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# TECHNICAL UPDATE

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## Furloughing, adopting contracts & Holiday Pay

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In the case [Re Debenhams Retail Ltd \[2020\] EWCA Civ 60](#) the issue of Administrators adopting contracts, and what that liability entailed for furloughed staff, was revisited. The reason this had become an issue was that the government had updated their guidance on the Coronavirus Job Retention Scheme (CJRS) in respect of holiday pay entitlement. The further guidance indicated that employers, and by inference Administrators, would be liable for holiday entitlement above the 80% or £2,500 restriction. The case had originally been heard in the High Court where it was determined that where staff were furloughed their contracts of employment had been adopted and in particular the 20% of holiday not paid under the CJRS would be an expense of the Administration ranking ahead of the Administrators' fees. The court of Appeal reached the same conclusion. Contrary to [Re Carluccio's](#) the court determined that employee liabilities could be paid as they fall due under para 66 Sch B1 rather than under para 99 Sch B1 since para 99 only operates when the person ceases to be the administrator.

## Constructive Trust & Insolvency

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In the case of [Lowe and another \(as joint administrators of Benedict Cole Ltd \(in administration\)\) v Lloyds Bank Commercial Finance Ltd and another company \[2020\] EWHC](#)

[946 \(Ch\)](#) the company supplied temporary employees to MUFG Bank Limited (MUGF) who paid for the employees' services by way of invoices submitted by the company. The company had an invoice discounting agreement in place with Lloyds Bank. Prior to the company entering into administration MUGF paid three invoices and these funds were paid into the invoice discounting Lloyds account. The payment left the discounting provider with a surplus that the Administrators claimed. MUGF claimed that the payments were made in error and would not have been paid if they had known about the imminent insolvency and therefore they had a constructive trust over the funds held in the Lloyds account. The judge held that there was no constructive trust and the funds vested in the insolvent estate.

## S365 & Fair Presentation

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In the case of [Lasytsya v Koumettou and another \(trustees in bankruptcy of the estate of Lasytsya \[2020\] EWHC 660 \(Ch\)\)](#) the court considered the application of the debtor who raised various issues relating to misinformation provided to the court to obtain the S365 order. The judge made clear that whilst there had not been misrepresentation or non-disclosure, there had been causes for concern in respect of procedural fairness. The items to be seized in the S365 order were misdescribed and the order did not have the expected safeguards detailed within it. The judge also criticised the lack of file note of a meeting in May 2019 held with the debtor in which she provided

information and suggested that a further interview may have been more appropriate than a s365 order. However the judge allowed the order and seizure of goods to stand but indicated that the unfair representation finding would possibly be addressed by way of a costs order.

## Waiving Privilege

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In the case of [TMO Renewables Ltd v Reeves and another \[2020\] EWHC 789 \(Ch\)](#) an appeal was made against the deputy master's decision that a reference to an expert witness report in the liquidator's particulars of claim amounted to a waive of privilege. In respect of the expert report the judge held that "...by referring in two sentences in very broad terms to the methodology, it cannot properly be said that he was referring to its content..." and hence privilege had not been waived.

## Covid19 & winding up petitions

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In the case of [Re Saint Benedict's Land Trust Ltd; Re Shorts Gardens LLP \[2020\] EWHC 1001 \(Ch\)](#), the companies had been in a legal dispute about the need to pay non-domestic rates as they claimed to be occupying the properties for charitable purposes but the companies were not registered under the Charities Act 2011. The matter had become so acrimonious, a general civil restraint order (GCRO) was made against one of the companies. The application to restrain the petition was made, not by the

company with the GCRO, but by the director and shareholder of the company which the court concluded was an abuse of process in trying to circumvent the GCRO. Arguments were made that the companies were experiencing financial difficulties due to the coronavirus and that the government guidance in respect of avoiding winding up companies was broad enough to encapsulate the current circumstances. The court was happy that the government guidance did not apply in these circumstances and allowed that the petitions had been properly presented and could proceed.

### IPO & definition of family

In the case of *Fowlds v Bucknall and another (as joint trustees in bankruptcy of Peter Herbert Fowlds)*[2020] EWHC 329 (Ch) the judge held that a monthly payment made to an ex-wife, where no matrimonial order had been made, could be considered a payment made in respect of a dependant. The amount paid to the ex-wife would need to be included when determining available income.

### Landlords & Schemes of Arrangements

In the case of *Re Instant Cash Loans* [2019] EWHC 2795 (Ch) the company proposed a scheme of arrangement which would force the company's landlords to accept early surrenders of their leases. The judge held that requiring the landlord to accept a surrender of the lease could not be considered 'necessary' to give effect to the arrangement between ICL and its creditors. The Scheme was therefore approved with the clauses forcing the surrender of leases removed. The judgment could also apply to CVAs.

### Is rent in an ADM an expense during lockdown?

An interesting article has been written by Steven Cottee which may be found [here](#) about whether rent would be considered an expense of an administration during the period of lockdown imposed by the government. He reviews the recent Australian case of the retailer Colette Group where the court decided that the landlord would be an unsecured creditor for the rent due during lockdown.

### Landlords & CRAR

The government had set out guidance for landlords so that leases could not be forfeit during the lockdown, however landlords were circumventing this by using the Commercial Rent Arrears and Recovery (CRAR) legislation which has led to the government taking further measures including temporarily voiding statutory demands and winding up petitions where the company is unable to pay its bills due to the coronavirus. Further information may be found [here](#) but the legislation has yet to be drafted and enacted.

### Coronavirus Act 2020

Information on the *Coronavirus Act 2020*, what has been brought into force and what has since been suspended and reviewed may be found [here](#).

### Companies House & Electronic Filing

The move by Companies House to allow electronic filing by IPs is certainly helpful in meeting statutory deadlines. It is to be noted though that if there are errors in the email subject line or the document has errors, then the

document will not be deemed to have been filed and the deadline will not have been met. Further information about electronic filing may be found [here](#).

### Companies House - Testing

Dear IP 100 has been published and is available [here](#). Companies House is asking for help to test the online document submission system they are installing for IPs.

### Law Society - Virtual Execution & E-Signatures

The Law Society issued a note which brings together a variety of established guidance in relation to virtual execution and the use of e-signatures. The note may be found [here](#).

### Government Guidance on Contractual behaviour

The government has issued guidance on contractual behaviour during the Covid19 emergency which may be found [here](#).

### Insolvency statistics

The Insolvency Service has decided to publish monthly statistics and the first month is available [here](#). If you are looking for more regular information, Michelle is updating her statistics within this blog weekly and the blog may be found [here](#).

### Coronavirus Job Retention Scheme

The government has been continually updating and refining the guidance relating to the CJRS. Office holders using the furlough scheme may want to review the website regularly which is accessible [here](#).



Joanne Harris has 22 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.