TECHNICAL UPDATE

CVAs "the fine print"

In the case of Oakrock Ltd v Travelodge Hotels Ltd and others [2015] All ER (D) 119 (Jan) the company had entered into a CVA with its landlords and the CVA provided for a lower rent to be paid to the second class of leases defined by the CVA. The creditor had two claims, the first was for the breach of not carrying out the refurbishment work agreed which resulted in the company being placed in the second class of leases. The second claim was that if the refurbishment work had been completed then they would have been able to serve 'notice to vacate' and let the premises for market value. The court held that the first claim failed as it was covered by the CVA agreement which was binding but that the CVA agreement was not wide enough to cover the second claim. The court's view was that this was a contract between the company and its creditors and the interpretation of that contract was a matter for the court to determine.

Duty of care owed by Registrar of Companies

In the case of Sebry v Companies House and another [2015] EWHC 115 (QB) the Registrar of Companies (ROC) had erroneously indicated that the company had been wound-up. The company's accountant, having identified the error, contacted ROC and the information was corrected, but not quickly enough. The company's creditors became aware of the supposed liquidation of the company, demands for payment were made and contracts were terminated creating a cashflow issue for the company which had to enter into administration. The court, having applied the three stage test in *Caparo,* held that the ROC did owe a duty of care to the company.

Tribunal determination may not delay winding-up

In the case of Changtel Solutions UK Ltd (formerly Enta Technologies Ltd) v Revenue and Customs Commissioners [2015] EWCA Civ 29 the court was asked to decide whether the Company Court could wind-up a company prior to the determination by the Tax Tribunal. The court held that the Company Court could proceed with winding-up before the tribunal made a determination, especially in the case where this appeared to be a delaying tactic rather than a substantial issue to be considered.

COMI & rebuttal presumption

In the case of Re Northsea Base Investment Ltd and others [2015] EWHC 121 (Ch) the court considered the rebuttal presumption that the COMI of eight companies were where their registered office was located. The court held that it would need to be established objectively by the facts of each case where the companies' COMI were and that it was ascertainable by third parties. The court determined that the administration of the companies was located in England and Wales.

Draft SIP 16

The new draft SIP 16 was issued for consultation, which ended 2 February 2015.

I have continued my review of the proposed changes below:

SIP 16 para 11
Whereas previously an IP had to demonstrate that he had *considered* his duties as an administrator under the legislation, now an IP must demonstrate his duties have been *met*. I would suggest that the proposal document should adequately meet this requirement but do ensure yours is robust enough and make enhancements if required.

SIP 16 para 13
The addition to this paragraph is fundamental to the new approach to be adopted and the requirement is to include two additional documents with your SIP 16 disclosure. These are the statement provided by any pre-pack pool member and the viability review and must be filed at Companies House.

SIP 16 para 14
Maybe the most arduous requirement is the need to now send the proposal "as soon as reasonably practicable" which I assume will be within 5 business days' of appointment. In any event they require the proposal to be sent with the SIP 16 disclosure, so within 7 calendar days of the sale completing. Whilst previously this was recommended, this now seems to be required, and if not met then an explanation for any delay will need to be provided.

Valuation of property for the purpose of insolvency

In the case of National Asset Loan Management Ltd v Cahillane; Re John Christopher Cahillane [2015] EWHC 62 (Ch) the secured creditor sought to petition the debtor for the shortfall in the security over various properties where an LPA receiver had been appointed. The defendant sought to prove that there was sufficient equity in the properties. The court held that when determining the solvency of an individual the valuation of any property should be as at the date of the hearing and not at some future date.

Pensions the final frontier

In the case of Horton v Henry [2014] All ER (D) 193 (Dec) the issue of whether a trustee has the power to compel a bankrupt to crystallise his pension policies was reviewed with the court deciding that the trustee did not have that power. This case has been appealed and the appeal will be heard at the latest by mid-July 2015.

PPF maximum levy increased

The Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling) Order SI 2015/66 will increase the maximum levy ceiling for the financial year beginning on 1st April 2015 to £947,610,293.

UNCITRAL & Secured Transactions

UNCITRAL are seeking to re-draft the legislation in respect of secured transactions. This project was started in 2012 and may finally be coming to fruition. UNCITRAL are seeking to influence the way secured transactions are dealt with internationally and although the legislation will not be binding, it will be persuasive. An informative article by Dr Magda Raczynska about this may be found here http://goo.gl/Lnviw0.

Auto enrolment & an IP's obligation

The ICAEW will be hosting a webinar on the implications for IP's of auto enrolment on 11 February 2015 for its Insolvency Group members. The link to registration is here http://goo.gl/aZ4KUw.

CDDA obligations for dead directors

In a recent blog the ICAEW have confirmed that even if a director had died, a CDDA report on all directors in the three years prior to insolvency is still required. This clarification of the issue has been obtained from BIS and the blog may be accessed here http://goo.gl/5gHyDm.

Interest rate hedging products

The ICAEW has issued guidance on interest rate hedging products which may be found here http://goo.gl/9UeIAg. The ICAEW also has a free webinar on this issue available to insolvency group members here http://vimeo.com/116073613.

JIEB Block Courses

My JIEB classes have a maximum of 10 students allowing all students an opportunity to participate in the learning process. My block JIEB courses start 16th March. For information click the link www.insolvencyexamtraining.co.uk/jieb2015.html

Draft SIP 16 - ctd

Appendix
Marketing essentials were covered in my technical update last month.

Pre-appointment
As well as provide information on the alternative options, you also need to include options considered "prior to and within formal insolvency" which were considered by the company as well as the IP. If the IP decided not to consult with major creditors he now needs to explain why. If the IP did not request working capital from potential founders he needs to explain why.

Sale consideration
It seems that requirements of SIP 14 are being introduced and the method by which fixed and floating allocation was applied needs to be disclosed. There is a new requirement to obtain security in respect of the sale if there is deferred consideration or justify why this was not obtained.

Connected Party Transactions
This is the nemesis of the pre-pack and the reason it seems the disclosure requirements have become even more onerous.
Pre-pack pool
An IP must now state in his SIP 16 disclosure:
- whether a pre-pack pool member has been approached and his opinion, or
- whether the opinion obtained from the pre-pack pool has been disregarded, or
- whether the pre-pack pool was not approached.

Viability review
The IP is required to request a viability review from the connected party. If it is provided this must be disclosed to creditors. Where none is provided creditors must be notified of this failure. I have no idea of the depth or breadth of the viability study required and I assume this will be clarified in due course.

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