EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules amend the Insolvency Rules (Northern Ireland) 1991 (S.R. 1991 No. 364) ("the principal Rules").

Rule 2 makes transitional provision and Rule 3 provides for the principal Rules to be amended by the Rules in these Rules.

Rule 4 amends Rules 4.228 of the principal Rules (general rules as to priority) by replacing paragraph (1)(a), with new paragraphs (1), (2) and (3)(a). The provisions of Rule 4.228(1)(b) to (r) continue in force as Rule 4.228(3)(b) to (r). The new paragraphs provide for the costs and expenses of a liquidation, including expenses properly incurred in preparing for and conducting any legal proceedings or arbitration or dispute resolution procedures which the liquidator has power to bring or defend in his own name or that of the company, or in preparing for and conducting any negotiations leading to a settlement or compromise of the legal action or dispute, to be payable out of any proceeds from the legal proceedings, or from any award under arbitration or dispute resolution procedure or any compromise or settlement of the legal action or dispute reached prior to a judgement or award being made.

Rule 5 inserts new Rules 4.228A to 4.228E into the principal Rules.

Article 150ZA (payment of expenses of winding up) of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)) ("the 1989 Order") provides for the expenses of a winding up, insofar as the assets of the company available for the payment of general creditors are insufficient to meet them, to be payable out of any property comprised in or subject to a floating charge in priority to any claims against that property. New Rules 4.228A to 4.228E restrict Article 150ZA in its application to litigation expenses so that these may not be paid out of property comprised in or subject to a floating charge without the approval or authorisation of the holder of a debenture secured by, or holder, of the floating charge or any preferential creditor or the court, as the case may be.

Rule 6 makes consequential amendments.

Rule 7 substitutes a new version of Rule 4.238 in the principal Rules.

Both the original rule, and its replacement, are one of three Rules, numbers 4.238 to 4.240 in the principal Rules, which create exceptions to the prohibition in Article 180 of the 1989 Order on a person who has been a director (or shadow director) of a company in the 12 months prior to its entering into insolvent liquidation re-using that company's name or a name so similar to it as to suggest an association with the insolvent company (such a name is referred to as "a prohibited name").

The former version of Rule 4.238 allowed a director to act as the director of a company or otherwise in connection with its management where—

(a) the company used a prohibited name; and

(b) the company acquired the whole or substantially the whole of the insolvent company's business; and

(c) a notice was given to the insolvent company's creditors.

In First Independent Factors and Finance Limited v Churchill [2006] EWCA Civ 1623 the Court of Appeal in England and Wales ruled that such a notice could not be given where an individual was already a director of the successor company that wished to acquire the business of the insolvent company and adopt the prohibited name.

The new Rule 4.238 makes provision for a director of a company that enters insolvent liquidation to act as a director of a company (or otherwise be involved in the formation, promotion or management of that company) where that company—

(a) uses a prohibited name; and

(b) acquires the whole or substantially the whole of the insolvent company's business.

The new Rule provides that the prescribed notice may be given before the company enters insolvent liquidation (where, for example, the insolvent company is in administration and it is likely (or possible) that it will subsequently go into insolvent liquidation). In cases where the insolvent company is not in insolvent liquidation and also in cases where the acquiring company has not yet adopted a prohibited name, notice can be given where the director of the insolvent company is already a director of the acquiring company. However, notice must always be given before a director acts in a way that would be prohibited by Article 180.

The new Rule also allows a person to carry on the business of the insolvent company using a prohibited name other than through a limited company provided the relevant notice has been given.

Notice must be published in the Gazette and given to all creditors known to the director or whose names and addresses could be ascertained by the director by making reasonable enquiries.

Rules 8 and 9 abolish the requirement for the court to send copies of bankruptcy orders it has made to the Clerk of the Crown.

Rule 10 amends Schedule 2 to the principal Rules by providing for two forms to be inserted, one relating to the approval of litigation expenses by specified creditors, the other to the notice to be given to the creditors of an insolvent company of the intention to re-use a prohibited name.

With reference to rules 4, 5 and 6 a Regulatory Impact Assessment identifying the costs and benefits to business of the insolvency provisions contained within the Companies Act 2006 was prepared for that Act. No Regulatory Impact Assessment has been prepared in relation to the other rules as they do not impose any significant burdens on business.