

JOH Consultancy LLP

November 2013 Technical Update

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Ascertaining insolvency

In the case of **E-Clear (UK) plc v Elia and others** [2013] All ER (D) 65 (Sep) the court reviewed again when a company can be deemed to be insolvent to determine whether there was a triable issue. It was held that an excess of liabilities over assets would not stop a company continuing to trade, provided that it could meet its liabilities as they fell due and insolvency beyond reasonable doubt had not been proved.

Winding-up is not an alternative to a property adjustment order

In the case of **Maresca v Brookfield Development and Construction and another** [2013] EWHC 3151 (Ch) the individuals involved had started the business together and entered into a personal relationship. Upon the breakdown of the relationship one of partners sought to wind-up the company on the grounds of unfair prejudice or that it was equitable to do so. The court held that the winding up of the company was inappropriate especially as the other individual had offered to purchase the shares and had paid a substantial amount of the agreed value.

Administration not always appropriate

In the case of **Popham v Information Governance Holdings Ltd and others** [2013] EWHC 2611 (Ch) the director at the time made an application to place the

company into administration on the basis of it not being able to pay its debts as and when they fell due. The other shareholders replaced the director and opposed the application. The Court held that since the majority of the debts owed were to connected parties and only a small amount was owed to unconnected third parties and a full financial review of the company had not been undertaken, it was inappropriate to proceed with the administration.

Director's right to challenge administrators not stopped by para 64 Sch B1

In the case of **Closegate Hotel Development (Durham) Ltd and another v McLean and others** [2013] EWHC 3237 (Ch) the directors challenged the validity of the Administrators' appointment. The Administrators tried to argue that the directors were stopped from doing this as para 64 Schedule B1 which states that an officer of a company in administration may not exercise a management power without the consent of the administrator. The court held that para 64 did not stop the directors challenging the appointment on behalf of the company. Ultimately however the directors were unsuccessful in their challenge.

Consumer Credit Licence

The FCA will publish a new rulebook, the Consumer Credit Sourcebook, in February 2014. Included will be guidance and any existing OFT standards which the FCA can carry across, which will turn into FCA rules and guidance.

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Employee claims are complicated to deal with, if you are fortunate you have an employee who specialises in agreeing these claims or you outsource to experts, but I am sure there are some who muddle through this minefield. So for the non-experts a quick reminder of the technical releases dealing with employee claims.

Rather than review the full document I am going to review the key matters to be considered when calculating the employee's pay in lieu of notice (PILON) claim.

The first point to understand is that PILON is both statutory and contractual and these two amounts may differ. The RPO will pay the statutory amount but there may still be an amount due under their contract of employment.

Irrelevant factors

There are amounts that the employee is entitled to without deductions being made and these are:

- Redundancy pay
- Discretionary social security benefits, do staff understand what these are?
- National Insurance Contributions
- Retirement Pension

- Protective awards (possibly) - these are a minefield with quantum of these still being argued in the courts. Whether protective awards should be considered when calculating the claims may require legal advice.

Additional Claims

The calculation may not just be for the salary but may also need to include fringe benefits and lost pension scheme benefits. Knowledge of these matters may only be available from the employee contract.

Mitigation

Matters which may be considered when calculating the amount to be paid are:

- Remuneration - it seems obvious that if the employee has earned money during the period he is claiming for PILON then this is deductible.

Consultation for non-bank resolution regimes

This consultation seeks comments on the five proposed statutory instruments required to underpin the extended Special Resolution Regime (SRR). The five instruments will:

- exclude certain investment firms from the scope of the SRR
- set conditions which group undertakings must satisfy for SRR powers to be used in relation to them
- introduce partial property transfer safeguards relevant to the wider scope of the SRR
- set out the 'no creditor worse off' safeguards
- make relevant amendments to the Bank Administration Procedure (BAP) rules.

Details of the consultation may be found at <http://goo.gl/92gj6p> and closes 21 November 2013.

Guidance on PPI for Sequestration and Trust Deeds

Guidance has been issued by the RPBs in respect of the PPI mis-selling in respect of Sequestration and Trust Deeds and is available here <http://goo.gl/qgq81A>.

Duties of the IP as Advisor

The ICAEW reminded its members that when providing advice on the appropriate options, time should be taken to obtain full financial details and understand the reasons why one option over another is being chosen. So IVA v BKY v informal options and CVL v CL etc.

Senior Accounting Officer Rules

R3 and the ICAEW have recently reminded IPs of the need to be compliant with HMRC rules in respect of qualifying companies. The IP will usually be deemed to be the Senior Accounting Officer and will need to meet the reporting requirements during his period in office.

Senior Manager role

A unique opportunity has arisen for a Senior Manager with progression to partnership if you win work. This is an international firm which is seeking to establish a place in the UK market and pursuing corporate insolvency appointments. The IP heading up the office speaks 5 languages, is Spanish, and has 20 years' insolvency experience as well as being a licensed IP in the UK. Your role would be to support the partner, establish the UK office, acquire new clients and appointments, project manage case work with the guidance of the IP and ensure compliance with the UK insolvency regime. Salary will be commensurate with experience. Please send your CV to julia@quabbala.com. NO CVs FROM AGENCIES.

Job Opportunities

Recruiting staff is expensive and to help IP firms I have set up a page on my website for firms to place an advert for any vacant positions they may have. This service is free, just send your advert to neil@insolvencyexamtraining.co.uk. Here is a link to my website <http://goo.gl/ddwG08>.

The artist formerly known as ...

Visionblue Solutions is the new company name for Insolv Technologies. The name change is due to a change in ownership. Due to this new investment the company is now looking to expand their client base as well as increasing their staff size.

Since the change in ownership the team at Visionblue have continued to strive towards making the application more effective and efficient. The new owners are keen to see the product improve further and envisage that the application can be taken to even greater height. As the same team of employees is still in place, client values and expectations remain known to staff and are still being met by employees.

VISIONblue
SOLUTIONS

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Mitigation ctd

- Notional earnings - any contractual period over 3 months should be mitigated.

- Non discretionary benefits - this does not include Jobseeker's Allowance.

- Unfair dismissal - the deduction should only be made where it represents loss of earnings during the notice period.

- Protective awards - as discussed above whether this should or should not be deducted is far from clear and where substantial amounts are involved may require legal advice.

- Tax - this is another complicated area where a pragmatic approach has been adopted. In respect of claims less than £30,000 and where a small dividend is to be paid, then basic rate notional tax is deducted. For claims over £30,000, the calculation becomes more complicated and I would urge you to use an expert.

A pragmatic and commercial approach must be taken when agreeing employee claims and this thought process should be documented. Just remember that when paying out large dividends more diligence will be required.

N.B. SIP 14 places a duty on IPs to help employees make claims for the appropriate amounts.

Author

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