JOH Consultancy LLP
January 2013 Technical Update

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Duty of disclosure after an interim injunction is given

In **Speeder Logistics v Ardvark Digital [2012] EWHC 2776 (Comm)** the issue of whether there is an ongoing duty to the court to provide information, which would change the basis of granting an interim injunction once the injunction had been given. It was held that there was a duty to disclose information and this related, not just to freezing orders, but all other kinds of injunction. As a result of the party not disclosing the information to the court for 3 years, the interim injunction was dismissed.

Court grants forfeiture of lease in Administration

In **Lazari GP Ltd v Jervis [2012] EWHC 1466 (Ch)** an administrator had completed a pre-pack sale and had granted a licence to occupy to the purchaser. The landlord did not want to sell to the purchaser and had a tenant ready to replace the company in administration. The landlord requested authority from the Administrator to forfeit and was refused and then applied to court. The court held that the purpose of the Administration could be achieved without the lease and allowed the lease to be forfeited.

Annulment without notice to Trustee

In **Appleyard v Wewelwala [2012] All ER (D) 285 (Nov)** a bankrupt obtained an annulment order without notice being given to the Trustee. The order did not provide for the Trustee's release or payment of his expenses. The Trustee applied to court and the court felt it did have jurisdiction to provide for the Trustee's release and payment of his expenses, but only up to the date of the annulment order. The court felt that no costs should have been incurred after that date without the permission of the court.

Secondary proceedings could not be opened where it conflicted with the purpose of the main proceedings

In **Bank Handlowy w Warszawie SA and another v Christanapol sp. zoo [2012] All ER (D) 300 (Nov)** a company established in Poland, which was owned by a German company, and which was in turn owned by a French company, opened main proceedings in France, where a rescue plan was approved by the court resulting in deferred payments to creditors over 10 years. A creditor in Poland sought to open secondary proceedings in Poland to wind up the company. The matter was referred to the Court of Justice of the European Union for guidance. It was held that the court before which an application to have secondary insolvency proceedings opened, could not examine the insolvency of a debtor against which main proceedings had been opened in another member state, even where the latter proceedings had a protective purpose.

SIP 8

No, this is not new, it has been around a while, but I thought you might find a reminder of some key points useful and to ensure your standard documents are covering these points.

Para 4

Are you ensuring that your engagement letter is addressed to the board of directors? The SIP clearly states that you should "obtain written instructions from the board of directors".

Para 28

Remember that the SIP clearly defines the amount the proof is to be admitted for as being:
"... normally be the lower of:
(a) the amount stated in the proof; and
(b) the amount considered by the company to be due to the creditor."

More importantly though "The amount for which the proof is admitted for voting purposes should be set out in writing and signed by the chairman".

So are you ensuring that the lowest amount is admitted and are you having the chairman i.e. the director, sign the amount admitted? The easiest way to do this would be to have the chairman sign the proxy schedule with a sentence stating these have been admitted; does your proxy schedule allow for this?

Para 30

The liquidator appointed at the shareholders meeting is required to attend the creditors' meeting and if he does not, may be liable to a fine. Whilst the SIP accounts for an IP not being able to attend, this seems to be expected to be the exception rather than the rule, and a detailed file note is required to explain absence.

Para 35

At the s98 meeting the information about the shareholders' meeting must be provided and in particular the date the notice of the meeting was issued, the date and time of the meeting, and whether consent to short notice was asked for, and the reasons why and whether it was given and whether it was adjourned. Do your minutes contain this information?

Company may not be wound up where debt is disputed

In **Re R&S Fire and Security Services Ltd [2012] All ER (D) 294 (Nov)** the court again confirmed that it would not wind up a company when there was a genuine dispute. I would also warn against issuing a statutory demand where the debt is disputed.

On an application for an administration, court places company into liquidation

In **Re Bowen Travel Ltd [2012] All ER (D) 63 (Dec)** the board of directors made an application to court to place the company into Administration and to appoint their nominated administrators. The majority creditor, who was also secured, wanted the company placed into compulsory liquidation so that an investigation by the Official Receiver could be immediately undertaken. The court considered whether the para 3 purpose could be achieved but then decided to exercise its discretion and "make such order as was just in all the circumstances of the case". In this case it felt it appropriate to place the company into compulsory liquidation.

Insolvency and the Charities Act

Legislation in the form of the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012 commences 2 January 2013. The regulations allow a charitable incorporated organisation (CIO) to be treated as a registered company for the purposes of the Insolvency Act 1986. A CIO may therefore enter a Company Voluntary Arrangement, Administration, Receivership, Creditors' Voluntary Liquidation and Compulsory Liquidation. It also provides for what must happen when a CIO is dissolved for any other reason than insolvency, and makes provision for the restoration to the register of a dissolved CIO.

Bank accounts for undischarged bankrupts

The consultation BIS entered into earlier this year regarding bankrupts holding a bank account has finished, and it has been concluded that a change in the law would be beneficial. The proposed legislation will allow banks to be able to pay money from an undischarged bankrupt's account unless a bank has received a notice in a specific form from a trustee in bankruptcy. The notice must be about an asset which will benefit the estate and which the trustee is interested in, allowing the bank to be protected against claims from the trustee.

IVA Revised Protocol

The IVA Protocol has again been revised and the new version was made available on the BIS website from 1 January 2013 and is expected to be used from 1 March 2013. The new protocol amended the need to verify debts where delay was caused by the creditor and an IP is also able to obtain an online valuation for property. It also provides for automatic enrolment into a pension scheme, and gives discretion to terminate an IVA without the need for a meeting. IPs are also allowed to admit late claims, and there is a new website address for access to "In Debt? Dealing with your creditors".

Electronic Data

Dear IP 54 reiterated the need for IPs to ensure an electronic copy of the company's records are available in all cases in which a negative report is filed and disqualification proceedings are pursued. It is therefore essential to take a full back-up in all cases on day 1. Smaller firms may not have the resources or IT expertise to meet this requirement; however, there are IT providers on the market who offer these services and make available via a secure portal the electronic data for review and access. I would recommend insolvencyIT www.insolvencyit.com insolvencyIT

SIP 8 CTD

Para 35
Information is also required to be given to the meeting in respect of the date of instruction and the amount paid in fees. The fees information to be provided should include who paid the fees, whether the company or a third party, in respect of the the preparation of the statement of affairs, the calling of the meetings and advice given.

"The details for each category should include the name of the recipient, the amount, the source of the payment; and, in the case of advice, the nature of the advice given. If no payments have been made in respect of these costs prior to the meeting, the estimated amount of the costs should be stated. "

"If any of the costs have been or are proposed to be paid to someone other than the advising member, the nature of the relationship of the company or its directors to that person (e.g. auditor, solicitor, financial adviser) should be stated."

This information, I would suggest, should be in your S98 report and a copy of that report should be circulated to creditors after the meeting.

SIP 3 UPDATE

The new SIP 3 for personal insolvency will be available for consultation up to the 28th February. However, there may be a further delay in publication if the RPBs decide to wait until the SIP 3 for corporate insolvency has been finalised, and issue them both at the same time.

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