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TECHNICAL UPDATE

S423 claim outside of the jurisdiction

In the case *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd and others* [2018] EWCA Civ 1660. The Court of Appeal has ruled that the court does have power under the jurisdiction gateway in PD6B paragraph 3.1(20) (a) to permit service of a claim under the Insolvency Act 1986, section 423 outside England and Wales. However, the court had a discretion whether to make an order under section 423; and it might refuse to exercise that discretion if the defendant had insufficient connection with England and Wales.

Security for costs

In the case of *Absolute Living Developments Ltd (In Liquidation) v DS7 Ltd* [2018] various defendants in proceedings brought by the liquidator sought a £500,000 security for costs order. The liquidator had minimal funds in the case and so the test for security in respect of whether the liquidator would be able to pay a costs order was clearly no. The second criteria is whether in all the circumstances it would be just to make that order. The judge held that there must be a balancing exercise between the interests of the Defendants and those of the creditors. The judge concluded that the balance in this case clearly favours the liquidator continuing to bring claims for the benefit of creditors and that the Defendants therefore should not have security for costs.

Bar date set for expense claims in Administration

In the case of *Nortel Networks SA (In Administration), Re* [2018] EWHC 1812 (Ch) (17 July 2018) the High Court has agreed a bar date for the submission of expense claims in the administration of a French company, Nortel Networks SA (NNSA). Even the legislation does not specifically provide for this the court felt it appropriate in these circumstances to allow funds to be made available for a distribution to unsecured creditors.

Administration applies to FMI companies

The Financial Market Infrastructure Administration (England and Wales) Rules 2018 comes into force on 4 August 2018 and a copy of the legislation may be found [here](#). This legislation applies to infrastructure companies which comprise operators of recognised (inter-bank) payment systems, certain operators of securities settlement systems and other companies designated by the Treasury.

Social housing providers and administration

The Housing and Planning Act 2016 (Commencement No. 9 and Transitional and Saving Provisions) Regulations 2018 Came into force on 5th July 2018 and may be found [here](#)

Annual Firm Compliance

We are now subject to unremitting compliance requirements. So I thought it might be helpful to cover a few of the annual compliance requirements you as a firm should be addressing as opposed to case specific compliance.

SIP 11

In Jan 2018 a new SIP 11 was published which added to the compliance burden. The innocuous requirement is at the end of the SIP paragraph 11 and states:

*Financial controls and safeguards, including levels of insurance cover, **should be fully documented and reviewed** by the office holder for their adequacy, as and when appropriate (and **at a minimum annually**).*

Whilst paragraph 9 of SIP 11 details the minimum required to be documented I think you may find the ICAEW's Financial Controls for Insolvency Cases (which may be found [here](#)) a useful place to guide you through what needs to be documented and reviewed.

So have you documented the financial controls you have in place? Have you conducted an annual review of those controls?

MLR17

The MLR17 came into force 26 June 2017 and section 18 requires a firm risk assessment to be conducted in reviewing the "risk factors relating to: (i) its customers; (ii) the countries or geographic areas in which it operates; (iii) its products or services; (iv) its transactions; and (v) its delivery channels".

Scottish Insolvency

There are two pieces of legislation to be aware of [The Common Financial Tool \(Scotland\) Regulations 2018](#) the link for this is [here](#) and [The Debt Arrangement Scheme \(Scotland\) Amendment Regulations 2018](#) the link for which is [here](#) and both come into force 29th October 2018.

Court Fees

The Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018 came into force on 25th July 2018 and is available [here](#). This reduces the fees on a few insolvency applications to court.

Insolvency Recast Regulation

The Insolvency Regulation (Recast) amending Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings published in the Official Journal came into force 26th July 2018. Further information may be found [here](#).

Personal injury claims

The draft Third Parties (Rights Against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018 is available for review [here](#). The regulation comes into force 21 days after being made.

Revised Practice Direction on Insolvency Proceedings

After issuing the revised practice direction (PD) on insolvency on 25 April 2018 errors were identified. On 5 July 2018 an amended PD was approved and may be found [here](#). The revised practice direction has not clarified the issue of using electronic filing for appointments in administrations.

Pension Regulator

The DWP has opened a consultation on protecting defined benefit pension schemes. It is being proposed that advising of a "notifiable event" should occur earlier which may impact IPs. Further information may be found [here](#) and the consultation closes 21 August 2018.

Call for evidence on LASPO Act and insolvency

The government is undertaking a post-implementation review of Part 2 of LASPO Act. Views are being sought on the removal of success fees on CFAs and after event insurance premiums which are no longer recoverable. Consultation closes 24 August 2018, further information may be found [here](#).

ICO Reviews exemptions from charges

The government consultation on the ICO fees charged ends 1 August 2018. Further information may be found [here](#).

Responses to Airline Insolvency Review

The responses on the government's call for evidence on airline insolvency have now been received and documented. An interim report has also been published at [here](#).

HMT published FMI Special Administrations responses

HM Treasury have published responses to the consultation on rules for the financial market infrastructure special administration regime which may be found [here](#).

Annual Firm Compliance ctd

Then once you have conducted the review in accordance with section 19 you need to "establish and maintain policies, controls and procedures to mitigate and manage effectively the risks". This section also requires that a firm "regularly review and update the policies, controls and procedures".

You also need to establish an independent audit function in accordance with section 21 to monitor and evaluate the adequacy and effectiveness of the policies, controls and procedures adopted. As well as the above regular training in accordance with section 24 is also required.

So have you as a firm conducted a risk assessment? Put procedures and policies in place, had your annual MLR17 training and audited your compliance with your policies and procedures?

GDPR

Hopefully you as a firm have :-

- undertaken a mapping exercise of the data you receive and process
- a privacy notice on your website
- reviewed current cases and determined who needs to be provided with a privacy notice and when
- reviewed closed cases and put adequate security in place i.e. archived closed cases on software and the internal network and restricted access to those areas to one key person
- Have data controller/data processing agreements in place with all third parties you provide data to i.e. agents, ERA specialist, debt collectors, storage companies etc.
- Have data sharing agreements in place with any solicitors or accountants you instruct
- Have policies and procedures in place e.g. to mitigate the risk of trading

So much to do and so little time \o/



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.