Bankruptcy IVA providers, secret commissions and public interest winding-up petitions under section 124A of the Insolvency Act 1986 (Secretary of State for Business, Energy and Industrial Strategy v Vanguard Insolvency Practitioners Ltd)

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Restructuring & Insolvency analysis: This successful public interest winding-up petition, which was at first contested but then ultimately unopposed, was presented on the grounds that the respondent individual voluntary arrangement (IVA) providers (respondent companies) were carrying on their business in a way which lacked transparency and commercial probity, and which offended the spirit if not the letter of Statement of Insolvency Practice (SIP) 9. The respondent companies used various third party case management companies to conduct the IVAs and paid these third parties substantial fees for doing so. These fees made their way back to the respondent companies in the form of commission/revenue sharing. Neither debtors nor creditors were informed that the respondent companies would be benefiting from 'secret commissions'. Accordingly, monies within the IVA were not applied in the interests of creditors/debtors, but for the benefit of those controlling the respondent companies. Written by Alex Akin, associate at Keidan Harrison LLP.

Secretary of State for Business, Energy and Industrial Strategy v Vanguard Insolvency and others [2022] EWHC 1589 (Ch), [2022] All ER (D) 102 (Jun)

What are the practical implications of this case?

The arrangements by which office-holders in IVAs are remunerated (directly or indirectly)—must be transparent. This should be explained adequately in writing and be in line with SIP 9.

The approach of the respondent companies in this case was said to be contrary to public interest and justify the winding-up order. The court also appeared to rely on the failure of the respondent companies' director to recognise that the conduct was wrong in order to find that there was no sufficient competing reason for refusing winding-up orders. The willingness to recognise improper conduct may, therefore, in certain circumstances be sufficient to avoid winding up on public grounds albeit it would be unlikely in cases of suspected impropriety of this nature.

Noticeably lacking within the judgment is criticism of the insolvency practitioner (IP). In many ways this is not surprising as the IP was unaware of the financial benefit the respondent companies were deriving from the commissions because they appear to have been disguised. In addition, the third-party case management companies were appointed before the IP was in office.

What was the background?

This winding-up petition was presented under the public interest ground at section 124A of the Insolvency Act 1986 (IA 1986). It was initially opposed but the opposition was withdrawn prior to trial.

Although rarely used, IA 1986, s 124A provides that a company may be wound up if it is 'expedient' and 'in the public interest'.

The respondent companies were in the business of providing and administering IVAs. Mr Noblett was the sole director and the individual with significant financial control of the four respondent companies.

The applicant's grounds for winding up under the public interest ground can be broken down as follows:

- the respondent companies' business methods lacked commercial probity and transparency. Monies were paid out of IVA estates to third party case management companies and were classified as expenses. These were in fact payments which ended up as financial benefits to Mr Noblett, or his family and associates
- the third party case management companies made no discernable contribution, nor did they add to the value of the IVA estate
- the respondent companies did not at any stage communicate to debtors or creditors that Mr Noblett, or his family and associates would benefit from the payments to third party case management companies
- the business practices of the respondent companies offended the spirit, if not the letter of SIP 9

Detail on the first three grounds are provided below.

Commercial probity and transparency

The most apposite examples relate to payments to third party case management companies. For example, the second respondent company, MDN Consultancy Ltd, provided instructions to these third parties and in return it received commission of £3m. In addition, the fourth respondent company, KIS Financial Consultancy Ltd (KIS), paid £450,000 to five third-party companies. Most notably, KIS received £331,000 back as commission. Significant payments for software licenses were also made to Horizon Insolvency Software Development Limited–this company only had two clients, namely the first respondent company, Vanguard Insolvency, and another company which was owned by Newtco Ltd, the third respondent company.

Lack of Information provided to debtors and creditors

It was never at any time made clear to either debtors or creditors that Mr Noblett or family members were benefiting from the commission/revenue shares which were received from the third-party case management companies. For example, debtors and creditors were unaware that a Dubai company, Insolvency Analysis Consultants (which provided services to the IVA estates)—was owned by Mr Noblett's brother-in-law. This Dubai company received almost £3m out of the estates.

What did the court decide?

The judge was satisfied that the IVA arrangements lacked commercial probity. There was no evidence that the persons or entities interested in the IVA estates derived any value from the third-party case management companies, or that these companies provided any discernible services. The judge went as far as concluding that in many instances there was no evidence that these third-party case management companies carried out any work whatsoever.

As such the court concluded that the respondent companies should be wound up on public interest grounds.

On the subject of commissions, the judge concluded that the payments from the first respondent company to various third-party case management companies were 'simply a mechanism used to extract monies from the IVAs for the benefit of Mr Noblett and those connected with him, either for his own personal benefit, or in order to provide funding to [the first respondent company]'. Counsel for the applicant drew parallels with secret commissions and the decision in *Varden Nuttall Ltd v Nuttall* [2018] EWHC 3868 (Ch) which the judge endorsed.

It was held that the respondent companies' conduct was contrary to the spirit of SIP 9 as the objectivity of the IP was clearly at threat. The IP's employment was intrinsically linked to Mr Noblett and the financial position of the first respondent company.

At the closing paragraphs of the judgment, the judge commented on Mr Noblett's witness evidence. He noted that the winding-up petition was at first defended by the respondent companies but ultimately unopposed as they lacked the means to finance the dispute.

Strikingly, Mr Noblett appears to not accept that the business methods were opaque and worked to the detriment of creditors and debtors. This contributed to the judge's view that there was no sufficient competing reason to deny the winding up.

Case details:

- Court: Chancery Division, Manchester District Registry
- Judge: His Honour Judge Hodge QC (sitting as a High Court judge)
- Date of judgment: 12 May 2022

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