

JOH Consultancy LLP

August 2012 Technical update

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Minmar Resolved

In **Re BXL Services (2012)** Judge Pearl concluded that failure to serve a notice of intention to appoint on a company did not invalidate the appointment of administrators, even if that notice was required. The judgment now appears to bind the High Court and reconcile the recent conflicting judgments given, so this is the position until the matter is appealed to the Court of Appeal, if it is.

Company registered in England but COMI elsewhere, is it possible to wind-up the company in England?

In the case of **Trillium (Nelson) Properties Limited v Office Metro Limited [2012] EWHC 1191 (Ch) Mann J, 9 May 2012** it was reviewed whether a company registered in England but whose centre of main interest was not in England could be wound up in England. The key consideration was whether it had an establishment in England for the purposes of the Insolvency Regulations. The issue of establishment needs to be reviewed as at the date of the petition and in this case it was deemed that there was no establishment in existence at this date.

Filing notice at CH that security has been satisfied does not negate the security

In the case of **Re OC Realisations 2011 (in liquidation) HHJ Langan QC, Newcastle Upon Tyne District Registry, 4 July 2012** it was held that even though documents MG02 had been filed at Companies House the charge holder still held valid security. In this case the liquidator was ordered to pay the charge-holder.

SOCA closer to Law Enforcement than debt collector

In the case of **Serious Organised Crime Agency v Dong & Ors, Proudman J, 21 May 2012** the judge did not require cross undertakings from SOCA when seeking a Freezing Order as the judge deemed that SOCA was closer to law enforcement than proprietary right enforcement.

IPO over a Pension

In the case of **Raithatha v Williamson** the court decided that the Trustee had the right to an IPO where the Debtor was able to access his pension even if he had chosen not to. This case is being appealed and should be heard between September and November this year.

SIP 7

The new SIP 7 came into force on 2 May 2011.

The new SIPs all reduce the level of guidance given and set out principles to be followed. Personally I believe this makes the compliance with the SIPs more onerous as the IP will need to ensure he is complying with the principles, requiring more thought and more rigorous review of reports containing financial information i.e every report sent!

The SIP uses the terms "clear and informative" and "reasonably regard as appropriate or significant in the circumstances".

Principles

The principles are that information should be "transparent, consistent and useful" and of course "proportionate", allowing creditors to "understand the nature and amount" in the R & P. IPs are expected to assess requests for information including disbursements in a "fair and reasonable way" and of course be proportionate.

What does this actually mean though in respect of the information given on the R & P and within the body of the report ?

I have detailed some practical steps to ensure you are compliant:

Para 4

To reflect the 2010 Rule requirements all reports must provide period and cumulative figures. Hopefully whatever software you are using in respect of the case is able to produce the R & P in this format and also show statement of affairs figures.

Para 5

Information required to be provided may be either in the R & P or within the report. NB this does not apply to final meeting reports in CVL & MVL where R4.126 & 4.126A clearly define what must be itemised on the R & P.

Para 7

The information now required under the 2010 Rules in respect of expenses incurred also needs to follow the principles of this SIP i.e. transparent, consistent, useful and proportionate. Have you amended your reports to ensure that expenses incurred but not paid during the period are clearly detailed and explained within the report? Remember this information is only in respect of the period under review.

IP given 12 year disqualification from acting as a director

In the case of Wood and another v Mistry [2012] EWHC 1899 (Ch) an IP was disqualified in respect of:

- not carrying out his duties to investigate the group structure and transfer of funds from 180 companies over which he had been appointed liquidator,
- not seeking support from creditors to issue antecedent transaction proceedings,
- diverting money from the insolvent companies to a vehicle company where he was the beneficial owner.

Enforcement of Liens in Administration

In Re La Senza Ltd (in Administration) [2012] All ER (D) 120 (Mar) the court held that a haulier was able to enforce his lien even with the moratorium in place and more worryingly ordered costs to be paid by the administrators.

Charging Orders and Orders for Sale

On 17 May 2012 a change was made to the legislation to allow that a charging order may not be granted if the value of the debt is below a certain amount. The amount has yet to be determined but it is thought that this will be introduced in December 2012.

The second change to the legislation is due to be introduced on 1 October 2012 and relates to money judgments payable by instalments. The change will allow creditors to apply for a charging order even if there has been no default in respect of the instalments. However, the court will take into consideration that there has been no default when considering the application for a charging order. The court will also not

allow for an order for sale where there has been no default in the instalments.

Modernisation of the Rules

The latest *Dear IP* has stated that we should not expect the draft rules to be available until 2013. The new rules will not be introduced until at least 2014. The delay is due to the government project to reduce legislation called the Red Tape Challenge.

Statement from the Pensions Regulator

The Pensions Regulator (PR) has issued a statement of comfort to IPs in respect of Financial Support Directions which the court have deemed should be treated as an expense of a liquidation or administration. It seems that the PR will consider limiting the amount they require to that they would have received as a dividend if their claim was unsecured and will also allow their claim to be met after the administrators reasonable remuneration provided, an application to court is made to vary the order of priority.

Crime and Courts Bill

A Bill has gone before the House of Lords Committee seeking to replace SOCA and establish a national crime agency.

Personal Insolvency Bill Ireland

Ireland is seeking to change its personal insolvency to take away the more draconian elements and change discharge from 12 years to 3 years and also to allow debtors to enter into a debt settlement arrangement with their creditors (the equivalent of our IVA).

SIP 7 ctd

Para 8

When reporting to creditors you need to ensure that you have separate paragraphs dealing with pre-appointment fees, officeholder's remuneration and remuneration relating to supervision of trading.

The other areas that you need to ensure your report covers are any amounts paid requiring a resolution i.e. category 2 disbursements and payments to connected parties, payments to sub-contractors and any amounts paid to the office holder by third parties in respect of his remuneration and disbursements.

Para 12 & 13

The creditors' rights to request information in respect of expenses and remuneration and to apply to court to challenge excessive costs must be brought to the creditors attention. I would suggest a short paragraph summarising the creditors' rights will be sufficient and this paragraph should be in all reports.

Para 18

Where previously a separate trading account was merely recommended this has now become a requirement and ties in with the need to detail the remuneration for trading separately.

Para 23

The final change relates to being able to produce multiple R & Ps in different currencies. The only requirement being that an explanation be given as to why this was necessary, the impact of the currency holding on the estate and the value in sterling as at the date of the R & P.

Author

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