

CASE LAW

- INSOLVENCY AND CPR RULES
- MVLS, APNS AND INDEMNITIES
- ADJUDICATION, ARBITRATION, SET-OFF & INSOLVENCY
- DIVIDENDS & S423 IA86

SIPS

- THE PROBLEM WITH SIPS
- LEGISLATION**
- FURTHER EDUCATION & SIXTH FORM COLLEGES
 - PRACTICE NOTE ON CE-FILING

GENERAL INFORMATION

- CHANCERY GUIDE
- PENSION PROTECTION FUND
- PPI CLAIMS AND THE OR

More information about the firm and the services we offer may be found [here](#).

We also have a blog : <http://thecompliancealliance.co.uk/blog/>

All current and previous technical updates may be found [here](#).

TECHNICAL UPDATE

Insolvency and CPR rules

In the case of [Hellard and another v Graiseley Investments Ltd and others \[2018\] EWHC 2664 \(Ch\)](#) a transaction at an undervalue was being brought by the liquidator and had proceeded to trial. The pre-trial judge had allowed a contested witness statement to be left in evidence, but the trial judge excluded what amounted to the main witness statement. The judge did not find that there was a S238 IA86 transaction and remarked about the liquidator's witness statement not being compliant with the CPR rules. The judge further stated *"A liquidator conducting an investigation into a contentious issue arising in a company's affairs should strive to gather and review all readily available evidence on that issue on an impartial basis. He should be alive to the possibility of conjecture and unsubstantiated opinion. He should re-evaluate evidence as the investigation progresses."*

MVLS, APNs and Indemnities

In the case of [Currie v Thornley and another \[2019\] EWHC 172 \(Ch\)](#) an MVL liquidator issued proceedings against the directors and shareholders who had signed an indemnity in respect of liabilities to HMRC. HMRC had issued accelerated payment notices (APNs) and the court reviewed how much of the HMRC liability the indemnity provided for. Judgment was given for the lower amount which did include the amount detailed in the APNs

and this was deemed a tax liability. The court also made clear that the indemnity was between the directors and shareholders and the liquidator, and not the company which was not a party to the indemnity and any claim made needed to be in respect of the losses of the liquidator personally.

Adjudication, arbitration, set-off & Insolvency

In the case [Bresco Electrical Services Ltd v Michael J Lonsdale \(Electrical\) Ltd, Cannon Corporate Ltd v Primus Build Ltd \[2019\] EWCA Civ 27](#) the court of appeal was asked to determine what appeared to be two conflicting judgments. In Bresco an injunction was given preventing the continuation of adjudication in which Bresco (who was in liquidation) sought declarations of sums payable by Lonsdale. The reason for the injunction was that the insolvency legislation of set-off would apply. In the case of Cannon, an order was sought to set aside the summary judgment granted in favour of Primus, a company in CVA and the refusal of a stay of execution. The summary judgement was based on the outcome of several adjudications. The jurisdiction/utility issue, raised successfully by Lonsdale, had not been raised by Cannon until this appeal thereby waiving any right to raise a jurisdictional challenge. The Court of appeal reviewed the issue of jurisdiction, acknowledging that whilst an adjudicator may not be appropriate, the liquidator could issue proceedings and have the matter referred to arbitration as

SIPs - why oh why?

My colleague Michelle Butler is in the process of reviewing the new rules and her recent blog about them may be found [here](#).

Following along this theme I thought I might detail my pet hates and likes for a few of the SIPs.

SIP 1

Whilst the SIP clearly states creditors should be informed at the earliest opportunity that "they are bound by the Insolvency Code of Ethics (CoE) when carrying out all professional work relating to an insolvency appointment" the RPBs have been recommending this be added to IPs sign off. So with the IPs licensing body, the jurisdiction they are licensed to act in, SIP 1 statement, a link to a privacy notice and the statement that you act as an agent in administration and administrative receivership, and para 45 statement your sign off is probably longer than most emails sent!

I also find it odd that we need a CoE and a SIP summarising the CoE. The latest version of the SIP requires IPs to report other IPs for bringing the profession into disrepute; did we really need this put within the SIP? Isn't this part of your professional responsibilities as an IP under the CoE? Did we really need a SIP to state that non-compliance with any of the SIPs is a regulatory offence? Finally, with the amendment in 2015 to the IP Reg 2005, which requires documentation of administration of cases, SIP 1 seems completely superfluous.

the underlying right of action is not extinguished by liquidation. However, the judge considered that Bresco's right to refer a dispute to adjudication was not automatically lost when they went into liquidation. The issue with adjudication was that a reference to adjudication of a claim by a contractor in insolvent liquidation where there is a cross-claim would be an abuse of the cost-neutral adjudication regime to use it as a cheap assessment service, knowing that enforcement could never happen. In Cannon, the judge held Cannon cannot now be permitted to rely on their original general reservation of position in order to be able to raise this objection as the reservation was too general. The judge also determined that the discretion used in the previous judgement was appropriate since there was a distinction between a CVL and a CVA, which would result in the company trading out of its difficulties.

Dividends & S423 IA86

In the case of *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112 the court reviewed whether payment of a lawful dividend could be challenged under S423 IA86. The wholly owned subsidiary "paid" a dividend and the proceeds of the dividend were used to offset the debt owed by the holding company to the wholly owned subsidiary at a time when there was a contingent liability. The court held that the payment of the dividend did fall under s423 when considering whether the transaction put assets beyond the reach of creditors.

Further Education & Sixth Form Colleges

The *Education Administration Rules 2018* SI 2018/1135 came into force on 31 January 2019 and Companies House have issued the relevant form that needs to be used to notify of insolvency

proceedings for a further education or sixth form college, which may be found [here](#).

Practice Note on CE-Filing

A Practice Note, which may be found [here](#), was issued by Barling J on the procedural requirements during the transitional period leading to the launch of the Courts Electronic Filing system (CE-File) in the Business and Property Courts (B&PCs) in Manchester.

Chancery Guide

The Chancery Guide was updated 21 January and may be found [here](#). The changes include Ch.24 (Insolvency Appeals) and Ch.25 (Insolvency and Companies List).

Pension Protection Fund

The Pension Protection Fund (PPF) have published and updated various insolvency related guidance in December 2018 on their website which may be found [here](#) and are also detailed individually below:

- PPF's approach to insolvency proceedings found [here](#),
- IP remuneration found [here](#),
- Pre-pack administrations found [here](#),
- Potential legal action by IPs found [here](#),
- CVAs found [here](#),
- PPF drift found [here](#),
- Appointment of independent scheme trustees found [here](#).

PPI claims and the OR

The Financial Conduct Authority (FCA) introduced a deadline of 29 August 2019 for making PPI claims. The Official Receiver made a statement 5 February 2019 about seeking to claim outstanding PPI awards available in bankruptcy estates to ensure creditors receive assets owed. Further information may be found [here](#).

SIPs - why oh why? - ctd

SIP 14

Whilst I am generally in favour of revoking all SIPs, I do think a revamp of SIP 14 is long overdue and would actually be helpful to IPs.

SIP 14 is titled "A Receiver's Responsibility To Preferential Creditors". It should actually be re-titled "Principles of allocation of assets and liabilities between Fixed and Floating Charges".

Section 3 & 4 of SIP14 are still very relevant. The one area where I would expect IPs to carefully document their reasoning is in respect of allocating assets and liabilities between fixed and floating charges as this will have a direct impact on the calculation of the prescribed part.

A key area is fees in respect of this allocation, in particular the IP's fees. Having specific time codes to record each asset separately for both fixed and floating charge assets will help in ensuring fees are properly allocated against the relevant assets and if the fixed charge holder has limited the fees for realising fixed assets then any fixed charge fees, which are in excess of that approval, will need to be written off. Equally, agent's and lawyer's fees need to be appropriately allocated and especially where the sale of assets are not all under one sale agreement.

Trading is another area where the allocation of the costs would need to be determined based on various factors. If you are trading at a loss to obtain a better overall realisation and the bulk of the sale benefits the fixed charge holder, then consideration needs to be given to whether the loss should be under the fixed charge. Also, a review of the assets under the floating charge upon appointment and what they would have realised in CVL should be considered if these assets are used in trading at a loss, i.e. Stock and WIP.



Joanne Harris has 20 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.

M: 07780 613826

E: jo@johconsultancy.co.uk

E: jo@thecompliancealliance.co.uk

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

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