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TECHNICAL UPDATE

Where the Right of Action Vests

In the case of *Hellard and another (as Trustees in Bankruptcy for Mireskandari) v Chadwick (Trustee in Bankruptcy for Tehrani) and another* [2014] EWHC 2158 (Ch) the litigation seemed to hinge on whether the trustee of Mireskandari ("M") had a right of action against the wife of Mr Tehrani ("T"). M assigned the benefit of his loan account with Azadian and his shares in Azadian to T in settlement of M's liability to T. T then assigned these assets to his wife. T and M were made bankrupt and the Trustees of the different estate both wanted to pursue Mrs T. The court held that the preference from M to T was a provable debt in T's estate and as such the Trustees of M could not pursue Mrs T. However, the Trustees of T could pursue Mrs T, enhancing realisations for the general body of creditors.

Termination of use and ROT

In the case of *Blue Monkey Gaming Ltd v Hudson and others* - [2014] All ER (D) 222 (Jun) various issues arose in the administration where the company used gaming machines, some of which were owned by a third party, MDM. MDM's claim stated that the administrators were under a duty to identify MDM's property and claimed retention of title based on allocation of funds across invoices and not on the basis of money being paid against the oldest invoice first. The court held that it was not for the administrators to identify third

party goods and no clear or unconditional demand had been made for the return of the machines and it was not for MDM to allocate funds across invoices. In any event, the court was not satisfied that MDM had ever terminated or withdrawn the consent that it had given to Frankice to continue to use the machines in the administration.

HR1 and Criminal Liability

In the case of *Akbar and others v Comet Group Ltd and another* [2014] the court held that that staff had not been consulted about the redundancies. This is hardly surprising, but what is worrying is that the Insolvency Service are considering whether criminal proceedings should be brought against the administrators of Comet who did not advise of redundancies.

Court will not give relief if there is non-compliance

In the case of *Patterson (trustee in bankruptcy of George Spencer) v Spencer and others* [2014] All ER (D) 213 (Jun) the trustee had issued proceedings to unravel a s423 and s339 transaction. One of the individuals against whom the action was taken had continuously delayed the proceedings or not filed documents within the relevant court time limits. The court agreed to strike out the defence of the individual due to the persistent non-compliance and did not give relief from sanction as justice would not be served by allowing this behaviour.

SIP - 3.1 IVA

I am continuing with my review from last month of the diary lines, checklists and documents you need to produce to be compliant with the new SIP 3s.

Preparing for an IVA, section 13

This section seems to focus on due diligence and the expectation that the IP obtains sufficient information to complete his nominee's report. The following information is required:

- (i) the measures taken by the debtor to avoid recurrence of their financial difficulties, if any;
- (ii) the likely expectations of any key creditors;
- (iii) the effect of the IVA on third parties where their view may have an effect on the viability of the IVA;

If your nominee's report does not currently deal with these issues I would suggest that it now needs to.

The most important sentence in this paragraph though is the requirement placed on the IP by para 13(d) "proportionate investigations into, and verification of, income and expenditure and assets and liabilities." This to me seems to be requiring the same level of due diligence that a Protocol IVA insists upon. I would suggest a checklist of evidence required, i.e. bank statements, wage slips, copy of latest credit card statements, etc. The evidence will need to be supplied before the nominee's report is completed and circulated.

Registrar to Advise Electronically of Strike Off

The Companies (Striking Off) (Electronic Communications) Order 2014 SI 2014/1602 which comes into force on 11 July 2014 will allow the Registrar of Companies to send certain communications electronically, where previously these communications were required to be sent as letters by post.

EU Modernisation of Insolvency

The proposed modernisation of the EU insolvency legislation is continuing to be supported and is progressing. It is likely that the adoption of the rules will occur at the end of this year. Further information may be found here <http://goo.gl/e49Jos>.

IVAs ... and there's more

Along with the new SIP 3.1 insolvency practitioners will also need to adjust their engagement letters to accommodate the requirements of The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134), which came into force on 13 June 2014. An IP contracting with a consumer must allow a 14 day cooling off period in the case of 'distance' and 'off-premises' contracts for the sale of goods or services. Further information may be found here <http://goo.gl/452406>.

Employees in Northern Ireland

The Pension Protection Fund (Entry Rules) (Amendment) Regulations (Northern Ireland) 2014 SR 2014/195 come into force on 21 July 2014. It allows

employers to be able to take advantage of European insolvency if they fulfil the requirements of the Pensions (Northern Ireland) Order 2005, SI 2005/255.

Insolvency Rules coming 2016 ... maybe

The introduction of the proposed modernisation of the insolvency rules has now been deferred until 2016.

TUPE Disclosure

The ICO has published guidance on the employee information to be given when transferring employees which may be found here <http://goo.gl/9kMsp0>.

Report on Pre-packs

The Graham report has been issued and may be found here <http://goo.gl/oVhnXt>. A positive consequence of this is not having to file your SIP 16 report with the Insolvency Service any longer.

Continuity of IT and Utilities

The insolvency service have issued a consultation document which may be found here <http://goo.gl/aeAJ8x>. The proposals would add IT suppliers to the list as a new category of essential supplier and also utility providers who are not presently covered (so-called 'on-sellers' of utilities). Consultation closes 8th October 2014.

IPA and Self-Certification

The IPA has advised that they only require self-certification on cases in the year prior to a visit, lessening the burden on IPA licensed IPs. ACCA do not require case reviews and the ICAEW continue to require annual ICRs.

SIP - 3.1 IVA ctd

The proposal, section 14

This section doesn't really add anything new, however section (e) states that "sufficient information to support any profit and cash projections, subject to any commercial sensitivity" needs to be given which I think is just fundamental to the overarching criteria for transparency to allow creditors to decide whether to support the VA.

The nominee, section 14

This section places great emphasis on providing sufficient information to the debtor in respect of any modifications, so that the debtor fully understands the consequences of accepting the modifications. The IP is also required to evidence that the debtor and creditors accept any modifications. A letter setting out any modification and the consequences needs to be supplied to the debtor and he will need to sign the letter to demonstrate understanding and acceptance. If this means that an adjournment of the meeting needs to occur, then staff need to be made aware of this.

The supervisor, section 14

This section can be summarised as "be compliant" but I will give a few recommendations. Section (a) requires that notice of modifications be given to creditors, this should be fully covered in your chairman's report which you circulate to creditors but make sure sufficient information is provided. Another area post-appointment which is a compliance issue is identifying promptly a breach of the VA and ensuring that the terms of the VA are followed in respect of a breach. I would recommend inserting diary lines for contributions and income and expenditure requests or management accounts which will make it easier to pick up when there is a breach. However, I do not believe the supervisor section has introduced any new requirements.



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Joanne also provides training for the JIEB, CPI, CPPI & CPCI exams.

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