

Ongoing IVA Trusts: Where are we now?

Kathryn MacLennan wonders if debtors can take any comfort from the recent ruling by the Court of Appeal



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In March of this year the Court of Appeal (“CoA”) handed down the long awaited decision in the case outlined below. This provided clarity to the IVA (Individual Voluntary Arrangements) industry on the issue of trusts within a duly completed IVA and the purpose of a certificate of completion provided to debtor.

What comfort can debtors actually take from this document in respect of their liabilities, their assets and how they can know whether their IVA is actually “complete”?

Facts of the Case

Mr Wright entered into an IVA with his creditors in 2007 and met all obligations under the contract. This was an “all assets” IVA: any assets which would have been comprised within a bankruptcy estate were now comprised within the IVA unless specifically excluded. The IVA created a trust to the effect that assets comprised within the arrangement were held on trust for the benefit of creditors.

The definition of “assets” within the IVA was the same as that for bankruptcy. The right to pursue the PPI mis-selling claims was in existence in 2007 when the IVA was entered into, therefore an asset was comprised within the IVA. This is regardless of the fact that the debtor or the supervisor may not have been aware of the existence of any such claims when the IVA terms were agreed.

In 2013 the IVA concluded successfully. A final dividend was paid to creditors and Mr Wright received his certificate of

completion. He had complied with all his obligations under the contract and the certificate confirmed that he had no further liability to the creditors bound by the IVA. Months later two PPI mis-selling claims were upheld and funds in the region of £24,500 were paid by the respective banks. Those funds were paid to the supervisor of the IVA.

The lower courts held the funds were due and payable to the debtor. A certificate of completion was conclusive and it brought to an end the debtor’s liability to those creditors, the IVA and any trust created by it.

Court of Appeal

The Court of Appeal (“CoA”) overturned the decision of the lower court and ruled the funds were due to the supervisor. There were a number of key issues addressed.

Does an IVA trust survive completion?

Yes. If there is no specific provision within the IVA terms to confirm what will happen to a trust on completion, then it will survive. The CoA took the view that despite *Green v Wright* dealing with due completion, as opposed to termination, the debtor faced the same burden as in *N T Gallagher & Son Ltd v Tomlinson* [2002] EWCA Civ 404 i.e. to demonstrate why a fully constructed trust should come to an end where the contract does not provide for that outcome.

Who are the beneficiaries?

The debtor’s position was that due completion brought the trust to an end and that even if it did not,



and the trust survived, there were no beneficiaries under such trust as the creditors has accepted the dividend payments under the IVA in full and final settlement of his liabilities.

The CoA decided the IVA creditors remained as beneficiaries under the trust and it considered the fundamental definitions of “creditor” and “debt” in reaching this conclusion. Any reference to “creditor” was to be fixed by reference to those owed at the commencement of the IVA.

What does a certificate of discharge achieve?

The debtor had received his certificate and all creditors had been notified of completion of the IVA in accordance with the Insolvency Rules 1986. The debtor took the view that he had no further liability to the creditors which sat alongside his argument that therefore the creditors could

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not be beneficiaries under any trust. The CoA has clarified that a certificate of completion is to have the same effect as a certificate of discharge in bankruptcy. Section 281 (1) of the Insolvency Act 1986 confirms that a certificate of discharge in bankruptcy releases the bankrupt from his liability for the bankruptcy debts but it has no effect on the bankruptcy estate and the Trustee's position.

The bankruptcy debts continue notwithstanding the certificate of discharge and assets which have vested in the Trustee remain so vested and available for realisation to pay those debts.

The CoA has drawn a parallel between the certificate of completion in an IVA and that of discharge in a bankruptcy. However, it is worth noting that Rule 5.34 of the Insolvency Rules 1986 (Rule 8.31 Insolvency Rules 2016) sets out the procedural requirement for completion of an IVA and is silent on the effect of the certificate. The CoA concluded that the certificate of completion will have the same effect as that for discharge in that it will separate the debtor from his liabilities. He would be free from any liabilities but his pledged assets within the IVA would remain subject to the on going trust until realised. The difficulty with this assessment is that in bankruptcy the assets remain vested in the Trustee pursuant to section 306 of the Insolvency Act 1986. There is no such vesting in an IVA. Any PPI claims remain vested in the debtor (in the absence of assignment), so the debtor is not free from his obligations – as a bankrupt arguably would be – as he continues to be subject to the obligation of holding the assets in question on trust.

Current position

This decision has brought some long needed clarity to the IVA sector. IVAs which were kept open pending this decision can now be dealt with and long awaited certificates of completion can be issued to debtors. This decision was welcomed by the insolvency profession for the clarity it

provided but matters may not be as straightforward as they seem and the decision could, in the short term, create more problems than it solves.

This decision does not affect every IVA. There is no statutory requirement for an IVA to create a trust and, although many of them do, there will be some arrangements with no trust. It is too simplistic to say that *Green v Wright* affects every case and is a vehicle for PPI realisations to be collected by the IP post closure in every case. IPs will need to consider the terms of each case and decide whether there is a trust and whether it has been terminated. They will need to exercise caution in any view they can claim post closure realisations without undertaking this exercise. If they do not, then they risk claiming, receiving and distributing post closure realisations they have no entitlement to leading to claims against them by the affected debtors.

Green v Wright considers the R3 standard conditions applicable to the arrangement of Mr Wright. Other terms and conditions which contain different trust provisions which might lead to a different outcome. The most common being the IVA Protocol terms which include a trust provision but this is “*whilst the arrangement is in force.*” These words were not considered in *Green v Wright* so there is no authority on their effect on any trust on completion. It is possible to interpret these words as ending the trust on completion or, equally, they can be viewed as allowing the trust to continue – an arguable case can be made either way. This ambiguity in such widely used terms and conditions is not helpful to IPs or consumers and different interpretations are already appearing.

Variations are also a cause for concern. There are instances of IPs contacting debtors where an IVA was concluded early due to a one off payment. The debtor may take the view that such payment

was in lieu of all obligations under the IVA (which would include any obligation to continue to hold assets on trust) but some IPs are taking a different view and maintaining the variation did not end the trust, therefore any post closure PPI would still be caught by that trust.

IPs may well find themselves holding PPI realisations which have awaited distribution pending Green v Wright. However, they may also find there is no provision for them to be paid any fees in respect of post closure realisations. IPs are then faced with having to reach agreements with creditors as to what fees will be paid from trust assets.

There will be a significant number of trusts out there. The trustee will be the supervisor who was in office when the IVA concluded. This causes practical problems when IPs move on etc. A block transfer order is appropriate to transfer the office of supervisor but it may not be the correct mechanism for transferring the role of trustee of any on going trust. This will have an impact on the movement of appointments and sale of IVA books particularly where a provider has decided to exit the market completely. That provider and the book purchaser will want to ensure that the role of trustee passes to the purchaser along with all rights and obligations associated with that office.

The FCA has confirmed the deadline for submission of PPI claims is August 2019 and it is anticipated there will now be an increase in numbers as consumers must act before this cut-off date. Lenders are setting aside millions in additional funding to cover these claims. These are big numbers and it seems that, given the existence of on going trust and the amounts involved, PPI claims will continue to be a prominent issue within the IVA industry ■



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