

JOH Consultancy LLP

September 2013 Technical Update

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Definition of establishment for secondary proceedings

In the case of **Re The Trustees of the Olympic Airlines SA Pension & Life Insurance Scheme v Olympic Airlines SA** [2013] EWCA Civ 643 the Court of Appeal held that it is not sufficient for a company to have a branch or office that fulfils no function, other than to assist in the winding up of a company. Instead, there must be a business operation with economic activity which is external and market facing to prove establishment in that jurisdiction.

Establishment defined for employees

In the case of **Usdaw v Ethel Austin Ltd (in administration)** [2013] All ER (D) 17 (Aug) the issue of establishment was reconsidered again and supports the current case law. The words 'at one establishment' ought to be deleted from s188 of the Act as a matter of construction pursuant to the court's obligations to apply the EC directive's purpose. Therefore if a company is making more than 20 individuals redundant the requirement for 30 or 45 days' consultation applies.

Double Proof in respect of pension claim accepted

In the case of **Bestrustees Plc v Kaupthing Singer & Friedlander Ltd (in Administration)** [2013] All ER (D) 06 (Aug) the pension fund had valued the shortfall but had not taken off £2m from their £74 million claim in respect of funds

being held on trust. The court held that the unjust enrichment claim failed because the pension deficit had increased since the date of being valued. The challenge to s75 also failed because the administrators did not challenge the nil value in the accounts attributed to the £2 million held in trust.

Clarification of s123

In the case of **Carman v Bucci** [2013] All ER (D) 03 (Aug) the court used the recent principles laid down in **Eurosail** to determine insolvency under s123 for the purposes of a s238 transaction. The court held that the test of determining whether the company had reached the point of no return was not appropriate. **Eurosail** established that distinction should be given between considerations of cash flow, and considerations of assets and liabilities. It required the court to focus clearly on the debts which were due or would fall due in the reasonably near future when applying s123(1)(e) and which debts were future debts to be brought into account under s123(2).

Data requests and Liquidator's obligation

In the case of **Re Southern Pacific Personal Loans Ltd** [2013] All ER (D) 63 (Aug) the liquidator sought an order of the court stating that they should not be required to continue to hold data that related to the redeemed loans or to continue to incur the costs associated with responding to requests for information. The court agreed that the liquidator did not have a duty to retain and supply data requested under the data protection act for the loans.

SIP 14

I would like to review SIP 14 and I am sure you will ask the question why, since the SIP refers to A Receiver's Responsibility to Preferential Creditors. May I suggest we look beyond the superficial title to the principles which define the SIP. The requirement to appropriately allocate assets and liabilities between the fixed and floating charge is very much a live issue in both Administrations and Liquidations and in ensuring the calculation of the prescribed part.

Para 3 Categorisation of Assets and Allocation of Proceeds

The key principles:

3.1 Ensure that you have advice from a solicitor on the proper interpretation of the charging document to ensure correct categorisation of assets.

3.2 The charging document itself may not be relied on and I am sure we are all painfully aware that book debts are floating charge assets and not fixed.

3.3 If there is doubt about the correct categorisation there should be consultation with the preferential creditors and if not agreed an application to court should be made.

3.4 The type of charge is determined at creation and not crystallisation.

3.5 I think this is out of date and you actually owe a duty of care to the preferential creditors and the unsecured in respect of their entitlement to a prescribed part distribution.

3.6 When selling the business as a going concern proper regard should be given to correct allocation of the funds in respect of the assets sold.

Para 4 Apportionment of costs

4.1 The funds available to preferential creditors are the realisations from floating charge funds less the costs. Now we also need to factor in the calculation of the prescribed part after payment to preferential creditors. There is obviously an interest by all creditors in the correct allocation of costs.

Proposed changes to Disqualification of Directors

BIS have published proposed measures to help improve corporate transparency and strengthen director disqualification laws.

The key proposals are:

- amend directors' statutory duties in key sectors such as banking and allow sectoral regulators to disqualify directors in their sector;
- allow the court to consider the nature and the number of previous company failures in which a director has been involved for disqualification proceedings,
- help creditors receive compensation when they have suffered from a director's fraudulent or reckless behaviour;
- increase the time limit for bringing disqualification proceedings in insolvent company cases from two to five years;
- directors who have been disqualified should be offered education or training;
- individuals subject to foreign restrictions should be prevented from being a director of a UK company;
- directors convicted of a criminal offence in relation to the management of an overseas company should be able to be disqualified in the UK.

Further information may be found at <http://goo.gl/Ejr5UW> and the consultation closes on 16th September 2013.

Revisions to the UNCITRAL guide

There has been a revision to the guide to the enactment of the UNCITRAL. The changes relate to enactment of the model, clarification on centre of main interest, director's obligations and review of director's conduct during the period the company experienced financial distress. Further information may be found at <http://www.unis.unvienna.org/unis/pressrels/2013/unis188.html>

Bank accounts for bankrupts

The draft Deregulation Bill published 1 July 2013 proposes an amendment to section 307 by introducing a further subsection which excludes bankers provided they have not received notice from the Trustee about a transaction. A copy of the draft bill may be found at <http://goo.gl/GA2dl>.

No more Early Discharge from bankruptcy

The Insolvency (Amendment) Rules 2013 SI 2013/2135: will come into force 1 October 2013. A bankrupt will be automatically discharged after a year providing they have not been subject to any restrictions or their discharge has not been suspended. Early discharge will no longer be available.

Consultation: Industrial and Provident Societies

The consultation is seeking opinion on the introduction of insolvency rescue procedures and in particular administration. Further information maybe found at <http://goo.gl/lpwLJh>.

Insurance for pre-packs

The ICAEW have blogged about the need to ensure that even if you are undertaking a pre-pack sale there will be a need to put insurance in place for the period between the appointment and the sale. <http://www.ion.icaew.com/insolvencyblog/27081>.

Consultant

If you need help to develop a new business or help re-assessing a current business then I would highly recommend Richard McGlade of Zephyr Business Consulting. Richard is able to help bring a new prospective which will leave you motivated and energised. Richard's website is <http://www.richardmcglade.com>. Inspirational!

SIP 14 CTD

4.2 This paragraph specifically reviews the three types of costs in respect of a receivership but I believe the principles may be applied to any insolvency appointment. There are costs in discharging statutory duties, costs incurred by the company and the remuneration and expenses of the IP.

4.3 The IP is responsible for ensuring that the costs which directly relate to either fixed or floating assets should be deducted accordingly.

4.4 Where the IP trades the business, the costs of trading are not so easy to allocate as a benefit may be obtained under both the fixed and floating charge. The IP therefore has a duty to exercise his "professional judgement" with "independence of mind and with integrity" when making the allocation of costs.

4.5 The IP is expected to keep contemporaneous records of the dominant reasons costs were incurred to then allow him to allocate those costs appropriately. This is evidence should the allocation be challenged.

4.6 The IP must consider why costs were incurred, the benefits obtained, who benefitted and the decrease in liabilities achieved due to a going concern sale.

4.7 The considerations for the split of costs involving statutory duties should follow the guidelines above.

4.8 The allocation of remuneration and disbursements should also follow the same guidelines.

Author

Joanne Harris is a licensed Insolvency Practitioner and has 15 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 also provides training for the JIEB exams.

M: 07780 613826

E: jo@johconsultancy.co.uk

E: jo@insolvencyexamtraining.co.uk

W: <http://www.johconsultancy.co.uk>

W: <http://www.insolvencyexamtraining.co.uk>

