



# JOH Consultancy LLP

## December 2012 Technical Update



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### Administrator personally liable for CFA

In **Wright Hassall LLP v Morris (administrator of Marketbalance Ltd and another company)** [2012] All ER (D) 198 (Nov) the earlier judgment that the administrator was not liable has been overturned. The Court held the conditional fee agreement was between the IP and the solicitors and not the company in Administration.

### Petitioning costs and their order of priority

In **Neumans LLP v Andronikou and others** [2012] EWHC 3088 (Ch) a company had instructed solicitors to defend petition proceedings. The company subsequently dis-instructed the solicitors and was placed into administration by the QFCH. The solicitors sought an order for the costs of defending the petition to be an expense of the administration. The court held that the costs were not an expense of the administration but would be an expense of the liquidation, which the company subsequently entered into. Decision has been appealed and will be heard 2013.

### Matrimonial lump sum order survives bankruptcy

In **McRoberts v McRoberts** [2012] EWHC 2966 (Ch) the debtor who had been made bankrupt and had been

discharged was seeking release from the lump sum matrimonial order that had been made prior to the bankruptcy. The court held that whilst it did have discretion to release the debtor it was not prepared to do so.

### Fresh evidence admitted out of time

In **Oraki and another v Dean & Dean (a firm) and another** [2012] EWHC 2855 (Ch) the debtors had been made bankrupt on a judgment in default for unpaid solicitors bills in 2004. It was subsequently found that the individual was not a solicitor and disciplinary action was taken against him and he was struck off in 2010. The court gave leave to the debtors to admit fresh evidence and to do so out of time to be able to annul the bankruptcy orders.

### Court able to give retrospective leave to issue proceedings

In **Re Colliers International UK plc (in administration)** [2012] EWHC 2942 (Ch) the bank sought retrospective permission of the court to issue proceedings in respect of a negligence claim against the company in administration. The court felt it did have the authority to give retrospective leave and did so but with the restriction that enforcement of any judgment could not occur without the leave of the court.

### SIP 4

Having reported last time on the possible withdrawal of SIP 4, it would seem sensible to review Dear IP 54 and the guidance document which has recently been issued by BIS to identify any particular changes or enhancements you should be adopting as part of your investigation and reporting process.

#### DEAR IP 54

The Insolvency Service (IS) is offering to provide training to IPs and their staff; I would recommend contacting them to arrange this. The feedback from firms who have participated so far has been very positive.

#### GUIDANCE ISSUED BY BIS

The BIS has published a document called **Guidance Notes for the Completion of Statutory Reports and Returns**. The document is very detailed and addresses new areas and requirements. I shall review the new requirements individually.

#### ACCOUNTING RECORDS

The new SIP 2 does not specifically require that details of all attempts to obtain the books and records be documented. This is because the new SIP 1 requires that you document your compliance with the SIPs. It is therefore not surprising that BIS are requesting that you provide a record of the steps taken to obtain the company documents. BIS also requires a detailed list of who has the company records and when the information was obtained. I would suggest a simple checklist with the different accounting records listed, and a couple of columns stating who holds the documents and the date the documents were collected.

#### INFORMATION TO BE SUPPLIED

You are now being asked to supply information on directors detailing where contact has not been successful, what attempts have been made and the relationship (if any) to co-directors. You are also being asked to supply full bank details/VAT/PAYE references.

#### EVIDENCE FOR EACH OFFENCE

The guidance gives very detailed information about evidence required for each type of offence. It would therefore seem appropriate to draft your investigation checklist from the guidance to help staff to carry out the relevant investigations and collect the appropriate evidence.

## No appeal on pension subject to IPO

In the case of **Raithatha v Williamson** it is my understanding that this matter has been settled and will not be heard at the end of November as previously listed. That means this is the current law on the ability to incorporate a pension into an IPO.

## Was the appointment of administrator the same as a liquidator for a bank?

In **Heis and others v MF Global Inc Re Global UK Ltd (in special administration)** [2012] All ER (D) 37 (Nov) the judge held that for the purposes of the Global Master Repurchase Agreement administration was not the same as liquidation and did not trigger a default which did not require notice. The Investment Bank Special Administration Regulations 2011 was taken into consideration by the judge.

## Crime and Courts Bill

It is proposed that the Serious Organised Crime Agency and the National Policing Improvement Agency be abolished and replaced with a national crime agency. The bill is currently in the House of Lords.

## Bribery Act and Hospitality

The SFO has reviewed its policy on facilitation payments, business expenditure and corporate self-reporting. The new guidelines make it clear that facilitation payments and hospitality, where bribes are disguised as legitimate business expenditure, will be prosecuted. Self reporting will no longer stop prosecution. I believe the practical issues for IPs in respect on the above changes is minimal. If you have been spending £500 per client and you continue to do so there is no risk. However, if you change the amount you spend significantly, then questions will be asked about the

appropriateness of the hospitality. Further information may be found on their website: <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx>

## HMRC Insolvency Notice 700/56

HMRC issued in October an updated 700/56 confirming that insolvent companies are exempt from filing electronic tax returns. The previous amended version issued in May this year gave updated addresses, a new email address for the VA service, an amended process for claiming VAT refunds, and an amended process for dealing with partially exempt insolvent businesses.

## Criminal liability

I would recommend watching a webinar provided by ICAEW which discusses an IP's potential criminal liability under the Health and Safety regime. There is discussion about the need for IPs to be careful when selling the assets of the company and also about their duties whilst in office. It seems having a H & S assessment is just the beginning. Suggestions were made about enhancing document packs to add a level of protection against being pursued personally. It is available at <http://www.ion.icaew.com/insolvencyblog/25771>

## ICAEW representations

If you wish to know about the representations made by the ICAEW to consultations issued by Government and other bodies then you may find them here: <http://www.icaew.com/en/technical/insolvency/insolvency-reps>

## JIEB 2013

If you or a colleague are sitting the JIEB exams in 2013 then I would urge you to review the courses I am offering: <http://www.insolvencyexamtraining.co.uk/jieb1.html>

## SIP 4 CTD

### FEES

The new guidance clearly states that work will not be paid for when complying with providing the information detailed in appendix 2 of the guide. SIP 4 makes clear that payment must be agreed in advance. The guide goes on to say that they expect staff at the appropriate level to be completing the work. When agreeing a fee you will need to include an estimate of all the staff likely to be involved. In agreeing the fee basis the following will be considered: complexity and nature of the case, the amount of documentation, and the reasonableness of the rates which acknowledges the seniority of the staff required and the litigious nature of the work.

### DISCLOSURE OF D REPORT

The D report is confidential but not privileged and the guidance advises that all enquiries made about disclosure of the D report to IPs should be referred in the first instance to Intelligence Operations. This includes all requests from anyone made under the Data Protection Act 1998 ("DPA") and the Freedom of Information Act 2000 ("FOIA") for a report or return. The guidance also states that they may have to release the D report and asks IPs to ensure that they only provide factual information and not defamatory remarks.

### NEW CHECKLIST AT APPENDIX 2 OF THE GUIDANCE

Appendix 2 is a mixture of the list of documents requested on the D1 form and the information to be provided in the body of the report by SIP 4, together with information about the collection of the books and records. It makes a great checklist of information to be provided with the D1 and I would add this to the bottom of the D1 document on your system.

### Author

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