeholder informs creditors that he wishes to do a certain thing which in his opinion allows him to carry out his duties and do his job effectively, but the legislation requires creditors to approve this.

The most obvious example here is the appointment of a Liquidator in a creditors voluntary liquidation (see ITB 3). Under the previous insolvency rules the approval of the appointment of a liquidator (i.e. where creditors would vote "yes" or "no" to his appointment) needed an active involvement from creditors submitting their votes at a creditor meeting either in person or by proxy.

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Almost invariably (unless it was a very large or high-profile case) the vast majority of creditors would not even bother to submit a vote in reply to a notice convening a meeting of creditors to appoint liquidator due to a lack of interest.

This often led to problems in the liquidator being appointed if no "yes" votes were received regarding his appointment. If that happened a liquidator would not be appointed by the creditors which leads to an application to the Court, or a second meeting of creditors would need to be convened which added to the time and cost of the case. Now, where a decision is required from creditors (with some exceptions), such a decision can be obtained by deemed consent.

It is a simple process:

- A notice is sent to creditors setting out the details of the decision that is required (e.g. the appointment of a liquidator) and the date by which it is to be made;
- in the absence of enough objections to an assumed "yes" decision, creditors are deemed to have consented to the decision in the form of a "yes, you can go ahead and do what you have proposed", e.g. the named liquidator can be appointed;
- the officeholder can then proceed as if creditors had actively consented to the decision;
- the date when the decision is deemed to have been consented to is called the "decision date" and where matters require a specific date, this date is used;

objecting to "deemed consent"

At any point from the date the notices are delivered to creditors, they can object to an automatic deemed consent taking place by giving notice to the office holder that they object to it and such objection would trigger a mandatory requirement for a physical meeting of creditors to be held to consider the decision instead.

The opportunity to object provides a safety feature in an automatic process so that if creditors want to engage on a particularly complex or thorny matter, they can!

Objections must meet certain criteria, the so-called "10/10/10 rule". This is:

- 10% (or more) in value of creditors; or
- 10% (or more) in number of creditors; or
- 10 (or more) individual creditors.

In practice, this means:

- where the value of total creditors who could vote are estimated at £110,000, then a minimum of £11,000 of creditor value needs to object, even if the number of creditors are less than 10% of the total number of creditors or less than 10 individual creditors;
- where there are 45 individual creditors who could vote, then 10% of these (i.e. a minimum of five, rounding up) need to object even if they do not add up to 10% of the total value of creditors or are less than 10 individual creditors;
- where 10 or more individual creditors who could vote object, even if they do not total 10% of the value or 10% of the number of creditors.

Once the relevant objections have been received, the only outcome then is to cancel the deemed consent procedure and move to the mandatory holding of physical meeting.

In this way, important but otherwise potentially non-contentious, decisions can be made to enable the office holder to get on with things but where creditors do wish to be involved in the process they have an opportunity to do so.

Given the previous and potentially continuing lack of engagement by creditors in the insolvency process the "deemed consent" procedure is a very useful way forward.

there is no substitute for expert advice

I have been advising individuals and businesses suffering financial distress since 1986, a substantial part of that time having been spent within the Insolvency and Business Recovery practices at two of the "Big Four" UK accountancy firms.

In that time I have come across many instances where a particular insolvency process has proven to be a blessing in disguise for someone who may have no idea of what they can do.

As a Fellow of the Association of Business Recovery Professionals (also known as "R3" - Rescue, Recovery and Renewal) you can be assured that I am an expert in my field and will be able to help with an individual's needs.

Get in touch

Please call me for further information or to arrange a free initial meeting.

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