

CASE LAW

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TECHNICAL UPDATE

'Ordinarily resident' question of fact

In the case of *Re: Khan* [2016] All ER (D) 92 Feb the individual was a citizen of Pakistan and a member of the Pakistan Senate. He did however have property in the UK and his children attended school in the UK. The debtor's solicitors in the UK had petitioned for his bankruptcy for unpaid bills of £492k. The court determined that the expression 'ordinarily resident' was a question of fact and degree and in this case, despite the debtor usually residing in Lahore, he did spend time in the UK and together with other facts indicated a degree of permanence allowing a bankruptcy order to be made in the UK.

Possible to petition to wind up co. to realise interest

In the case of *Hamilton and another (Joint Trustees in Bankruptcy of Charles Newell Brown) v Brown and another company* [2016] EWHC 191 (Ch) the Trustee applied to wind up the company that the debtor had shares in on the basis that those shares were not vested in him. The debtor had also involved himself in the management of the company despite no longer being able to act as a director and it was thought that assets within the company had been deliberately disposed of to reduce the value of the Trustee's interest. The court held that the Trustee could be held to be a member of the company as required by s74 IA86 and that the Trustee had established unfair

prejudice as a ground to wind up the company.

Prior officeholders' fees claimable in liquidation

In the case of *Tackie & Anor v Morrison* [2015] EWHC 3980 (Ch) the costs of a prior liquidator who was party to the litigation, before being replaced due to ill health, were challenged and not surprisingly the court held that the argument had no merit. However, a fresh retainer had been entered into with the solicitors and the retainer expressly provided for costs when the previous IP was in office. The costs order made was also for costs incurred in the period prior to the new liquidator taking office.

Clarification for challenges to ancillary relief

In the case of *Sands (as trustee in bankruptcy of Singh) v Singh and others* [2016] EWHC 636 (Ch) the court was asked to consider the transfer of the bankrupt's solely owned property to his wife as part of the ancillary relief given under matrimonial proceedings. The court reiterated the principles of *Hill v Haines* that unless there was fraud, mistake, misrepresentation or collusion between the spouses then the court would not consider setting aside the transaction. The judge did suggest that it might be possible to challenge ancillary relief if all the facts were not known to the court when the order was made and hence a different order should have been made. The sham charging order on the

SIPs 2 & 13

The new SIP 2 has finally been published replacing both SIP 2 & 4 for post 6 April 2016 cases with SIP4 finally being removed in October 2016.

The new SIP 2 has all of the matters in the previous SIP issued in May 2011 so I shall just be commenting on the new paragraphs added.

Para 3

Mentions the statutory requirement to report.

Para 4c

The requirement to submit the reports within 3 months and more importantly re-emphasising guidance by the Insolvency Service (IS) that extensions will only be given in exceptional circumstances. Also the need to report subsequent new information.

Para 19

This is a reflection of the SIP 4 information that the report should be based on information coming to light during the normal course of the IP's enquires. It also states reporting is a statutory duty irrespective of the funds in the case.

Para 20

This para is suggesting that the IP meet with directors to confirm their understanding of the facts. I am unconvinced that a three month period will be sufficient for the IP to have obtained and reviewed bank statements let alone analyse all the information and coordinate a meeting with directors. However, this is the new regime and IPs will be expected to proactively comply.

property was successfully challenged.

Whether right to redress is an asset of the company

In the case of *Walker and another v National Westminster Bank plc and another* [2016] EWHC 315 (Ch), [2016] All ER (D) 268 (Feb) the Administrators had obtained their release from office and the company had been dissolved. The Administrators were subsequently notified of a redress payment from interest rate swaps. The former Administrators sought an order of the court directing that the compensation be paid directly to them in respect of their charge under para 99 Sch B1 for their outstanding fees. The court held that the offer of redress was not an asset that was captured by para 99 Sch B1 and therefore it would not be appropriate to make payment directly to the former Administrators. The judge went on to say that the appropriate route would be restoration of the company and the appointment of a liquidator. The judge further stated that it would be a conflict of interest in these circumstances to appoint the former administrators as liquidators.

Piercing the corporate veil

In the case of *Boyle Transport (Northern Ireland) Ltd v R; Boyle and another v R* [2016] EWCA Crim 19, [2016] All ER (D) 265 (Feb) two road hauliers were convicted of tachograph offences. They were the sole directors of the company and the company transferred its assets to a new company following their conviction. The transaction occurred after they had resigned as directors and before the confiscation proceedings. The court held that the confiscation proceedings could not pierce the corporate veil. The criteria set in

the case *Re Prest* to pierce the corporate veil still applies.

Northern Ireland

The Small Business, Enterprise and Employment Act 2015 (Consequential Amendments) (Reports on Conduct of Directors) (Northern Ireland) Regulations 2016 which came into force on 6 April 2016 requires D reports to be filed within 3 months and may be found [here](#). The Insolvency (Amendment) (2016 Act) (Commencement No. 1 and Transitional Provisions) Order (Northern Ireland) 2016 may be found [here](#). A few of the changes in legislation which were brought into force 1 April 2016 by this: sanction no longer required for compromises over calls, debts and claims due to companies; criteria introduced for liabilities in tort to be provable, and the regulation of insolvency practitioners by the Department.

IP Regulation review

The Insolvency Service annual review of Insolvency Practitioner Regulation is now available [here](#). Amazingly the highest number of complaints did not relate to IPs' fees.

Consultation on insolvency framework within the EU

The European Commission has issued a consultation on an effective insolvency framework within the EU and has asked for responses by 14 June 2016. A link is [here](#).

No more LAPSO exemption

The exemption for insolvency expired 6 April 2016. It will be interesting to see whether this does impact IPs issuing insolvency proceedings.

SIP 2 & 13 - ctd

Para 21

This is a reminder that the IP report must not be disclosed to third parties.

Para 22

A timely reminder about the fact that whilst the IP may not disclose the report, that does not mean that the report will not end up being seen by the directors. If an IP receives a request to disclose the D report he must revert to the Secretary of State (SoS). I have reviewed the questions that IPs will be asked to answer when submitting a D report. A Word document of the current list of questions has been circulated with this technical update for your use. I would suggest discussing with staff the evidence required to substantiate any "yes" answers to the questions asked to avoid any potential defamation claims.

Para 23

This paragraph deals with the need to advise SoS about any action the IP may be taking so that a conflict is avoided between the IP's action and a possible compensation order sought by SoS.

Para 24

This is the old para 18 but amended to reflect that this covers both the initial investigation and the statutory D report and now focuses solely on offences needing to be reported to other authorities.

SIP 13

A consultation has been launched in respect of the proposed amendments to SIP 13, a copy of which may be found [here](#). The consultation closes 11 May 2016 and I would suggest feeding back your comments.

My initial thoughts, as with all the principles based approach SIPs, are that it does not provide clear guidance on disclosure for connected party transactions, which will be necessary since this now applies to all insolvency case types.



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