

JOH Consultancy LLP

July 2013 Technical Update

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Employees unable to claim in second insolvency

In the case of Secretary of State for Business Enterprise and Skills McDonagh & Ors UKEAT/0287/12/ LA it was found that where the company had previously entered a CVA and subsequently entered liquidation, the employees would not be paid by the RPO. The employees had not been aware of the CVA and their employment had continued whilst the company was in CVA. The CVA failed, the company entered into liquidation, and the employees submitted claims to the RPO. It was held that the CVA was the first insolvency process and the RPO therefore did not have to pay the employees in the second insolvency process, the liquidation. The unfairness and the need to address this gap in the legislation was acknowledged.

Receiver and manager trumps litigation receiver

In the case of JSC BTA Bank v Usarel Investments Ltd [2013] All ER (D) 252 (Jun) the court held that where both a litigation receiver and a receiver and manager had been appointed, it was for the receiver and manager to determine whether an appeal against a previous judgment of the company was appropriate.

When does a landlord take possession?

In the case of RVB Investments Ltd v Bibby [2013] EWHC 65 (Ch), the issue of when a surety had been released from his

obligations under a lease was reviewed. The company had entered into CVL and the liquidator disclaimed one of the two units, the other unit was disclaimed by the Treasury solicitor after the dissolution of the company. The court held that returning keys to the landlord or the landlord clearing the site, partially securing the property and marketing were not acts of taking possession. The surety remained liable.

Appealing the Chairman's decision in an IVA

In the case of McNally v Dymond and another [2013] All ER (D) 210 (Jun) a creditors' meeting had been called to consider an IVA. The bank had valued their security and the quantum was used to defeat the IVA. The court held that the test in an appeal against a voting decision was whether the challenged indebtedness was, on balance, owed. In this instance the letter provided by an estate agent which valued the property was deemed merely a guide for marketing purposes and was not sufficient.

Right of appeal is not assignable right of action

In the case of Re GP Aviation Group International (in liquidation) Ltd Williams v Glover and another [2013] All ER (D) 41 (Jun) the liquidator sought directions from the court on whether the right to appeal tax assessments was property as defined by s436 and could therefore be assigned. The court held that a bare right to appeal was not property within the meaning of s 436 and could not be assigned.

SIP 15

SIP 15 is long overdue for amendment and review and removal of the guidance papers (similar to SIP 9). However, I thought it would be interesting to review the areas that are easily forgotten and the amendments introduced by the 2010 Rules which the SIP does not currently detail.

Certificate of Constitution

The Certificate of Constitution and any amendment to it must now be filed "as soon as reasonably practicable" which was introduced by the 2010 rule changes to harmonise compulsory liquidations (CL), creditors' voluntary liquidations (CVL) and bankruptcy (BKY) with Administration (ADM).

LIQUIDATIONS AND BANKRUPTCIES

Para 3.1.4

The requirement to provide a written report to committee members where the committee is established 28 days after the appointment of the office holder is unique to CL, CVL and BKY. Also, new members of the committee, after its establishment, may require a summary report from the IP.

Para 3.1.5

Remember that unless specified to be more frequent, and not more often than every 2 months, the IP must report once in every 6 month period in CL, CVL and BKY. Note that this does not mean every 6 months.

Para 3.1.6

The SIP refers to the Insolvency Regulations 1994 reg 10(4) & 24(3) which is the right of the committee to review the IP's financial records. The committee also has the right to refer any anomalies to the Secretary of State.

Para 3.2

This paragraph reminds IPs that the agreed reporting requirements should be documented in the minutes.

Para 3.3

The IP should also agree with the committee areas to report on, but needs to remember that he has a duty to report matters of concern to the committee whatever they may be.

The Bankruptcy and Debt Advice (Scotland) Bill 2013

The Bankruptcy and Debt Advice (Scotland) Bill 2013 came into force in June 2013. Some of the more interesting changes are: the requirement for a debtor to undertake mandatory financial education, a new 'Minimal Asset Process' route into bankruptcy, the debtor must satisfactorily co-operate with their trustee and with creditors to obtain their discharge, improving the processes for re-opening bankruptcy cases and creditors to submit claims within 120 days. More information may be found at <http://goo.gl/Pu4fB>.

Third Parties (Rights against Insurers) Act 2010

The government intends to make changes to the legislation to allow a number of specific insolvency proceedings to ensure that third parties are protected. Once these amendments have occurred the legislation will be enacted.

Paymex

Further clarification on Paymex has been provided by HMRC. I am not sure if it helps understanding but it gives guidance on being able to claim VAT as a Supervisor if the Nominee was from another firm. Also, if the company moves from Administration to CVA as the exit route, then VAT may be claimed. The full guidance information may be found at <http://goo.gl/Nw2Wd>.

Real Time Information (RTI) reporting to HMRC

HMRC have made it clear that where possible they do expect IPs to comply with the real time information reporting. This means that when trading, although an initial grace period may be given, HMRC expect notification of any difficulties in complying, and the rectification to occur quickly. IPs will be expected to provide pre-appointment information where this is readily available.

Finally, HMRC have accepted that using RTI when paying a dividend would be a problem, but have advised that they will be publishing guidance on this in due course. Full guidance is available at <http://goo.gl/JJsrb>.

Consumer Credit Licence

R3 have recently brought to the attention of IPs that under the new FCA regime, an IP would not be able to rely on their RPB's group licence for pre-appointment advisory work, but would be able to for post-appointment advisory work. This means that all IPs would need to apply for a Consumer Credit Licence if this was introduced. R3 have responded to the consultation but the issue has yet to be determined.

R3 technical updates

There have been a couple of technical bulletins this month which you should be aware of: The Capture, Storage, Maintenance and Destruction of Records and Privilege and Access to Information which are both available on the R3 website.

New Personal Insolvency book

The Personal Insolvency Law in Practice book by Sue Morgan, Neil Smyth and John Tribe has recently been published by Jordan Publishing. The book is brilliant for everyday use on dealing with personal insolvency cases or for JIEB students. Neil Taylor's comments on the book are "I have it and I am LOVING it! Congratulations - well written, useful and practical. What a breath of fresh air!" and I couldn't agree more. The book is amazingly well-referenced, allowing you to find information by case law, rule or section number and by topic.

March 2013 Edition: 1st Format: Papercover (£100) and eBook (£90) **Jordan Publishing are offering a 20% discount until 31 July 2013 when ordered using the code G224, visit www.jordansinsolvencylaw.co.uk/g224 to order.**

SIP 15 CTD

ADMINISTRATIONS

Para 4

The SIP labours the point of the differences between the pre and post Enterprise Act 2002, which would have been relevant at the time of writing. However, I think the key matter to note is the requirement to call a meeting within 6 weeks of establishing the Committee. The 2010 Rules have changed 3 months to 6 weeks in CL, CVL and BKY as part of the harmonisation process.

Still unique to ADM is the need to give 5 business days' notice to the Committee before resigning. The 5 business days was changed by the 2010 Rule changes from 7 days.

The Administrator has no other statutory reporting duties except those which he agrees with the Committee.

ADMINISTRATIVE RECEIVERSHIP

Para 5

In Administrative Receivership (ADR) the duty is to the charge-holder and not the creditors. The Committee's role is therefore limited. However they are provided with the IP's annual receipts and payments account.

The ADR must give 5 business days' notice of his intention to resign and must advise the Committee "as soon as reasonably practicable" of his vacation from office.

The Receiver has no other statutory reporting duties, except those which he agrees with the Committee.

TO BE CONTINUED

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