

# JOH Consultancy LLP

## July 2012 Technical update

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### **Winding-up Petition v Notice of Intention to Appoint**

In **Re Ramora UK 2011 EWHC 3959 (Ch)** the directors filed a notice of intention to appoint and immediately after a creditor filed a winding-up petition. The court held that the filing of the intention to appoint created a valid interim moratorium. The court commented that the directors had to have no knowledge of the imminent filing of the winding up petition for the court to be satisfied that there had been no abuse of the administration process.

### **Pre-appointment Costs and the Court's Jurisdiction**

The court held in the case of **Re Bickland [2012] EWHC 706 (MANN J)** that it did have jurisdiction under para 13(1)(f) to make an order in respect of pre-appointment costs even where the appointment of the Administrators was made under Para 14. Consideration was given by the judge to the pre-pack sale achieved and the benefit of this sale to creditors.

### **Successful use of UNCITRAL to obtain Disclosure**

In **Re Chesterfield United Inc [2012] EWHC 244 (Ch)** the liquidators were able

to seek relief under Art. 21.1(d) and (g) which allowed them to use S236 IA 86 to obtain an order for disclosure of documents from Deutsche Bank relating to how they dealt with conflict of interest issues in respect of various transactions.

### **Undertaking given for Freezing Injunction was Limited to the Net Assets in the Liquidation Estate**

In **Re Ultraclass Limited v Assemakis and others** (unreported) the liquidators were pursuing a claim against a de-facto director and applied for a freezing injunction. The court held that because the liquidator had a strong case and no funding was available from creditors, the undertaking given by the liquidator should be limited to the net realisable assets of the liquidation estate.

### **Football Creditor Rule**

The recent case of **HMRC V The Football League Ltd [2012] EWHC 1372 (Ch)** has made the court's position on this issue clear. The court will not entertain that the football creditor rule is challengeable by the anti-deprivation principle or the pari passu principle.

## SIP 2

The new SIP 2 came into force on 2 May 2011. I have detailed some practical steps to ensure you are compliant:

### Para 5

#### **Securing Books and Records**

The requirement to secure the books and records appears to have become more onerous. Previously if you were unable to secure the books and records you were told to document your actions and this has now been removed.

#### **Letter of Engagement / First Correspondence with Directors**

I would recommend making clear in your engagement letter or initial correspondence with the director the need to secure the books and records before the s98 meeting or on day 1 of the Administration. In a compulsory liquidation the Officer Receiver may have them but if they haven't you still need to secure them.

### Para 6

#### **Information Sought from Creditors**

The requirement to seek information from creditors does, I believe, require most IPs to change their documents and procedures.

### Minutes of Meetings

I would recommend changing your s98 minutes, proposal meeting minutes and the first meeting minutes of a compulsory liquidation to reflect that creditors were asked to provide information on any concerns in respect of conduct and potential recoveries. Also ensure your first committee meeting minutes reflect the request for information.

### First Letter to Creditors

You will also need to ensure that a short paragraph is added to the first letter to creditors on all case types asking for information about conduct and potential recoveries. If you have a creditors' questionnaire to send with the first letter then do send it.

### Para 11

#### **Public Interest**

It appears that public interest is now a consideration in determining the extent of the investigation and I would suggest maybe placing a duty to investigate even if there are no funds available.

## Enterprise and Regulatory Reform Bill

The Enterprise and Regulatory Reform Bill is seeking to remove the early discharge from bankruptcy that may be given by the Official Receiver. This legislation is still going through Committee, so watch this space.

## New Insolvency Practice Direction

I have detailed a couple of key issues for you to be aware of below, although I would of course recommend reading the whole document:

### Extension of an Administration

- Unless there are special circumstances, an application for an extension needs to be made **not less than one month before the end of the Administration**.
- If later than one month the costs may be disallowed and therefore will be payable by the Administrator or his firm personally

### Application to Court for Approval of Remuneration

The guiding principles are:

- **Justification**
- **Benefit of the doubt** - if there is any doubt about the guiding principles then the court will find against the IP.
- **Professional Integrity** - the court will give weight to the fact that an IP is a member of a professional body and therefore expected to act with integrity.
- **The value of the service rendered** - just because you have the WIP does not mean it was necessary and value will need to be demonstrated.
- **Fair and reasonable** - again what has been achieved is important to assessing remuneration.
- **Proportionality** - of both information and remuneration. The information you supply must be proportionate to consider

the amount of fees being requested and of course the fees being requested must be proportionate to the work.

- **Professional guidance** - new SIP 9 will be taken into consideration.
- **Timing of application** - the court will expect a valid reason for any delay in making the application.

I would conclude that any application for remuneration should be carefully considered and of course the practice direction should be followed closely in respect of the information to be provided to the court.

## Insolvency Amendment Rules 2012

A payment from the social fund by way of a crisis loan or budgeting loan survives bankruptcy and is not a provable debt.

## Consultation on EC Regulations on Insolvency Proceedings

The European Commission has issued a consultation paper on the future of European Insolvency and the consultation closed on 21 June 2012. The changes are on the agenda for this year.

## Consultation on Draft Energy Supply Company Administration Rules

It is proposed that the new rules will only apply to companies that the English and Welsh Courts have jurisdiction to wind-up. The emphasis is on the uninterrupted, safe operation of essential services. The consultation ends 7 September 2012.

## Consultation on Reform of the Process to Apply for Bankruptcy and Compulsory Winding-up

The main proposal is to remove the court from the process and allow the debtor/director to submit a form online to an adjudicator.

## SIP 2 ctd

### Para 12 Waive to Consultation Dependent on Circumstances

Greater emphasis is being placed on proceeding quickly with investigations and issuing proceedings without consultation. However, since most antecedent transactions in liquidation require sanction this only appears to be relevant in Administrations.

### Para 13 & 14 Written Resolution and Information to be Provided

The SIP has been amended to reflect the new rules and allows that written resolution for sanction and authority to investigate may be obtained. But in seeking a written resolution the SIP requires your report to provide sufficient information to make a decision including at least details of costs and potential returns to creditors.

### Para 16 & 17 Reporting to Creditors

I would also suggest that your annual or progress reports will need to change to reflect the requirement to provide information on your investigation and your actions. The exceptions to disclosing information are that it is subject to privilege, confidentiality or risk to proceedings. You are expected to report initially and then continue to update creditors in subsequent reports.

### Para 19 Record Keeping

This is just reiterating the new SIP 1 requirement to document everything. If you do not have checklists for your investigation work then I would suggest you need them to be able to comply with the requirement to document initial assessment, investigations, conclusions and justification of actions taken or not taken.

### Author

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