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# TECHNICAL UPDATE

## Bankrupt's pensions not part of IPO unless drawn down

In the case of *Horton (as trustee in bankruptcy of Michael Gerard Henry) v Henry* [2016] EWCA Civ 989 the court dismissed the appeal confirming the position of the High Court which held that the court did not have the power to require Mr Henry (or indeed any bankrupt) to elect to draw down his pension in any particular way within the context of an application by a trustee in bankruptcy for an income payments order under section 310 of the Insolvency Act 1986 (IA 1986). This reconfirms the position brought about by the Welfare Reform and Pensions Act 1999 which stopped pensions vesting in the bankruptcy estate.

## Contributory negligence by bank

In the case of *Barclays Bank plc v Christie Owen & Davies Ltd (trading as Christie & Co)* [2016] EWHC 2351 (Ch) Barclays were suing Christie's for providing negligent valuations on two properties which it had used to determine whether to provide a loan. However whilst there had been negligence in providing the valuation, the bank had contributed to its own losses by not investigating the 2003 mortgage. The court held that Barclays has been contributorily negligent so it was only entitled to 60% of the sum sought in compensation.

## When is security for costs appropriate?

In the case of *Re Premier Motorauctions Ltd (in liquidation) and another v Pricewaterhousecoopers LLP and another* [2016] EWHC 2610 (Ch) the defendant sought security for costs when there was actually ATE insurance in place. The court held that the defendant had not shown that there was any reason to believe the costs already incurred would not be met by the insurers and therefore no order for security of costs was made.

## Difficulty of Antecedent transactions

In the case of *Re Kiss Cards Ltd; Smith and others v Lawson and another* [2016] All ER (D) 10 (Sep) the liquidators were seeking an order under s238 for repayment of the benefit obtained from the wife for motor expenses, car finance payments, insurance and other ancillary sums made at undervalue. The court made an order, partially allowing the liquidators' claims having allowed some of the arguments put forward by the defendant.

## New Insolvency Rules 2016

The final version of the draft New Insolvency Rules has been published and may be found [here](#). The time is now ticking for the profession to understand and put in place sufficient checklists, diaries and documents. In preparation to the new rules coming into force 6 April 2017 the

## SIP 13 and New Insolvency Rules

The new SIP 13, copy [here](#), has been issued and comes into force 1 December.

A quick review of the matters IPs need to think about:

- This now relates to disposal of assets in any insolvency process so you will need to add a reminder to your bankruptcy checklists.
- Reporting as soon as reasonably practicable so just a reminder that if you sell assets on appointment in a CVL remember to disclose when you circulate your s98 report to creditors.
- You now need to explain to the debtor, directors and creditors the nature and extent of the role of advisor in the pre-appointment period, the same as for SIP 16 transactions.
- For sales prior to a s98 meeting you now require a separate letter to be sent to the connected party purchasing the assets suggesting they seek independent advice.
- I would also suggest a paragraph in the engagement letter stating that the IPs role is not to advise any parties connected with the purchaser.
- The issue of ensuring that your agents have PII in place is raised again here and I would suggest IPs obtain annually a copy of the PII certificate of the various agents they use.

following pieces of legislation have been drafted to be enacted 6 April 2017:

- Small Business, Enterprise and Employment Act 2015 (Commencement No 6 and Transitional and Savings Provisions) Regulations 2016 which may be found [here](#).
- Deregulation Act 2015 (Commencement No 6 and Savings Provision) Order 2016 which may be found [here](#).

### Amendment to EC Regulation Insolvency

The annexes to the [EC Regulation on Insolvency 1346/2000](#) have been updated to add insolvency procedures from Poland and Slovakia to Annexes A, B and C and this may be found [here](#).

### Northern Ireland & DROs

The Draft [Insolvency \(Monetary Limits\) \(Amendment\) Order \(Northern Ireland\) 2016](#) has been published and may be found [here](#). It raises the maximum for a person's debts from £15k to £20k to qualify for a DRO and assets from £300 to £1,000. No date given for enactment yet.

### Scotland & Bankruptcy

There are significant changes to Scottish insolvency legislation which are detailed and linked below and coming into force on 30 November:

- [Bankruptcy \(Scotland\) Act 2016 \(Commencement\) Regulations 2016](#) may be found [here](#).
- [Bankruptcy \(Scotland\) Act 2016 \(Consequential Provisions and Modifications\) Order 2016](#) may be found [here](#).
- [Protected Trust Deeds \(Forms\) \(Scotland\) Regulations 2016](#) may be found [here](#).
- [Protected Trust Deeds \(Scotland\) Amendment Regulations 2016](#) may be found [here](#).

- [The Bankruptcy \(Scotland\) Regulations 2016](#) may be found [here](#).
- [Bankruptcy \(Applications and Decisions\) \(Scotland\) Regulations 2016](#) may be found [here](#).
- [Act of Sederunt \(Sheriff Court Bankruptcy Rules\) 2016](#) may be found [here](#).

### FCA and RBS

The FCA has updated its website with a summary on the issue of the independent review of Royal Bank of Scotland's treatment of business customers in financial difficulty. The final report from the skilled person has been submitted to the FCA, and the summary may be found [here](#).

### Consultation on PPF long service compensation cap

The government opened a consultation and is seeking views on measures to ensure that the Pension Protection Fund long service compensation cap works as intended to address issues created by insolvency. A link may be found [here](#) on [draft Pension Protection Fund \(Modification\) \(Amendment\) Regulations 2017](#) as well as three other draft pieces of legislation. The consultation closed 9 November 2016.

### New government body offering debt advice

A new government body will offer debt advice, money and pensions guidance, HM Treasury (HMT) and the Department for Work and Pensions (DWP) have announced. Plans will be taken forward to develop a single public financial guidance body which is responsible for delivering key financial matters including debt advice, money and pensions guidance. Further information may be found [here](#).

### SIP 13 and New Insolvency Rules - ctd

- I would also ensure that the letter to agents has a sentence asking them to confirm their independence.
- Where the sale of any assets occurs without an appropriate valuation this needs to be disclosed as part of your SIP 13 provision of information.
- Make sure you have a file note detailing your decision making process and the rationale behind the sale as well as detailing [alternatives considered](#).
- I have no idea what a proportionate and sufficiently detailed justification looks like but I would suggest just enhancing the previous prescriptive approach proforma.

### [New Insolvency Rule Opting out v Websites](#)

The new rules provide that the first communication to creditors must offer them the option to opt out of receiving communication by post. There are certain exceptions to when opting out would apply, including when you send a notice of intended dividend to creditors. The onus is then on the IP to action any request as soon as reasonably practicable. This means staff resources will need to be allocated to this and the software used will need to be able to distinguish between general notifications and notifications where opting out does not apply.

However, there is an option to put all communication onto a website provided you initially notify creditors of this and notify them that you will not be sending correspondence to them again. This will work well if your website allows creditors to log on and request an email notification when new documents are posted. Of course creditors will have the right to request a physical copy be sent. [Further information is in Michelle's webinar on Part 1 of the New Rules.](#)



Joanne Harris has 18 years' experience in insolvency dealing with all case types. She was formerly a Director of Technical and Compliance in a top 20 firm before starting her own business to supply technical services for insolvency practitioners without a compliance resource.

Joanne is also a partner of both The Compliance Alliance and JOH Consultancy which offer a range of services that may be tailored to an individual IP's needs.