



# JOH Consultancy LLP

## December 2013 Technical Update



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### Court's view on Trustee's costs

In the case of **Secondus v Atkinson, 1509 of 2010 Chancery Division 17 May 2013**, the application of the annulment was heard and the issue of costs was considered. The principles as detailed in the Insolvency Proceedings Practice Direction (PD) 1 October 2004 were applied. The key issue on this case seems to be payment of the petition debt, plus interest, plus costs by the mortgage company which was then added as an additional loan to the mortgage. The Trustee held that the payment by the mortgage company was a preference but the judge held it was neither a preference nor a void disposition. The judge reduced the Trustee's fees from £11,718.75 to £4,500 and allowed £1,000 for closing the case and his solicitor's fees were to be taxed.

### Administrators may make redundancies for economic reasons

In the case of **Kavanagh v Crystal Palace FC (2000) Ltd [2013] All ER (D) 139 (Nov)** the administrators were trying to sell the club as a going concern, however negotiations stalled and at the end of the season the administrators made redundancies as they had no income to meet the level of ongoing liabilities. A sale of the club was achieved and the dismissed employees brought claims under TUPE. The court held that the dismissals were for genuine economic reasons.

### Adjudication of pre-CVA debt

In the case of **Westshield Ltd v Whitehouse [2013] All ER (D) 292 (Nov)** the court reviewed whether a pre-appointment CVA debt could be the subject of adjudication and whether any judgment was then enforceable. The court held that a pre-CVA debt could be the subject of adjudication and that the enforceability of judgment was not precluded by the CVA, but the court would take into consideration the existence of the CVA.

### EC regulation, COMI and provisional liquidators

In **Re Arm Asset Backed Securities SA, [2013] All ER (D) 107 (Nov)** the company was based in Luxembourg and its sole business was to issue bonds to investors. The company had operated without a licence and was then required to apply for a licence and their application was rejected. The company then applied to be wound-up on the basis of it being just and equitable. The court did not consider that the winding-up for just and equitable reasons would fall under the EC regulations and had the pleadings changed to insolvency. In determining COMI the court held that it was the location of the agents and professional advisors who the company dealt with primarily that should be considered and these were located in the UK. The court also held that provisional liquidators could be appointed even where the assets were not at risk.

### DRAFT SIP 3 CVAS

The draft SIP 3 for CVAs has finally been issued and I thought a quick comparison with the draft SIP 3 for IVAs might be useful.

All new SIPs are following the principles based approach. The overriding principles in all the new SIPs seem to be transparency, fairness by acting professionally and with objectivity and failure to act appropriately may bring the profession in to disrepute.

#### Principles

The principles detailed are the same as those in the draft SIP 3 for IVAs. The need to :

- differentiate between the roles of the IP and stages of the CVA process to the directors, shareholders and creditors
- provide information and explanations about the options available
- provide explanation of the director's responsibilities and role
- achievable and fair balance between interests of company and creditors
- provide sufficient information for an informed decision to be made.

#### Advice for director's proposal

The same emphasis is on the need to have processes in place to advise of :

- the key stage and the roles
- the advantages and disadvantages
- what is required of the company and its directors
- the consequences of a CVA
- what happens if the CVA is not successfully completed.

The treatment of the directors seems to be that of unsophisticated individuals and I would suggest a review of engagement letters may be appropriate to address the approach required.

#### Meeting with directors

As would be expected a meeting with the directors should always be held.

#### Assessment

This again seems to be placing the burden of the professional relationship on the IP who must assess viability, co-operation of the directors and their understanding of the process, and of course whether a moratorium is required.

## S238 requires the company to enter into the transaction

In *Re Ovenden Colbert Printers Ltd Hunt v Hosking and others* [2013] EWCA Civ 1408 (Nov) the court of appeal has again reiterated the need to prove that the company entered into a s238 transaction to be able to apply s241. In this case, money held in a client account and paid out of the client account to a third party did not involve the company in the transaction.

## Protected Trust Deeds Scotland

The Protected Trust Deeds (Scotland) Regulations 2013 SSI 2013/318 commenced 28 November 2013 and further information may be found at <http://goo.gl/tY4ry0>. The provisions made deal with how voluntary trust deeds entered into by debtors for the benefit of their creditors become protected from action by creditors, the consequences of a trust deed being granted that status, the rights of creditors, the discharge of the debtor and trustee from the trust deed, and the administration of trust deeds.

## Guidance on Fees and Ethics

Guidance on fact-find payments and other outlays after the commencement of The Protected Trust Deeds (Scotland) Regulations 2013 has been issued and may be found here <http://goo.gl/hFSNkH>. The guidance re-emphasises that fact-find fees are now to be paid by the firm in respect of trust deeds and not by the estate. Also fact-find fees and payment of the debtor's application fees in sequestrations either directly or indirectly is prohibited.

## FSA guidance on selling of interest rate hedging products

Guidance is available at R3 regarding the selling of interest rate hedging products which I would recommend reviewing if you have cases where this may apply. Further information at <http://t.co/NJzDi8bn8e>.

## Urgent applications

Registrar Baister issued a notice on 20 November 2013 that urgent applications under the Insolvency Proceedings Practice Direction (PD) should be made to the registrar and not to the applications judge unless there are exceptional circumstances. Slots for hearings are reserved for Tuesday and Friday although a registrar is available everyday. A reminder is given that :

- practitioners should complete the certificate in paragraph 9 of the PD
- court fees should be paid on the ground floor of the Rolls Building,
- listing should be arranged through the registrars' clerks on the first floor.

## PPI claims and tax on interest

The ICAEW have reminded IPs of the need to retain 20% of the interest to meet the tax liability. Although from the comments on the blog it appears banks were required to start deducting interest from 1 October 2013.

## Guidance for PPI in Trust Deeds and Sequestrations

The RPBs have issued guidance on how to deal with PPI mis-selling in Trust Deeds and Sequestrations which may be found here <http://goo.gl/qgq81A>.

## PVA and RPO claims

I understand that the RPO has declined to pay claims for employees who have been made redundant by a partnership that then entered into a PVA. It seems that the RPO would only pay the employees where the partners have entered into IVAs.

## JIEB & CPI Courses

My JIEB courses start 7th December on Saturdays and 6th January on Mondays. My CPI course starts 13th January. Further information may be found at [www.insolvencyexamtraining.co.uk](http://www.insolvencyexamtraining.co.uk).

## DRAFT SIP 3 CVAS CTD

### Documentation

It is required that records be maintained demonstrating that all advice to directors has been confirmed in writing. Where the CVA is proposed by the administrator or liquidator then a detailed strategy note is necessary.

### Preparing for a CVA

The key requirement that needs to be focused on in Para 14 is (b)(i) & (iv), the requirement to obtain sufficient information for the nominee's report. This must include:

- the measures taken to avoid recurrence of the financial difficulties
- proportionate investigations to verify income and expenditure and assets and liabilities

### The proposal

The SIP gives broad criteria on the information to be contained in the proposal.

### The nominee

The three Greystoke tests in respect of a CVA are still expected to be reviewed by the nominee and commented on. The requirement for the company to consent to any modifications and for the IP to ensure that the company understands the impact of the modifications is new, but I would suggest these requirements are already being met in practice.

### The supervisor

My comments from my previous review are still applicable, this was an elegant reduction and the two new points were areas being reviewed as part of a firm's compliance in any event.

### Author

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