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# TECHNICAL UPDATE

## Furloughing staff in an ADM

In the case of [Re Carluccio's \[2020\] EWHC 886 \(Ch\)](#) the joint administrators made an application to the court in respect of whether they would be able to use the government's Coronavirus Job Retention Scheme (the "Scheme") and "furlough" staff whilst in administration, the guidance for which was sparse. The Administrators sent a letter to all staff explaining that they wished to use the scheme to pay staff 80% of their salary but that there were insufficient funds to meet the remaining 20% and that employees who accepted being placed on furlough would accept that their pay would be reduced to 80% during this period. The issues before the court were: 1. Could the Scheme be used by the Administrators? 2. On what basis could the funds received from the scheme be paid to the employees since there was no clear guidance on whether funds received were to be held on trust for employees? 3. What would be the position for employees who had not responded to the Administrators' letter? The court held that the intention of the Scheme was to save jobs and because the Administrators had expressions of interest from various parties there was a reasonable prospect of a sale and therefore jobs would be saved and use of the Scheme was appropriate. The court held that the liabilities incurred for the employees after the 14 days fell within para 99 Sch B1 and therefore could be paid from the funds received from the government. In respect of the employees who had not replied, it

was noted by the court that significant efforts were being made by the Administrators' staff to contact those employees. The court held that until those employees had elected to participate in the furlough scheme the administrators would not be deemed to have adopted their contracts which would allow the administrators time outside the 14 days to contact the employees and negated the need for the Administrators to terminate their employment. IPs may want to revisit their letter to employees based upon the judge's comments at para 93 to 95 of the judgment.

## Obligations when an error occurs

In the case of [Lehman Brothers Australia Ltd \(in liquidation\) v MacNamara and others \[2020\] EWCA Civ 321](#) due to the complexity of the claims in the administration, the Administrators had offered to enter into Claims Determination Deeds with creditors based on "using LBIE's in-house valuation methodology" and "using a set of processes, data sources and valuation approaches in line with market practice and universally applied to determine Street Creditors' unsecured claims". The representatives of the administrator made a clerical error in respect of the conversion to Sterling and used Aus\$/£Sterling exchange rate as at 15 September 2008, rather than at the Euro/£Sterling exchange rate, and the representatives of the creditors failed to identify the error and proceeded to agree the claim and entered into the CDD based on the error. When the

error was identified the liquidator of the creditor requested the Administrators rectify the error and the Administrators refused. The court deemed that as an officer of the court, an Administrator should be held to higher standards and the correction of the error was appropriate.

## Fees, voting & IVAs

In the case of [Royal Bank of Scotland plc v Munikwa \[2020\] EWHC 786 \(Ch\)](#) RBS issued proceedings challenging the approval of an IVA where the modifications proposed by RBS in respect of the IVA were disregarded but their vote was used to approve the proposal. The judge found that the IP and his staff had not followed the insolvency rules and there had been a material irregularity. The judge, has referred the matter to the IP's regulator.

## Adjudicating proofs of debt

In the case of [Nimat Halal Food Ltd and another company v Patel \(in his capacity as administrator of Tariq Halal Meat \(Ilford\) Ltd\) and another \[2020\] EWHC 734 \(Ch\)](#) the Administrator, after interrogating the books and records of the company, seeking information from the director and information from the creditors, rejected two proofs of debt and detailed why on the rejection notice. The creditors applied to court to have the claims reinstated and provided new evidence and evidence under cross examination which had not previously been provided to the

Administrator and parts of the claims were subsequently admitted. The creditors sought a costs order personally from the Administrator. The issue of whether the Administrator should be personally liable was fully explored by the judge who concluded that he had “acted appropriately and with integrity. His approach to the hearing was as expected. He adopted a neutral position.” The order for costs was an expense of the administration.

### Prescribed Part

The [Insolvency Act 1986 \(Prescribed Part\) \(Amendment\) Order 2020 SI 2020/211](#) came into force from 6 April 2020 and is available [here](#). The prescribed part is increasing from £600,000 to £800,000 but only for security given from 6 April 2020 and where a pre-4/20 charge is subordinate in priority to one after 4/20.

### Proposed new insolvency legislation

The government has announced plans to change the UK's Insolvency Framework and will add new restructuring tools including:

- a moratorium for companies giving them breathing space from creditors enforcing their debts for a period of time whilst they seek a rescue or restructure;
- protection of their supplies to enable them to continue trading during the moratorium; and;
- a new restructuring plan, binding creditors to that plan.

The legislation is in the process of being drafted.

### Practice Direction (PD)

The [Temporary Insolvency Practice Direction](#) was published 7 April 2020 and is accessible [here](#) and will be in force until 1 October 2020. The PD addressed the immediate issue of swearing a

declaration although it was not as reassuring on the issue as had been hoped as it only referred to Administration declarations. There was also the 113th PD update which may be found [here](#) and was published around the same time. It is slightly confusing as Part 22.1(g) CPR, which deals with statements of truth (SoT) refers to “any other document where a rule or practice direction requires” and since R1.2 IE&WR16 refers to SoT made in accordance with Part 22 CPR this all fits together. However, the PD 22 which relates to SoT refers to 22.1 of the CPR and defines the documents and leaves out 22.1(g). This is significant because PD 22 has been amended and now requires additional wording for SoT. So it is currently unclear if a statement of truth under the insolvency legislation requires the additional wording but prudence would suggest adding it to the SoT supporting Statement of Affairs for CVL, ADM, CVA & IVA.

### Dear IP

We have had a deluge of Dear IPs being published and circulated. The last Dear IP posted to their website was Dear IP 90 Sept 2019 and we are now on Dear IP 99. Unfortunately the last 9 have not been integrated into the Dear IP manual as yet, so I have provided the individual links to each below: [Dear IP 91](#), [Dear IP 92](#), [Dear IP 93](#), [Dear IP 94](#), [Dear IP 95](#), [Dear IP 96](#), [Dear IP 97](#), [Dear IP 98](#), [Dear IP 99](#).

### New Code of Ethics

The new Code of Ethics went live 1 May 2020. Michelle has blogged about the changes which may be found [here](#). The changes introduced will have a huge impact on what needs to be documented on a case. Familiarising yourself with the changes and introducing new checklists and documents should

be a priority if they are not already in place.

### IVA Protocol & Covid 19

The Insolvency Service has issued guidance which may be found [here](#) on how the IVA standing Committee expect Supervisors to exercise the discretion within the proposal and protocol terms and conditions where appropriate.

### SIP consultation 3.1, 3.2, 7 & 9

Consultations have opened on proposed amendments to SIPs 3.1, 3.2, 7 and 9. The consultation applies to England, Scotland and Northern Ireland, with a slightly different SIP 9 for Northern Ireland. The consultation closes 20 July 2020 and you should send your responses to the consultation to [jic\\_sip\\_consultation@icaew.com](mailto:jic_sip_consultation@icaew.com) Further information about the consultation may be found [here](#) and [here](#).

### HMCTS weekly operational summary

The HM Courts and Tribunals Service are posting [here](#) a weekly summary of the operational position during the coronavirus pandemic.

### Access to COVID-19 Information

Matters have been moving so rapidly in response to COVID-19 issues that I thought a list of links to resources and information on from RPBs might be helpful:

[Latest from IPA](#),

[Talk Insolvency for latest from](#)

[ICAEW](#)

[ICAS Covid -19 IP Guidance](#),

[R3 blog](#)



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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.