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R3 TECHNICAL BULLETIN

Information issued by the General Technical Committee of the Association of Business Recovery Professionals to members, associates and new professionals

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Association of Business Recovery Professionals
R3
Rescue Recovery Renewal

122.1

WHOSE CLAIM IS IT NOW?

"I paid off your claim, so I'm the creditor now."

That seems to be a common assumption, but as all the best lawyers will tell you for a modest fee, "Maybe. It all depends."
So if Insolvent owes £100 to Imprudent, and Bountiful comes along and pays £100 to Imprudent in respect of the claim, how does that impact on the relative standing of the parties?

Question 1.

Why did Bountiful make that payment? If the payment was made by reason of a guarantee that Bountiful had entered into with Imprudent, **section 5 of the Mercantile Law Amendment Act 1856** has something to say (actually quite a lot to say in one breathless sentence):

Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

In a nutshell "Pay in full under the guarantee and all the rights and remedies of the original creditor are now yours." As to part payments, and part guarantees, those are another story for another time, as are contractual restrictions in the guarantees preventing Bountiful from making a claim.

If there was no guarantee has Bountiful entered into an agreement with Imprudent to buy Imprudent's claim against Insolvent? If that is the case, the terms of the deal are a private matter between Bountiful and Imprudent and the price to be paid need not be the £100 face value of the claim. If the paperwork has been handled correctly the claim (for £100) is transferred to the outright ownership of Bountiful. Ideally Insolvent is notified of the transfer, so that it knows to pay Bountiful rather than Imprudent, if, when and to the extent that it can, and the transfer is a Legal Assignment. If Insolvent is not told of the transfer, it will inevitably make any payment or part payment to Imprudent, who is then bound to pass on the money to Bountiful, an Equitable Assignment.

The payment may expressly be a gift. Bountiful finds Imprudent weeping over its loss and being rich, generous and deeply moved, the communication is to the effect of "There, there! Your need is greater than mine. Take this £100 and we will say no more about it", whereupon no more is said about it, but Imprudent does remember to withdraw its claim against Insolvent.

Or perhaps the payment was a loan. "Take this £100, but continue your claim against Insolvent and if it ever pays you anything you can repay me." Or is that actually an Equitable Assignment of the claim? Or of any dividend that Insolvent may one day pay? The Grand Wizard, the Insolvency Practitioner, will be familiar with rule 14.43 in the Book of Spells which allows for a simple statutory assignment of a right to a dividend with a minimum of formality and without an assignment of the claim itself.

Or more straightforwardly "Take this £100. Repay me when you can, whether or not Insolvent ever pays up."

But if Bountiful simply pays £100 to Imprudent, as a rabbit out of a hat, and there is no understanding or agreement as to the fate of Imprudent's claim, that is unlikely to allow Bountiful unilaterally to seize control of an entitlement to the claim.

Bountiful may have ulterior motives in buying up the claims of creditors, in order to take a robust/rigorous / aggressive/spiteful stance against Insolvent and/or the Grand Wizard. That will not invalidate or impeach the validity of any assignments entered into. It is a wholly separate question whether any steps then taken by Bountiful against Insolvent or the Grand Wizard will be good in law, or may be struck down by the Great Tribunal.

If Bountiful's motive in buying the claim of Imprudent is to take over the position of Imprudent on the creditors' committee, the mere purchase of the claim does not appear to achieve the result. It was Imprudent who was appointed to membership of the committee. Upon the assignment of its claim taking effect, Imprudent is no longer a creditor and so ceases to be a committee member. There is then a vacancy to be considered in accordance with **rule 17.8.** It may be that Bountiful, now being a creditor, is elevated by due process to the august heights of membership of the committee, but there is nothing to suggest that the role simply transmits with the claim.

Learned works can be, and have been, written on guarantees, assignments of debts and random, or not so random, third party payments.

The moral of today's tale is that before Bountiful parts with £100 and presents itself to the Grand Wizard as the holder of the claim in place of Imprudent, and likewise before the Grand Wizard admits Bountiful to the further ceremonies, pause for thought is required. Who? What? Why? When? Tell me more!

R3 wish to thank Stephen Hill, a member of R3's General Technical Committee, for this note.

122.2

BREXIT: END OF THE ROAD…

On 31 January 2020 the United Kingdom ('UK') left the European Union ('EU') and entered into a transition period with the EU under the Withdrawal Agreement ('WA'). The WA confirmed that EU regulations would continue to apply until 11 pm on 31 December 2020, at which point the continued effect of such regulations would be determined by a separate agreement on the future commercial and legal relationship between both parties. As things stand with no such agreement in sight, the automatic recognition of insolvency proceedings between the UK and EU stands to become a thing of the past.

A reminder of the EU regulations

The current EU regulations allow automatic recognition of UK insolvency procedures across the EU, and vice versa, and form a vital part of the UK's insolvency and restructuring environment. The benefits of the Recast Insolvency Regulation (Regulation (EU) 2015/848) which provides for such recognition will continue to apply to all insolvency proceedings commenced before 11 pm on 31 December 2020.

Post-31 December 2020

Even if a trade deal is agreed upon between the UK and the EU it is unlikely to incorporate provisions on cross-border insolvency law As a result, any UK insolvency proceedings commenced after 11 pm on 31 December will no longer be recognised automatically by the remaining EU member states. It will be possible for separate proceedings to be commenced in relation to the same debtor/assets in the UK and EU Member States, but with limited rules on how to cooperate or determine any disputes in relation to those proceedings. It will also be possible for formal application to be made to individual member states for the recognition of UK insolvency proceedings (see further below).

Recognition of professional qualifications in practice

Directives 2005/36/EC and 2006/123/EC will no longer apply to UK insolvency practitioners. Recognition may no longer be available and insolvency professionals who have relied on these provisions, or wish to rely on their UK qualification, should seek advice from the appropriate authorities in the member state where they wish to practice. As mentioned above, this should not affect pre 31 December 2020 insolvency appointments where the proceedings will benefit from the automatic recognition and effects provided by the Recast Insolvency Regulation.

What options are available for insolvency professionals?

As mentioned above, there are still some routes to recognition for UK and EU practitioners.

With regards to 'incoming' recognition requests from the EU (and other jurisdictions) to the UK courts, the **Cross-Border Insolvency Regulations 2006 ('CBIR')** which incorporate the **UNCITRAL Model Law on cross border insolvency proceedings** (Model Law) already provides a gateway to recognition and assistance for foreign proceedings. However, a formal application for recognition via the CBIR is required and will add time, cost and complexity to the recognition process,. Other mechanisms for assistance pursuant to **S426 IA86** (limited to a defined list of countries, largely former commonwealth countries, but including Ireland) or based on common law principles may also be available in the UK for foreign representatives seeking assistance.

It may also be worth noting that the English courts will in theory have a wider jurisdiction to commence insolvency proceedings in relation to EEA debtors, as there will be no longer be a requirement for the centre of main interests (COMI) or and establishment to be located here.

In relation to, 'outgoing' recognition and assistance, this may be sought by UK insolvency office holders from the courts of a foreign state in relation to a UK insolvency proceeding where that foreign state has adopted the Model Law. Unfortunately, the Model Law has not been adopted by the UK's main EU trading partners and so will not be available to UK office holders when asking courts in those non-adopting states for recognition and assistance. Those EU states which have adopted the Model Law are Greece; Poland; Romania; and Slovenia.

In most of the EU member states where the Model Law is not available, UK insolvency office holders would instead need to apply to the courts of each member state for recognition of their appointment and to seek the appropriate assistance as required in each case.. The consequences of seeking recognition and assistance would be additional time, costs and complexity which has historically been unpredictable and is subject to a patchwork of local law rules. Practitioners will need to factor in these additional steps, and make contingency arrangements not least to address the uncertainties that will arise from the lack of automatic recognition and potential for strategic jurisdictional challenges. In certain cases, for example, where creditors from elsewhere have participated in the UK insolvency processes by either voting or proving, recognition elsewhere may not be as crucial. But where assets need to be recovered and realised, there may be little option other than to seek formal recognition in the local court, and this may have implications for the timing and ability of the insolvency practitioner to effect any realisations . In cases where there are significant assets in the EU it may be worth insolvency practitioners considering whether to open a separate EU process in addition to the UK proceedings, any EU process would then benefit from automatic recognition elsewhere within the EU.

Helpful links

- Europa.eu, Insolvency - The webpage provides an overview of Cross-border insolvency (EU rules) and links to detailed information on a number of EU State's insolvency procedures **(Link)**
- Europa.eu, Summary of insolvency processes in each member state **(Link)**
- Europa.eu, Insolvency registers **(Link)**
- Europa.eu, List of local lawyers **(Link)**
- INSOL Europe **(Link)**
- INSOL Europe, Insolvency content– Technical content available to non-INSOL Europe members **(Link)**

R3 wish to thank Gabrielle Ruiz, a member of R3's General Technical Committee, and Lexis®PSL for their contributions to this note.

Recognition within the EU of insolvency proceedings commenced outside the EU Member States (i.e. commenced in third party states)

EU Member State	UNCITRAL Model Law on Insolvency - Yes or No?	Recognition of insolvency proceedings commenced in third-party states
France	No	Outside the scope of the Recast Regulation on Insolvency, insolvency proceedings commenced in another country have limited effects in France, until they are officially recognised through an exequatur judgment and are made enforceable in France. Up until then, debtors can be the subject of enforcement measures or insolvency proceedings in France. Once the foreign insolvency proceedings are recognised in France, the foreign insolvency rules apply. The company's assets and business in France are handled in accordance with these rules.
Germany	No	Generally, German insolvency law allows for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators. The concept of automatic recognition is similarly reflected in the Insolvency Act governing international insolvency law for non-EU members. According to section 343 of the German Insolvency Act, the opening of foreign insolvency proceedings shall be recognised. However, this shall not apply if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law or where recognition leads to a result which is manifestly incompatible with basic rights.
Ireland	No	For third-party countries, the insolvency office-holder will be required to apply to the Irish High Court for recognition.
Luxembourg	No	On the basis of the principles of universality and unity of the insolvency proceedings resulting from case law, foreign insolvency decisions are generally recognised (without any proceedings being required) if the following conditions are fulfilled: 1. if they are lawfully made judgments (i.e. rendered by a competent court—case law generally holds that insolvency proceedings can only be filed before the jurisdiction determined by the location of the debtor's COMI—not obtained by way of fraud, due process has been complied with and not contrary to Luxembourg public policy), and 2. if the judgment has international effect in the jurisdiction of origin (i.e. if the law of the country where the judgment has been issued has extraterritorial scope). If not, the judgment will only have effect in this country The powers of the foreign representative are immediately recognised and they may collect assets locally. The debtor is no longer permitted to dispose of its assets located in Luxembourg and the enforcement rights of the creditors are suspended. If the foreign representative wishes to give effect to enforcement measures set out in the foreign judgment on assets located in Luxembourg, an enforcement order (exequatur) is required. There is no condition of reciprocity.

The Netherlands	No	The effects of the opening of insolvency proceedings in other non-EU jurisdictions (including Denmark which has opted out of the Recast Regulation on Insolvency) are only to a certain limited extent recognised in the Netherlands. This recognition may be challenged if the principles of due process and fair trial have not been observed in the foreign procedure. In cases where there was an absence of a treaty and where the predecessor or the Recast Regulation on Insolvency did not apply, the Dutch Supreme Court has consistently decided that the foreign insolvency proceedings only have a territorial effect, meaning that they do not affect the debtor's assets located in the Netherlands and the legal consequences attributed to the bankruptcy pursuant to the bankruptcy law of such foreign country cannot be invoked in the Netherlands to the extent that it would result in any unpaid creditors no longer being able to take recourse on the assets of the debtor located in the Netherlands (either during or after the relevant foreign insolvency proceedings). In Dutch case law it is determined that if a foreign insolvency office-holder is allowed to invoke their rights as available pursuant to the foreign domestic insolvency law, including over assets that are located in the Netherlands. The office-holder is also allowed to sell these assets and consider the proceeds part of the assets of the foreign bankruptcy estate. Notwithstanding that the foreign insolvency procedure's seizure is regarded as having only territorial effects of the foreign insolvency, the effects are de facto recognised in the Netherlands, because the foreign insolvency office-holder is able to exercise their power under the lex concursus. Note however that the effect of foreign insolvency proceedings (and any actions by a foreign insolvency office-holder related thereto) on assets located in the Netherlands can be set aside by a Dutch court, if the court determines such proceedings to have been in violation of public policy.
Spain	No	Non-EU insolvency proceedings are recognised in Spain through the exequatur proceedings contained in the Civil Procedure Act, provided that the following requirements set out in the Insolvency Act are met: 1. the foreign decision refers to collective proceedings grounded in the insolvency of a debtor by virtue of which all of its assets and activities are controlled or supervised by a tribunal or authority in relation to its liquidation or reorganisation 2. the foreign decision is final 3. the competence of the foreign court is based on the jurisdictional criteria found in the Insolvency Act (i.e. COMI or domicile) or there is a reasonable connection equivalent to the aforementioned criteria 4. the decision has not been rendered in the absence of the debtor or it has not been rendered after the summoning of the debtor in due form and with sufficient time for it to properly defend itself, and 5. the decision is not against public policy

Other countries are available on Lexis®PSL Restructuring & Insolvency (subscription required) here:
How EU Member States recognise insolvency proceedings of a third-party state.

122.3

THE R3 STANDARD FORM COVID 19 CVA PROPOSAL

The R3 Standard Form Covid 19 CVA Proposal ("**Standard Form"**) and accompanying Covid 19 Standard Conditions for Company Voluntary Arrangements ("**Standard Conditions**") are intended for use by SME companies whose businesses have been affected by Covid 19. They are intended to save time and costs, and therefore make CVAs more accessible to the SME market.

1.1. The Standard Form is **NOT** a panacea. The introduction of the Standard Form is not intended to replace the professional advice and judgement of insolvency practitioners and lawyers who may be advising companies, but simply form part of their arsenal of available tools to assist their clients. At best, this should be considered a foundation upon which the appropriate CVA can be based.

1.2. Company advisors will need to consider whether a CVA is an appropriate way to deal with the company's financial distress, or whether, for instance, simple bi-lateral agreements with creditors might be better. The proposed use of a CVA may also enable debtors to engage more effectively with creditors to find consensual solutions.

It is impossible to create a template CVA to tackle all variations that may be necessary in a CVA. This form has therefore been drafted to fit the following criteria: .

- *A directors' proposal* - The vast majority of CVAs are proposed by a company's directors and so the Standard Form is drafted for this situation, rather than for proposals made by an administrator or liquidator.

- *A delayed payment in full* - The Standard Form provides for a breathing space period followed by a delayed payment of 100% of the company's debts. It is designed for use by companies whose businesses have been hit by the Covid 19 pandemic and which need some time to get their businesses fully operational. Creditors with pre-CVA debts are consequently prevented from enforcing their debts against the company whilst the CVA is in operation. Trading costs incurred during the CVA are to be paid out of new trading income. Continuation of the business will permit regular contributions to be made to the supervisor out of operational cash flow.

Available documents

1. Standard Form Covid 19 CVA Proposal. Version 1. September 2020. England and Wales
2. Standard Conditions for Company Voluntary Arrangements. Version 1
3. Comparison IVA Standard Terms. Standard Conditions for Company Voluntary Arrangements.
4. Explanatory note for insolvency practitioners
5. Explanatory note for media

All documents can be accessed **here**.

Scotland versions available **here.**

Northern Ireland versions available **here.**

UPDATE - LexisPSL have kindly written standard variations to Appendix 2 of the Standard Form for:

(i) exit from administration and
(ii) debt waiver

Both live on LexisPSL R&I and are also freely available outside of their paywall on their blog **here**. Access to their blog is free once individuals have signed up with their email address etc.

122.3 // THE R3 STANDARD FORM COVID 19 CVA PROPOSAL

The creation of the Standard Form and Standard Conditions was orchestrated by Stewart Perry and Professor Peter Walton, both members of R3's General Technical Committee. Any errors that the documents may contain are R3s (and in that regard R3 refers you to the disclaimer), but they were also fortunate to have the assistance and constructive criticism of others in reviewing clauses or parts, all giving up their time for free, in an effort to help the profession and respective clients. In this regard we would especially like to thank Anna Hughes, Ben Luxford, Brian Burke, Caroline Sumner, Charles Turner, Fiona Miller, Gareth Limb, Jim James, Louise Durkan, Marcus Rea, Michelle Butler and Stephen Hill.

We would like to thank Matthew Finnie, Roddy Mckellar, Sophia Harrison and Tim Cooper; all of whom provided assistance with the standard documents for Scotland. Finally, we would like to thank Joan Houston and Michael Neill; both of whom provided assistance with the standard documents for Northern Ireland.

Disclaimer - The Standard Form and Standard Conditions are not intended to be statements of law, will not be appropriate for any case until suitably modified, and are not a substitute for professional or legal advice. R3 and its contributing editors believe that both documents are accurate but accept no liability for any fault, error, negligence or omission howsoever caused, or for any loss or damage of any kind resulting from reliance on their contents.

HMRC UPDATES

Insolvency Guidance

HMRC as a preferential creditor - This briefing explains how taxes paid by employees and customers will be protected in an insolvency procedure commencing after 1 December 2020. (November 2020)

Update on issues on Making Tax Digital – Further update on the issues being experienced with regard to the processing of VAT returns (VAT 426/427) and pre-appointment returns. (November 2020)

Customs Authorisations and Insolvency - Insolvency Practitioners, when they are appointed, become responsible for the correct operation of the authorisations, and for compliance of the conditions and obligations associated with any authorisation. (November 2020)

Making Tax Digital for VAT - Issues on Making Tax Digital – Update on the issues members are experiencing with regards to delays with the processing of VAT returns (VAT 426/427), pre-appointment returns and clearances. (October 2020)

Post and IVA claim requests - To assist HMRC's Individual Voluntary Arrangements Service (VAS) team clear the backlog of correspondence and proposals, members are being asked for help on (1) Duplicated post items and (2) IVA claim requests. The guidance from HMRC sets out how members can help. (October 2020)

Incorrect rate being used for Corporation Tax - Corporation Tax rate to remain at 19% "We are finding that some Insolvency Practitioners are submitting Corporation Tax returns for periods ending after 1 April 2020 using an incorrect rate for Corporation Tax." (September 2020)

Digital Mail Service - HMRC have updated Insolvency (VAT Notice 700/56) with the latest contact details for each of their EIS teams. Please use the right details so HMRC can make sure your correspondence is scanned into the right channel to be worked. (September 2020)

Employer Bulletins

October 2020 – This bulletin provides information on the Coronavirus Job Retention Scheme, an update on the Job Retention Bonus and information regarding recent government announcements including the Job Support Scheme, extension to the reduction of VAT for Hospitality and Tourism, and the VAT Deferral New Payment Scheme.

November 2020 – No bulletin released.

December 2020 – This bulletin provides updates and guidance on the extension to the Coronavirus Job Retention Scheme, VAT Deferral and VAT reverse charge measure for the construction industry, Statutory Sick Pay eligibility for those self-isolating, Virtual Christmas Parties, checking the financial benefits of Tax-Free Childcare and information on the “Tax avoidance: don’t get caught out” campaign and the new HMRC Charter. And more.

122.5

PRE-PACK SALE ADMINISTRATION. OUTCOME OF REVIEW OF INDUSTRY REFORMS TO PRE-PACK SALES IN ADMINISTRATION

On 8 October 2020, the Government published its report on the findings and recommendations following a review to assess the impact of voluntary industry measures introduced in November 2015 to improve the transparency of pre-pack sales in administration. A number of regulations are to be introduced.**(Link)**

The headlines from the report are –

- An administrator will be unable to dispose of property of a company to a person connected with the company within the first 8 weeks of the administration WITHOUT either

    - the approval of creditors or
    - an independent written opinion (report) by an 'Evaluator'.*

- The connected party purchaser will be required to obtain the written opinion AND provider of the opinion must be independent of the connected party purchaser, the company and the administrator and must meet certain eligibility requirements.

**If there is an adverse opinion/report the Administrator may still proceed with a substantial disposal but must give justification in a written report (see regulation 12, Notifications).*

The Government has also published draft regulations, which the Government intends to lay before Parliament as soon as Parliamentary time allows and ahead of the expiry of the power at the end of June 2021.

R3's response can be found **here**.

122.6

HMRC - SECONDARY PREFERENTIAL CREDITOR IN INSOLVENCIES (CORPORATE AND PERSONAL)

From 1 December 2020 HMRC will become a secondary preferential creditor in insolvencies (corporate and personal) . The provisions can be found within the **Finance Act 2020** at page 79, Part 4, Miscellaneous and Final, Insolvency, HMRC debts: priority on insolvency.

"Schedule 6 'The Categories of Preferential Debts' of the Insolvency Act 1986, has been amended. From 1 December 2020 certain HMRC debts will fall within the categories of preferential debts, however, these debts will rank at the bottom of the ladder of these type of debts. All other preferential debts listed in schedule 6 must be paid in full before HMRC are to receive a distribution under its new preferential status.

HMRC debts captured are VAT or a relevant deduction, which is as follows –

"(a) the debtor is required, by virtue of an enactment, to make the deduction from a payment made to another person and to pay an amount to the Commissioners on account of the deduction,

(b) the payment to the Commissioners is credited against any liabilities of the other person, and

(c) the deduction is of a kind specified in regulations under section 99(3) of the Finance Act 2020."

For example, PAYE and employee National Insurance Contributions (NICs). Other tax debts, such as Corporation Tax or employer NICs, will remain an unsecured debt.

The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020 clarifies a 'relevant deduction' –

"The deductions are—

(a) deductions under section 61 (deductions on account of tax from contract payments) of the Finance Act 2004(5), **- Amounts withheld under the construction industry scheme**

(b) deductions under paragraph 6(1)(b) (deduction of earnings-related contributions) of Schedule 4 to the Social Security (Contributions) Regulations 2001(6)**, - Employee national insurance contributions**

(c) deductions under regulation 21 (deduction and repayment of tax by reference to employee's code) of the Income Tax (Pay As You Earn) Regulations 2003(7), and **- Amounts withheld under Pay As You Earn**

(d) deductions under regulation 50 (deductions of repayments) of the Education (Student Loans) (Repayment) Regulations 2009(8)." **- Student loan repayments via payroll deduction**

Important note – The above changes do not apply in relation to any case where the relevant date is before 1 December 2020.

122.7

INSOLVENCY SERVICE

Dear Insolvency Practitioner (Dear IP)
(**Link**)

Issue 116 (December 2020)

- EU exit - legal changes following the end of the transition period

Issues 115 (December 2020)

- Official Receiver Services (ORS) Operating Model
- Feedback on Guide for Monitors

Issue 114 (December 2020)

- HMRC: New IT platform update
- COVID-19 Financial Support Schemes – Reporting Misconduct

Issue 113 (November 2020)

- HMRC: Customs Authorisations and Insolvency
- Report to the Secretary of State of the approval of an Individual Voluntary Arrangement (IVA)
- Revival of suspension of wrongful trading provisions of sections 214 and 246ZB of the Insolvency Act 1986

Issue 112 (October 2020)

- DCRS Changes
- Filing notice of a Restructuring Plan for an overseas company, pursuant to the Corporate Insolvency & Governance Act 2020
- HMRC: Post and IVA claim requests

Issue 111 (October 2020)

- Outcome of Insolvency Service's review of pre-pack sales in administration
- Companies House – Request for assistance
- Directors Using Claims Management Companies (CMC)
- Code of conduct for large or high-profile cases with the Redundancy Payments Service (RPS)

Issue 110 (September 2020)

- Official Receiver use of Debt Collection Agencies (DCAs)
- Corporate Insolvency and Governance Act 2020 – extension of temporary measures
- Reinstatement of Insolvency Service account cheque payment production

LEGISLATION REMINDER

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Suspension of Liability for Wrongful Trading and Extension of the Relevant Period) Regulations 2020
The Wrongful Trading provisions have once again be suspended from 25 November 2020 until 20 April 2021. (**Link**)

The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No.3) Regulations 2020
Section 82 of the Coronavirus Act 2020 provides that a right of re-entry or forfeiture, under a relevant business tenancy, for non-payment of rent may not be enforced, by action or otherwise, during the relevant period. These Regulations provide that the relevant period is extended to 31 March 2021. (**Link**)

CASE LAW

Re Eric Andrew Robinson (in Bankruptcy) [2020] EWHC 2928 (Ch)
In this case the court held, amongst other matters, that a Trustee carrying on a business of a Bankrupt can only be continued for the purpose of winding it up beneficially, which requires only a limited period of trading. (**Link)**

Re Saint George Investment Holdings Ltd Manolete Partners plc v Matta and others [2020] EWHC 2965 (Ch)
An application was made for repayment of a significantly overdrawn director's loan account (DLA) (c£1.3m) and various preference payments and TUVs. The court held that the director had breached his obligations under CA 2006 in respect of his dealings with the DLA and was liable to pay the sum sum in respect of which the DLA was overdrawn as at the date on which the Company was placed into administration. **(Link)**

Re Totalbrand Ltd Cage Consultants Ltd v Iqbal and another [2020] EWHC 2917 (Ch)
The applicants applied for permission to appeal against a decision of District Judge Matharu, whereby she dismissed the application by the applicants to dismiss or stay proceedings against them. Those proceedings were in relation to various rights of action including statutory rights of action (e.g. TUV and preferences) that were assigned to the respondent (CCL) by the liquidator of Totalbrand Ltd. Application refused. **(Link)**

Re L & N D Development and Design Ltd Dixon v Myers and another (as administrators of L & N D Development and Design Ltd) [2020] EWHC 2803 (Ch)
The applicant (director and sole shareholder) applied under para 74(1)(a) sch. B1 of the IA86 for an order requiring the respondent (administrator) to assign a cause of action to her. The application was REFUSED as the applicant failed to discharge the burden of showing that there was real prospect of success in respect of the cause of action. **(Link)**

John Doyle Construction Ltd (in liquidation) v Erith Contractors Ltd [2020] EWHC 2451 (TCC)
In this case a claim for enforcement of an adjudicator's decision by way of summary judgment under CPR Part 7, in proceedings issued by JDC, which is in liquidation, and has been since 2013 FAILED. The court set down five principles which will be applied when an insolvent party seeks to enforce an adjudicator's award. **(Link)**

Re IT Protect Ltd (in liquidation) Bramston and another (as joint liquidators of IT Protect Ltd) v Pye and another [2020] EWHC 2473 (Ch)
The case concerned a misfeasance claim against two respondents; a de jure director of the company and a de facto director. **(Link)**

CASE LAW (SCOTLAND)

Accountant in Bankruptcy v Brooks 2020 SAC (Civ) 15

The Sheriff Appeal Court refused an appeal against the decision of the sheriff to allow an application for division and sale of the debtor's family home

The Accountant in Bankruptcy, in his capacity as trustee in the sequestration of the first defender and appellant (the debtor), raised an action seeking an order under s 113 of the Bankruptcy (Scotland) Act 2016 for the division and sale of the debtor's family home and related orders. Such an order was necessary because the second defender and appellant, the debtor's spouse and co-proprietor, had refused to give her consent to the sale. The action was defended.

At first instance, following a debate on the trustee's preliminary pleas, the sheriff held that the defences were irrelevant and granted decree for certain of the trustee's craves (the remainder being consequential on the decree for division and sale). The defenders appealed.

The Sheriff Appeal Court noted that there was little dispute as to the material facts. The defenders were the joint owners of the family home where they resided with their adult son. The defenders had resided in the home since 1982. The trustee averred that after deduction of the sums due to the secured creditors, there was equity in the property of nearly £95,000 which he wished to realise for the benefit of the debtor's creditors. He estimated that the amount of the debtor's debts was just under £21,000. The creditors would, therefore, be paid in full. The trustee averred that he had been unable to identify any other assets from which payment to the creditors could be made, with the result that unless the subjects were sold, there would be little or no dividend payable to the creditors and the public purse would be required to meet the costs of the sequestration. The defenders had disputed the amount of the debts and averred only that the granting of the order would leave them and their son homeless.

The sheriff at first instance had accepted that the trustee, as co-proprietor of the home, was entitled to insist on an action of division and sale. Under s 113 of the 2016 Act, in deciding whether to grant such an order, the court had to consider all the circumstances of the case. The court could only do so, however, if it was told what these circumstances were, and it was for the parties to bring to the court's attention the circumstances which they considered to be relevant. In this case, the defenders had given no information about any income or capital which they or their son might have; their averment that they would be made homeless if the home was sold lacked specification and did not give fair notice to the trustee of the case he had to meet; and there were no averments relating to whether or not alternative accommodation had been sought and its availability. There was therefore a complete lack of specification. The record did not set out any facts which would permit proper consideration of the (non-exhaustive list of) factors listed in s 113 to which the court is directed to have regard and there were no averments of any other circumstances to which the court might have regard. In contrast, the trustee did aver circumstances to which the court might properly have regard, in particular the position of the creditors. The general public also had an interest in having the expenses of the sequestration met from the debtor's estate rather than public funds, the public interest including considerations such as expedition and recovery of costs. Having balanced all the interests, the sheriff concluded that the defenders' pleadings disclosed no defence to the action and there was no information which would assist in dealing with the specific factors set out in s 113. The defenders' pleadings lacked specification and would be bound to fail at proof. Decree was therefore granted as noted.

On appeal, the main argument for the defenders was that the sheriff had erred in his consideration of the relevant matters under s 113. (There was also a technical argument relating to the record, which the Sheriff Appeal Curt dismissed on the basis that there was no real prejudice to the defenders). The Sheriff Appeal Court rejected that argument.

The Sheriff Appeal Court began by noting that because the first defender's interest in the home had vested in the trustee, his consent to a sale was not required, and he was therefore a party to the action only in so far as it craved the removal of both of the defenders from the home. Insofar as his defences related to the merits of s 113, therefore, they were irrelevant, and standing his limited interest in the action, it was doubtful whether they could be said to be relevant at all.

With regard to the merits of the defences in so far as they related to s 113, the Sheriff Appeal Court agreed with the sheriff that at common law, a pro indiviso proprietor has, subject to any issue of personal bar, the right to insist on an action of division and sale. In the case of a trustee in sequestration, the reasons for seeking to do derive from the statutory obligation on the trustee to ingather and realise the debtor's assets for the benefit of the creditors. However, s 113 inhibits the trustee's common law right to insist on division and sale of a family home by requiring the trustee to obtain the relevant consent or the authority of the court before selling or disposing of the debtor's interest in that home. In deciding whether to grant such authority, the court has to take account of all the circumstances of the case, and in particular the five factors set out in s 113(2)(a)-(e). The Sheriff Appeal Court raised the question of the correct test to be applied by a sheriff in granting authority but reserved its opinion on the matter in the absence of argument as to whether the decision is truly one of discretion as opposed to one of judgment. The Sheriff Appeal Court stressed that the factors listed in s 113(2) are not exhaustive and identified other factors which might be relevant as including the behaviour of the debtor, his co-operation and delay in the conduct of the sequestration. The factors and the weight to be attached to them will, however, vary from case to case. Parliament had recognised that it was not possible, and probably not desirable, to provide a prescriptive list of factors and the relative weight to be given to them. There were many permutations which could arise, and the ultimate decision was entrusted to the court which had to reach a decision based on the material put before it. In the view of the Sheriff Appeal Court, "the ultimate calculus for the court to undertake is one of reasonableness, judged in the light of the particular facts and circumstances of the case". In this case, in testing the relevancy of the defenders' averments, the sheriff had applied the well-known test of whether a party would be bound to fail even if all of his averments were proved. In the context of a case under s 113, it was important to note that the trustee will often have limited knowledge of the personal circumstances of the debtor and the debtor's family and it was not for the trustee to look for reasons not to sell the family home. That information is within the knowledge of the debtor and the debtor's spouse/civil partner, although the trustee may have information about the interests of the creditors which is relevant to the matter, such as certain creditors being particularly deserving/subject to hardship in the event of delay. The trustee will also have information about the progress of the sequestration and the extent of the debtor's co-operation. However, the onus is on the defender to aver with sufficient particularity the facts which the defender relies on as justifying the court in exercising its powers under s 113 to do something other than order the sale of the home. Since each case is fact-specific, the adequacy of the averments falls to be tested on their own merits, and they must be sufficient to satisfy the court that, if proved, they would justify the court in tempering the grant of authority to sell the home. In this case, the defenders' averments were very limited and proving them would not make it unreasonable for the home to be sold. The defences were irrelevant both because on their own, they did not go far enough, and because they gave no fair notice to the pursuer of what case he would have to meet. The sheriff was therefore correct in the decision which he had reached, and the appeal would be refused.

R3 wish to thank Donna McKenzie Skene, a member of R3's Scottish Technical Committee, for this summary.

TECHNICAL REMINDERS

(1) Revised insolvency code of ethics
The revised Insolvency Code of Ethics became effective from 1 May 2020 and is available **here.**

The Insolvency Code of Ethics applies to all insolvency practitioners, irrespective of their authorising body. It applies to all professional work relating to an insolvency appointment and to any work that may lead to such an appointment. The Code is based on the International Ethics Standards Board for Accountants (IESBA) Code.

R3's Recovery Magazine, spring edition, contained an article titled 'A Few Good Practitioners' about the uneasy journey of the code from inception to its public debut. (**Link**) Members are reminded that they, and their staff, should be familiar with the requirements of the revised Code.

(2) Prescribed part increases to £800,000 from 6 April 2020 – in certain cases
On 6 April 2020, the Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020 came into force. It increased the maximum amount of the prescribed part from £600,000 to £800,000, however the increase will only apply where the floating charge affected was created on or after 6 April 2020. If the lender has a relevant floating charge which was created prior to 6 April 2020, the cap will remain at £600,000 regardless of the date of the insolvency appointment." (**Link)**

(3) Joint and Several Liability of Company Directors etc
Finance Act 2020, Joint and Several Liability of Company Directors etc, (Schedule 13, page 177)

"Clause 97: Joint and several liability of company directors", will make directors personally liable for tax debts in situations where they are suspected of abusing the insolvency framework in order to avoid paying taxes.

This could apply to directors with a track record of corporate insolvency, or where the director's company is facing, or in, an insolvency procedure.

With regard to schedule 13 of the Finance Act 2020 'Joint and several liability of company directors etc', R3 and members of GTC watched this piece of legislation from start to statute. We are of the view that the legislation is too widely drafted and the HMRC is relying on guidance to restrict its application. This is something R3 is pushing HMRC to release.

Despite our reservations and concerns, we are pleased that the legislation does not apply retrospectively and welcomed clarification of the unpaid tax liabilities threshold, which both support the intentions of the policy i.e. a form of deterrent for tax abuse using company insolvencies and capturing certain companies, who propagate such abuse.

It is unclear whether it will have the desired affect but it is certainly something IPs and other professionals should bear in mind when advising clients. The more exposure the provisions have, the more likely they will have the desired effect. Members may wish to consider updating letter of engagements to make clients known of these new provisions.

To recap for repeated insolvency and non-payment cases an HMRC officer may give a Joint Liability Notice to an individual if it appears to the officer that a number of conditions have all been met.
Condition A is that there are at least two companies in the case of each of which—

(a) the individual had a relevant connection with the company at any time during the period of five years ending with the day on which the notice is given ("the five-year period"),

(b) the company became subject to an insolvency procedure during the five-year period, and

(c) at the time when the company became subject to that procedure—

In sub-paragraphs (ii) and (iii) "relevant" means relevant to the question whether the company had a tax liability or how much its tax liability was.

Condition B is that another company is or has been carrying on a trade or activity that is the same as, or is similar to, a trade or activity previously carried on by—

(a) each of the old companies (if there are two of them), or
(b) any two of the old companies (if there are more than two).

Condition C is that the individual has had a relevant connection with the new company at any time during the five-year period.

Condition D is that at the time when the notice is given—

(a) at least one of the old companies has a tax liability, and
(b) the total amount of the tax liabilities of those companies—

(i) is more than £10,000, and

(ii) is more than 50% of the total amount of those companies' liabilities to their unsecured creditors.

** MVLs have been excluded, if debts are paid within 12 months of the liquidation.*

Important note - The legislation does NOT apply retrospectively but does apply from 22 July 2020.

CONSULTATIONS

Law Commission consultation on consumer sales contracts: transfer of ownership

The Law Commission were conducting a public consultation on a draft Bill to reform the rules on the transfer of ownership of goods as they apply to consumers. The draft Bill seeks to implement recommendations the commission made in their 2016 report, Consumer prepayments on retailer insolvency.

What is it about?
"Transfer of ownership" – the rules which determine when ownership of goods is transferred from a trader to a consumer under a sales contract.

What are the Law Commission doing?
They are conducting a public consultation on a draft Bill to reform the rules on the transfer of ownership of goods as they apply to consumers. The draft Bill seeks to implement recommendations the commission made in their 2016 report, Consumer prepayments on retailer insolvency.

The Draft Bill

The Draft Bill sets out proposed rules for when ownership of goods transfers under a sales contract between a consumer and a trader. Different rules apply to different types of goods. For example –

(1) Goods identified and agreed on at the time the sales contract is made For example, items selected in a physical store, or where there is only one (like an antique bought online) Ownership transfers when…

- Goods are labelled with the consumer's name in a way that is intended by the trader to be permanent
- Goods are set aside for the consumer in a way that is intended by the trader to be permanent
- Alteration of the goods to a specification agreed between the trader and the consumer is completed
- Consumer is told by the trader that goods bearing a unique identifier will be used to fulfil the contract

(2) Goods not identified and agreed on at the time the sales contract is made For example, items bought online according to a generic description Ownership transfers when…

- Manufacture is completed, if the goods are to be manufactured for the consumer to a specification agreed between the trader and the consumer
- Goods that are to be used to fulfil the contract are identified by the trader in some other way, and the trader intends the identification to be permanent
- Goods are delivered to the consumer
- Goods are delivered to a carrier for delivery to the consumer
- On examining the goods the consumer agrees that they are to be used to fulfil the contract

In September 2015, R3 provided comments in response to the consultation paper issued by the Law Commission in June 2015 titled 'Consumer prepayments on retail insolvency'. In our response we advised that we saw some merit in providing an enhanced degree of protection for consumers in the event of insolvency, but not at the cost of further complicating statutory insolvency procedures or burdening other creditors of the insolvent estate with the costs of administering those protections.

The Draft Bill fails to address the probable cost implications for IPs. Additional costs to an insolvency estate will arise when upon appointment the company has no money to continue to trade or keep staff on the payroll and therefore need to close down operations immediately. When a situation like this occurs, under these new proposals, the consumers will own goods made to order when they are manufactured or otherwise when the rules provide (e.g. they have been labelled, sent for dispatch or otherwise identified). These goods could be anywhere in the country or even abroad, which places a huge burden on the IP as costs will need to be incurred to (1) locate the items (2) determine ownership (3) make contact with the owner (4) arrange delivery or wait for the consumer to collect, whilst incurring storage costs on an item the company or its creditors would not receive any benefit for.

R3's response can be found **here.**

FCA Guidance for insolvency practitioners on how to approach regulated firms

FCA are consulting on non-handbook guidance for insolvency practitioners on how to approach insolvencies of regulated firms. The **proposed guidance** aims to help IPs comply with our rules and guidance and relevant legislation which aim to achieve better outcomes for consumers and market participants following the failure of a regulated firm.

The deadline for comments is Monday 18 January 2021. R3 intend on responding to the consultation and therefore, if members have any comments please submit these to **ben.luxford@r3.org.uk.**

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THE R3 PODCAST

Released on 25 August 2020. Available exclusively to members, the R3 Podcast provides insight into the key issues affecting the insolvency and restructuring profession from the people dealing with them.

Each episode features an interview with someone from R3's network of professionals about a key insolvency and restructuring related topic, supporting R3's education and technical principle: 'delivered by the profession for the profession'.

Listen to Podcasts

Summary of available recordings and future episodes –

PODCAST TITLE	STATUS
Litigation: Preparation and Logistics	RELEASED
Finance Act 2020. The R3 Journey	RELEASED
The Healthy, Happy Workplace	RELEASED
R3 COVID-19 Standard CVA document (with Stew Perry and Peter Walton)	RELEASED
An update from NEST: Pension Autoenrollment provider	RELEASED
Corporate intelligence and investigations	RELEASED
Manolete: Wrongful trading and Director Duties	UPCOMING
Cryptocurrency in an insolvency context	UPCOMING
'Partnership Insolvency – Pandora's Box'	UPCOMING
The Future of the Profession – New Professionals series	UPCOMING
Life as a New IP – New Professionals series	UPCOMING
Supporting the Profession – New Professionals series	UPCOMING

R3 TECHNICAL ALERTS

HMRC update - Contact Details (November 2020)
This alert provides members with updated addresses for HMRC, a reminder on electronic banking for IPs making dividend payments and a brief update on the issues being experienced with VAT and tax clearances. **(Link)**

Outcome of review of industry reforms to pre-pack sales in administration (October 2020)
On 8 October 2020, the Government published its report on the findings and recommendations following a review to assess the impact of voluntary industry measures introduced in November 2015 to improve the transparency of pre-pack sales in administration. **(Link)**

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Early Termination of Certain Temporary Provisions) Regulations 2020 (September 2020)
The Regulations will come into force on 1 October 2020 and as a result a number of temporary provisions in the Corporate Insolvency and Governance Act 2020 will terminate. **(Link)**

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (September 2020)
On 24 September 2020 the Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 ('Regulations') were laid before the UK Parliament and will come into force on 29 September 2020. The Regulations amend a number of provisions within the Corporate Insolvency and Governance Act 2020. (**Link)**

Companies House issues, Insolvency Service telephone numbers and Recognition of Qualifications (September 2020)
This alert provides an update on the issues members are experiencing with the Companies House 'Upload a document to Companies House' service. The alert also notifies members on the changes to the Insolvency Service telephone numbers and provides details of a call for evidence by BEIS about the recognition of Professional Qualifications post Brexit. **(Link)**

OTHER REMINDERS

Business evictions ban extended until March 2021 (Link)
On 9 December 2020 the UK Government announced that businesses will be given further support and protection during the COVID-19 pandemic as the following measures are being extended until the end of March 2021:

- the protection from forfeiture of business tenancies for non-payment of rent under **s82 of Coronavirus Act 2020**
- the restrictions on the exercise of Commercial Rent Arrears Recovery (CRAR) to recover unpaid rent
- the restriction on statutory demands/winding-up introduced in the **Corporate Insolvency and Governance Act 2020**

R3 COVID-19 CONTINGENCY ARRANGEMENTS WEBPAGE
For all COVID-19 related matters, please view R3's designated webpage **here.**

THE R3 TECHNICAL COMMITTEES
For more information about the committees, please visit the following webpages –

General Technical Committee

Scottish Technical Committee

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