

# Adrian Leopard & Co

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## Individual Voluntary Arrangements

### The views of Adrian Leopard & Co

#### The Background

The Individual Voluntary Arrangement (IVA) is a procedure which was introduced by the Insolvency Act 1985 and is now embodied in the Insolvency Act 1986. It was brought about to create a realistic alternative to bankruptcy for individuals. Whereas companies have been able to go into voluntary liquidation for many years, the only voluntary procedure available to individuals was to enter into a deed of arrangement which was in itself a cumbersome process.

The essence of a voluntary arrangement is that it is just that - voluntary. It requires the consent of at least 75% in value of the creditors voting but it is then binding on all the creditors who were notified of the creditors meeting. The procedure starts with the application to the court to stay all actions and proceedings against a debtor by means of what is known as an "interim order" under section 252 of the Insolvency Act. Such an order is effective for fourteen days and before the end of that time, an insolvency practitioner who is termed "the nominee" prepares a report to the court stating whether he recommends that a creditors meeting ought to be called or not. If he does then he specifies a time, date and venue and the court will extend the period during which the order is effective to enable the meeting to be held.

At the meeting, the creditors have to decide whether to accept or reject the proposal with or without modifications. It can be adjourned for up to fourteen days but if it is not approved by the end of that period, it is automatically rejected. A debtor can only make one application for an interim order in any period of twelve months so it is essential that he gets it right the first time.

Having got it right, the debtor merely has to honour his proposal. Provided he does, he will avoid bankruptcy and the disabilities which go with it. He may find that this will enable him to continue running his business and save his long term living whereas in bankruptcy that is invariably lost.

## Benefits to Creditors

*Why should creditors go along with a voluntary arrangement?*

In our view, a voluntary arrangement must have the following ingredients to give it credence:

1 The proposal ought to provide that the creditors will do better than if the debtor were to go bankrupt. Only if such an incentive exists are creditors likely to be persuaded that an arrangement is beneficial.

2 Debtors must come with absolutely clean hands and a full disclosure of all their financial affairs, no matter how painful that may be.

3 If there is a possibility of saving a business, jobs and perhaps homes, then a voluntary arrangement has additional merit bearing in mind the difficult times we live in and the number of businesses which, unfortunately, cannot be saved.

4 Considering that the debtor is likely to benefit overall from the making of an arrangement, then those benefits ought properly to be reflected in the offer made to creditors.

5 *Any proposal put must realistically be achievable.*

6 The Official Receiver's costs and Department of Trade and Industry's ad valorem fees of 15% of assets realised will be saved.

## Our Principles for an IVA

### 1 Debtor's Arrangement

Firstly it can be seen that there are advantages to a debtor in persuading his creditors to go along with a voluntary arrangement. For each individual, the reasons will be different. However, on the assumption that there is a reason, a debtor needs to ensure that his creditors will do better. He may have to work extra hard; he will probably have to economise in his standard of living; above all he will have to show that he will be making a

real effort, because *only one person will ensure the success of an IVA - the debtor himself.*

## 2 Full Disclosure

In our view, full disclosure is an absolute fundamental to a voluntary arrangement. If a debtor does not want to disclose all of his affairs, then he should avoid a voluntary arrangement because all he will do is to cause embarrassment to his practitioner who will, in the end, either have to avoid acting or perhaps bankrupt him. He would perhaps do better to take his chances with the Official Receiver; playing with fire has its risks.

For the avoidance of doubt, this firm will not act in any case where it considers that a debtor does not fulfil the condition laid down in this paragraph.

## 3 Debtor's Possessions

It is undoubtedly difficult for a debtor to come to terms with parting with his motor car or some of his valued possessions but this is the downside of insolvency generally and applies equally to a voluntary arrangement as it does to bankruptcy. However, in a voluntary arrangement, it may be possible to persuade creditors to leave certain assets alone provided that some alternative funds can be made available to compensate them.

## 4 Saving the Business

One of the greatest reasons, in our view, to go for a voluntary arrangement is to save a business or deal with its orderly winding up and disposal. Bankruptcy simply does not provide a satisfactory route for businesses which are still running and there is much that an insolvency practitioner can do, especially with the protection of an interim order, to preserve the assets for the creditors generally even if the business has been sold by the time the creditors meeting is held.

Insolvency practitioners are today exhorted to try and save businesses if there is any possibility of doing so and for an individual or partnership, the voluntary arrangement is the only practicable way forward. There must clearly be merit in any scheme which will save a business and jobs and perhaps more private houses from being forced on to an already saturated market.

## 5 Hidden Benefits

Sometimes a voluntary arrangement can produce "*hidden benefits*" or opportunities which would probably be lost in a bankruptcy situation. It is our view that the value of those benefits should be disclosed and shared or made available to creditors. It is, after all, their forbearance which enables those benefits to be obtained.

## 6 Must be achievable

It is obviously essential for the debtor to make a proposal which he can achieve as failure to meet his obligations will result in his being made bankrupt. Moral - do not attempt the impossible as that is as bad as giving nothing at all!

## 7 Other disclosures

A voluntary arrangement requires disclosing whether certain transactions have taken place. These are transactions which could be set aside in bankruptcy but not otherwise. The requirement is such that any such transaction must be notified to the creditors so that they can decide whether bankruptcy should be pursued to have the matter rectified.

These transactions are:

a *Transactions at an undervalue - section 339.* This section provides that a gift for no consideration, a transaction in consideration of marriage or a transaction for a consideration, the value of which is less than the actual value of the transaction, may all be set aside and reversed.

b *Preferences - section 340.* This operates where a person has been in some way preferred or put in a better position by a debtor. There must also be present a desire to prefer.

c *Extortionate credit transactions - section 343.* This section relates to transactions involving the provision of credit to a debtor, the terms of which require grossly exorbitant payments to be made in respect of the provision or otherwise grossly contravene ordinary principles of fair dealing.

In our view, if one of the foregoing has taken place, a debtor wishing to pursue a voluntary arrangement should either take steps to nullify the position himself or must somehow show that his creditors will be otherwise compensated for the loss to his estate or the transaction must be of insignificance in assessing the overall position of his estate.

It may be necessary to take legal advice on such matters before a proposal can be embarked upon.

Do not venture into a voluntary arrangement if one of these problems exists without coming clean - it will only cause inordinate grief and, in the end, if it is concealed you can go bankrupt anyway because you will have made a false statement in your proposal.

It is this firm's view that we will not act if we do not agree with the prospective treatment of any transactions falling under the above-mentioned headings.

Also, debtors must be aware that the making of false statements for the purposes of obtaining approval to a voluntary arrangement is an offence.

### Caveat

The individual voluntary arrangement is a process recognised by law but thereafter little regulated. As a result, many matters have come before the courts since the inception of the procedure in order to clarify various issues. Needless to say, these issues have been decided both for and against debtors. Accordingly, it should be pointed out that in some circumstances the voluntary arrangement can encounter difficulties which it may not be possible to foresee.

### Conclusions

What all of this means to debtors is that there is a positive alternative to bankruptcy if there are opportunities ahead or there is a business with some value to continue or to have wound up professionally. As is so often the case, people wait until it is too late and then approach an insolvency practitioner. Although they do sometimes perform miracles, they do need some reasonable material to work with and a business with no assets and virtually no customers offers little opportunity for any sort of rescue package or other way to enable a debtor to walk away with some degree of honour still intact. In such cases, bankruptcy is the only route.

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