

# JOH Consultancy LLP

## August 2013 Technical Update

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### **FSD is not an expense in Administrations but a provable debt**

In the case **Nortel Networks and others [2013] UKSC 52** the Supreme Court narrowed the definition of an Administration expense excluding an FSD and widened the definition of provable debts to include an FSD.

### **Ability to enter into a Scheme of Arrangement in foreign jurisdiction**

In the case of **Re Vietnam Shipbuilding Industry Group [2013] All ER (D) 241 (Jun)** it was held that the facility agreement, which was governed by English law, was sufficient for the purpose of establishing a connection between the company in the English jurisdiction. This allowed the company to propose a scheme of arrangement which the court would consider.

### **Finance companies right to enforce, not barred by proving**

In **Evans and another v Finance-U-Ltd [2013] All ER (D) 233 (Jul)** two debtors who had been made bankrupt were jointly liable for finance for a car. The finance company had proved in one of the bankruptcies for the full amount of the

loan; however, the second claimant continued to make monthly payments. When the second defendant defaulted, the finance company sought to enforce their claim by repossessing the car. This was defended on the basis that the finance company had given up their right because they had submitted a claim in the bankruptcy. The court held that the right to repossess was still available to the finance company.

### **Globespan confirmed**

In the case of **Re Property Professionals + Ltd [2013] All ER (D) 110 (Jul)** the Registrar of Companies received the form 2.34B the day the administration was to end. They rejected the form for lack of a second address which was the same as the one given. The court held it was settled law, where the form had been received before the end of the administration, the period was extended to deal with any anomalies in the documentation.

### **Execution and distraint for commercial rent**

In the Tribunals, Courts and Enforcement Act 2007 (Commencement No 9) Order 2013 SI 2013/1739 powers to make statutory instruments in relation to taking control of goods in order to satisfy commercial rent arrears have been brought into effect from 15 July 2013.

## SIP15

Having not finished reviewing SIP 15 last month, I thought I would continue my review and take the opportunity to explore the effect of the changes introduced by the 2010 Rules on committees generally.

### Bonding

Rule 12.8 has been replaced post-2010 with R12A.56. The committee is responsible for reviewing the adequacy of bonding in an administration, an administrative receivership, a bankruptcy and a liquidation. This no longer applies to committees in voluntary arrangements.

### Confidentiality of Documents

Rule 12.13 has been replaced post-2010 with R12A.51. The rule relates to the refusal to allow documents to be inspected. Post 2010 the terminology has changed from the reason being that it is "injurious to the interests of the creditors, members or contributories" to it being "prejudicial to the conduct of proceedings or .....lead to violence". Reference to the inspection of proofs and proxies has also been removed.

### Charges for Copy Documents

Rule 12.15A has been replaced post-2010 with R12A.53. The new rule caveats the provision of copies of documents with the restriction that individuals are only entitled to documents which the Act or Rules permit. The costs of photocopying are still detailed at R13.11.

### Assessment of costs

Rule 7.34 has been replaced post-2010 with R7.34A. The rule requires that costs be subject to assessment by the court if they cannot be agreed, or if the creditors' committee requests that they be assessed by the court. The only key change seems to be the repayment of costs that have been paid on account from being due immediately to "as soon as reasonably practicable."

The following is a review of the changes made by the 2010 Rules to the general rules dealing with committees. The changes were made to ensure standardisation in preparation for the further harmonisation of the Rules.

## Consumer Rights Bill

The draft Consumer Rights Bill is currently available at <http://goo.gl/3d0og>. This will effect IPs when trading. The bill covers services, goods and supply of digital content.

## Red Tape Challenge and Insolvency Reforms

BIS has recently announced several proposed key insolvency reforms as part of the review undertaken for the Red Tape Challenge:

- removing the requirement for IPs to hold meetings with creditors where they are not necessary.
- Enabling IPs to make greater use of electronic communications, for example making it easier to place notices on websites instead of sending individual letters to creditors.
- Allowing creditors to opt out of receiving further communications.
- Streamlining the process by which IPs report misconduct to the Secretary of State.
- Removing the requirements on IPs to record time spent on cases, where their fees have not been fixed on a time-cost basis, and to maintain a separate record of certain case events.
- Removing the requirement for trustees in bankruptcy and liquidators in court windings-ups to apply to creditor committees before undertaking certain functions, to achieve consistency with powers in administrations. Further information may be found at <http://goo.gl/JOziOv>. The consultation for the proposed changes runs from July 2013 for 12 weeks. I would urge you to review and comment.

## Corporate or Personal Insolvency Licence

The Insolvency Service is again seeking to license IPs for either Corporate or Personal Insolvency or both. The stated aim is to "...reduce the time and money it takes to qualify for those who choose to specialise

and to open up the industry to more people and improve competition." It will be interesting to see how the JIEB exam will change to meet the new Insolvency Service requirements and whether we will be doing the same as we did in 2007 by allowing those who pass the Personal paper to be licensed for Personal Insolvency and by inference those who pass the other two papers to be licensed for Corporate Insolvency.

## Updated land registry guides amended

The land registry have updated two documents to reflect disclaiming a property does not affect any charges or the chargeholder's rights. Practice Guide 35—Corporate insolvency and Practice Guide 34—Personal insolvency.

## CT in Administration

The ICEAW have reminded IPs that when a company enters into administration, a new accounting period for corporation tax does not automatically occur. If the company does not trade in administration, then the tax period will be from appointment to the company's normal accounting period end (APE) date. If the company trades the CT return will be from the date of appointment to the end of trading, then the end of trading to the APE date, and then from the APE date to the end of the 12 month period. This is all fully explained in the blog by the ICAEW at <http://www.ion.icaew.com/insolvencyblog/27115>.

## Consumer Credit Licence

The IPA has clarified the position in respect of the pre-appointment position for IPs who wish to give debt advice. If the IP does not deal with bulk IVAs and is licensed by the IPA, ACCA and ICAEW, then their group licence may be relied upon. This is obviously good news for IPs. However, it would have been better to have been excluded due to the over-regulation already in place for IPs.

## SIP 15 CTD

### First meeting of the creditors' committee

Pre 2010 in administrative receiverships, liquidations and bankruptcies there was a requirement to convened within 3 months of the committee being established. The requirement was then changed from 3 months to 6 weeks which then made it consistent with administrations.

### Notice of creditors' meetings

The rule changes in 2010 introduced business days and changed 7 days' notice to 5 business days as being the notice required for physical meetings. However, the 2010 Rules also introduced the ability to remotely attend meetings and the Rules require 7 business days' notice for meetings conducted in this manner.

### Membership of Committee

The 2010 Rules introduced the restriction on a member of the committee being subject to a debt relief order.

### Committee - members' representatives

The 2010 Rules introduced a restriction on who could represent a member and restricted another member of the committee or a person who is at the same time representing another committee member from acting in this capacity. Also those individuals subject to a debt relief restriction undertaking or order may not act as a representative on the committee. However, protection was added to validate any acts of the committee despite any defect in the qualifications of the representative.

### Author

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