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TECHNICAL UPDATE

Abuse of process

In the case of [Ward V Loughlin & Hutt \[2018\] EWHC 77 \(Ch\)](#) the liquidator, who had previously brought a claim for misfeasance and breach of fiduciary duty which had been struck out, brought a preference claim for the same amount and arising from the same facts. The court struck out the claim on the basis of abuse of process, since the money that would be repaid by the partners would then be paid to the liquidator, whose costs would be deducted and the surplus distributed back to those who would be subject to any judgment.

Third party funds & the order of priority

In the case of [MK Airlines Limited v Katz & Anor \(Acting as Joint Liquidators of MK Airlines\) \[2018\] EWHC 540 \(Ch\)](#) the High Court has held on appeal that administrators who paid their fees and expenses from funds provided by a third party specifically for that purpose ahead of other expense creditors were not guilty of misfeasance under para 75 Sch B1 IA86.

CVA, ADM & Rent Clauses

In the case of [Wright and another \(Liquidators of SHB Realisations Ltd\) v The Prudential Assurance Company Ltd \[2018\] EWHC 402 \(Ch\)](#) a CVA had been entered into by the company whereby the landlords of the company had been split into three different categories and some had agreed a

reduced rent amount. There was a clause in the CVA which provided on the failure of the CVA for the landlords to reclaim in full what they would have been entitled to if the CVA had not been approved. The company then entered administration but the CVA continued during the period of the administration. The CVA then failed and the administration was converted to a liquidation. The administrators whilst trading the company continued to pay to the landlords the reduced rent amount agreed under the CVA only. One of the landlords sought payment of the non-CVA rent amount for the period the administrators were in office trading and using those premises, as an administration expense. The court held that even though the amount owed to the landlords did not crystallise until the CVA failed, which was after the administration ended, the full rent amount that would have been due during the period of occupation by the administrators was an administration expense.


MVL & co-operative society

In the case of [Re Watford Printers Limited \(in liquidation\) \[2018\] EWHC 329 \(Ch\)](#) the court held that the default order of distribution under the IA86 would apply to a co-operative society if no provision had been made in the society's rules.

RPO weekly limit increases

It's that time of year again when the weekly limit for RPO claims rises. The new weekly limit is £508. [The Employment Rights](#)

GDPR

In the words of Fugees "Ready or not, here I come, you can't hide, Gonna find you 

It has been difficult obtaining practical information about how the GDPR will affect IPs, whether they will be data controllers or data processors, or both, and the effect of agency status.

Here are some matters that were discussed at a recent R3 breakfast seminar that may be helpful for you to consider:

Closed cases

IPs will be keeping the books and records of companies for 12 months after dissolution. On personal cases it is rare to be given the debtor's accounting files. IP case files will be kept for 6 years or longer on all case types. The IP case files may be both digital in the form of IP specific software, and potentially if the firm's filing system is digital, the day to day documents generated on the case. It was suggested that IPs should be completing a file note documenting the data held and the basis on which the information was being kept. It was less clear whether notification should be given on closed cases to data subjects, e.g. individual creditors and employees about the data being held. This is certainly an area where clarification from the RPBs via R3 would be welcome.

Open current cases

Again it was suggested that IPs on current cases should be completing a file note on each case detailing the data held and the basis on which it was being held.

(Increase of Limits) Order 2018 SI 2018/194 may be found [here](#).

Minimum wage & Pensions

The National Minimum Wage (Amendment) Regulations 2018 SI 2018/45 came into force on 1 April 2018 and may be found [here](#). You also need to be aware of the increase in employer contributions on auto-enrolment pensions that take effect from 6 April 2018; further information may be found [here](#).

Practice Directions

The Practice Direction 510 - The Electronic Working Pilot Scheme came to an end on 6 April 2018 by formal amendments to the Civil Procedure Rules, it is now compulsory to use the electronic working system. The Practice Direction 51P - Pilot For Insolvency Express Trials came to an end on 1 April 2018 and there is no news as yet as to whether this will continue.

Insolvency & Corporate Governance

The government opened a consultation on 20 March 2018 with responses to be submitted by 11 June 2018. Some interesting areas of the consultation are the proposed powers of the Insolvency Service to investigate insolvent companies that have been struck off and increasing the prescribed part cap. Further information may be found [here](#).

Company Books & Records

The GDPR is about to go live and IPs are trying to understand their obligations in respect of the books and records of the company which now will fall into two main categories, those under SIP 2 and those as agent for the company under the GDPR. Clarification has

been given by the Insolvency Service in Dear IP 80 for IPs and their obligation under SIP 2 which may be found [here](#).

HMT Approved AML Guidance

The CCAB have issued an updated final HMT approved version of their AML guide which unfortunately still does not have a finalised insolvency appendix. The guide may be found [here](#). The Law Society have given a quick summary of the changes from their draft version to the HMT approved version which may be found [here](#).

Administering insolvent estates

The Law Society published guidance in February 2018 on administering insolvent estates and the need to comply with Administration of Insolvent Estates of Deceased Person Order 1986, which may be found [here](#).

Northern Ireland & Complaints

From 1 May any complaints against a Northern Ireland IP will go through the Complaints Gateway. Further information may be found [here](#).

GDPR and emailing my technical update

The GDPR comes into force on 25 May 2018. This requires active consent to be given to be able to send you emails. The exception is where you have already been receiving emails from us and we believe you have a legitimate interest in the material we are providing. If, however, you wish us to cease sending you technical updates please email either jo@johconsultancy.co.uk.

GDPR- ctd

Open current cases ctd

Where the IP is the data controller, notification needs to be sent to the subject of any personal data processed (including held) by them. The GDPR gives 30 days from the point at which personal data is first held for this notification to be made. Will this necessitate a single letter to be circulated on all open current cases? Will the ICO and RPBs be satisfied if this notification is made with the next progress report? If the case is pre 2010 and a bankruptcy or compulsory liquidation progress reports are not required, then a single letter should be circulated. Clarification from the RPBs would again be welcome so that, as an industry, we are consistent in the way this is tackled.

New cases

The easier cases to tackle compliance on will be the new cases especially if your document packs have been updated to address GDPR.

Difficulties

It will not be sufficient to rely on posting information about the GDPR to a website, so even if you have sent a general use of website notice under R1.50 you will still need to send a physical letter to those whose data you hold. You will also need to ensure that notice is sent to all creditors that have opted out of receiving information.

R3 have a forum where GDPR issues are being discussed which is accessible [here](#). ICAS has produced some templates which may be of help to IPs when updating documents accessible [here](#).

I will be recording a webinar on GDPR and the practical application for casework and reviewing the areas within your document packs that need to be enhanced. Webinar information may be found [here](#).



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.

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