# 28 days later

## When will the courts allow an out of time challenge to an IVA? Daniel Lightman examines the case law

Creditors wishing to challenge the approval of a debtor's individual voluntary arrangement (IVA) should beware of applying out of time. A recent case has highlighted the importance of keeping to the 28-day time limit for bringing such applications – unless you have a very good excuse for applying late.

Applications to the court may be made under s 262(1) of the Insolvency Act 1986 (the Act) on two grounds: that the IVA approved by a meeting of the debtor's creditors unfairly prejudices the interests of a creditor of the debtor; and that there has been a material irregularity at or in relation to the meeting.

### Applying out of time

However, s 262(3) of the Act provides that an application to challenge the decision of the creditors' meeting "shall not be made after the end of the period of 28 days beginning with the day on which the report of the creditors' meeting was made to the court under s 259". By s 262(8), except by way of a challenge under s 262, an IVA's approval at a creditors' meeting is not invalidated by any irregularity at or in relation to the meeting.

### Tager v Westpac

In *Tager v Westpac Banking Corp* [1997] 1 BCLC 313 HH Judge Weekes QC (sitting as a High Court judge) held the 28-day time limit for making a challenge under s 262 may be extended in appropriate circumstances by virtue of s 376 of the Act, which provides: "Where by any provision in this Group of Parts or by the rules the time for doing anything is limited, the court may extend the time, either before or after it has expired, on such terms, if any, as it thinks fit."

Judge Weekes came to that view even though he recognised that "there is an inherent conflict between s 262 standing alone, which seeks to achieve finality and certainty, and s 376, which introduces an element of flexibility and discretion."

### Facts

The facts of *Tager v Westpac* were most unusual. Creditors opposed to the IVA challenged (within the requisite 28 days) the nominee's decision to allow a particular creditor to vote. They were successful in that challenge, and the debtor sought to argue (after the expiry of the 28-day period) that an opposing creditor should have been excluded from voting. There had been no reason for the debtor to challenge the original decision of the meeting (the IVA having purportedly been approved) until he became aware of the opposing creditors' challenge.

### Re Bournemouth & Boscombe

Subsequently, in *Re Bournemouth & Boscombe Athletic Football Club Co Ltd* [1997] BPIR 183, Lloyd J determined that the court has no power to extend the 28-day time limit from the date of the report to the court for bringing applications under s 6 of the Act in relation to company voluntary arrangements (CVAs). Section 376 only applies to time limits imposed by provisions in the Second Group of Parts of the Act (ss 252 to 385, which concern personal insolvency) or by the Insolvency Rules 1986, and s 6 falls within the First Group of Parts of the Act (ss 1 to 251, which concern corporate insolvency).

However, where a creditor should have been but was not given notice of the creditors' meeting to consider an IVA or a CVA, s/he may apply to challenge the decision within 28 days of becoming aware that the creditors' meeting has taken place: s 262(3)(b) of the Act, as added by ss 2 and 3 of, and Scheds 2 and 3 to, the Insolvency Act 2000.

### Plant v Plant

In *Plant v Plant* [1998] 1 BCLC 38, at 53, Carnwarth J noted:

> "I certainly can see considerable arguments as a matter of policy for treating the time limit in s 262 as absolute but I see force in the point which led Judge Weeks to the contrary conclusion, namely that s 376 is in clear terms, and in those terms does apply to s 262. The fact that there is no equivalent power in relation to the corresponding provisions for companies is a factor, but certainly not such a factor as would lead me to say that that decision was plainly wrong.
>
> **"On the other hand, I do see the force of the point that the court will not grant an extension of time, other than in special circumstances. Certainly, I see it as inconceivable that the court would grant an extension of time to someone who was seeking to rely on an irregularity, the gist of which was fully known to him at the time the IVA was established, and in circumstances where he had full opportunity to pursue the point at that time..."**
> [emphasis added]

### 10-month extension

In contrast, in *Debtor (No 488 IO of 1996), Re A Debtor, JP v Debtor* [1999] BPIR 206, the time for applying under s 262 was extended for almost 10 months. Sir John Vinelott noted the debtor husband had not suffered any significant prejudice, and said:

> "It would, I think, be unduly harsh that the wife should be bound by a voluntary arrangement which, in my judgment, unfairly prejudices her because of delays which have occurred largely as a result of failures which cannot be attributed to her personally."

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### *Warley Continental Services Ltd*

Very recently, in *Warley Continental Services Ltd v Paul Johal* (2002) *The Times*, 28 October, HH Judge Norris QC (sitting as a High Court judge) had to consider a tardy application by a creditor under s 262 claiming there had been some material irregularity at, or in relation to, the meeting of creditors at which an IVA proposal had been approved. The meeting took place on 26 June 2001. The report of the meeting was duly made to the court under s 259 on 28 June 2001. However, the creditor did not issue its application to revoke or suspend the approval of the IVA until 12 September 2001, more than 10 weeks later.

Judge Norris QC (obiter) agreed with Judge Weekes QC's decision in *Tager* that the court does have a discretion to extend the time limit imposed by s 262(3).

Judge Norris QC rejected the argument that the power to extend time under s 262 is an exceptional one, and, following Judge Weekes QC's approach in *Tager*, held: "The exercise of the discretion involves balancing considerations such as the length of the delay, the reasons for the delay, the merits of the underlying complaint, and the prejudice to the parties (other than that inevitably involved in extending the time limit)."

He added that the conduct of the parties "... is of potential significance in a wide range of cases. Such conduct would include, on the applicant's side, warning given of the application; and on the supervisor's/debtor's side promptness and openness in addressing concerns raised by potential applicants (bearing in mind the status of the supervisor as an independent professional responsible to the court, not a servant of the debtor)."

The judge noted, however, that the time-limit is a substantive provision laid down in the Act itself, not a procedural time-limit, and, as Sir Robert Megarry VC stated in *Re Salmon (dec'd)* [1981] Ch 167, at 175: "The burden on the applicant is thus... no triviality; the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to extend the time."

### 'Neutral' prejudice

Judge Norris QC found there had been material irregularities at the meeting of creditors, but for which the IVA proposal would have been rejected by the debtor's creditors, and the debtor had failed to discharge his obligations of good faith and total transparency. He also found the prejudice caused by the s 262 application having been made late to be "neutral", after stating:

> "... prejudice has, principally, to be assessed as at the time when the application under s 262 is made, rather than at the time when that application falls to be determined. Only rarely would events occurring after the date of the application and before the date of the hearing come into consideration: one instance may be where the applicant's conduct of the application itself has served to prolong the period of uncertainty. The possibility of prejudice arising between the date of the application and the date of its determination is inherent in the process of challenge itself."

Judge Norris QC formulated the essential question faced in the instant case as: 'Does a strong case on the merits outweigh significant delay for which there is no really satisfactory justification?' He concluded the answer was 'no', in light of the need to give:

> "... proper weight to the need for certainty, and recognising the very short time limit which the Act imposes to achieve that objective ... and giving proper weight to the need for consistency of approach at first instance (bearing particularly in mind the observation of Carnwath J in *Plant v Plant*)".

Judge Norris QC rejected the creditor's application for permission to extend time for the bringing of its application under s 262, because all of its complaints with real merit could have been advanced within the 28-day time limit:

> "A substantial case needs to be made in support of the application to extend time. Substantial merits count, but substantial reasons for the delay are also required, and they are lacking."

### Conclusions

There are powerful policy considerations for a restrictive approach to late challenges to the decisions of creditors' meetings to approve (or reject) IVAs. Certainty of outcome is of paramount importance in relation to IVAs. Legal certainty is important if the debtor, the creditors and the supervisor are to know where they stand. That is the reason for the short time limit for challenge imposed by s 262(3) and the prohibition on other challenges on the ground of irregularity imposed by s 262(8): see per Robert Walker LJ in *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615, at 628.

The need for certainty exists whether the IVA proposal is approved or rejected. If the IVA proposal is approved, it is important for the supervisor to know that, if no application under s 262 has been made within 28 days after s/he has reported to the court, s/he will be able to rely upon the outcome of the meeting, and to commence his/her duties. The success of the IVA often depends on its being implemented without delay.

If, on the other hand, the IVA proposal is rejected, a petitioning creditor will wish to present a bankruptcy petition quickly, and should not, as far as possible, be delayed by an appeal made out of time.

The same time limit – and the same policy considerations in relation to applications to extend time – apply to appeals under r 5.17(8) of the Insolvency Rules 1986 against the chairman's decision on entitlement to vote at a meeting of creditors to consider the IVA proposal ■

## Practice points

- Creditors wishing to challenge the approval (or rejection) of a company's CVA proposal or a debtor's IVA proposal who were given notice of the creditors' meeting to consider the IVA or CVA proposal must apply to the court within 28 days of the report to court of the creditors' meeting.
- If a creditor should have been, but was not, given notice of the meeting, the application to the court must be made within 28 days of their becoming aware that the creditors' meeting has taken place.
- The court has no power to extend the 28 day time limit for applications in relation to CVAs.
- While the court has jurisdiction to extend the 28 day time limit within which a debtor's creditors can bring applications in relation to an IVA:
  - it is very unlikely to do so unless the applicant provides substantial reasons for the delay, and
  - it will not do so if the applicant is seeking to rely on matters it knew of at the time the IVA was approved (or rejected), in circumstances where it had the opportunity to pursue the point at the time, regardless of how strong the applicant's case is on the merits.