

# JOH Consultancy LLP

## June 2013 Technical Update

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### A g r e e m e n t t o p a y instalments excluded right of set-off

In the case of **IG Index Ltd v Ehrentreu [2013]** EWCA Civ 95 (22 February 2013) it was held that because the defendant had agreed the quantum of the debt and to make payments by certain times, this stopped any counterclaim he had being set-off against the agreed amount owing.

### Court will not extend administration where exit was dissolution

In the case of **Rloans LLP v The Registrar of Companies [2013]** All ER (D) 180 May the petitioning creditor applied to have a company that had previously been in Administration and had exited under Para 84 Sch B1 (dissolution), restored to the register and placed into liquidation from the date the company had exited administration. The court held that the circumstances were not the same as Para 83 Sch B1 and declined to extend the Administration until the date of liquidation.

### Mortgagee's duty of care

In the case of **Meah v GE Money Home Finance Ltd [2013]** EWHC 20 (Ch) the court confirmed the mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. Whilst there were criticisms levied at the selling agents, the court held the mortgagee had not acted inappropriately.

### Duty of IP to sell for value

In the case of **McAteer v Lismore [2012]** it was held that a Trustee in bankruptcy was in breach of his duty to take reasonable care in marketing a property. The court ordered the trustee to pay compensation to the estate of £122,500. This was a Northern Ireland case.

### Test of insolvency

In **BNY Corporate Trustee Services Ltd and others v Neuberger Berman Europe Ltd (on behalf of Sealink Funding Ltd) and others [2013]** UKSC 28 the courts held that although Eurosail had experienced financial difficulties in the wake of the Lehman Brothers collapse, this did not mean that it was insolvent under s123. The indebtedness of Eurosail could not be determined until 2045 due to the complex nature of the loan note documentation.

### Consent from FCA filed day after notice of intention

In the case of **Re Harlequin Management Services Ltd [2013]** All ER (D) 202 May the FCA consent to appointment Administrators was filed the day after the notice of intention to appoint and the validity of the appointment was challenged. The court held that on the proper construction of s362A of the Financial Services and Markets Act 2000, it could still be said to have been filed 'along with' a notice of intention to appoint or to 'accompany' the notice of appointment.

### SIP 16 DRAFT

Since I was only able to cover the enhanced disclosure requirements last month, I thought I would now discuss the other proposed changes. I find it interesting that whilst the profession is trying to move from a prescriptive approach to a principles based approach, the draft SIP 16 is even more prescriptive than the one it is replacing.

#### Para 1

Unfortunately there is still no clear guidance on what the term "shortly after" actually means, so this could still be anything from days to weeks.

#### Para 2

The draft specifically refers to ethical considerations and deems failure to result in the profession being brought into disrepute. This seems superfluous since SIP 1, which details the ethical principles, states that it applies to all SIPs.

#### Para 3

The draft requires disclosure of the different roles of the IP associated with a pre-pack sale. This will require further amendment to the letter sent for a pre-pack and the proposal.

#### Para 4

The draft seems to be requiring the detailed justification for the pre-pack, not only to be documented, but to be specifically disclosed. This paragraph again seems redundant since the appendix asks that information on alternative courses of action need to be given as well as why it was not appropriate to trade the business.

#### Para 7

A more generalised statement that an IP needs to consider his duties under the legislation has been added.

#### Para 8

Interestingly, as well as providing detailed explanations and justification of why a pre-pack sale was undertaken, an IP is also now required to state that the transaction enables the statutory purpose to be achieved and "that the price achieved was the best reasonably obtainable in all the circumstances".

## Use of s426 to obtain administration order

In the case of **HSBC Bank plc v Tambbrook Jersey Ltd [2013] All ER (D) 247 (May)** the court again considered the issue of whether a Jersey company with assets in England could have an administration order made by the English court. The court of Appeal held that it was possible under s426 and made an administration order.

## Enforcement under the New Civil Procedure Code

The New Civil Procedure Code (NCPC) came into force on 15 February 2013 and has given greater power to enforcement officers (EO). EO's may obtain information from public databases, have the Public Ministry obtain information from financial databases, have the debtor fined if uncooperative and have third parties liable if they fail to provide information. The link to a more detailed article on this is <http://goo.gl/iuywh>.

## Energy Supply Company Administration Rules 2013

The statutory instrument SI 2013/1046 comes into force 7 June 2013. It will allow large energy companies to continue trading in the event of administration proceedings in England and Wales. Existing insolvency rules will be applied to energy supply company administration situations. The equivalent statutory instrument SI 2013/1047 has been introduced in Scotland and is effective on the same day.

## Consumer Credit Licence

I advised last month of the need to apply to the FCA for an interim licence if you are licensed by the IPA, however it seems that the IPA are shortly to obtain a group licence

which will be sufficient to cover IPs who do not deal with bulk IVAs. Good news for IPA licensed IPs. However if you deal with bulk IVAs you will need to apply to the FCA.

## Progress report in MVL

In the case of an MVL, the ICAEW on their blog reminded IPs that it is expected that a progress report should be sent to creditors if they have still not been paid when the report falls due.

## National minimum wage

The following rates will come into effect on 1 October 2013:

- the adult rate will increase to £6.31 an hour
- the rate for 18-20 year olds will increase to £5.03 an hour
- the rate for 16-17 year olds will increase to £3.72 an hour
- the apprentice rate will increase to £2.68 an hour
- the accommodation offset increases from the current £4.82 to £4.91.

## Health and Safety for IPs

IPs face considerable potential exposure to health and safety criminal liability in their personal capacities, arising from the companies and properties they control. Deborah Manzoori at Insolvency Consultancy offers training and consultancy in order to assist IPs to set up layers of defensive measures to reduce the chances of prosecution, fines, disqualification and even imprisonment. For a free, no obligation, chat and quote please contact Deborah by email [deborah@InsolvencyConsultancy.com](mailto:deborah@InsolvencyConsultancy.com) or on 07803 585603.

## JIEB Resits 2013

I still have spaces available on my JIEB resits courses. If you or a colleague are re-sitting the JIEB exams in 2013 then I would urge you to review the courses I am offering: <http://insolvencyexamtraining.co.uk/>

## SIP16 DRAFT CTD

### Para 10

The proposed notification time has been reduced from 14 days to 5 business days which is when the first notification to creditors is due. However if the sale does not occur within the first week then notification is due within 7 calendar days from the sale. (I am assuming that this will be changed to 5 business days to be consistent with the 2010 rule changes). As IPs, you now have more prescriptive information to be provided in less time, I am not sure that this will be conducive to being able to be compliant.

## SIP12

Having had to review SIP 12 for my JIEB students I thought it might be helpful to provide my comments in light of the amendments made by the 2010 Rule Changes.

### Filing at court

In bankruptcies and compulsory liquidations it was a requirement to file any resolutions passed at court within 21 days of the meeting. The 2010 changes withdrew this requirement.

### Filing with the records of the case

The other significant change was that the minutes no longer needed to be kept within the company's minute book in certain case types.

### Best practice

The most relevant part of the SIP is the best practice prescriptive list. Everything detailed before this in the SIP refers to either pre-2010 legislation or more worryingly pre-2003 legislation. This is low on the priority list to amend.

### Author

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