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# TECHNICAL UPDATE

## CFAs

In the case of [Stevensdrake Ltd \(trading as Stevensdrake Solicitors\) v Hunt \(Liquidator of Sunbow Ltd\) \[2017\] EWCA Civ 1173](#), the court of appeal considered a CFA agreement where it was argued that the CFA agreement did not reflect the full basis on which the solicitors were instructed. There were five specific grounds of the appeal: an implied term in the CFA, estoppel by convention, undue influence, negligence and breach of fiduciary duty and contributory negligence. The court allowed the appeal on the implied term in the CFA stating that “*there was in my judgment no contractual justification for going outside the terms of the CFA*”. On the issue of estoppel the judge found “*this is a case not merely of material influence but of seriously detrimental reliance*” and the appeal on this basis was dismissed. Therefore the other three grounds were not required to be considered, although there is indication by Lord Justice Briggs that appeals on these grounds may have been successful.

## Invalid Administrators appointment

In the case of [Randhawa and another v Turpin and another \(as former Joint Administrators of BW Estates Ltd\) \[2017\] EWCA Civ 1201](#) the court reviewed the issue of whether the administrators had been validly appointed. The company’s articles required that a directors’ meeting needed a quorum of two to be validly held. The company had previously had

the husband and wife as directors. The wife resigned as a director and was not replaced. The husband was disqualified as a director and was replaced by his son. The Company’s shareholders as registered were a company that had been dissolved and the son. The previous argument that the *Duomatic* principle applied was dismissed. It was found that the administrators had not been validly appointed and that this was not curable as a procedural defect. The argument that this was an abuse of process and a means only to challenge the administrators’ fees was also dismissed as not relevant to the technical issue of appointment.

## Unjust enrichment and vesting property

In the case of [Evans and another v Carter \[2017\] EWHC 2163 \(Ch\)](#) the judge considered on appeal the issue of the Trustee claiming the benefit of the bankrupt’s successful appeal against a charge by the bank, on her interest in the jointly owned property, gained by the undue influence of the husband. The judge held that due to the lack of evidence about the bankrupt’s understanding or lack of understanding, about the Trustee’s interest in the property it was not appropriate for the judge to draw inferences as to those matters. Therefore the interest in the property vested in the Trustee. However, out of the sale proceeds the unrecovered legal costs and an amount to compensate the debtor for her time and trouble in pursuing the claim were ordered to be paid.

## General Data Protection Regulation

The General Data Protection Regulation (GDPR) will apply from 25 May 2018 and this will continue after the exit from the EU.

The GDPR may be found [here](#).

The ICO have a very informative area on their website which they are committed to enhancing to help meet the 25 May 2018 target date and this may be accessed [here](#).

The GDPR applies to ‘controllers’, and ‘processors’ and these have the same definition as under the DPA.

The obligations for processors are new requirements under the GDPR.

Equally the definition of ‘personal data’ under the GDPR is more detailed and wider.

So how will this apply to IPs who will be holding data that the company has collected in both digital and physical form and will be holding records as part of the case administration?

The ICO has set out 12 steps to prepare for the GDPR which may be found [here](#). Whilst not all are relevant for IPs there are some which will certainly help prepare your practice for your obligations under the GDPR.

[Awareness](#) - who in your firm will be responsible for implementing the requirements of the GDPR and do they have sufficient recourses?

## Discretionary Collection Fees

In the case of *BHL v Leumi ABL Ltd* [2017] EWHC 1871 (QB) the court considered the entitlement of Leumi to an additional collection fee of 15% where BHL had agreed to indemnify Leumi in respect of funds due under the receivables finance agreement with Cobra Beer Limited (Cobra). In this case over £8 million had been collected in a relatively short period. Leumi had charged for hiring two credit controllers from Cobra as well as the services of a third party collection company and solicitors. Leumi also increased the discount charge by 2% to cover anticipated operating costs. Leumi then claimed an additional 15% collection fee. The judge held that in assessing the discretionary 15% fee the Braganza duty applied. The judge determined that Leumi had just claimed the full 15% without a proper estimating exercise being undertaken. The judge reduced the 15% fee to 4%.

## Guidance - Green v Wright

R3 have published guidance based on the Green v Wright case which may be found [here](#).

## CCAB Guidance on MLR17

Draft guidance has been published by the CCAB entitled *Anti-Money Laundering - Guidance for the Accountancy Sector*. Unfortunately an appendix dealing with the relevance of this to insolvency is still in the process of being produced. The draft may be found [here](#).

## PEP new guidance by FCA

The FCA have issued the following guidance, *FG 17/6 The treatment of politically exposed persons for*

*anti-money laundering purposes*. The guidance may be found [here](#).

## ICO guidance for SARs

The ICO has issued guidance on subject access requests due to recent court decisions. The guidance may be found [here](#).

## Change to Insolvency Forms at Companies House

Companies House have amended the majority of their insolvency forms to add a continuation sheet where a third IP has been appointed. The forms may be accessed [here](#).

## Guidance for Reporting Misconduct

The Insolvency Service (IS) has published guidance for reporting the misconduct of individuals and companies which may be found [here](#).

## Insolvency Service Annual Plan 2017/2018

The Insolvency Service annual plan has been published for 2017/2018 and may be found [here](#).

## Bank of England Resolution Planning

The Bank of England (BoE) must conduct resolution planning for all financial institutions. The BoE is requesting views on the consultation paper by 17 November 2017. Further information may be found [here](#).

## New JIEB Exams

The JIEB has issued a statement about the transitional arrangements for 2017 [here](#).

## GDPR- ctd

Information held - document what personal data is held, where the data came from, and who it is shared with. For IPs this may include agents and solicitors as well as interested parties wanting to purchase the business. Since it is a requirement of the GDPR to maintain records of how you use, process and manage data this will be another document to add to case management.

Communicating privacy information - what you currently have in place may not be sufficient. The requirements include explaining your lawful basis for processing the data, your data retention periods and that individuals have a right to complain to the ICO.

Individuals' rights - The GDPR includes the following rights for individuals:

- the right to be informed
- the right of access
- the right to rectification
- the right to erasure
- the right to restrict processing
- the right to data portability
- the right to object and
- the right not to be subject to automated decision-making including profiling

The rights that will affect the IP will not be all of these, but the right of access will need to be addressed by the IP.

Subject access requests - how do you normally deal with these and are staff trained to deal with them? Note needs to be taken of the time limit reduction from '40 days' to 'a month' to comply.

Lawful basis for processing personal data - again this needs to be documented and may be part of new checklist.

Recovery magazine has an article on GDPR which I would recommend. I shall continue to cover this topic next month.



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.