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# TECHNICAL UPDATE

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## Supreme Court rules on Lehman

In the case of [Re Lehman \[2017\] UKSC 38](#) the Supreme Court determined various issues and disagreed with some of the earlier rulings. In particular they determined that it was not open to the foreign currency creditors to seek to claim as a non-provable debt the difference between the sterling value of the debt at the administration date and the sterling value of that debt when paid out as a dividend. The other key issue the Supreme court disagreed on was statutory interest. The Supreme Court has concluded the contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for a debt and been paid on his proof in a distributing administration.

## Fiduciary duty of director not tortious

In the case of [O'Keefe and another v Caner and others \[2017\] EWHC 1105 \(Ch\)](#) the liquidators of the two Jersey companies, which had originally been placed into administration in England and were now in liquidation, issued proceedings against the directors under s212 IA86, breach of their duties as directors. The court held that the relevant duty under Jersey company law was a fiduciary duty and not tortious, which meant that the limitation period would be 10 years and not 3 years. Since Jersey does not have any specific limitation

legislation like our Limitations Act 1980, this was key to being able to proceed.

## Valid service of statutory demand necessary

In the case of [Canning v Irwin Mitchell LLP \[2017\] EWHC 718 \(Ch\)](#) the court on appeal considered whether a petition could be presented if valid service of a statutory demand had not been affected. The court held that it had no jurisdiction to consider a bankruptcy petition if the statutory demand had not been validly served.

## Re Ex parte James, fairness & bankruptcy

In the case of [Allen \(trustee in bankruptcy of Young\) v Young, \[2017\] All ER \(D\) 65 \(Apr\)](#) the Trustee made an application to court to enforce an agreement between himself and the bankrupt. The agreement related to trust assets of which the bankrupt was entitled to 20% of the £1.3 million life policy. The bankrupt agreed to sign whatever paperwork was necessary to realise the trust assets for the fee of £15k. Whilst the court found the agreement between the Trustee and the bankrupt was binding it also determined that the trust assets in this case did not vest in the bankruptcy estate. Therefore the agreement could not be enforced or the bankruptcy estate would benefit from unfair enrichment. There was no criticism made of the Trustee by the judge, who determined that

the Trustee when entering into the agreement and issuing the proceedings had genuinely believed it was an asset of the bankruptcy.

## Security for costs

In the case of [Dalnyaya Step LLC \(in liquidation\); Cherkasov and others v Nogotkov \(Official Receiver of Dalnyaya Step LLC \(in liquidation\)\) \[2017\] EWHC 756 \(Ch\)](#) the court appointed liquidator of a Russian company sought recognition under the Cross-Border Insolvency Regulation 2006, which had been granted. The liquidator then applied under s236 for disclosure of documentation and interviews with relevant parties. The parties then applied to set aside the recognition order and sought security for costs. The security for costs was granted on an exceptional circumstances basis since it would be difficult to enforce a costs application in Russia, the liquidator had no assets in this jurisdiction and also because the liquidator had sufficient funds to enable him to put up money for security.

## Winding up petitions should not be used for disputed debt

In the case of [Breyer Group plc v RBK Engineering Ltd \[2017\] EWHC 1206 \(Ch\)](#) the court struck out a winding-up petition brought by a subcontractor on the basis that the main contractor could not pay its debts, as the debt was disputed and the proper place for

the dispute was adjudication or ordinary court proceedings.

### Judgment based on tax assessments

In the case of *Hope v Revenue and Customs Commissioners* [2017] All ER (D) 151 (May) the court considered and struck out the claim that judgment given to Revenue and Customs Commissioners had been obtained as a result of fraudulent misrepresentation. The Revenue had presented a bankruptcy petition based on VAT assessments and the appeal concerned the rejection of a proposal for an IVA. The court held that no duty of care had arisen at common law or statute law on the part of the Revenue; and that there were no grounds to find a misfeasance claim, and no evidence to support the contention that the Revenue should have withdrawn or not relied on a VAT assessment at a meeting of creditors to consider an IVA. Further, the claim was held to be an abuse of the court's process.

### HMRC Assessments & Statutory Demands

In the case of *Vieira v Revenue and Customs Commissioners* [2017] All ER (D) 32 (May) the court dismissed the appeal to set aside a statutory demand, which was based on arrears of assessed income tax, VAT and penalties where there was a pending appeal. The court held that para 13.3.3 of the Practice Direction: Insolvency Proceedings precluded the Bankruptcy Court from inquiring into the validity of the assessments upon which the statutory demand had been based at that stage.

### Scotland

The *Insolvency (Regulation (EU) 2015/848) (Miscellaneous*

*Amendments) (Scotland) Regulations 2017* comes into force on 26 June 2017 and may be found [here](#). The *Public Services Reform (Corporate Insolvency and Bankruptcy) (Scotland) Order 2017* comes into force on 1 August 2017 and may be found [here](#).

### EU to harmonise ranking of unsecured debt

The Council of the European Union has issued a proposed Directive to amend the Bank Recovery and Resolution Directive (BRRD) (Directive 2014/59/EU) as regards the ranking of unsecured debt instruments in insolvency hierarchies. Further information may be found [here](#).

### ML Regulation

The draft *Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017* comes into force 26th June 2017 may be found [here](#)

### Chancery Guide updated

The Chancellor of the High Court, Sir Geoffrey Vos, has approved an addition to the Chancery Guide directing the attention of practitioners involved in an international insolvency case to the desirability of considering at an early stage whether to invite the Companies Court to adopt a set of guidelines on Court-to-Court communication and co-operation for use in the proceedings. The press release may be found [here](#) and the guide may be found [here](#).

### SIP 16 & Pre-Pack Pool

The report annual review of the pre-pack pool for 2016 was published in March 2017 and may be found [here](#). Michelle Butler has posted a blog on SIP 16 and the

pre-pack pool which may be found [here](#).

### R3 Guides to Fees

The new Creditors' Guides to Fees are available [here](#).

### Introduction of Business and Property Courts

From June 2017, users seeking to issue proceedings electronically in the specialist civil courts will be directed to the Business and Property Courts of England and Wales. An explanatory note has been issued which outlines the practical changes which may be found [here](#). In particular documents must be titled as follows:

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
OF ENGLAND AND WALES  
COMMERCIAL COURT (QBD)

or  
IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
IN MANCHESTER BUSINESS LIST  
(ChD)

### Guidance on distributable profits

ICAS and ICAEW have published joint guidance on realised and distributable profits under the Companies Act 2006 which may be found [here](#).

### Technical support

The Compliance Alliance offers an annual subscription to our technical support for £1,000 plus VAT per firm, subject to fair usage. As well as email and telephone support, technical support clients have access to our online Q&A section that sets out the guidance we have given on the new rules queries answered to date.



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