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# TECHNICAL UPDATE

## What is a binding contract & is sale by auction “unfair”?

In the case of *Meem SL Ltd (In Administration), Re* [2017] EWHC 2688 (Ch) (30 October 2017) the court assessed whether an email exchange between the administrators and a solicitor for a creditor/member constituted a binding contract to sell a cause of action. The court held that the administrator had been clear in stating that he would be instructing solicitors to deal with the contract for the assignment and as such the email exchanges were by implication subject to contract and not binding. The court also confirmed that a proposed auction of that cause of action did not constitute unfair harm to the creditor/member under paragraph 74 of Sch B1 IA86.

## Review of fees in Scottish Liquidation

In the case of *S & M Livestock Limited* [2017] SC DUMF 78 the Reporter conducted an in-depth review of the case and its strategy and suggested that if a different strategy had been applied the fees would be significantly less. The Sheriff indicated it was not the remit of the Reporter to review the strategy of the IP but to “...“audit” the accounts and... that meant seeing that the time charges were justified by file entries and records.”. The judgment is in line with the current understanding of the role of the Reporter but is not binding. The case may be found [here](#).

## Equal pay claim is wages & RPO & transferee liable

In the case of *Graysons Restaurants Ltd v Jones & Ors* UKEAT/0277/16/JOJ Employment Appeal Tribunal (EAT) considered the issue of who would be liable where a claim for equal pay was successful in an insolvent situation and where there had been a transfer under TUPER. EAT held that a claim for equal pay is a wages claim within the meaning of s184(1) ERA. Liability for up to eight weeks of pre-transfer arrears of pay only (subject to the statutory limit), is potentially the liability of the Secretary of State and does not transfer to the transferee. Liability for any arrears of equal pay in excess of the eight week limit does transfer to the transferee.

## Committal proceedings in a bankruptcy

In the case of *Simmonds v Pearce* [2017] EWHC 3126 (Admin) the High Court considered the procedure for a trustee in bankruptcy to apply to commit a bankrupt who has failed to comply with his statutory obligations. The court stated that a trustee in bankruptcy should not be required to launch fresh proceedings under CPR Part 8 in order to ensure that the bankrupt is punished for non-compliance with his statutory duties except in rare cases where a bankrupt's dishonesty is only discovered after he has been discharged from bankruptcy and the administration of his estate has been completed.

## SIP 6 & 11

The new SIP 6 came into force on 1 January 2018.

I thought a quick review of the changes may be useful and how they will impact upon your procedures.

1. Change in title of the SIP 6 now defines it as “Deemed Consent And Decision Procedures In Insolvency Proceedings” just in case there was any ambiguity to when this applies. So every time you seek a decision from creditors you need to ensure that sufficient information is provided to allow creditors and other interested parties to make an informed decision.
2. Notices no longer need to be sent on the same business day to all known participants “irrespective of delivery method used”.
3. An insolvency practitioner should disclose the extent of their prior involvement, any threats identified to the Code of Ethics, and the safeguards applied to mitigate those threats. This disclosure should be made with the notices convening the deemed consent or decision procedure.
4. Last, but certainly not least is the authority to now put the SIP 6 report on to a website or alternatively make it available to creditors upon request, no later than one business day before the decision date.

## Restoration Order & joining of 3rd party

In the case of [Welsh Ministers v Price \[2017\] EWCA Civ 1768 \(07 November 2017\)](#) the court considered the appropriateness of joining a third party to the restoration proceedings. The third party were being sued by the director/company and sought to be joined in so that they could seek for the restoration to be revoked for breaches of the restoration order. The court did not think it appropriate for them to be joined into the proceedings and clarified that the sanction for contempt of court for breach of an order would result in fine or imprisonment only.

## Employment Law Changes

The [Employment Rights Act 1996 and Pension Schemes Act 1993 \(Amendment\) Regulations 2017 SI 2017/1205](#) came into force on 26th December and may be viewed [here](#). The Regulations bring insolvent employers that are not defined as a company, an individual, or LLP, within the provisions of the Acts for the purposes of enabling employees to make a claim for redundancy and insolvency related payments.

## CVLs and HMRC

HMRC have experienced difficulties in participating in the appointing of a liquidator due to what they consider to be the reduced notice period of 3 business days and the non-advertising of deemed consent procedure. In order for HMRC to participate they have requested that IPs email [notifications.hmrcvcl@hmrc.gsi.gov.uk](mailto:notifications.hmrcvcl@hmrc.gsi.gov.uk) with the initial notification only of the decision procedure or deemed consent being used for the appointment of an IP in CVL. The subject of the email should

contain: company name, CRN and the decision date.

## MVL & HMRC

R3 have issued guidance on payment of statutory interest on tax liability from the date of appointment in MVL. They are not clear about whether the deduction for early payment is challengeable. The guidance may be found [here](#).

## Review of Pre-pack regime

The Government announced on 12 December 2017 their intention to undertake an assessment of the measures introduced to improve the transparency of connected party pre-pack sales in administration. The assessment will inform the decision on whether regulation is needed prior to the expiration of the regulation making power in May 2020. Further information may be found [here](#).

## Suspicious Activity Reports

The National Crime Agency issued guidance in December 2017: Suspicious Activity Reports Online User Guidance, which may be found [here](#).

## Business and Property Courts Leeds

A brochure was issued on the Business and Property Courts in Leeds which may prove useful and has a copy at Appendix B of the Practice Direction - Business and Property Courts and may be found [here](#).

## Taking a Break

The next Technical Update will be published in March 2018 and will cover Feb/Mar. "Reports of my death are grossly exaggerated." ;-)

## SIP 6 & 11- ctd

The new SIP 11 came into force on 1 January 2018. For a full review you may see my earlier technical update available [here](#). I have therefore focused on the amendments to the earlier draft.

### Records Section 5

Office holders should ensure that records are maintained to identify estate money (including any interest earned thereon) for each case for which they are the office holder and [document transactions involving such funds](#).

### Safeguards Section 8

Those arrangements should include [appropriate financial controls and may include insurance](#).

### Section 9

Controls which may be put in place by officeholders:

- a. ensuring transactional processing is conducted in a timely manner;
- b. [seek to ensure that solicitors and agents holding estate money account for those funds in a timely manner](#);
- c. allowing only appropriate persons within the entity to conduct transactions;
- d. adequate supervision of personnel with access to funds;
- e. limiting the size of transactions that can be processed by different grades of staff;
- f. implementing secure and robust authorisation procedures within the entity;
- g. regular reconciliation of estate and client accounts;
- h. periodic risk assessment of transactional processes within the entity;
- i. requiring joint signatories or joint authentication.

### Section 11

Remember the financial controls and safeguards now need to be [reviewed annually](#) at a minimum to ensure they are adequate and need to be fully documented.



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.