JOH Consultancy LLP
March 2013 Technical Update

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s238 actions must be evidenced

In the case of Re Ovenden Colbert Printers Ltd Hunt v Hosking and others [2013] All ER (D) 312 (Feb) the court was clear that when bringing a s238 action the criteria to be met had to be evidenced and a speculative action requiring further investigation work would be struck out especially where the fundamental requirements of the section could not be proved against the individual.

Costs' award on a s262 appeal may be voted on at a further IVA meeting

In the case of Davis and another v Price and another [2013] All ER (D) 245 (Feb) the IVAs which had been approved were subject to a s262 appeal in respect of the value placed on an unliquidated claim. The judge suspended the IVAs and placed a value on the liquidated claim giving the debtors' an opportunity to send revised proposals. The creditors voted in the IVA meetings for the amount determined by the court for the unliquidated claim but did not vote for the value of the costs' order awarded to them at the same time. The creditors then issued statutory demands for the costs. The court held that at the further IVA meetings the amount to be used for voting purposes was the total amount owed at the date of the meeting, therefore capturing the judgement and the costs' order, both of which were bound by the approved IVAs and not just the original amounts owed at the previous meetings.

Duty of care of a Credit Rating Agency

In Smeaton v Equifax plc [2013] All ER (D) 238 (Feb) the applicant had been made bankrupt in 2001 and the order had then been rescinded. The applicant in 2006 applied for a loan which was declined due to the Credit Rating Agency(CRA) indicating that the applicant had been made bankrupt. The applicant then sought to have the correct information placed on the CRA file and applied for a loan again, which was also declined. The applicant then sought damages against the CRA. The court held that a CRA does not owe a duty of care in tort, provided he has taken all reasonable steps to ensure the accuracy of the data. A key aspect of this case was the CRA's inability to obtain information on the rescission order since it does not need to be published.

Assessing contingent claims in an MVL

In the case of Ricoh Europe Holdings BV and other Companies v Spratt and another Re Danka Business Systems plc (in MVL) [2013] All ER (D) 217 (Feb) the court held that the liquidator was right to assess contingent claims for dividend purposes and was not required to ring fence money for the potentially full contingent amount until the matter had been determined. In particular it was appropriate for the liquidator to use his own expertise and his expert advisors to make a realistic estimate.

SIP 16

After reviewing SIP 13 last month it seems appropriate to review the criteria of SIP 16 and Dear IP 42, especially as the Insolvency Service is once again focused on compliance with potentially a new round of complaints being made to the RPBs.

Para 1

This paragraph identifies when a sale would be classified as a pre-pack and states this is where the sale is "negotiated with a purchaser prior to appointment" and the sale occurs "immediately on or shortly after his appointment". The lack of an actual time period appears to cause confusion for many, since the finalising of the contract may take longer than initially anticipated, even though the principles of the deal had been finalised before appointment. I would suggest where there is ambiguity then err on the side of caution and make your SIP 16 disclosure.

Para 2 & 3

The requirement to keep detailed records of your reason for undertaking a pre-pack sale is not new but maybe you have not yet created a proforma document to be completed on each new case. I would recommend drafting a document detailing not only why you decided on a pre-pack but also why you chose an administration instead of another insolvency process. This will then help ensure you are meeting your para 3 purpose as well as the requirements of the SIP.

Para 5

The paragraph highlights the need to keep in mind who you are advising prior to formally being appointed, in particular where directors are purchasing the assets. I would recommend checking that your engagement letter is going to the Board of Directors and consider having a separate letter to be sent to directors where they are the purchaser, advising them to seek independent advice.

Para 6

This paragraph is a reminder to IPs about the company incurring credit prior to Administration and their potential personal liability where they advise the company to do so.

Now able to provide social care in Scotland even if an insolvent event occurs

The **Social Care and Social Work Improvement Scotland (Requirements for Care Services) Amendment Regulations 2013** comes into force on 1 April 2013. It has been illegal to provide care services upon certain insolvency events occurring in Scotland. The regulation now allows care services to be provided in insolvency on the condition that notification is sent to the Care Inspectorate upon insolvency occurring.

Exemption from Jackson litigation issues

The government has announced that CFA success fees and ATE insurance premiums will continue to be recoverable in insolvency proceedings until April 2015. This exemption was brought in by **The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013**. Unfortunately this appears to only be a delay, according to the statement made which went on to say that it was "to allow time for those involved to adjust and implement such alternative arrangements as they consider will allow these cases to continue to be pursued."

Changes to registration of charges

There is a new procedure to register charges from 6 April 2013. This obviously will entail the use of new forms which Companies House has published at the following link http://www.companieshouse.gov.uk/pressDesk/news/part25CompaniesAct.shtml. As a consequence there will also be new forms for being appointed and ceasing to act in an Administrative Receivership. The 21-day limit for filing the particulars of a property acquired which is subject to a charge has been removed. Apart from the charges which apply to property or undertaking acquired, charges must still be registered within the 21-day filing period.

Concerns identified in Insolvency Service Report

There were various concerns identified in the Insolvency Service Report and the full report may be found at http://www.publications.parliament.uk/pa/cm201213/cmselect/cmbis/675/67502.htm. However, the two concerns that will have a direct impact on IPs is the continuing issue of the appropriateness of pre-packs. The recommendation to address pre-packs is that there be research into the evidential basis for pre-pack administrations. Also that where there is non-compliance with SIP 16 this is reported to the RPBs and disciplinary action is expected to be taken. The second issue is IPs' fees which is in the Insolvency Services power and role as regulator to review.

R3 IVA Standard Terms re-issued

R3 has finally revised its standard terms and conditions for IVAs and they may be found at http://www.r3.org.uk/media/documents/technical_library/IVA%20Standard%20Terms/IVA_standard_terms_version_3_web_version.pdf. The changes appear to be minor and an attempt to incorporate the 2010 rule changes allowing for the use of websites and remote attendance at meetings as well as language changes and an attempt to account for future changes in legislation.

JIEB Resits 2013

The 2012 JIEB results are out and what a disappointing year, only 87 people out of the 308 who sat between 1 and 3 papers passed the JIEB. If you or a colleague are re-sitting the JIEB exams in 2013 then I would urge you to review the courses I am offering: http://insolvencyexamtraining.co.uk/jieb2.html

SIP CTD

Para 8 & 9

The key paragraphs in this SIP are 8 & 9. Dear IP 42 went to great lengths to clarify that these paragraphs should be read in conjunction. I would hope by now each firm has a 3 to 4 page proforma to help guide staff through the level of information to be provided where a pre-pack sale occurs. If you don't have this, then now is the time to draft this document.

Dear IP 42

Dear IP 42 was issued in October 2009 just 10 months after SIP 16 had been introduced, as the industry was failing to provide adequate disclosure. This document provided more detail about what exactly was required and introduced the need to provide a brief company history and set the time limit of notifying creditors within 14 days of the sale. When drafting a proforma in respect of the disclosure requirements I would suggest this document is your starting place.

Para 11

This paragraph states the need to send the disclosure with the first notification to creditors, which would be the letter to creditors sent within 5 business days of appointment. However, as discussed above, a sale may not occur on day one. The SIP 16 disclosure was therefore being left until the proposal was sent, which is why Dear IP introduced the 14 day time limit. The SIP also requires that a meeting be called "as soon as possible" after appointment. I wonder how many IPs are compliant with this particular requirement?

Author
Joanne Harris is a licensed Insolvency Practitioner and has 15 years experience in insolvency dealing with all case types. She was formerly a Director of Technical and Compliance in a top 20 firm before starting her own business to supply technical services for insolvency practitioners without a compliance resource. Joanne also provides training for the JIEB exams.

M: 07780 613826
E: jo@johconsultancy.co.uk
E: jo@insolvencyexamtraining.co.uk
W: http://www.johconsultancy.co.uk
W: http://www.insolvencyexamtraining.co.uk