

**CASE LAW**

- DUTIES OF AN ADMINISTRATOR
- DEEMED CONSENT & VALIDITY OF APPOINTMENT
- LIABILITIES OF DIRECTORS UNDER COMPANIES ACT 2006

- SCOTTISH COURTS REVIEW OF THE ROLE OF THE REPORTER
- WHEN IS TERMINATION OF EMPLOYMENT EFFECTIVE?

**NEW PRACTICE DIRECTIONS**

- INSOLVENCY PROCEEDINGS

**LEGISLATION**

- DIRECTOR'S ADDRESS PRIVACY
- DATA PROTECTION BILL
- PRACTICE DIRECTION - INSOLVENCY PROCEEDINGS
- PRACTICE DIRECTIONS' AMENDMENTS

**GENERAL INFORMATION**

- TAX ABUSE AND INSOLVENCY
- AIRLINE INSOLVENCY
- PROTECTING DEFINED BENEFIT PENSION SCHEMES

# TECHNICAL UPDATE

## Duties of an Administrator

In the case [Dunbar Assets plc v Davey \[2018\] EWHC 766 \(Ch\)](#) the court was asked to consider the duty of care of administrators, the process by which administrators appoint agents, the permissible extent to which they consult the appointor QFCH, and the impact of not justifying the choice of administration objective in the administration proposals. The sole asset of the company was a piece of land subject to a fixed charge. The court held that the administrators had acted appropriately in respect of all the issues raised and held that the actions of the administrators were still valid despite not stating explicitly *why* objectives 3a and 3b could not be achieved.

## Deemed consent & validity of appointment

In the case of [Cash Generator Limited v Fortune and others \[2018\] EWHC 674](#) the court considered whether the liquidators had been validly appointed where notice of the deemed consent process had not been circulated to all creditors, in particular the applicant, employees and landlord. The court held that R15.15 supported its view that non-compliance would not result in an invalid appointment. The court interestingly made the following comment "the Rules Committee may wish to reflect upon whether there is a need to consolidate [the relevant rules] in a simplified form for the benefit of users in

particular when they concern standard procedures".

## Liabilities of directors under Companies Act 2006

In the case of [LRH Services Ltd \(in liquidation\) v Trew and others \[2018\] All ER \(D\) 161 \(Mar\)](#) the directors of the company restructured the company, transferred out its assets, reduced its capital to £1, cancelled the share premium account and share reserves and paid a dividend of £21,317,726, made a statement of solvency under s643 of the Companies Act 2006 and left onerous leases in the company with no means for them to be serviced. The court reviewed the actions of all the directors involved. The court then found individually against each director in respect of their particular actions and responsibilities.

## Scottish courts review of the role of the reporter

In the case of [Provisional/Interim Liquidator of Equal Exchange Trading Limited \[2018\] CSOH 35](#) the Court of Sessions reviewed the role of the court reporter again and considered the view of the Sheriff in [S & M Livestock Limited](#) as being too narrow. The court held that the reporter had the right to raise concerns to the court, including the liquidator's compliance with SIP13, and it was for the officeholder to address these concerns with the court. While the court was satisfied with the responses provided by the officeholder in respect of the concerns raised, it awarded a

## PRACTICE DIRECTION (PD) - INSOLVENCY PROCEEDINGS

I have detailed below some key points of the new practice direction.

### Definitions

The PD reflects the changes in the categories of judges as detailed in R12.59 IR 2016 and also the implementation of the Recast EU Insolvency Regulation.

### Distribution of court business

The emphasis has changed to a list of applications which may be brought in the County Court leaving all other applications to be issued in the High Court.

### Service of court documents

The previously detailed provisions have been replaced with reference to Sch 4 IR 2016 and Part 6 CPR. The new PD specifically states that a statutory demand is not a court document.

### Drafting of orders

It is now a requirement that the draft orders be submitted with any application made. This may actually help IPs to ensure all areas are addressed within the order.

### Urgent applications

Whilst the need to submit a certificate of urgency is no longer required, you still need to be able to justify with reasons why the application is urgent.

### Administrations

The PD clarifies that out-of-hours appointments of administrators cannot be effected using the electronic working online system.

costs order personally against the officeholder.

### When is termination of employment effective?

In the case of [Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood \[2018\] UKSC 22](#) the court reviewed when notice of termination of employment takes effect. The facts of the case were that while the employee was on holiday her employer sent a letter effecting termination of her contract of employment by first class post, by recorded delivery and an email to her husband's email address. The employee returned home and read the letter on 27 April. The court held that notice was given when the employee became aware, in this case on the 27 April, unless the terms of her contract provided otherwise.

### Privacy of Director's address

The [Companies \(Disclosure of Address\) \(Amendment\) Regulations 2018 SI 2018/528](#) came into force on 27 April 2018 and allows directors to not make their residential address public. This information will be available to Insolvency Practitioners as a public authority listed under Sch 1. The SI is available [here](#).

### Data Protection Bill

The [Data Protection Bill](#) is due to come into force on 25 May 2018, bringing into legislation the GDPR. The latest draft of the bill will next be considered at Report Stage on 9 May 2018 which leaves it open for amendments to be introduced before 25 May. A link to the most recent version is [here](#).

### Insolvency Proceedings

The promised revised practice direction for insolvency came into force on 25 April 2018. However, there are a few errors which are in the process of being corrected. A copy of the new practice direction may be found [here](#).

### Practice Directions' amendments

The pilot schemes for PD 51P for Insolvency Express Trials and PD 51O Electronic Working Pilot Scheme have been extended until 6 April 2020. There is a new PD 51R regarding the Online Court pilot. Further information about the changes may be found [here](#).

### Tax abuse and insolvency

The government on 11 April 2018 issued an open consultation on tax abuse and insolvency and are seeking views on how to tackle the small minority of taxpayers who abuse the insolvency regime to avoid their tax liabilities. The consultation closes 20 June 2018. Information may be found [here](#).

### Airline Insolvency

The government has issued a call for evidence on 16 April 2018 to ensure airlines can wind down with the minimum impact of passengers and the taxpayer. The consultation closes on 11 May 2018 and further information may be found [here](#).

### Protecting defined benefit pension schemes

The government issued a white paper on 18 March 2018 about protecting defined benefit pension schemes. Further information may be found [here](#) and a technical bulletin on the issue may be found [here](#).

### PD - INSOLVENCY PROCEEDINGS - ctd

#### Administrations - ctd

The PD also states the Electronic Practice Direction 510 provides that 'the date and time of payment' will be the filing date and time and 'it will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working'.

#### Validation orders

The PD states that failure to give notice to the petitioning creditor and other relevant creditors is likely to result in the application being adjourned or dismissed.

#### Applications relating to remuneration

Appointees are now referred to as office-holders.

The paragraph previously dealing with apportionment of fixed remuneration between a former and replacement office holder has been removed.

The key change is to bring the PD in line with the remuneration changes introduced in October 2015. Any application now requires a fee estimate:

- to be exhibited to an application to draw remuneration in excess of the total fee estimate. It also requires the officeholders to address the matters in rule 18.30(3) of the IR 2016 (*Remuneration: exceeding the fee estimate: matters to be specified in request for approval*) and
- to be exhibited in respect of any remuneration application.

There is also now a requirement to provide the court with the names and contact details of not only all those the office holder considers has an interest in the assets, but also "any other persons who are required by the IR to be notified of the hearing application".



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.