

CASE LAW

- EMPLOYEE CLAIMS
- DIVIDENDS AND/OR SALARY?
- SPLIT OF INTEREST IN PROPERTY

GENERAL DATA PROTECTION REGULATION**LEGISLATION**

- CRIMINAL FINANCE ACT 2017
- S172 COMPANIES ACT 2006
- SCOTLAND & INSOLVENCY RESERVED POWERS RELEASED

- NI FRIENDLY SOCIETIES ACT

GENERAL INFORMATION

- BUSINESS & PROPERTY COURTS

- NEW RPS GUIDANCE
- CONSULTATION ON BONDING
- POST BREXIT CIVIL JUDICIAL COOPERATION
- BREXIT AND INSOLVENCY

TECHNICAL UPDATE

Employee Claims

In a recent ERA case the Employment Appeal Tribunal has determined that holiday pay should take into account commission (if this was part of an employment contract) and voluntary overtime (if individuals regularly worked overtime in the 12 weeks prior to their employer becoming insolvent). Further information may be found [here](#).

Dividends and/or Salary?

In the case of [Global Corporate Ltd v Hale \[2017\] EWHC 2277 \(Ch\)](#) the director was paid a small salary and he took £1,383 per month as dividends in respect of which he signed a dividend tax form for each month. At the end of each financial year the company's accountant would decide whether there had been sufficient profits and if not convert the amount to salary. The liquidators of the company assigned various rights of action which included repayment of the dividends as unlawful, or a transaction at an undervalue and/or preference and misfeasance. The court held based on the facts that although a tax declaration of dividends had been made, the company had not formally declared a dividend and the defendant was not liable to repay them as unlawful dividends. The court also held there had been no misfeasance since the payment of dividends and tax declarations was a scheme devised by the accountant as a way of saving tax on salary. The payment by the company to the directors was to satisfy a liability for services

provided. In respect of payments at an undervalue this was not the case because services had been rendered. The judge was not willing to determine the issue of whether there had been a preference since there was some ambiguity as to whether this had been assigned as a right of action and the liquidators were not a party to the proceedings.

Split of interest in property

In the case of [Insol Funding Company Ltd v Cowlam and others \[2017\] EWHC 1822 \(Ch\)](#) the court reviewed the beneficial interests in a property. The two individuals Mr C and Ms C purchased the property in 1998 in joint names. The circumstances changed after the purchase of the property and in 2001 it was agreed that the property should be held 80%:20%, by 2004 the individuals were completely estranged and whilst Mr C continued to reside at the property until 2011 he made no contribution at all. Mr C was made bankrupt in 2007 and remortgaged the property with Insol to annul the bankruptcy. When Insol took proceedings to repossess the property Ms C claimed undue influence and a money judgment was obtained and an equitable charge over Mr C's beneficial interest in the property. Insol then issued proceedings against the property and Ms C came to an agreement with Insol. The agreement was not adhered to and Insol applied for sale of the property. Ms C then claimed she had both equity of exoneration and equity of subrogation against Mr C's interest in the property in respect of her agreement with

General Data Protection Regulation

Following on from my last update I shall continue to review the ICO's 12 steps to prepare for the GDPR which may be found [here](#).

[Lawful basis for processing personal data](#) - remember that whilst most data collected is in respect of our lawful duties carrying out the legislation as IPs, special consideration may need to be given to IVAs and the data collected prior to appointment. You should consider enhancing your engagement letter to meet the disclosure requirements of the GDPR when collecting data and this may be something you also want on your website.

[Consent](#) - the GDPR requires you to review how you record and manage consent. The ICO has published specific guidance on consent [here](#), which may be of interest. Again if you deal with IVAs this may be very relevant as the ICO states that the request for consent should be clear and unambiguous and should not be tied up with the terms and conditions.

[Data breaches](#) - you are expected to have procedures in place that will allow you to detect, report and investigate a personal data breach. In insolvency this will relate to data being held on insolvent company computers as well as your own firm's. The GDPR requires certain types of data breach be reported to ICO and in some cases to individuals i.e where a breach is likely to result in a high risk to the rights and freedoms.

Insol. The court held that the property was held 80%:20% but that since Mr C was not a party to the agreement with Insol neither equity of exoneration nor subrogation could be applied.

Criminal Finance Act 2017

The Criminal Finance Act 2017 came into force on 27 April 2017 and may be found [here](#). However from 30 September 2017 the Act makes companies and partnerships criminally liable if they fail to prevent tax evasion. The government has issued guidance which may be found [here](#). This will certainly make MVLs more interesting.

S172 Companies Act 2006

There has been a recommendation that the Financial Reporting Council, FRC, require informative narrative reporting from directors on the fulfilment of their duty under S172 CA06. The government's response however takes this further and states they plan to introduce secondary legislation to require all companies of significant size to explain how their directors have regard to S172 CA06. The Corporate Governance report may be found [here](#).

Scotland & Insolvency Reserved Powers Released

The Scotland Act 1998 (Insolvency Functions) Order 2017 has been drafted to provide power to bring forward appropriate legislation for companies, LLPs and incorporated friendly societies in respect of reserved or unreserved matters. A copy of the draft may be found [here](#).

NI Friendly Societies Act

The Friendly Societies Act 1992 (Modification of Part 2) (Northern

Ireland) Order 2017 SI 2017/906 addresses the issue of IPs with a partial licence and who may be appointed. It is available [here](#) and came into force 3 October.

Business & Property Courts

The Business and Property Courts (B&PCs) started operating on 2 October 2017 and this will impact terminology on documents as advised in our June update. The Practice Direction that will apply to the B&PCs is expected to be published in the near future, but currently awaits approval. In the meantime, a helpful provisional B&PCs Advisory Note has been published which may be accessed [here](#).

New RPS guidance

The Redundancy Payments Service has updated their redundancy factsheets. These may be found [here](#).

Consultation on Bonding

The government has now published the summary of responses received from their call for evidence on bonding arrangements for insolvency practitioners which is accessible [here](#).

Post Brexit Civil Judicial Cooperation

The government has published a briefing paper on post Brexit civil judicial cooperation which may be found [here](#).

Brexit and Insolvency

The City of London Law Society's Insolvency Committee has written a letter to the Insolvency Service on the implications of Brexit for insolvency which may be found [here](#).

General Data Protection Regulation - ctd

[Data Protection by Design and Data Protection Impact Assessment](#) - the GDPR makes privacy by design an express legal requirement, under the term 'data protection by design and by default'. Data Protection Impact Assessments are mandatory in certain circumstances e.g., where there is processing on a large scale of special category data. I do not believe this will impact most insolvency cases but you will want to ensure staff understand when this may become an issue.

[Data Protection Officer](#) - There is only a formal requirement to appoint a Data Protection Officer (DPO) if you are a public authority, you carry out regular and systematic monitoring of individuals on a large scale or you carry out large processing of special category data. It is not anticipated that most firms will need to appoint a DPO but you may wish to designate the role of compliance with the GDPR to an individual.

[International](#) - if your firm operates in more than one EU country then you need to determine your lead data protection supervisory authority and this is only relevant where you carry out cross border processing. This is not really relevant for IPs but is a great heading to remind IPs about selling data to firms outside the EU. The current DPA states "Personal data shall not be transferred to a country or territory outside the EEA unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data". This is within the GDPR under Article 45 so still an issue for IPs selling data.

I look forward to the publication of R3's guidance for IPs on the GDPR.



Joanne Harris has 19 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.