TECHNICAL UPDATE

Legal Advice Privilege

In the case Addlesee v Dentons Europe LLP [2019] EWCA Civ 1600 the issue of legal advice privilege was revisited. A group of investors in a scheme marketed by a company which had been dissolved, issued proceedings against the company's lawyers on the basis that the scheme was fraudulent. The investors sought the disclosure of correspondence between the lawyers and the dissolved company which would normally be subject to privilege. The crown had disclaimed all interest in the dissolved company's property. The court held that the question was who could waive privilege, and if the person entitled had done so. The court held that the disclaimer by the Crown cannot be treated as a waiver.

Discharge & Remuneration in Administration

In the case of Re Nortel Networks France SAS [2019] EWHC 2447 (Ch) the issue of discharge from liability and its timing and approval of remuneration were considered. This is an incredibly practical judgement that accounted for Brexit happening on 31 October. In particular the Administrators sought to have their discharge from liability occur on or before the 31 October. The administrators not only approached the creditors of the company over which they were administrators, but also the shareholder company's creditors, since they would be receiving the surplus funds from the administration. Similarly, having identified that the administration company creditors were to be paid in full, the administrators initially sought fee approval from the shareholder company's creditors. However it was felt that since they had not been involved in the company's administration that the court should conduct a full review and determine fees. Again, due to the impending 31 October time limit and the need to dissolve one of the group companies for the funds to flow through, a pragmatic approach was taken by the court. The court appointed an independent IP to assess the fees but agreed that fees could be drawn as requested subject to an undertaking being given by the administrators to repay any fees deemed to be excessive.

CVAs and Landlords

In the case of Discovery (Northampton) Ltd and others v Debenhams Retail Ltd and others [2019] EWHC 2441 (Ch), the landlords challenged the CVA proposal on the following grounds:
- the landlords do not have a claim for rent to be paid in the future at the time the CVA was effective and therefore they could not be bound;
- the CVA provisions reducing rent payable under relevant leases is unfairly prejudicial as it changes the terms of the leases;
- the CVA does not have the jurisdiction to restrict the landlords' proprietary rights of forfeiture;
- the CVA unfairly prejudiced the landlords as it treated them less favourably than other unsecured creditors without proper justification;
- there had been a material irregularity in the CVA process because there were potential antecedent claims under s239 and 245 if the company went into administration which had not been disclosed in the CVA.

The conclusion reached by the court on these issues were:
- future rent is a pecuniary liability to which the company may become subject by reason of the covenant to pay rent and therefore future rent may be included in the CVA;
- since the rent on the leases were not for current market rate and the proposed rent in the CVA is for current market rate and not less and the CVA provides for the landlords to determine the lease the court held there was no unfair prejudice;
- the court held in favour of the landlords on the right of forfeiture and this was removed from the CVA proposal;
- the court held that unfair prejudice came down to market rates and whereas suppliers were subject to more competitive pressures, the landlords were being paid above market rate and the reduction would only be an issue if it proposed the payments be reduced to less than market rate;
- the non disclosure of the antecedent transaction was not upheld and references to various monetary transactions were actually covered in the CVA and in any event the nominal amount that could possibly have been recovered would not have substantially affected the voting.

Conflicts of Interest

In the case of Re Ariadne Capital Limited the court was asked to consider whether the administrators should be appointed compulsory liquidators when the case moved to liquidation. The secured creditor, who was the only creditor likely to be paid a dividend, objected and wanted independent insolvency practitioners appointed liquidators. The court held there were two considerations which were equally valid: efficiency and the creditors' right to choose a liquidator. To complicate matters the administrators also were challenging the status of the secured creditor and purported to have conditional funding in place to pursue a claim against the secured creditor. The secured creditor equally suggested that they had a potential claim against the administrators and opposed the court giving the administrators their discharge from liability. Neither party provided evidence to support their positions. The court decided that a cautious approach should be adopted and noted that if there was a potential claim against the administrators, this would create a conflict of interest in their appointment as liquidators. The official receiver was appointed liquidator and the court allowed the administrators to be discharged from liability within 28 days.

UNCITRAL

The UN Commission on International Trade Law (UNCITRAL) has published the final report from its 52nd session, which may be found here.

18 Month Rule

After a year of uncertainty, it seems we finally have clarity on the 18 month rule as it applies to ADM and CVLs. The IPA has issued a statement about the result of the RPBs liaising with the Insolvency Service which may be found here. The conclusion is that IPs may approach creditors in CVLs and ADMs after 18 months, even if the remuneration has not yet been agreed. Remember though that in BKY and WUC if the creditors have not approved your fees, then after 18 months schedule 11 scale rate applies.

Dear IP Banking Fee

Dear IP 90, which may be found here, brings to IPs' attention the need to give 4 business days' notice of closure on bankruptcies and compulsory liquidations prior to the quarter end or the banking fee will be charged.

R3 Pension Guidance

The issue of pensions has become a more prominent target on the RPB monitors list now that auto-enrolment staging dates have all passed and every company should have a pension in place. R3 has provided guidance and a checklist to help IPs around the complex issues which may be found here.

R3 Technical Bulletin

R3 has recently published a technical bulletin which as well as highlighting the need to instruct agents who have the experience/ expertise to deal with the type of assets being sold in light of the Iqbal case, it also gives a brief summary of the technical alerts that have been published over the last 7 months. The bulletin is available here.

Volume IVA Providers & Monitoring

The Insolvency Service has recently updated its guidance for the monitoring of IVA volume providers and protected trust deed providers which may be found here.

CCAB & Insolvency

CCAB has published its insolvency specific draft guidance pending approval from HM Treasury which may be found here.

AML Annual Firm Risk assessment

The IPA, as part of their licence renewal, are asking for copies of the IP's firm's annual risk assessment and has given some guidance on the areas that should be covered which were lacking last year "*There was considered scope for improvement in terms of documenting the risks posed from customers, geographical locations and delivery channels.*" Further information may be found here.

Insolvency Service Newsletter

The Insolvency Service summer newsletter is available here.

Insolvency Service Annual Review

Michelle has now posted three blogs analysing the annual report published which you might find interesting and which may be found here, here and here.

FRC & Thomas Cook

The Financial Reporting Council (FRC) has commenced an investigation into the audit by EY of the financial statements of Thomas Cook Group Plc (Thomas Cook) for the year ended 30 September 2018. Further information may be found here.

Compliance Alliance

Joanne Harris has 21 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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