

CASE LAW

- FSA, WARNING NOTICES & S130IA 86
- PURPOSE OF THE ADMINISTRATION

BREXIT

- BREXIT EU REGULATIONS, GDPR, ETC

LEGISLATION

- PERSONAL INSOLVENCY
- FSA: PAYMENT SERVICES & ELECTRONIC MONEY
- COVID SPECIFIC MATTERS
- BREXIT LEGISLATION

GENERAL INFORMATION

- HMRC SECONDARY PREFERENTIAL CREDITOR
- CHANCERY GUIDE UPDATED
- DEAR IP
- INSOLVENCY LIVE!

- GUIDANCE FOR IPS ON HOW TO APPROACH FCA REGULATED FIRMS
- SMART CONTRACTS
- ICAEW CHECKLIST UPDATED
- BITESIZED TRAINING ONLINE

TECHNICAL UPDATE

FSA, Warning Notices & S130IA 86

In the case [Re Carillion plc \(in liquidation\) Financial Conduct Authority v Carillion plc \(in liquidation\) \[2020\] EWHC 2146 \(Ch\)](#) the FCA sought authority to initiate “proceedings” within S130(2) IA86 in order to start the process to decide whether sanctions should be imposed upon the company under S91 & S123 FSMA. The court decided it was in the public interest for the FCA to pursue its objective and gave leave for the FCA to proceed against Carillion on the understanding that this may result in sanctions in the form of a Warning Notice and a Statutory Notice. However, there could be no execution of the penalty without leave of the court and Carillion may apply to stop the levying of a financial penalty.

Purpose of the Administration

In the case of [Re Moulds Fencing \(Torksey\) Limited \[2020\] EWHC 2933 \(Ch\)](#) the court was asked to consider whether it was appropriate to suggest the purpose of the administration was 3(c) Sch B1 IA86 when a distribution to unsecured creditors was possible and the applicants alleged therefore that purpose 3(b) should have been achievable by the Administrators and their proposal should have reflected that position. Since purpose 3(b) states (b) “*achieving a better result for the company’s creditors as a whole than would be likely if the company were*

wound up (without first being in administration)” it is unclear on what basis 3(b) could have been proposed unless it achieved a better result than liquidation. The court agreed that paying a distribution to unsecured creditors did not necessarily mean purpose 3(b) was achievable.

Personal Insolvency

[The Debt Respite Scheme \(Breathing Space Moratorium and Mental Health Crisis Moratorium\) \(England and Wales\) Regulations 2020](#) SI 2020/1311 has been published and is due to come into force on 4 May 2021.

FSA: Payment Services & Electronic Money

[The Payment Services and Electronic Money \(Amendment\) Regulations 2020](#) SI2020/1275 came into force on 8 December 2020 to allow for amendments to be made to the existing insolvency procedures. HM Treasury have opened up a [consultation](#) on insolvency changes for payment and electronic money institutions. The consultation ends 14 January 2021.

COVID specific matters

The legislation passed earlier in the year to deal with lockdown has been extended:

- [The Business Tenancies \(Protection from Forfeiture: Relevant Period\) \(Coronavirus\) \(England\) \(No. 3\) Regulations 2020](#) SI 2020/1472,

Brexit EU Regulations, GDPR, etc

The transition period came to an end on 31 December 2020. Since our insolvency processes are embedded into identifying what type of insolvency proceeding is being initiated within the EU, some amendments to document packs and checklists will need to occur.

Resources

Resources that might be helpful:

- [Insolvency \(Amendment\) \(EU Exit\) Regulations 2019](#)
- [The Insolvency \(Amendment\) \(EU Exit\) Regulations 2020](#)
- [The Provision of Services \(Amendment etc.\) \(EU Exit\) Regulations 2018](#)
- [Data Protection, Privacy and Electronic Communications \(Amendments etc\) \(EU Exit\) Regulations 2019](#)
- [Dear IP 83](#), [Dear IP 86](#), [Dear IP 106](#), [Dear IP 116](#).

Terminology

Let’s start with the changes to terminology:

- COMI proceedings = COMI in UK
- Establishment proceedings = COMI not in UK but an establishment in UK
- EU recognition does not apply and other grounds in UK law apply

Document changes

There are certain instances within the rules where the type of insolvency proceedings needs to be detailed:

- Administration documents filed in court
- IVA & CVA - Proposal, Nominee’s report and report on the consideration of the proposal.

- [The Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Extension of the Relevant Period\) \(No. 2\) Regulations 2020](#),
- [The Corporate Insolvency and Governance Act 2020 \(Coronavirus\) \(Suspension of Liability for Wrongful Trading and Extension of the Relevant Period\) Regulations 2020](#)

The [Temporary Insolvency Practice Direction](#) has also been extended. The following regional guidance supplementing the new TIPD has been issued so far:

- [North: New TIPD variations and guidance \(5 October 2020\)](#).
- [North: Electronic bundle guidance for insolvency cases \(6 October 2020\)](#).
- [London: New TIPD variations and guidance \(1 October 2020\)](#).

Brexit Legislation

In addition to the legislation detailed in the right panel here is further Brexit insolvency legislation:

- [The Bank Recovery and Resolution \(Amendment\) \(EU Exit\) Regulations 2020](#)
- [The European Union \(Withdrawal\) Act 2018 \(Relevant Court\) \(Retained EU Case Law\) Regulations 2020](#)

HMRC Secondary Preferential Creditor

HMRC published a [policy paper](#) on HMRC as a preferential creditor on 30 November 2020 and R3 published a [technical alert](#) on the issue.

Chancery Guide

The Chancery Guide was updated 30 November 2020, amendments include: Ch.2 (new contact details for Judges and Clerks); Ch.14 (Information regarding remote hearings); Ch.17 (link to update on the Disclosure Pilot

Scheme); Ch.25 (entire new chapter for Insolvency and Companies Court including a new Temporary Practice Direction to support IPD during the coronavirus pandemic, winding up and bankruptcy petitions).

Dear IP

The latest Dear IPs are now available: [Dear IP 112](#), [Dear IP 113](#), [Dear IP 114](#), [Dear IP 115](#), [Dear IP 116](#) and [Dear IP 117](#).

Insolvency Live!

If you missed [Insolvency Live!](#) in 2020 you may still access the various recordings of the event.

Guidance for IPs on how to approach FCA regulated firms

The FCA have opened a [consultation](#) on the guidance they issue to IPs on how to approach regulated firms. The consultation closes 18 January 2021.

Smart Contracts

The Law commission have issued a [call for evidence](#) on smart contracts. The consultation ends 31 March 2021.

ICAEW Checklist updated

The ICAEW have updated their [checklist](#) to include moratoriums and Scottish cases.

Bitesized Training Online

Need to catch up on CPD or need help training staff? We are running weekly 20 min bitesized interactive training online for 12 weeks. Topics, cost and further information may be found [here](#).

Brexit EU Regulations, GDPR, etc ctd

[Document changes ctd](#)

NB: Unfortunately for some reason R8.24(2)(c) has not been amended to reflect the post Brexit terminology for the report on the consideration of the IVA proposal. Hopefully this will be amended some point.

[GDPR](#)

For those hoping that exit from the EU would remove the onerous GDPR requirements, I am afraid you will be disappointed. The GDPR is now incorporated as the [UK GDPR](#) and everything stays the same, except we are now no longer in the EU so the ICO have provided helpful [proformas](#) and a process to create compliant data controller/data processor agreements. Your privacy notice will probably need to be amended if there is any reference to the EU in it.

[Provision of Services Regulations](#)

This is another piece of legislation being retained within the UK legislation so no huge amendments are needed for your engagement letters. However, if you are working in the UK under EU law rather than qualified via JIEB, you will need to discuss the matter with your licensing body.

[Redundancy Payments Office](#)

Employees who are working in the UK but do not hold a British passport will still be able to make claims for redundancy and payment in lieu of notice from the Redundancy Payments Office and their claim should be processed in the normal way.

[Transition](#)

If proceedings were issued pre 31 December 2020 they will be recognised under EU law, however post 31 December 2020 you will be relying on Cross Border insolvency legislation and UNCITRAL. Watch out for Michelle's Blog on Brexit being published shortly.



Joanne Harris has 22 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

M: 07780 613826

E: jo@johconsultancy.co.uk

E: jo@thecompliancealliance.co.uk

W: <http://www.johconsultancy.co.uk>

W: <http://thecompliancealliance.co.uk>