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TECHNICAL UPDATE

Non-contractual agreement for fees does not vest

In the case [Gwinnutt V George and another \[2018\] EWHC 2169 \(Ch\)](#) the issue of whether fees paid, under a non-contractual honorarium agreement, were defined as property under s436 IA86 and therefore vest in the Trustee under S306 IA86 was reviewed. It was found that the barrister’s unpaid fees arising under a non-contractual honorarium engagement, were not property within the definition in section 436 IA86 and therefore did not automatically vest in his Trustee in bankruptcy on appointment. The issue of whether the funds received could be claimed by the Trustee as after acquired property under S307 or as part of an income payment order under S310 were not specifically reviewed.

S127 and settlement agreements

In the case of [Officeserve Technologies Ltd & Anor v Annabel's \(Berkeley Square\) Ltd & Ors \[2018\] EWHC 2168 \(Ch\) \(15 August 2018\)](#) the court was asked to consider payments made and their recoverability under S127 IA86. The liquidators had issued proceedings against various parties including the director and these matters had been the subject of arbitration resulting in a settlement agreement. Despite this the liquidators continued to pursue third parties not subject to the arbitration agreement. The court considered the impact of the settlement agreement and

determined it did not preclude the liquidators from pursuing the s127 voidable dispositions since the settlement agreement did not cover all of the company’s losses. The defendants could have applied for a validation order or submitted defences with evidence but these had not been pursued.

Obligations to creditors when selling assets

In the case of [Fraser Turner Ltd v PricewaterhouseCoopers LLP \[2018\] EWHC 1743 \(Ch\) \(12 July 2018\)](#) claims were brought against the administrators for (1) a claim for damages for procuring a breach of contract; (2) a claim for damages for conspiracy to cause loss by unlawful means; (3) damages for breach of duty as administrators; (4) damages for misfeasance; and (5) relief pursuant to paragraph 74(3)(a) Sch B1 IA 86. The claimant had procured the purchase of a lease in Sierra Leone for the company prior to its administration and the facilitation agreement provided for royalties based on iron ore sold. The company then disputed the royalties and litigation ensued, ending with settlement agreements based on royalties. The company subsequently entered administration. The claimant had advised the administrators of his settlement agreements and stated that any sale of the assets needed to include the transfer of the obligation to pay royalties. The administrators did not agree or disagree with the statements made by the claimant and sold the assets without including the royalties. The court reviewed the

settlement agreements to identify whether any contractual obligation existed that would bind the administrators when selling the assets and determined that none existed. The court also reviewed whether a special obligation was owed by the administrators to this creditor. The court found that no special relationship existed and no obligation was owed, and providing for royalties as part of the sale of assets would potentially have adversely affected the sale price and the obligation owed to the general body of creditors.

Administrators, QFCs and conflict of interest

In the case of [Zinc Hotels \(Investment\) Limited and others v Beveridge and others \[2018\] EWHC 1936 \(Ch\)](#) an application had been made by the ultimate shareholders to have the administrators, who had been appointed by a QFC, removed due to a conflict of interest and to stop any sale proceeds being paid to the secured lender. Allegations had been made about: a conflict of interest as the administrators had been appointed by the QFC prior to their appointment to review the company’s financial position, using the same lawyers as the QFC, not considering achieving para 3a Sch B1 IA 86 purpose and various other issues. The judge found that there was no conflict of interest created by the administrators being used prior to appointment to assess the status of the company. There was no inherent conflict in using the same solicitors, however, it was

noted that upon the administrators identifying that there might potentially be a return to shareholders they had changed solicitors and had their previous actions reviewed by the new solicitors. There was no pre pack sale issue which might have created potentially a conflict of interest. The judge held that the only way an administrator could be replaced in these circumstances, where there was a QFC appointment, would be by an application to court by the current administrators under para 103 Sch B1 IA 86. The judge also declined to give injunctive relief in respect of the sale proceeds since valid security was in place.

Adjudication, Liquidation and the right of set off

In the case of [Michael J Lonsdale \(Electrical\) Ltd v Bresco Electrical Services Ltd \[2018\] EWHC 2043](#) the claim brought by Lonsdale was for declarations and a permanent injunction to prevent Bresco (in liquidation) from bringing a claim to adjudication, on the basis that the liquidation operates in law in such a way as to extinguish the claim(s) relied upon by Bresco in that adjudication. The judge reviewed the position of whether adjudication was appropriate where a liquidator had been appointed and found that claims and cross-claims cease to be capable of separate enforcement when a liquidator is appointed. Further the judge held that the adjudicator in this case does not have jurisdiction to determine the dispute referred to him.

Revocation of IVA

In the case of [Gertner v CFL Finance Ltd & Anor \[2018\] EWCA Civ 1781 \(30 July 2018\)](#) the Court of Appeal reviewed the decision of the High Court in revoking an IVA. In this case the main creditor had entered into a compromise agreement with a third party in

respect of the debtor's liability but had also voted in the IVA which meant the IVA had been approved. The High Court had concluded that the debt had been extinguished and therefore it should never have been allowed to vote or should have been admitted for a nominal sum. However, the Court of Appeal determined that the debt, even subject to the settlement agreement, continued to exist and since the sum was quantifiable the bank was entitled to vote for the full amount. The Court of Appeal did conclude that the bank's position created a material conflict of interest. It held that the bank should have been disqualified from voting at the creditors' meeting due to it breaching the duty of good faith between creditors, which is included within the concept of material irregularity. The earlier decision to revoke the creditors' approval stood.

Environmental costs expense of liquidation

In the Scottish case of [Joint Liquidators of Doonin Plant Limited](#) the Opinion given by Lord Docherty states that the cost of complying with a s59 notice by the Scottish Environmental Protection Agency is deemed an expense of the liquidation. The Opinion does provide for the costs of the liquidation to be paid as a priority before the costs of the s59 expenditure. The transcript may be accessed [here](#).

Insolvency and Corporate Governance

The consultation on Insolvency and Corporate Governance ended and the summary of findings may be found [here](#). The Government has announced the following proposed changes:-

- Moratorium for viable businesses to restructure

- New restructuring procedure for distressed companies
 - Investigation of directors of dissolved companies by Insolvency Service
 - Enhanced antecedent recovery powers
 - Increase in the prescribed part
- Further information may be found [here](#).

New classes of creditor for financial institutions

The suggested introduction of three new classes of non preferential creditor will apply to insolvency of financial institutions. The draft order is available [here](#). A link to HM Treasury's consultation, which closes 10 October 2018, may be found [here](#).

UNCITRAL - recognition and enforcement of judgments

The United Nations Commission on International Trade Law (UNCITRAL) has now published the final, adopted text of the UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments. Information may be found [here](#).

EU litigation and no Brexit deal

The government published on 13 September 2018 a technical notice about handling civil cases that involve EU countries if there is no Brexit deal which may be found [here](#).

Report on Monitoring and Regulation of IPs

The Insolvency service have published their report on Review of the monitoring and regulation of insolvency practitioners which may be found [here](#).



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.