PPI Guidance Review in the light of the decision in Green v Wright

INTRODUCTION

1. In April 2013, the RPBs, in collaboration with R3 and DRF, issued guidance on the treatment of PPI claims in personal insolvency ("PPI Guidance"). That guidance was subsequently subject to minor revision in respect of notification to HMRC. A recent review of the current PPI Guidance by those issuing this guidance indicates that its provisions are unaffected by the decision in Green v Wright. This guidance note is supplemental to the PPI Guidance and intended to provide clarification in respect of individual voluntary arrangements only.
2. This guidance is issued by:
    - Insolvency Practitioners Association
    - The Institute of Chartered Accountants in England & Wales
    - The Association of Chartered Certified Accountants
    - The Institute of Chartered Accountants of Scotland
    - Chartered Accountants Ireland
    - Association of Business Recovery Professionals (R3)
3. This guidance does not constitute legal advice nor does it seek to instruct or direct IPs in the administration of their insolvency cases. The bodies issuing this guide do not accept any liability in respect of actions that IPs may take in accordance with it, as it must be for each IP to be satisfied that his/her conduct meets the legal and professional requirements placed upon office-holders. However, notwithstanding the above, IPs should have regard to the regulatory as well as legal consequences of their actions.
4. This guidance covers the following matters:
    - Implications of the decision in Green v Wright
    - Is the PPI refund an asset of the arrangement?
    - What is the effect on any continuing trust of the completion or termination of the arrangement?
    - What are a former supervisor's obligations in respect of closed cases?
    - Unexpected PPI claims in "full and final settlement" cases
    - Documenting strategies, decisions and the reasons for them
    - The importance of communications with debtors
    - Future IVAs

IMPLICATIONS OF THE DECISION IN GREEN V WRIGHT

5. The decision in Green v Wright has provided some welcome clarification as to the entitlement to PPI refunds that are received by a former supervisor following the completion of an IVA. The decision could also apply to other post-closure receipts (other than where these have been specifically provided for). Uncertainty about this area may have resulted in completion certificates being withheld in some cases, and in others, distribution of post-closure PPI receipts being delayed, pending the outcome of the case.

6. It is now settled that where an IVA has created a trust over assets which is not terminated upon completion of the arrangement and the former supervisor receives the realisation of a trust asset after the completion of an IVA, it is in order for them to distribute these funds in accordance with the terms of the arrangement. This is notwithstanding that a Completion Certificate may have been issued to the debtor. The decision confirms that the mere issuing of the Completion Certificate will not itself, without express additional provision, terminate any trust over the arrangement assets.
7. This decision should provide IPs with comfort that they may now distribute funds being held pending this decision and they may also now agree assignments with debtors to deal with the PPI post-closure, in appropriate cases (a suggested option to facilitate closure in the PPI Guidance). As the decision has not been appealed, the case itself should no longer provide a reason for Completion Certificates to be withheld, nor distributions to creditors further delayed.
8. The wider implications of this ruling on closed cases have been the subject of some conjecture. In the Green v Wright case, the debtor received a refund post completion which was sent to the former supervisor. The ruling has provided clarity as to who is entitled to that refund, given the terms of that particular arrangement, which were based upon R3 Standard Conditions for IVAs (which are both “all asset” in their nature and impose a continuing trust, post-completion – see below).
9. The possibility of PPI refunds has been known for some years and arrangements written since the issue became widely known will typically make express provision for the treatment of these claims. Many arrangements written prior to an awareness of the availability of PPI refunds have been varied to contain specific provision for their inclusion.
10. Where the possibility of PPI claims was known, the IPs will have conducted due diligence as to the availability of such claims to the arrangements that they supervise, in accordance with the PPI Guidance. Therefore, in most instances, the possibility of there being unknown claims in respect of which express provision had not been made, receipt of which then occurs post--closure (whether by termination or completion), should be infrequent. These factors may limit the impact of the Green v Wright decision on those cases. However, the Financial Ombudsman regularly revises guidance for banks in respect of PPI claims and claims are revisited on this basis. It is the case that there will be instances where claims which were originally rejected will be upheld on application of the new guidance and payment made accordingly.

Where a PPI refund is encountered following the closure of a case, IPs should consider and ascertain the following:

IS THE PPI REFUND AN ASSET OF THE ARRANGEMENT?

11. As noted in the PPI Guidance at paragraph 2.2, there are broadly two types of IVA: “all asset” and “defined asset” types. The guidance on this distinction was provided with the benefit of Counsel’s advice and is not thought to be materially contradicted by the decision in Green v Wright. Furthermore, the decision in Green v Wright is understood only to be of direct application to “all asset” type arrangements.
12. For an IVA to be an “all asset” type IVA, there must be a specific clause to this effect, bringing those assets within the scope of the arrangement. It is understood that a “defined asset” type IVA is less likely to be impacted by the decision in Green v Wright, as the assets of the arrangement are ascertained and treatment of them is defined at the inception of the arrangement. However, it remains possible that arrangement assets remain unrealised at the conclusion of the IVA, particularly where claims have not been fully disclosed or where previously rejected claims have subsequently been upheld.

13. Both R3 Standard Conditions and IVA Protocol Standard Conditions currently contain an “all asset” clause. However, it should be noted that prior to the January 2014 iteration, the IVA Protocol Standard Conditions did not contain such a clause.

14. In all cases, reference should be made to the terms of the individual proposal (and any approved modifications or variations thereto) to ascertain whether the standard conditions have been altered in respect of the assets comprised within the arrangement i.e. whether the arrangement is an all assets or defined asset type and whether there is a trust. There is further discussion on trusts below.

15. In any instance where PPI claims are specifically provided for within the arrangement terms, or where the arrangement terms provide for the inclusion of all assets that would be included within an estate in bankruptcy, the PPI claim is likely to be an asset of the arrangement. Where the arrangement is a defined assets type containing no provision for the inclusion of PPI claims, then it is unlikely that a PPI claim will be an asset of the arrangement. Provisions relating to the availability of the debtor’s income (as referred to in the PPI Guidance at paragraph 2.5) will not be effective following the conclusion of an arrangement as any entitlement to income would have come to an end.

WHAT IS THE EFFECT ON ANY CONTINUING TRUST OF THE COMPLETION OR TERMINATION OF THE ARRANGEMENT?

16. Green v Wright is clear in that, in order to bring a fully constructed trust to an end, there should be a specific term to this effect, and it should also confirm what is to happen to the assets which would have been comprised in such trust. In the absence of such provision, and following the decision in Green v Wright, it appears likely that the trust will continue.

17. It is possible for there to be a continuing trust in both “defined asset” or “all asset” type IVAs, depending upon the provisions of any trust clause they contain. In most cases utilising Standard Conditions, there will be clauses which specify what will happen to any trust over the assets in the event of termination of the arrangement.

18. Where R3 standard conditions have been used, these are contained at clauses:

> Version 1 (2001) 29(3) / Versions 2 (2004) & 3 (2013) 28(3):
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> **[Trusts to survive termination of Arrangement]** The trusts referred to in Sub-paragraphs (1) and (2) shall not come to an end upon termination of the Arrangement. Instead those assets shall be got in and realised by the Supervisor, and any proceeds applied and distributed in accordance with the terms of the Arrangement.

The decision in Green v Wright was based upon an unmodified version of this clause. Notwithstanding that this clause does not expressly refer to completion, the Court concluded that the trust over arrangement assets continued. The Court was satisfied that this clause effectively deals with the eventuality of termination of the IVA, but considered that it does not deal with circumstances where the arrangement is successfully completed. The Court’s position was that following completion the trust continued because there was nothing in the IVA to say otherwise. In the absence of any specific terms the default position is that the trust continues.

19. In Protocol cases, provision is found in the following clause, which has not been subject to revision within any of the various iterations of the Protocol Standard Conditions:

> **Holding arrangement assets in trust**
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> Whilst the arrangement is in force:

> **15(1)** You must hold in trust for the purposes of the arrangement any property in your possession, custody or control that is an asset of the arrangement, until it is realised (if required) in accordance with the arrangement.
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> **15(2)** The Supervisor must hold in trust for the purposes of the arrangement any property in his/her possession, custody or control that is an asset of the arrangement.

20. It is open to interpretation whether the words "*whilst the arrangement is in force*" are sufficient to cause the termination of the trust over arrangement assets in the event of termination or completion. It is arguable that this wording limits the lifetime of the trust to the currency of the arrangement, irrespective of whether the arrangement has been terminated or completed. A contrary interpretation is that as this clause does not expressly terminate the trust that it has created, a trust over unrealised arrangement assets subsists (unless additional more specific provision to the contrary is contained with the proposal or any approved modifications or variations thereto).
21. In some cases, the proposal document or agreed modifications thereto will make additional, express provision concerning the continuation or termination of any trust, effectively resolving the position. However, as it is yet to be determined by the Courts whether a trust will continue upon the strength of this clause alone, IPs should take care when negotiating settlements with debtors on the strength of this clause not to make inappropriate or misleading demands about the availability of post-completion PPI refunds. The Ethics Code dictates that IPs should act with objectivity and that self-interest may present a threat to that fundamental principle. IPs may wish to obtain legal advice if they are in doubt as to the availability of an asset and explain that advice to the debtors affected by it.
22. In all cases, reference should be made to the terms of the individual proposal (and any approved modifications or variations thereto) to ascertain whether the standard conditions used have been altered in respect of the effect of completion or termination on any trust over the assets of the arrangement. Particular attention should be paid to any agreed modifications to the proposal, as it is not uncommon for modifications to contain specific provision terminating any trust upon the conclusion of the arrangement (for instance, where HMRC are a creditor).
23. Where it is concluded that the trust has terminated, then there is no further action that the former supervisor can or is required to take.

WHAT ARE A FORMER SUPERVISOR'S OBLIGATIONS IN RESPECT OF CLOSED CASES?

24. Paragraph 5.1 of the PPI Guidance notes that a former supervisor in an IVA does not have a duty to seek out PPI mis-selling claims in closed cases although, depending on the terms of the IVA, he/she may have the power do so. Where he/she becomes aware of such a claim (e.g. a lending institution requests clearance to pay a sum in compensation to the debtor) and it is one that is commercially viable for the office holder to pursue, then the former supervisor should consider whether the terms of the IVA are such that the compensation is a trust asset which should be claimed by him/her acting as trustee for the benefit of the IVA creditors.
25. It does not appear that this commentary is materially affected by the decision in Green v Wright and there is no new regulatory expectation as a consequence of that decision that an IP should routinely investigate, review and/or otherwise seek to re-visit closed cases.

26. Where a former supervisor becomes aware of the realistic prospect of realising PPI compensation, they should consider the entitlement to the claim proceeds (specifically, whether there is any uncertainty over the existence of a continuing trust) and the length of time that has elapsed since the conclusion of the arrangement. When pursuing such a course, an IP should be able to clearly demonstrate and have documented that they have struck a fair balance between the interests of the creditors and those of the debtor, in the circumstances of each case. It is very unlikely that a decision to pursue a post-closure recovery would be appropriate where it would not result in a distribution to the creditors.

UNEXPECTED PPI CLAIMS IN "FULL AND FINAL SETTLEMENT" CASES

27. Questions have been raised as to the impact of Green v Wright in cases where full and final settlements have been reached – principally, should the former supervisor accept and/or seek out previously unknown PPI claims in such instances. It is anticipated that known PPI claims will usually have been included and validly compromised within the terms of the full and final settlement reached.

28. It is imperative that reference is made to the precise terms of any variation, as these may themselves determine whether any existing trust has come to an end. However, in instances where it is concluded that the PPI was not fully compromised by the full and final settlement, the obligations and considerations which the IP should apply are likely to be similar to those that would arise in any closed case, and reference should be made to the PPI Guidance in this regard.

29. Where an unexpected receipt is received by the former supervisor, they should consider both the above analysis as to the potential availability of the asset to the arrangement had the settlement not been reached and the effect of the terms of the settlement agreement and of any variations to the proposal, (with the benefit of legal advice, where necessary).

30. An IP should be mindful that an ordinary interpretation of the words "full and final settlement" may reasonably lead a debtor to the belief that their obligations under the arrangement have been concluded, unless it has been expressly brought to their attention by the IP that certain assets remain part of a continuing trust. Creditors are likely to have a similar expectation that the matter has been concluded and that no further funds will be available to them. Where a former supervisor concludes that there is a continuing trust over assets which were not included within the terms of the settlement, they should be able to demonstrate this with reference to the precise terms of the arrangement and evidence that they have acted fairly and impartially in reaching that conclusion.

31. As noted above, there is no new regulatory expectation as a consequence of the decision in Green v Wright that a former supervisor should routinely investigate, review and/or otherwise seek to re-visit completed cases.

DOCUMENTING STRATEGIES, DECISIONS AND THE REASONS FOR THEM

32. In any case where an IP has cause to assess the impact of Green v Wright on an IVA that they are supervising or formerly supervised, care should be taken to fully document the strategy deployed, the decision reached and the reasons for both, in accordance with SIP 1.

THE IMPORTANCE OF COMMUNICATIONS WITH DEBTORS

33. A change to the anticipated course or outcome of an IVA may cause justifiable concern and confusion for the debtor. IPs should take care to clearly explain the reasons for and expected impact of the change.

34. Where a former supervisor concludes that there is a continuing trust, they should explain to the debtor what assets they consider to be comprised within it. Where uncertainty exists as to the existence of a continuing trust, this should also be explained as in such circumstances, the debtor may wish to obtain their own independent legal advice.

35. In all cases, completion or termination documentation should be clear and unambiguous as to the continuation or termination of any trust, and where the continuation of a trust is anticipated, the assets comprised in that trust.

36. Insolvency practitioners should take care when negotiating settlements in respect of post-closure asset realisations particularly where the availability to the estate is less than certain, to act fairly and not to make inappropriate or misleading demands. Clear, directly relevant and timely communication of the issues will aid the debtor's comprehension of the situation and may assist in avoiding misunderstanding and complaint.

FUTURE IVAS

37. Paragraph 13 of SIP 3.1 places a number of requirements upon IPs when preparing for an IVA. These include being able to form a view of whether the debtor has a sufficient understanding of the process of an IVA, its likely duration and the consequences, and whether there will be full cooperation and commitment from the debtor. Where it is intended that the IVA proposal will contain "all asset" and/or trust clauses and impose a continuing trust post-completion, the implications of these provisions in the event that arrangement assets are identified following the closure of the IVA would reasonably be expected to form a part of these discussion.

38. Alternatively, an IP may conclude that in the interests of providing certainty and closure for the debtor, it would be appropriate in the circumstances of the cases for the proposal to be of a defined asset type and/or contain specific provision terminating any trust upon completion. Both R3 and IVA Protocol Standard Terms and Conditions are currently subject to review.

39. In all cases, new proposals should contain clear provision as to the precise effect of termination or completion on any trust created by it and debtors should be made aware of the implications of entering an arrangement containing such clauses. IPs should take care to clearly explain the potential impact of such clauses, to the extent that the complexities of this area permit.

40. The terms of any full and final settlement reached should clearly state whether any trust over the assets of the arrangement is terminated or will continue, and if it continues, what assets are comprised within that trust. Where a full and final settlement is reached, it will usually be preferable in the interest of certainty to provide for the termination of any trust over the arrangement assets, unless there is a compelling reason in the circumstances of the case to provide otherwise.