

CASE LAW

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TECHNICAL UPDATE

Capacity to enter into an IVA

In the case of [Fehily and another v Atkinson and another \[2016\] EWHC 3069 \(Ch\)](#) the issue of whether the debtor had the capacity to enter into an IVA was reviewed by the court. The court deduced the following general principles:

- In order to understand a proposed transaction, a person needed the mental capacity to recognise the issues that needed to be considered to obtain, receive, understand and retain relevant information, including advice and to weigh the information (including that derived from advice).
- Capacity was issue specific, to be judged in relation to the particular decision or activity in question and not globally.
- It is also time specific, if a person's capacity varied over time.
- Did the person have the ability to understand the transaction, not whether they actually had understood it?
- Even if the person needed help in understanding the transaction that did not prevent them from having the capacity to understand it.

On the facts of this case it was found that the debtor did have the capacity to enter into a contract.

Court held hearing for contempt could be held in debtor's absence

In the case of [Hicken \(as Trustee in Bankruptcy of Ellison\) v Ellison \[2016\] EWHC 2791 \(Ch\)](#) the court

heard an application for contempt of court in the absence of the debtor. The debtor had been served with four different orders of the court which required disclosure of information and which provided for the time by which that information should be supplied. The debtor repeatedly failed to supply the information requested. The court considered the continuing failure of the debtor to co-operate as well as the failure in respect of disclosure required by the four orders. The court was satisfied on a criminal standard of proof that the debtor was in breach of the orders and the allegations of contempt of court had been established.

Trustee's right to be joined in proceedings

In the case of [Sands \(as trustee in bankruptcy of the estate of Layne \(a bankrupt\)\) v Layne and another \[2016\] EWCA Civ 1159](#) the court considered the appeal of the trustee in bankruptcy in respect of the court's ability under S375(1)IA86 to review, rescind or vary an order previously made by that court in exercise of its jurisdiction to hear an appeal from a lower court. In particular the trustee wished to challenge the order made that did not deal with his costs and did not consider the rights of other creditors. The court held that the court could review, rescind or vary the order. The court held that the trustee ought to have been joined to the proceedings so that provision could be made for his costs and expenses. However the trustee could not oppose the application based upon the grounds that other

New Rules - S98 meetings?

S98 is being revoked when the New Rules come into force on 6 April 2017. So how will companies be placed into CVL? [Members' meeting](#) - will occur in the same way as it always has under S84 IA86 which is unchanged.

[Creditors' meeting](#) - a physical meeting is not initially an option available.

[Decision procedure](#) - R6.14 of the new rules sets out the new procedures for obtaining creditors' approval of a liquidator. The processes which may be used in respect of obtaining creditors' approval of the liquidator are either [deemed consent](#) or [virtual meeting](#). I have therefore detailed below both of the processes for the options an IP is able to use.

[Deemed consent](#) - Notice of the deemed consent procedure will need to be **delivered** 3 business days before the decision date (in most instances you will want to arrange for the decision date to be the day of the members' meeting).

One business day before the deemed consent decision date the Statement of Affairs (SOA) will need to be delivered to creditors.

The creditors will then have the option up until 23.59 on the decision date to object and if they object then a physical meeting will need to be held. The earliest the physical meeting may be held is 3 business days after the notice calling the meeting has been delivered but not later than 14 days from when the objection criteria had been met i.e. 10% in value.

creditors might be prejudiced.

Third Party Funding

In the case of [Excalibur Ventures LLC v Texas Keystone Inc & Ors \[2016\] EWCA Civ 1144](#) the court held that third party funders could be held liable for costs awarded on an indemnity basis even where they were not complicit in the conduct which generated the indemnity basis award. The court also awarded the costs order against the parent companies of the third party funders looking at the economic reality rather than the legal reality in respect of the funding. This was not an insolvency case but the principles established will no doubt have implications for insolvency litigation funding.

S216 & Partnerships

In the case of [Re Newtons Coaches \[2016\] EWHC 3068 \(Ch\)](#) the court considered whether s216 could apply to a partnership. The partnership had been wound up and the partners wished to be directors of a limited company with a similar name. The partners made an application to court for clarification of whether s216 applied to partnerships. The court held s216 did not apply to partnerships.

Banking Act amendments

The [Bank Recovery and Resolution Order 2016 SI 2016/1239](#) came into force on 16 December 2016 and may be found [here](#).

Distributions and Insurance Companies

The [Companies Act 2006 \(Distributions of Insurance Companies\) Regulations 2016](#) came into force on 30th December 2016 and may be found [here](#).

New Insolvency Rules

The Joint Select Committee on Statutory Instruments have identified defects in the draft New Rules. Further information may be found [here](#). I would suggest though that there are many more yet to be addressed, not least of which is the issue with Schedule 5 and calculation of time periods, and fee approval where a para 52(1)(b) statement has been made as well as various typographical errors.

SIPs

David Menzies of ICAS has provided information on the current Joint Insolvency Committee's Work Programme regarding the SIPs and they appear to be working on SIPs 7, 8, 10 and 11. The consultation for SIP 15 closed 12 September and it seems we should expect this to be issued by the RPBs early in 2017. David's post maybe found [here](#). Since the largest change brought in by the New Rules will be to the CVL appointment process it is hoped that publishing a revised SIP 8 will occur before the New Rules go live.

No more forum shopping?

The European Commission has announced it plans to present a set of European rules on business insolvency. The proposed Directive focuses on three key elements:

- Common principles on the use of early restructuring frameworks.
- Rules to allow entrepreneurs to benefit from a second chance, as they will be fully discharged of their debt after a maximum period of 3 years.
- Targeted measures for Member States to increase the efficiency of insolvency, restructuring and discharge procedures. This might actually address the forum shopping issue. Further information may be found [here](#).

New Rules - S98 meetings? - ctd

A physical meeting may also be requested by 10% in number of the creditors or 10 creditors.

The only matter that would disrupt this time-table is if the SOA had been circulated to creditors but a material transaction occurred before the decision date. It would then be necessary to provide a report of the material transaction to creditors. Material transaction has not been defined but I would suggest a sale of the assets would be considered a material transaction. The decision date would then be extended to ensure that creditors had 3 business days to consider this new information. However, if creditors have objected then the report of the transaction may occur at the physical meeting. The deemed consent procedure cannot be used to approve fees.

[Virtual meeting](#) - Notice of the virtual meeting procedure will need to be delivered 3 business days before the virtual meeting (in most instances you will want to arrange for the virtual meeting date to be the day of the members' meeting). One business day before the virtual meeting the Statement of Affairs (SOA) will need to be delivered to creditors.

The convener of the virtual meeting, i.e. the director will chair the meeting with the help of the IP. The creditors will then have the option up until the virtual meeting to object and if they object then a physical meeting will need to be held. The earliest the physical meeting may be held is 3 business days after the notice calling the meeting has been delivered but not later than 14 days from when the objection criteria had been met i.e. 10% in value, 10% in number or 10 creditors.

The report on material transactions must be presented to the meeting. For further information subscribe to my webinar dealing with the new rules for liquidations coming soon.



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