




*THE
INSOLVENCY
SERVICE*

www.insolvency.gov.uk

**Section 371 of the Insolvency Act
1986 Re-direction of Bankrupt's
Letters, etc.**

A Consultation Paper

2 July 2004



Awarded for excellence



INVESTOR IN PEOPLE

dti

Purpose of the Consultation

The Insolvency Service is considering the introduction of procedures and practice in relation to postal re-direction orders obtained under section 371 of the Insolvency Act 1986 to strike a balance between the rights of the bankrupt and the legitimate need, as recognised by the European Court of Human Rights, to have an effective re-direction regime in an appropriate case. The Service has concluded provisionally that this may be achieved by amendments to the Insolvency Rules 1986.

The purpose of this, limited, consultation is to seek views on whether the Insolvency Rules 1986 should be amended to introduce specific Rules in relation to postal re-direction applications and orders. This paper is being sent to those with experience of insolvency law and to interest groups who represent those who would be affected by any changes. As this is a technical matter requiring only limited consultation we have set a 10-week deadline for responses rather than the usual 12-weeks.

Issued 2 July 2004

Respond by 10 September 2004

Enquiries to Lee Hewlett
The Insolvency Service
Policy Unit
Area 5.7
21 Bloomsbury Street
London WC1B 3QW

Tel: 020 7291 6730

Fax: 020 7291 6746

E-mail: lee.hewlett@insolvency.gsi.gov.uk

CONTENTS

	<i>Page</i>
Executive summary	4
How to respond	6
The proposals	8
What happens next	13
Annex A: Consultation response form	14
Annex B: Code of practice on consultations	20
Annex C: List of individuals and organisations consulted	21

Executive Summary

1. Under sections 291 and 333 of the Insolvency Act 1986, a bankrupt is required to co-operate with both the official receiver and his or her trustee in bankruptcy. Unfortunately, on occasions a bankrupt may refuse to co-operate at all in the proceedings or may not make a full disclosure of his or her affairs and the Insolvency Act therefore gives the official receiver/trustee certain powers and means of enforcing co-operation or otherwise gathering information about a bankrupt's affairs.

2. Section 371 of the Insolvency Act permits the court to make an order, on the application of the official receiver or trustee, for the re-direction by a postal operator of a bankrupt's post for a period not exceeding 3-months. It must be emphasised that applications for the re-direction of a bankrupt's post are not standard practice and orders are only sought in a small number of appropriate cases.

3. Re-directed post can provide useful information about a bankrupt's affairs and may lead to the recovery of assets for the benefit of creditors and the re-direction order itself may cause a previously uncooperative bankrupt to fulfil his or her statutory obligations. However, there are concerns that postal re-direction orders may be used in ways that are not compatible with the European Convention on Human Rights and the result is that the courts have become increasingly reluctant to make such orders, especially against residential addresses. The European Court of Human Rights has held that a section 371 order is compatible with the European Convention on Human Rights but has stated that the implementation of the measures must be accompanied by "adequate and effective safeguards" which ensure "minimum impairment" of an individual's right to respect for his correspondence.

4. The key proposal in this paper is that the Insolvency Rules 1986 be amended to introduce specific Rules in relation to postal re-direction applications and orders in order to meet the concerns expressed by the European Court of Human Rights.

5. The proposal would extend only to England and Wales as personal insolvency is devolved in Scotland and Northern Ireland.

6. As the proposal would not create burdens for business, charities or voluntary organisations a draft regulatory impact assessment is not required as part of this consultation.

7. The consultation questions, which are also listed separately at Annex A for ease of completion, are: -

Q1. Is section 371 of the Insolvency Act sufficiently useful to justify its retention, or should it be repealed?

Q2. Do you consider it necessary or desirable to amend section 371 (as primary legislation)? If so, please give reasons, and what amendments would you suggest?

Q3. Do you consider that the Insolvency Rules 1986 should be amended to introduce specific Rules in relation to applications and orders under section 371 of the Insolvency Act 1986 to give guidance to official receivers and trustees in bankruptcy on standard procedures for applying for, and operating, postal re-direction orders?

Q4. Are there any circumstances in which it would be worth applying for a mail re-direction order on notice to the bankrupt?

Q5. On what, if any, grounds should a bankrupt be able to resist or set aside a mail re-direction order?

Q6. Do you consider that the Rules should provide for all post to first be re-directed to a third party filter, such as an independent solicitor, or should it be left to the court to impose such conditions as it thinks fit as appropriate to a particular case?

Q7. Do you have any other comments or suggestions?

How to respond

8. When responding please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make clear who the organisation represents and, where applicable, how the views of members were assembled.

9. A copy of the Consultation Response form is enclosed at Annex A. An electronic version is also available at www.insolvency.gov.uk.

10. A response, or any questions about the policy issues raised in the document, can be submitted to:

Lee Hewlett
Policy Unit
The Insolvency Service
Area 5.7
21 Bloomsbury Street
London
WC1B 3QW

Tel: 020 7291 6730

Fax: 020 7291 6746

E-mail: lee.hewlett@insolvency.gsi.gov.uk

11. A list of those organisations consulted is in Annex B. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional Copies

12. Further printed copies of the consultation document can be obtained from The Insolvency Service, contact details given above.

An electronic version can be found at www.insolvency.gov.uk

Other versions of the document in Braille, Welsh or other languages, or audio cassette are available on request.

Confidentiality

13. Your response may be made public by The Insolvency Service. If you do not want your response (or any part of it) or name made public, please state this clearly in your reply. Any confidentiality disclaimer that may be generated by your organisation's IT system or included as a general statement in your fax coversheet will be taken to apply only to information in your response for which confidentiality has been requested.

14. We will handle any personal data you provide appropriately in accordance with the Data Protection Act 1998.

Help with queries

15. A copy of the Code of Practice on Consultation is included at Annex B.

If you have any comments or complaints about the way this consultation has been conducted, these should be sent to:

Philip Martin
Consultation Co-ordinator
Department of Trade and Industry
Room 723
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 5561

E-mail: philip.martin@dti.gsi.gov.uk

The proposals

Introduction

16. Section 371 of the Insolvency Act 1986 permits the court to make an order, on the application of the official receiver or the trustee of the bankrupt's estate, for the re-direction by a postal operator of a bankrupt's post for a period not exceeding 3-months.

17. A bankrupt has a statutory duty to co-operate with both the official receiver and his or her trustee in bankruptcy. Postal re-direction applications are rare and such orders are typically only sought in cases where, contrary to his or her duties under the Insolvency Act, a bankrupt refuses to co-operate with the official receiver/trustee or where the applicant believes that a bankrupt has not made a full disclosure of his or her affairs (for example in an attempt to conceal assets to the detriment of creditors). In cases where a bankrupt does not co-operate, re-directed post can provide useful information about his or her affairs, may lead to the recovery of assets for the benefit of creditors and may encourage a bankrupt to fulfil his or her statutory obligations to provide information to the official receiver/trustee in bankruptcy.

18. The Insolvency Service understands that applications for the re-direction of post against residential addresses are now infrequent and this may be due to the reluctance of courts to make such orders because of possible breaches of the European Convention on Human Rights.

19. It is worth noting that there is no specific provision in the Insolvency Rules 1986 relating to postal re-direction applications. Section 371 of the Insolvency Act requires there to be an application to court and this is an "ordinary application" (Rule 7.1 of the Insolvency Rules 1986). The Rules do not require such an application to set out the grounds on which it is made and under Rule 7.5 the application may be heard with or without notice to the bankrupt, although the court does have the power to fix a venue for the application to be heard.

20. Under schedule 4 to the Insolvency Rules, a postal re-direction order to the Post Office under Section 371 of the Insolvency Act must be made in Form 6.80. That form will be amended, if necessary, as a result of any amendments to the Rules.

Legal concerns about the operation of re-direction orders

21. Recent court judgements suggest that it is necessary to introduce measures regarding procedures and practice in relation to postal re-direction applications and orders. In the case of *Foxley v UK* [2000] (BPIR 1009), the European Court of Human Rights confirmed that while mail re-direction orders under section 371 of the Insolvency Act are not intrinsically in breach of the European Convention on Human Rights, continuing the re-direction beyond the 3-month period was unlawful and the court was also concerned about the interception of privileged communication between the bankrupt's lawyers and the bankrupt. The court was of the opinion that the implementation of mail re-direction orders has to be accompanied by "adequate and effective safeguards" which ensure "minimum impairment" of the right to respect for an

individual's correspondence as guaranteed by Article 8(1) of the European Convention on Human Rights

22. In an earlier domestic case, *Singh v Official Receiver* [1997] (BPIR 530), the then Vice-Chancellor criticised the practice of an applicant for a postal re-direction order not providing the court with detailed evidence in support of the application other than perhaps general background of the bankrupt's non-cooperation. The then Vice-Chancellor considered that all applications to the court for re-direction orders ought to be supported by detailed evidence of the non-cooperation. He also suggested that it would be unreasonable for an application to be made in circumstances where the substantive allegations on which the application is based were not set out in some written form available to be provided to the bankrupt. As a result of that judgement, official receivers are advised to provide the court with a report in support of a mail re-direction application which explains in detail why the re-direction order is being sought.

23. There is clearly a balance to be struck between the rights of a bankrupt and the legitimate need to have an effective re-direction regime for use in appropriate cases and this consultation therefore seeks views on possible ways of introducing measures regarding procedures and practice in relation to the re-direction of a bankrupt's post to strike that balance and ensure full compliance with the European Convention on Human Rights.

Options

24. The Insolvency Service has considered the following options:

- repeal of section 371;
- amendment of section 371;
- take no action;
- amend the Insolvency Rules 1986.

Repeal of section 371

25. The Service considers the repeal of section 371 to be unnecessary and undesirable. The European Court of Human Rights has confirmed that section 371 is not in itself incompatible with the European Convention on Human Rights and re-directed mail can be a useful means of gathering information where a bankrupt refuses to co-operate with the official receiver/trustee and may lead to the recovery of assets for the benefit of creditors.

Q1. Is section 371 of the Insolvency Act sufficiently useful to justify its retention, or should it be repealed?

Amendments of section 371

26. The provisions of section 371 have not been criticised and The Service considers that amending the Insolvency Act 1986 (even assuming that an appropriate legislative vehicle could be found) is not necessary to introduce "adequate and effective safeguards" which ensure "minimum impairment" of an individual's right to respect for his correspondence.

Q2. Do you consider it necessary or desirable to amend section 371 (as primary legislation)? If so, please give reasons, and what amendments would you suggest?

Do nothing

27. Section 371 orders are not inherently a breach of the European Convention on Human Rights and the criticisms in the Foxley case were essentially operational matters rather than issues arising from the wording of the legislation. In Foxley, the court did not say that the opening and copying of correspondence was itself contrary to the European Convention. Indeed, if re-directed post could not be opened, there would be no point in seeking a re-direction order. However, the Court found, not surprisingly, that opening post outside the 3-month period of the order was unlawful and was also concerned that the reading, copying and filing of privileged material was a breach of the bankrupt's Convention rights. It could be argued that it would be impossible to legislate to prevent these kinds of breaches and therefore there would be little point in doing anything to change the current position.

28. Further, it could reasonably be argued that the bankruptcy court is required to read and give effect to section 371 of the Insolvency Act in accordance with the Human Rights Act 1998.

29. However, doing nothing would not result in our having in place "adequate and effective safeguards". Nor would this option provide any guidance to applicants as to the procedures they should adopt.

Amend the Insolvency Rules 1986

30. There are currently no specific Rules in relation to section 371 applications and orders and The Service has concluded provisionally that specific provisions should be introduced to overcome the criticisms of the European Court of Human Rights. At present, section 371 requires an "application" to court and this is an "ordinary application" (Rule 7.1). The Rules do not require such an application to set out the grounds on which it is made and under Rule 7.5 the application may be heard with or without notice, although the court may fix a venue for the application to be heard. Under schedule 4 to the Rules, a postal re-direction order must be made in Form 6.80. That form will be amended, if necessary, as a result of any amendments to the Rules.

Current procedures

31. It is not open to the Secretary of State to give directions to insolvency practitioners acting as trustees in bankruptcy, but as a result of the criticisms and observations made by courts in the Singh and Foxley cases, official receivers are currently advised that:-

- when making an application under section 371, a report should be filed which explains in some detail why the re-direction order is being sought. If appropriate, the bankrupt may be given an opportunity to see the report.
- application for a re-direction order may be made with or without notice to the bankrupt but should normally be made without notice;
- the terms of a re-direction order should be complied with at all times. If, for example, post is redirected after the expiry of the order it should be forwarded unopened to the bankrupt. Properly re-directed items which

are clearly of a personal nature or are privileged correspondence should be forwarded to the bankrupt without delay and without being copied.

Q3. Do you consider that the Insolvency Rules 1986 should be amended to introduce specific Rules in relation to applications and orders under section 371 of the Insolvency Act 1986 to give guidance to official receivers and trustees in bankruptcy on standard procedures for applying for, and operating, postal re-direction orders?

Possible amendments to the Insolvency Rules 1986

Notification of grounds

32. Section 371 does not specify the grounds on which a re-direction order may be sought, but in the case of Singh the then Vice-Chancellor was of the opinion that the substantive grounds on which the application was based should be set out in a written form available to be provided to the bankrupt.

33. Clearly as there are a variety of legitimate aims for which a re-direction order may be sought, it would appear preferable to leave the grounds at large rather than limiting them by prescription. However, it would show transparency if the applicant were required to set out the grounds in an affidavit or report. This would also be consistent with current practice which official receivers are advised to follow.

Notification to bankrupt

34. No criticism was made of without notice applications in the Foxley case. Indeed, the jurisprudence of the European Court of Human Rights does not support the proposition that without notice applications are, without more, contrary to the Convention. This is particularly so where the defendant is able to apply to court after the order is made to rescind the order, which is the case with orders under section 371. Current advice to official receivers is that a copy of the application (including the statement of grounds) should be provided to the bankrupt, if appropriate, so that he may be in a position to apply for review, variation or rescission of the order if he wishes.

35. However, in the light of the various decisions, the important question would seem to be whether all section 371 applications should be on notice. Currently, the majority of such applications are made and dealt with on a without notice basis. If applications continue to be made and dealt with on that basis, it is not clear that "adequate and effective safeguards" will have been put in place and there will be a continuing risk of further references either to domestic courts or to the European Court of Human Rights. On the other hand, since such applications are usually made in non-cooperation cases, a requirement to give notice could allow the bankrupt an opportunity to reorganise his affairs, perhaps giving him time to put alternative arrangements in place to negate the benefit of the order. There may also be scope for delay while adjournments are sought.

36. If, therefore, the Rules were to require notice of the application to be given to the bankrupt, it could reasonably be argued that the period of notice should be short - for example, 2 days - as this is an emergency enforcement measure following a period of non-cooperation.

37. If notice of the application is not to be given routinely to the bankrupt, it could be argued that the Rules should at least provide for him to be served, after the event, with a copy of the order and application so that he may consider whether to apply for review, variation or rescission of the order. However, serving a copy of the order on a bankrupt would also give him or her the opportunity to frustrate the order, for example by using another postal address for correspondence.

Q4. Are there any circumstances in which it would be worth applying for a mail re-direction order on notice to the bankrupt?

Q5. On what, if any, grounds should a bankrupt be able to resist or set aside a mail re-direction order?

Content of the re-direction order

38. In the case of Foxley, the court did not find that the opening and copying of correspondence was itself contrary to the European Convention on Human Rights. Indeed, if re-directed post could not be opened, there would be no point in obtaining a re-direction order. The problem lies in what is opened, when it is opened and what is copied. It was the reading, copying and filing of privileged material that gave rise to the finding in Foxley that there had been an interference with the bankrupt's Convention rights, as well as the opening of post after the expiration of the order.

39. Section 371 provides that the court can order re-direction to the official receiver, trustee "or otherwise". Therefore, it is possible that all post could initially be re-directed to a third party "filter", for example an independent solicitor, with appropriate papers being sent to the applicant and items such as legally privileged material being forwarded to the bankrupt. The Service understands that certain courts have previously made orders to this effect. However, using an independent solicitor in every case would involve significant costs and The Service's view is that the Rules should provide no more than that, in making a re-direction order, the court may impose such conditions as it thinks fit.

Q6. Do you consider that the Rules should provide for all post to first be re-directed to a third party filter, such as an independent solicitor, or should it be left to the court to impose such conditions as it thinks fit as appropriate to a particular case?

Q7. Do you have any other comments or suggestions?

What happens next?

40. The results of the consultation will be published on The Service's website.

41. We would aim to bring any amendments to the Insolvency Rules 1986 into force in April 2005.

Section 371 of the Insolvency Act 1986 Re- direction of Bankrupt's letters, etc.

Consultation Response Form

The closing date for this consultation is 10 September
2004

The Service may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual consultation responses. This will extend to your comments unless you inform us that you wish them to remain confidential.

Please tick if you want us to keep your response confidential

Name _____

Organisation (if applicable) _____

Address _____

Return completed forms to:

Lee Hewlett
The Insolvency Service
Policy Unit
Area 5.7
21 Bloomsbury Street
London
WC1B 3QW

Tel: 020 7291 6730

Fax: 020 7291 6746

E-mail: lee.hewlett@insolvency.gsi.gov.uk

Respondents are asked to tick one box from the following list of options which best describes them as a respondent.

	Representative Organisation
	Interest Group
	Insolvency Practitioner
	Legal Practitioner
	Other (please describe):

Q1. Is section 371 of the Insolvency Act sufficiently useful to justify its retention, or should it be repealed?

Comments:



Q2. Do you consider it necessary or desirable to amend section 371 (as primary legislation)? If so, please give reasons, and what amendments would you suggest?

Comments:



Q3. Do you consider that the Insolvency Rules 1986 should be amended to introduce specific Rules in relation to applications and orders under section 371 of the Insolvency Act 1986 to give guidance to official receivers and trustees in bankruptcy on standard procedures for applying for, and operating, postal re-direction orders?

Comments:



Q4. Are there any circumstances in which it would be worth applying for a mail re-direction order on notice to the bankrupt?

Comments:



Q5. On what, if any, grounds should a bankrupt be able to resist or set aside a mail re-direction order?

Comments:

Q6. Do you consider that the Rules should provide for all post to first be re-directed to a third party filter, such as an independent solicitor, or should it be left to the court to impose such conditions as it thinks fit as appropriate to a particular case?

Comments:

Q7. Do you have any other comments or suggestions?

Comments:



Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

ANNEX B: The Consultation Code of Practice Criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

The complete code is available on the Cabinet Office's web site, address <http://www.cabinet-office.gov.uk/servicefirst/index/consultation.htm>.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to Philip Martin, DTI Consultation Co-ordinator, Room 723, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6206 or email to: Philip.Martin@dti.gsi.gov.uk

ANNEX C: List of Individuals/Organisations Consulted

Association of Business Recovery Professionals (R3)
Association of Chartered Certified Accountants
Bankruptcy Association
Bankruptcy Advisory Service Ltd
City of London Law Society
Court Service
Department for Constitutional Affairs
Insolvency Court Users' Committee
Insolvency Lawyers Association
Insolvency Practitioners Association
Insolvency Rules Committee
Institute of Chartered Accountants in England and Wales
Law Commission
National Association of Citizens Advice Bureaux
The Law Society