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TECHNICAL UPDATE

Defective appointments in ADM

In the case *Re Spaces London Bridge Limited* [2018] EWHC 3099 (Ch) (18 October 2018) the court had to again review the issue of inserting a date and time of appointment on the notice of appointment of administrators. In this case, no date and appointment had been inserted at all. The court found that the issue arose from transcribing the form into words under the 2016 Insolvency Rules, since previously there was a box that was endorsed by the court with a time and date of appointment. The court suggested best practice when completing the form would be to insert the following "This appointment will take effect at the date and time specified below as the date and time when the notice is filed." However, the court also stated that the absence of completing this box would not lead to the appointment being invalid. Whilst this is another High Court case, it has certainly helped to clarify this issue.

Unlawful dividends & defences

In the case *Global Corporate Ltd v Hale* [2018] EWCA Civ 2618 the court of appeal reviewed the issue of whether unlawful dividends had been made and whether a *quantum meruit* claim would be an adequate defence. The court held that the judge should not have focused on intention, but on the payments themselves when determining if they were unlawful. The court found the payments to

be unlawful. In respect of the *quantum meruit* claim the court held that this could only be an unliquidated claim for compensation which the director would have to prove for in the liquidation and could therefore not be a defence. The trial judge was also criticised for going too far in attempting to counter any perceived imbalance.

Trustee's Fees

In the case of *Singh v Hicken (trustee in bankruptcy of Singh)* [2018] EWHC 3277 (Ch) the bankrupt had originally applied to court for permission to make an application under R18.35 to challenge that the Trustee's remuneration or expenses were excessive. The judge used his discretion and denied permission to make the application. He stated that he did not believe that the remuneration or expenses due to the circumstances of the case would be reduced to such an extent to provide a surplus to the bankrupt. The bankrupt then appealed this decision. The issue on appeal was that the judge should not have used his discretion that way without full detailed information in accordance with the Insolvency Practice Direction being submitted. On appeal it was found that the judge had the right to use his discretion based on the information he had been provided.

Tools of the trade

In the case of *Birdi v Price and another* [2018] EWHC 2943 (Ch) a Trustee in bankruptcy took

possession of the equipment held by the bankrupt that formed part of a trading garage. Key to this case is the changing information provided by the bankrupt in respect of the various assets and trading during the course of the bankruptcy and various public examinations. In particular, a company was formed for which he was deemed to be acting as a shadow director and prior to the bankruptcy he purported to have leased all the assets to the company, which he held was trading from the premises and he was a consultant to the company. The first Trustee concluded the assets formed part of the bankrupt's estate and sold them. The first Trustee then retired and was replaced. The bankrupt brought a claim against both the first Trustee in respect of property that was seized and sold, claiming that it was exempt property under S283(2)(a), and against the second Trustee for holding funds which he was not entitled to since they were the proceeds of assets that were exempt. The judge advised he could not rely on the bankrupt's evidence. Since the bankrupt attended the first meeting with the Trustee at the garage with a lawyer, the judge determined that it was not for the Trustee to provide information about claiming exempt property. The judge held that at the time of seizing the property and when the property was sold the Trustee could not be criticised for concluding the property was not exempt. The first Trustee was therefore able to rely on the defence of S304(3). The judge dismissed the claim against the second Trustee since the defence was valid for the first Trustee and

due to the significant delay in the bankrupt bringing the claim since the sale occurred in 2013 and the claim was brought in 2016.

Disclaimed property & surplus funds

In the case of *Sleight v The Crown Estate Commissioners* [2018] EWHC 3489 (Ch) the High Court was asked to make an order for the surplus funds from the sale of two properties which had previously been disclaimed by the trustee to be paid to him. The court held that the trustee did not have standing under section 320(2)(a) of the Insolvency Act 1986 to apply to court at a later date for a vesting order in relation to those properties, nor in relation to the surplus arising from their sale by a mortgagee.

Powers of The Pension Regulator

The Pension Regulator (TPR) has obtained a conviction and fine against Dominic Chappell for £124,000 for failing to reveal information about the sale of BHS, requested by TPR under s72 Pensions Act 2004. Further information may be found [here](#).

Financial Services and Banking Reform

The Financial Services (Banking Reform) Act 2013 (Commencement No 12) Order 2018 may be found [here](#). This Order brought into force on 1st January 2019 the provisions of the Financial Services (Banking Reform) Act 2013 (c. 33) relating to the ring-fencing regime which are not already in force.

Set off and the new regulation

The draft Business Contract Terms (Assignment of Receivables)

Regulations 2018 applies to contracts entered into after 31 December 2018 and may be found [here](#). This will be interesting since any assignment of the debt may still be set off against any liability owed by the creditor.

Brexit legislation

I have been remiss in tackling the legislative issues and amendments that have been drafted to deal with Brexit and potentially a no-deal scenario. I have therefore detailed below some draft legislation that will impact upon insolvency:

The Insolvency (Amendment) (EU Exit) Regulations 2018 which may be found [here](#).

The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 which may be found [here](#).

The Provision of Services (Amendment) (EU Exit) Regulations 2018, SI 2018/1329 which may be found [here](#).

Financial Markets and Insolvency (Amendment and Transitional Provision) (EU Exit) Regulations 2019 which may be found [here](#).

The Credit Rating Agencies (Amendment, etc.) (EU Exit) Regulations 2019 which may be found [here](#).

The Credit Institutions and Insurance Undertakings Reorganisation and Winding Up (Amendment) (EU Exit) Regulations 2018 which may be found [here](#).

The European Economic Interest Grouping (Amendment) (EU Exit) Regulations 2018 further information may be found [here](#).

The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU

Exit) Regulations 2018 which may be found [here](#).

Practice Note

A new Practice Note was issued in respect of Business and Property Courts and came into force 1 Jan 2019. The note may be viewed [here](#). The note does not however apply to Insolvency and Companies list cases.

Report on Alternative Dispute Resolution

A working group of the Civil Justice Council (CJC) has published a report making recommendations for Alternative Dispute Resolution - ways of resolving certain disputes that don't involve going to court. The report is available [here](#).

Consumer prepayments on retailer insolvency

The government has responded to the Law Commission's report on consumer prepayments on retailer insolvency and this may be found [here](#).

Land Registry guidance for Trustees

HM Land Registry have issued updated guidance: Personal Insolvency PG34 which may be found [here](#). The guide explains which entries you can make in the register of a title where the proprietor, or one of the proprietors, is a person subject to bankruptcy proceedings.

Scottish MVLs

HMRC have confirmed that statutory interest is not payable in Scottish MVLs. Further information 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.