JOH Consultancy LLP
April 2013 Technical Update

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Re-registration of removed charge sought, due to mistake, after bankruptcy

In the case of **Garwood (trustee of the estate in bankruptcy of Adekunbi Ibrahim Fabumni-Stone) v Bank of Scotland Plc [2013] EWHC 415 (Ch)** the bankrupt had fraudulently obtained funds from the charge-holder over two long leases that did not exist. The debtor owned the freehold of the property which he did not disclose. The debtor then sold one of the two flats creating a long lease and the charge was removed completely. The debtor was subsequently made bankrupt and the charge-holder then identified the mistake and sought to have the original charge reinstated. The court held that rectification was possible, giving the charge-holder back his secured status.

Abuse of process or not?

In **Ebbvale Ltd v Hosking (trustee in bankruptcy) [2013] All ER (D) 103 (Mar)** the Trustee was pursuing a company for an asset, which the debtor, prior to an adjudication of a claim, transferred. The Trustee held that the asset was beneficially owned by the debtor and therefore vested in him. The individuals, to whom the property had been transferred, then sold it to another company. The registration of the transfer and the mortgage used to purchase the assets could not be registered due to the caution registered against the property by the Trustee. The Trustee then issued proceedings against all parties. The charge-holder came to a settlement with the Trustee and transferred the debt to him. The Trustee then sought to wind-up the company in the Bahamas for the debt, whilst still being in litigation with the company in the UK. The court considered whether the winding up in the Bahamas was an abuse of process since it would substantially impact on the UK proceedings. The court held it was not an abuse of process, because the Trustee was a creditor of the company who was owed money, and one of his purposes was to secure his position as creditor and stop the costs which would occur with further court action. It did not have to be his main or only purpose.

COMI reconfirmed

In **O'Donnell and another v The Governor and Company of the Bank of Ireland [2013] All ER (D) 67 (Mar)** the couple appealed against the earlier order which established their COMI was Ireland, not England and Wales. The judge found that the new evidence could have been submitted during the original trial and was not materially different and confirmed Ireland as their COMI.

Ethics - conflict of interest

In the case of **Quantum Distribution (UK) Ltd [2012] CSOH 191** the court was critical of both the insolvency practitioner and the lawyer acting on his behalf. The lawyer acted for the petitioning creditor and continued to do so in negotiations on its claim, whilst not advising the IP that he could not act for him in this matter.

SIP 3 DRAFT

The new draft SIP 3 has been circulated and consultation ends 14 May 2013. Below are my thoughts on the changes and I would encourage you to participate in the consultation.

Para 1

This SIP offers a principle based approach. The key words are transparency, fairness, and act objectively. Failure of these key principles "can [...] bring the profession in to disrepute". This seems to be reducing the guidance whilst increasing the burden of compliance.

Para 2

The first change appears to be the need to explain the changing roles of the IP to creditors, not just the debtor. The current SIP requires the split of remuneration in respect of each function to be separately identified (para1.5) but there is no requirement to detail the changing roles of the IP.

Para 3

The emphasis is now that the IP "should ensure" that the debtor is able to make an informed judgement. Below I review para 9 which details how to achieve this.

Para 4

The burden seems to have increased from the IP "satisfying himself" that the proposal is fair, achievable and a fair balance between the debtor and creditors, to the IP being required to " ensure".

Para 5

This paragraph seems to be an attempt to address the lack of clear guidelines about information to be provided in the proposal and nominees' report whilst still expecting IPs to follow the current detailed disclosure requirements. The requirement is to "provide clear and accurate information and report clearly in a manner that is easy to understand and useful"

Para 6

The SIP appears to be split between general duties applicable, irrespective of the role of the IP, and specific duties that are dependant on the IP's role.

Adjudicator's decision is not equivalent to a court judgment

In the case of **Towsey v. Highgrove [2012] EWHC 2644** the court ruled that a winding-up procedure applicable to companies should not be used where there is a triable issue. In this case the validity of an adjudicator's decision was relied on as evidence of a company being unable to pay its debts. It was held that the appropriate process would have been proceeding through the Technology and Construction Court for enforcement.

Software licence survived insolvency

In the case of **VLM Holdings Limited v Ravensworth Digital Services Limited [2013] EWHC 228 (Ch)** the court decided that businesses are permitted to use software under a sub-licence if the head licensee's business is terminated or becomes insolvent. In this case, the company granted an informal licence to its subsidiary who then granted a sub-licence and it was held that this sub-licence survived insolvency. Both companies had common directors which was a significant factor in deciding this case. This is a worrying judgment for Insolvency Practitioners.

Letter of comfort not binding

In the case of **Re Simon Carves Ltd Carillon Construction Ltd v Hussain and others [2013] All ER (D) 304 (Mar)** a subcontractor of an insolvent company issued proceedings under s423 against the company in liquidation and the parent company who had issued a letter of support in respect of the accounts of the insolvent company. The court held that the letter of support had not subjected the parent company to any enforceable obligation. This reinforces the position which is that letters of comfort/support do not create enforceable contracts.

EU Micro Directive

Europe has decided to help simplify reporting requirements for small entrepreneurs defined as micro entities. The term micro entity is defined as Balance sheet total: £289,415 (€350,000), Net turnover: £578,830 (€700,000) and average number of employees during the financial year: 10. The government issued a consultation about the extent to which the EU directive should be adopted which closed on 22/03/2013. The effect of this to IPs will probably be minimal if adopted and will potentially impact upon the accounting information available. When reporting non compliance under the CDDA, checklists will just need to be amended to reflect the different criteria to be adopted between normal and micro entities. Here is a link to the consultation document: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/86259/13-626-simpler-financial-reporting-for-micro-entities-consultation.pdf

Government to tackle payday lending concerns

There has been a very public and political campaign to address those companies who provide payday loans. The government will be moving regulation of consumer credit to the new Financial Conduct Authority (FCA) from April 2014, which has greater enforcement powers.

VAT accounting for LPA Receivers

NARA will be shortly re-issuing guidance note GN6 - VAT, stating that "receivers may, in respect of the receivership property, set off input VAT against output VAT in making payments to HMRC in respect of VAT collected by them." The accounting for VAT may be completed using form 833. Further information may be obtained under members area http://www.nara.org.uk/

SIP 3 DRAFT CTD

Para 7

This paragraph requires IPs to have procedures in place to ensure the debtor is provided with specific information. The concern is that the information to be provided requires hindsight, as you are now expected to detail any potential delays or complications that are likely to occur. Is this trying to address the issue of the PPI claims, which had arisen in recent years and the delays in closing IVAs? If this had been in place 4/5 years ago would IPs now be subject to criticism for failing to point out the potential PPI claims and the delays this may cause?

Para 8

It is a new requirement to assess, at each stage of the process, the need to meet the debtor. SIP 1 states the compliance with the SIPs should be documented, therefore a new document would appear to be necessary to demonstrate the assessments.

Para 9

This paragraph states that there should be procedures to assess whether the debtor is being open and honest, the debtor understands the process and is committed to it, the attitude of key creditors and whether the IVA is likely to be approved. There is also a burden shift from "reasonably satisfied" to "satisfied". Before these amendments, file notes and general correspondence would cover these issues but would not, I suggest, demonstrate an assessment. It seems that more documentation will need to be introduced.

TO BE CONTINUED in the next circular

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