

JOH Consultancy LLP

May 2013 Technical Update

CONTENTS

• SIP 3 Draft & SIP 16 Draft

CASE LAW

• De facto director

LEGISLATIVE UPDATE

- Consumer Credit Licence
- Minimum consultation period with employees reduced
- Late payment of debts
- EU regulation on Insolvency proceedings
- Consultation for payment and settlement systems

GENERAL INFORMATION

- Money Laundering: ICAEW
- Updated guidance at Companies House
- Updated guidance from IS to be issued with RP1
- Republic of Ireland Insolvency Service on-line
- Outsourcing closing cases

De facto director

In the case of *Re UKLI Ltd*: Secretary of State for Business, Innovation and Skills v Chohan and others [2013] All ER (D) 253 (Mar) Hildyard J sets out ten guidelines for determining whether someone is a de facto director: (1) A de facto director must presume to act as if he were a director. (2) He must be or have been in point of fact part of the corporate governing structure and participated in directing the affairs of the company. (3) He must be either the sole person directing the affairs of the company or a substantial or predominant influence and force in so doing. Influence is not otherwise likely to be sufficient. (4) Whether the person concerned has undertaken acts or functions such as to suggest that his remit to act in relation to the management of the company is the same as if he were a de jure director. (5) The functions he performs and the acts [...] must be such as could only be undertaken by a director; not ones which could properly be performed by a manager or other employee below board level. (6) It is relevant whether the person was held out as a director or claimed or purported to act as such: but that, and/or use of the title, is not a necessary requirement, and even that may not always be sufficient. (7) His role may relate to part of the affairs of the company only, so long as that part is the part of which complaint is made. (8) Lack of accountability to others may be an indicator; so also may the fact of involvement in major decisions. (9) The power to intervene to prevent some act on behalf of the company may suffice. (10) The person concerned must be someone who was more than a mere agent, employee or advisor.

Consumer Credit Licence

The FCA will be responsible for consumer credit licenses from April 2014. A consultation paper has been published on how it is anticipated that the transfer of licensing will work and unfortunately if you are licensed by the OFT i.e., you hold your IP licence with the IPA or you deal with bulk IVAs then this will affect you. The guidance at the moment is suggesting that an interim permission may be applied for in Autumn 2013 and will take effect from 1 April 2014 when the OFT licence will no longer exist. A new application will need to be made to the FCA for a consumer credit licence and you will have until 2016 to put this in place if you have interim permission. If you are covered by the group license held by ICAEW or ACCA then provided these bodies apply for exemption then you will still be covered. Here is a link to the proposal document issued by the FCA <http://www.fsa.gov.uk/static/pubs/cp/cp13-07.pdf>.

Minimum consultation period with employees reduced

The Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 came into effect on 6 April 2013 and reduces the minimum consultation required for large-scale redundancies from 90 to 45 days. This seems to be the governments response to the many RPO claims being made for protective awards and the recent case which made the right to protective awards automatic and not dependant upon an award by an employment tribunal.

SIP 3 DRAFT

Continuing on from last month I shall try to finish my review of the draft SIP 3 and again would encourage IPs to submit their comments by 14 May 2013.

Para 10 Documentation

The requirement to document discussions with the debtor and other interested parties and evidence the advice given is not new and does not require anything further than you should already be doing.

Para 11 Initial advice

The requirements have been generalised from the original SIP and the prescriptive element has been taken away, so you no longer are told to supply the R3 booklet "Is a Voluntary Arrangement Right for Me?". The need to advise on the role of the IP at each stage of the process is reiterated again here.

Para 12 Preparing for an IVA

The SIP has been significantly reduced in size and this para appears to cover both the paras on Statement of Affairs and Obtaining Additional Information and Consideration of the Proposal which are in the current SIP. Again the need to advise of the different roles is mentioned.

Para 13 The nominee

The guidance has been drastically reduced and instead of a list of comments to be made by the Nominee this has been changed to "debtor's financial position is not materially different from that contained in the proposal and the nominee's report explains the extent to which the information has been verified". I think this was may be one area where having a list helped.

Para 14 The supervisor

I actually think the reduction of guidance was elegantly dealt with in this area. There were two new points being "any discretions conferred on the supervisor are exercised where necessary, on a timely basis" and "enquiries by creditors are dealt with promptly." Neither of these create additional burdens of compliance that were not already required.

Late payment of debts

The Late Payment of Commercial Debts Regulations 2013 came into force on the 16 March 2013 and made the following amendments to the regime:-

1. Interest accrues after 60 days on business to business debts
2. Interest accrues after 30 days on debts incurred by a public authority
3. Verification of debt must take no longer than 30 days
4. Compensation for recovery costs of £40, £70 or £100 maybe charged depending on the size of the debt.

All of these may be contracted out of provided that it is not "unfair".

EU regulation on Insolvency proceedings

The UK has opted in to an EU proposal which will amend the EU Regulation on insolvency proceedings. The amendments are aimed at supporting business rescue by expanding the scope of the Regulation to restructuring and pre-insolvency proceedings. Bankruptcy tourism will also be tackled by new rules on determining jurisdiction and increased transparency for creditors.

Consultation for payment and settlement systems

The government is proposing that a special administration regime should be put in place for systematically important payment and settlement systems if they were to become insolvent, under which the main objective would be to maintain the firm's critical services, the disruption of which could cause serious issues to the wider financial sector and the real economy. The consultation will close on 19 June 2013. Here is a link <http://goo.gl/1KbGu>.

Money Laundering: ICAEW

In a recent article on the ICAEW's website clarification is given about identifying

shareholders as needing to know no more than the ultimate beneficiaries names. Whether further identification is required is assessed on a risk-based approach which should be demonstrated within your documents. The article may be found at <http://www.ion.icaew.com/insolvencyblog/26455>.

Updated guidance at Companies House

Companies House has updated a number of its guidance documents to take account of recent changes and developments. The guidance includes liquidation for England, Scotland and Northern Ireland. Here is a link <http://www.companieshouse.gov.uk/about/guidance.shtml>.

Updated guidance from IS to be issued with RP1

The Insolvency Service has issued revised guidance to be issued with RP1 forms and the document may be found at the following link https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97717/RP1-FactSheet.pdf

Republic of Ireland Insolvency Service on-line

The Republic of Ireland Insolvency Service website is now online at <http://www.isi.gov.ie/> Those wishing to obtain a Personal Insolvency Practitioners licence are able to apply in May 2013.

Outsourcing closing cases

The constant complaint of the RPBs is the non-progression of cases to closure. I therefore have no qualms in recommending a senior administrator with huge experience of closing cases and who works from home. She has compliant document packs and charges £250 per case. Should you be interested in using her services she may be contacted at vickihorncastle@hotmail.co.uk.

SIP 16 DRAFT

I do not have enough space to cover all the changes to SIP 16 so I have focused on reviewing the changes to the disclosure requirements only.

Appendix

Detailed below are the additional disclosure requirements:-

- The source (to be named),
- Outcome of those [marketing] activities, or an explanation of why no marketing was undertaken
- A summary of the valuation methodology adopted by the administrator or his valuers/advisors
- The names and professional qualifications of the valuers/advisors and confirmation that they were independent of the company
- The outcome of any consultations with major creditors
- Sale consideration disclosed under broad asset categories and split between fixed and floating realisations
- In transactions impacting on more than 1 related company (group transactions), the administrator should ensure the disclosure is sufficient to enable a transparent explanation (for instance, allocation of the consideration paid).
- Details of any deferred consideration
- If the business or the business's assets have been acquired from an insolvency practitioner within the previous 24 months, or longer if the administrator deems that relevant to creditors' understanding, the administrator should disclose both the details of that transaction, and whether the administrator, administrator's firm or associates were involved
- Details of registered charges, with dates of creation

Author

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