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TECHNICAL UPDATE

Part 26A plan sanctioned using court’s discretion

In the case of [Re Houst Ltd \[2022\] EWHC 1941 \(Ch\)](#) the court approved the Part 26A restructuring plan using its cross-class cram-down power despite HMRC voting against. The plan proposed a larger return to the secured creditor than to HMRC but was still an amount in excess of the amount anticipated in a formal insolvency process. The court sanctioned the plan due to the better position HMRC would be in. HMRC did not attend the court.

Landlords, original tenant, guarantor & Part 26A

In the case of [Oceanfill Ltd v Nuffield Health Wellbeing Ltd and another \[2022\] EWHC 2178 \(Ch\)](#) the court considered whether the original tenant, who had guaranteed the rent and other arrears when the lease was assigned to Virgin Active, was still liable after Virgin Active had entered a restructuring plan pursuant to Part 26A. The court held that the third party was still liable under contract law and the Part 26A restructuring plan did not impact the rights of the landlord to pursue the third party, who had guaranteed the rent; it only released Virgin Active.

Sole Directors & the Model Articles

The recent cases on what authority a sole director has or

does not have and the contradicting case law is bringing back flashbacks of Re: Minmar. We again appear to have contradicting first instance cases. In the case of [Re Hashmi v Lorimer-Wing & Ors \(\[2022\] EWHC 191\)](#) the court reviewed the conflict within the Model Articles between 7(2), 11(2) and bespoke article 16 and concluded that if the model articles were adopted, then a minimum of two directors would be needed. However, in [Re Active Wear Limited \(In Administration\)](#), it was held that, in unamended model articles for private companies, Article 11(2) does not have the effect of requiring a company to have more than one director and so in a company with such articles, a sole director may take decisions without regard to any of the provisions of the articles relating to directors’ decision-making. It would be interesting to understand how this is differentiated from [Randhawa and another v Turpin and another \(as former Joint Administrators of BW Estates Ltd\) \[2017\] EWCA Civ 1201](#).

Fees, proofs and directors

In the case of [Re Somerset Stainless Solutions Ltd \(in liquidation\) \[2022\] EWHC 2182 \(Ch\)](#) the director who chaired the s100 meeting also voted for approval of the SOA and decision procedure fees. It was subsequently found that the director was not a creditor, but a debtor of the company. The Liquidator sought to have his pre-appointment and post-appointment fees fixed by the

court in the event that the fee approval agreed to by the director was found to be invalid. Whilst the judge commented on the original fee approval being valid because no challenge to the fee approval was made, he also suggested that the application by the liquidator to seek the confirmation of the position by an order of the court, if the decision of the creditors were to prove ineffective, was reasonable in the circumstances.

Waiver of privilege & its limitations

In the case of [Re Yurov; Thomas and others v Metro Bank plc and others \[2022\]](#) the court reviewed when privilege had been waived, and to what extent. The Trustees made an application under s366 for disclosure of bank statements and the application made reference to legal advice. An application was made for full disclosure of the advice but the advice dealt with many issues, not just the s366 application. The court ordered disclosure of the legal advice as it relates to the s366 application as well as the instructions, which led to the advice and any communications between advising lawyers and those giving instructions limited to the issue of the s366 application.

Duty of care to creditors

In the case of [BTI 2014 LLC v Sequana SA and others \[2022\] UKSC 25](#) the court considered the payment of a substantial dividend made in May 2009 when the

company was balance sheet and cashflow solvent, but it had long-term pollution-related contingent liabilities of an uncertain amount and an insurance portfolio of an uncertain value. Ten years later the company entered formal insolvency. The court considered whether a duty was owed to creditors when paying the May 2009 dividend and held that “...at the time of the May dividend, AWA was not actually or imminently insolvent, nor was insolvency even probable. The duty does not apply merely because the company was at a real and not remote risk of insolvency”.

Date of knowledge of wrongful trading

In the case of [Re BHS Group Ltd and other companies \(all in liquidation\) Chandler v Wright and others \[2022\] EWHC 2205 \(Ch\)](#) the court considered how much flexibility could be applied where a number of dates had been put forward for when wrongful trading claims arose. The court held that whilst no specific date needs to be given, it was not possible to plead a broad time period. The court cited [King v Stiefel \[2021\] EWHC 1045 \(Comm\)](#) in which three functions of pleadings were noted:

- to enable the other side to know the case it has to meet,
- to ensure the parties can properly prepare for trial, and
- to operate as a critical audit for the claimant and its legal team that it has a complete cause of action or defence.

Deposit increases

[The Insolvency Proceedings \(Fees\) \(Amendment\) Order 2022 \(SI 2022/929\)](#) has been laid before Parliament and will come into force on 1 November 2022, increasing the deposit amount on bankruptcies and winding up petitions.

EU Revocation & Reform Bill

[The Retained EU Law \(Revocation and Reform\) Bill 2022-23](#) was introduced to the House of Commons on 22 September 2022. This Bill makes provision for significant changes to the current status and operation of retained EU law.

Economic Crime & Corporate Transparency

[The Economic Crime and Corporate Transparency Bill 2022](#) is currently progressing through its second reading and the government has issued [factsheets](#) on the bill.

Practice Direction

Practice Direction 51U—Disclosure Pilot for the Business and Property Courts is no longer a pilot scheme and this PD has been replaced with [CPR PD 57AD](#) from 1 October 2022.

HM Land Registry

HM Land Registry has updated its guidance to confirm acceptance of electronic signatures as long as the documents are lodged by a conveyancer:

- [Notices, restrictions and protection of third-party interests \(PG19\)](#)
- [Electronic signatures accepted by HM Land Registry \(PG82\)](#)

Redundancy Payments Guidance

The Insolvency Service have amended the following:

- [Redundancy payments from the Insolvency Service](#)

- [Redundancy payments: links to further information and guidance](#)
- [Guidance on the criteria for directors to be able to apply for redundancy payments.](#)

HMRC Guidance

HMRC has issued guidance regarding the following:

- [Tax Clearance Requests in Members' Voluntary Liquidations](#)
- [Process for DLAs written off as part of corporate insolvency procedures.](#) The process is entirely voluntary.

CDDA new section

The Insolvency Service (IS) have added two [new sections](#) to the Director Conduct Reporting Service, the first regarding abuse of financial support schemes and misuse of funds and the second for corporate directors, both of which went live 3 October 2022.

R3

R3 has published its latest technical update and Technical Bulletin 126.

ICAS conference

If you missed the ICAS Insolvency and Restructuring Conference 2022, this is available [here](#).

Statistics

Michelle has continued to update her graph on insolvency case statistics every week and recently posted a [blog about the most recent position](#).

Dear IP

The latest Dear IPs are now available: [Dear IP 149](#) and [Dear IP 150](#).



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.