TECHNICAL UPDATE

Indemnity costs

In the case of Hosking and another v Apax Partners LLP and others [2018] EWHC 2732 (Ch) (18 October 2018) the claimant liquidators suddenly, and without explanation, discontinued their case four days into a six-week trial and the defendants sought indemnity costs because the claimants' conduct took the case "outside the norm". The claimant liquidators had pursued high-risk litigation aggressively and expensively in the UK after failed attempts in multiple jurisdictions. The court found that they had "shoe-horned" their complaints, (including allegations of dishonesty, fraud and serious commercial impropriety) into a claim under section 423 of the Insolvency Act 1986 with frail evidential support, seeking to continue what they had instigated elsewhere and to benefit from publicity actively generated there. The court found that the claimants had intentionally used the court as an anvil for settlement, not for adjudication. Such conduct was characterised as being close to an abuse, albeit not technically so. The court therefore awarded indemnity costs against the claimants.

Costs of intervention are liquidated

In the case of Blavo v The Law Society (acting through the Solicitors Regulation Authority) [2017] EWHC 561 (Ch) the Court of Appeal has unanimously held that unassessed costs of a Solicitors Regulation Authority (SRA) intervention agent is a debt for a liquidated sum, for the purposes of section 267(2)(b) of the Insolvency Act 1986. The Court of Appeal considered that paragraph 13, Part II, Schedule 1 to the Solicitors Act 1974 (SA 1974) that "any costs incurred by the Society for the purposes of this Schedule … shall be paid by the Solicitor", constitute a pre-determined formula or machinery which, when applied, will produce a figure. This creates a debt for a liquidated sum.

PPI and closed trust deeds

In the case Dooneen Ltd (t/a McGinness Associates) and another (Respondents) v Mond (Appellant) (Scotland), which may be found here, the Supreme Court dismissed the appeal of the trustee and held that the trust had terminated in accordance with the provisions of the trust deed and that the PPI repayment belongs to the debtor.

Scottish Corporate legislation

Some significant changes are being introduced into Scottish insolvency legislation with the intention to bring the Scottish legislation in line with the Insolvency (England and Wales) Rules 2016.

- The Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 will come into force on 6 April 2019 and may be found here here.
- The Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 are also due to come into force 6 April 2019 but the

A tale of two cases

I have resisted providing an update on an unreported case heard in March (reported Oct) that dealt with the validity of appointment.

As you are aware the proforma forms were removed under the new legislation and we were left with drafting documents based on the wording of the new rules. Companies House decided to produce proformas for documents filed with them and HMCTS decided to draft proformas for use by IPs in insolvency proceedings, but HMCTS did not produce documents for appointment in administration for the out of court procedures. Ambiguity slipped in to what was once a clear process.

Under the 1986 rules the date and time of appointment were accepted as the same as the date and time at commencement, both of which were indicated by the date and time stamped by the court when filed.

The wording of R3.24 and R3.25 requires a date and time of appointment of the administrator as well as a date and time endorsed by the court.

Some IPs and lawyers have therefore been completing the date of the appointment of the administrator as being the date and time the notice of appointment was filed at court, making a referential statement rather than entering an actual date and time which was different from that endorsed by the court.

draft has not been laid before parliament yet.

Whilst the changes will bring the legislation closer to English insolvency the differences relating to obtaining approval for fees will remain unchanged.

Scottish Personal legislation

The Debt Arrangement Scheme (Scotland) Amendment Regulations 2018 came into force on 29 October 2018 and may be found here. A table has been produced by the Accountant in Bankruptcy setting out the changes which may be found here.

The Draft Common Financial Tool (Scotland) Regulations 2018 however has been withdrawn with the intention to reintroduce the legislation by April 2019.

Bank Recovery and Resolution after Brexit

The Draft Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018 were published by HM Treasury on 8 October 2018. The purpose of the Regulations is to ensure that the regime established by the Bank Recovery and Resolution Directive (*2014/59/EU*) (BRRD), and in particular the special resolution regime (SRR), functions effectively after Brexit. Further information may be found here.

Education Administration Rules

The Education Administration Rules 2018 SI 2018/1135 come into force on 29 January 2019 and a copy may be found here.

Tax Abuse and Insolvency

The summary of the responses received from the consultation on Tax Abuse and Insolvency is now available here. This response document confirms that the government will legislate in 2019 to 2020 to allow HMRC to make directors and other persons involved in company tax avoidance, evasion or phoenixism jointly and severally liable for tax liabilities that arise from those activities where the company becomes insolvent.

"The more things change the more they stay the same"

The government has announced its intention to re-introduce HMRC as a preferential creditor from 2020. The intention is that HMRC will be a secondary preferential creditor in respect of taxes held on behalf of employees and customers, being paid after the current preferential creditors have been paid in full. Further information may be found here.

Breathing space scheme consultation

The government published its consultation on breathing space and statutory repayment plan on 29 October 2018 and the closing date for submissions is 29 January 2019. Interestingly the ability to apply for breathing space is based on seeing an FCA regulated debt advisor, meaning IPs would only be eligible to help with this process if they are regulated by the FCA. Further information on the consultation may be found here.

DAS consultation

The Accountant in Bankruptcy has also issued a consultation paper entitled 'Building a better DAS' which may be found here. The consultation will explore how DAS may be further improved. The consultation closes 24/01/18.

Deja vu - Another Minmar?

In the case of Re NJM Clothing Ltd [2018] EWHC 2388 (Ch) the argument put forward was that the appointment as administrator, because of the referential wording, occurred after the document was filed at court and not simultaneously making it invalid. The judge determined that this was not the case, stating the logical sequence of events was the appointment of administrator and then the filing of the appointment in court. The judge's comments indicated that even if the referential wording made the appointment invalid it was curable using R12.64. This left the profession with potentially defective appointments which needed to be ratified and also needed to potentially have a date and time of appointment that was different than the date and time of commencement of the appointment.

In the latest case of Re The Towcester Racecourse Company Ltd (in administration) [2018] EWHC Ch 2902 the case considered two defects, the defect relating to the wording on the notice of appointment is significant. In particular the date of appointment was referential to the date filed in court. The judge distinguished this case from Re NJM Clothing Ltd by stating that the previous judgment did not categorically state that putting a referential date made the appointment invalid, but merely hypothesised that following the argument put forward about the appointment being after the filing of the documents at court, there was a potential for it to be defective and that this could be corrected under R12.64. The judge held that a referential date did not invalidate the appointment.

These are both judgments from the High Court so at some point the issue may be appealed.

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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