TECHNICAL UPDATE

Security for costs ordered where ATE held

In the case ofPremier Motorauctions Ltd (in liquidation) and another v Pricewaterhousecoopers LLP and Lloyds Bank [2017] EWCA Civ 1872 the court considered whether the ATE insurance was adequate or whether security for costs should be obtained. In this particular case the ATE insurance could be avoided for non-disclosure or misrepresentation.The judge decided that because the evidence of the managing director of the claimant was central to the case, this raised the possibility that the policy could potentially be avoided if his evidence was not believed since the claim would then fail. Therefore security for costs was appropriate.

Statute barred & unliquidated debts

In the case of Dowling v Promontoria (Arrow) [2017] All ER (D) 82 (Sep) an application to set aside a statutory demand had been made in respect of a debt which had been assigned. The debt related to a personal guarantee given in respect of facilities lent by Anglo Irish Bank. The facilities became due and payable on 31 March 2008. The debt was assigned by the National Asset Loan Management Limited. The court reviewed the following matters raised to support setting aside the statutory demand: 1. All the documents evidencing that a valid assignment of the debt had occurred were not provided. 2. There had been an initial facility and a guarantee given in respect of that facility and a second facility and guarantee but the second guarantee had not been assigned and the court felt that it was strongly arguable that the second facility is not within the purview of the first guarantee. 3. The debt fell due under the facilities on 31 March 2008 and although the guarantee may have been executed as a deed it cannot be enforced against a debt that is statute barred. The judge accepted that his interpretation of when the debt fell due may be wrong but there was certainly an arguable case, making a statutory demand inappropriate. 4.The guarantee gives rise to an indemnity obligation and as such is enforceable by way of an action for unliquidated damages. Therefore the court set aside the demand.

Is an 'air carrier' still an 'air carrier' when insolvent

In the case of R (on the application of Monarch Airlines Ltd (in administration)) v Airport Coordination Ltd [2017] EWCA Civ 1892 the airline had entered administration and the administrators were seeking to sell the 2018 take-off and landing slots the company had applied for as assets. The key issue was whether the company had ceased to be an 'air carrier' within the meaning of the Slots Regulation and so had become ineligible to have slots allocated to it. The court held that the company could still be defined as an 'air carrier' for the purpose of the legislation and as such 2018 slots should be allocated to the company.

New Insolvency legislation: 8/12/17

Let's start by reviewing the Insolvency (Miscellaneous Amendments) Regulations 2017. As we know not all pieces of secondary legislation were amended when the new rules came into force. This legislation now brings the Limited Liability Partnerships England & Wales, Insolvent Partnerships England & Wales and Administration of Insolvent Estates of Deceased Persons England & Wales under the Insolvency (England and Wales) Rules 2016 ('IR16') regime. There are transitional provisions similar to those in IR16 to deal with partially completed processes.

There were also some minor amendments to Limited Liability Partnerships, Scotland and Limited Liability Partnerships, Northern Ireland.

The IR16 withdrew all the IR86 insolvency forms except Form 600 which was a form required under The Companies (Forms) (Amendment) Regulations 1987. Form 600 has now been withdrawn but the amended Companies House form is only to be used for MVLs and CVLs where the liquidator is appointed on or after 9 Dec in accordance with the information supplied by Companies House.

The Insolvency (England and Wales) and Insolvency (Scotland) (Miscellaneous and Consequential Amendments) Rules 2017 are also due to come into force on 8th December and here are the highlights.

COMI in the UK?

In the case of Bank Leumi (UK) Plc v Screw Conveyor Ltd [2017] WL 04764974 the court determined that the EU Regulation only applies to establish **international** jurisdiction. The court of the Member State which may open insolvency proceedings is designated, but territorial jurisdiction within that Member State is established by the Member State's national law. Therefore a Scottish court has no jurisdiction to wind-up a company registered in England and Wales even if its COMI is in Scotland.

Changes to the Insolvency Rules 2016 & other stuff

The Insolvency (England and Wales) and Insolvency (Scotland) (Miscellaneous and Consequential Amendments) Rules 2017 will come into force 8 December 2017 and may be found here. The Insolvency (Miscellaneous Amendments) Regulations 2017 also come in to force on 8th December and may be found here

Withdrawn legislation on assignment of receivables

The draft Business Contract Terms (Assignment of Receivables) Regulations 2017, which had been laid before the House of Commons on 14 September 2017 have been withdrawn as detailed here. This may be a consequence of the issues raised by the City of London Law Society detailed in their letter dated 13 October 2017 which may be reviewed here.

Guide to Compensation Orders

The Insolvency Service on 9th November 2017 issued guidance: Director disqualification: a guide to compensation orders which may be found here.

Review of consumer protection: Airline failures

The government has announced its intention to launch a review, led by an independent chair, into consumer protection in the event of an airline or travel company failure. Information may be found in the Autumn 2017 Budget available here.

Factsheet on Redundancy

The Insolvency Service factsheet on 'What to do when you have been made redundant' was updated again on 13 November 2017 and may be found here.

JIEB 2018

The JIEB have announced that from 2018 onwards, as well as only one corporate paper and one personal insolvency paper, the exams will also be computer-based and there is the introduction of a case study question in each paper.

What a year for CA

This has certainly been an eventful year at the Compliance Alliance. We managed to:

- issue new rules compliant document packs for all the usual case types for our clients by 6 April 2017
- update documents to reflect the MLR17, EU Reg, Dear IP and R3 Technical Bulletins as well as the new insolvency legislation
- Provide webinars on the new rules upon introduction, ongoing updates as understanding has developed as well as on the MLR17
- Focus client based site visits on helping clients understand the practical application of the new rules.

New Insolvency legislation: 8/12/17- ctd

There are some corrections of typographical errors and tidying up.

Notification to creditors - not sure what the intention was on amending R6.15 but instead of reporting on the decision process we now need to send a notice "**accompanied** by a report" on the decision process.

Blank proxy - the changes to R 16.3 will prohibit issuing proxy forms with the name of the proposed IP on them.

Establishment of committees - Finally common sense has prevailed and the committee is established when the notification is **sent** to either the registrar of companies or the court.

Final R & P to SoS for BKY & WUC
Whilst there are minor changes to reg 14 and 28 of Insolvency Regulation 1994 they will change the way we approach closures of compulsory liquidations and bankruptcies.

The IR16 envisaged cases only closing once all matters had been finalised and the bank account had been brought to Nil. This caused problems with court appointments and the ISA account as the Form 1 was not being sent until over 8 weeks after the final report to creditors was circulated meaning that additional account charges accrued.

Now the Form 1 will be sent within 14 days of the final report being circulated, requiring a change in diary templates, checklists, documents and procedure, if final reports are being sent before all issues are finalised.

Michelle Butler will be more thoroughly exploring these changes in an upcoming blog.

Compliance Alliance

Joanne Harris has 19 years' experience in insolvency dealing with all case types. She was formerly a Director of Technical and Compliance in a top 20 firm before starting her own business to supply technical services for insolvency practitioners without a compliance resource.

Joanne is also a partner of both The Compliance Alliance and JOH Consultancy which offer a range of services that may be tailored to an individual IP's needs.

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