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TECHNICAL UPDATE

Wrongful trading

In the case of [Nicholson and another v Fielding and others - \[2017\] All ER \(D\) 156 \(Oct\)](#) the court considered the issues of wrongful trading and in particular whether the three directors "knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation". The chairman and managing director had both previously been involved in an insolvent company. There was no payment of HMRC liability from June 2008 and a continuous lack of payment despite various agreements for payment being proposed by the company. The judge however placed emphasis on the changes in the industry due to the economic climate as well as contracts which became deferred or cancelled therefore allowing the directors to believe it had been possible to trade out of their current financial difficulties. The judge did criticise the lack of analysis undertaken by the officeholder in determining the deficiency. The judge also suggested that the officeholder should have reviewed the actions and responsibilities of the directors and their individual culpability.

Group Tax Relief and Insolvency

In the case of [Farnborough Airport Properties Company Ltd and Another v The Commissioners for HM Revenue and Customs: \[2017\] UKUT 0394 \(TCC\)](#) the Upper Tribunal upheld the First-tier Tax Tribunal that the company in

receivership was unable to surrender losses by way of group relief because the receiver's appointment severed the company in receivership from the loss relief group. The judgment may be accessed [here](#).

Liability of director for VAT

In the case of [Raithatha \(as liquidator of Halal Monitoring Committee Ltd\) v Baig and others \[2017\] EWHC 2059 \(Ch\)](#) the court reviewed the responsibilities of directors for registering for VAT and for collection and payment of VAT. The Company was incorporated as a community project ensuring that the meat and poultry consumed was Halal. The company experienced financial difficulties and after the debts were paid new directors were appointed. The court held that the new directors failed to explore the tax position on appointment or soon after, and their failure to take advice to enable those in control to reach a decision were breaches of their duty of care.

Exceptional circumstances

In the case of [Pickard and another \(Joint Trustees in Bankruptcy of Constable\) v Constable \[2017\] EWHC 2475 \(Ch\)](#) The court held on appeal that the exceptional circumstances being claimed by the husband of the bankrupt were not exceptional enough to justify the postponement of an order for sale and possession until the husband's death or earlier vacation of the premises. The order given was for a postponement of 12 months. The

Dear IP 76

I thought now it would be timely to issue a reminder about the guidance provided by Dear IP 76 which was issued in April 2017 to help with understanding the new rules. Disappointingly the Insolvency Service (IS) Blog, which also gave much useful guidance is not being continued. I have summarised some key points from the Dear IP below:

Limited Liability Partnerships - these are still being conducted under the 1986 Insolvency Rules, although this should be fixed by Nov/Dec new legislation.

Voluntary Arrangements - The IS believes that the 2016 rules are caught by T & Cs' definition of "the rules as amended" and they illustrate the likely consequences of this for Protocol IVAs. I am not convinced that their view is correct and would suggest IPs seek their own legal advice on this issue.

Electronic and correspondence voting - since R15.31(8) clearly states votes may not be changed once cast, the IS is suggesting for CVAs and IVAs that IPs invite creditors to submit proposed modifications in advance of formally voting so that these may be discussed with creditors and debtor/company.

Deadlines for physical meetings - the IS have stated that a request for a physical meeting must occur before the decision date, however this still does not stop a centrebind for deemed consent in S100 since objections will also lead to a physical meeting.

husband, who was in his 60's, suffered from an auto immune disease.

Statutory interest

In the case of [Burlington Loan Management Ltd and others v Lomas and others \[2017\] EWCA Civ 1462](#) further consideration was given to entitlement to surplus and calculating the statutory interest due to creditors on the debts of a company in administration. This is examined by Robert Amey, of South Square [here](#) on the LexisNexis blog.

New rules other processes

The Small Business, Enterprise and Employment Act 2015 (Consequential Amendments, Savings and Transitional Provisions) Regulations 2017 have been drafted and may be accessed [here](#). The changes are to remove the need to call physical meetings and allow creditors to opt out of receiving correspondence in certain financial services legislation which deals with insolvent entities.

92nd update to Practice direction

The Ministry of Justice has circulated a draft 92nd Update-Practice Direction Amendments Making Document which is available [here](#).

Breathing space

The government has issued a call for evidence on the proposition of a breathing space scheme, so that an individual may obtain legal protection from further interest, charges and enforcement action for a period of up to six weeks. Further information may be found [here](#). Responses must be submitted by 16 January 2018.

Revised guidance for monitoring volume IVA providers

On the 8 November 2017 the Insolvency Service published revised guidelines for the monitoring of volume individual voluntary arrangement providers. the guidance may be found [here](#).

Failure of Financial Institutions

The Bank of England is responsible for taking action to manage the failure of financial institutions; a process known as 'resolution'. The Bank of England's approach to resolution has been updated and the latest version may be found [here](#).

INSOL Directions for an Insolvent Trust

INSOL has published a set of proposed standard directions for adoption and use where a trust can be said to be insolvent, which may be found [here](#).

Tax Evasion

Draft guidance has been published [here](#) by HMRC that explains when accountants, lawyers, financial advisers and auditors, amongst others, might be penalised for helping others to avoid tax.

CyberCrime

A presentation on cybercrime was given at a recent IPA conference. With GDPR introducing the requirement to self report on data breaches IPs should be assessing the data they hold and the systems they use and where they may be vulnerable to cybercrime. Here is a link to some videos on the Met Police's website [here](#).

Dear IP 76- ctd

[Request for a physical meeting para 52\(1\)\(b\)](#) - as the Administrator does not invite creditors to approve proposals that include a para 52(1) statement, creditors have 8 business days in which they can requisition a decision (by physical meeting or otherwise) on the proposals"

[Do creditors' notices have to comply with standard contents?](#) - not if the departure is immaterial R1.9(1)(b).

[R1.45](#) - whilst r1.45(4) refers to office holder and office holder has a specific definition, if the company had communicated with its creditors by email, it would be a nonsense to suggest that the director could not deliver S100 notices to creditors by email.

[Delivery of documents for a s100 decision:](#) the IS have stated that they do not think the director has the right to use a website to deliver documents under the rules, so this means a SOA must be delivered by post or email.

[Progress reports and extensions of administrations](#) - IS is suggesting that where an ADM reporting date has been changed due to an extension this does not need to change again.

[Calculation of unconnected creditors in voluntary arrangements](#) -value of unconnected parties against/value of unconnected parties who have sent written claim

[Delivery to overseas creditors](#) - the IS is recommending email or post but if by post ensure sufficient notice is given if at all possible.

[Virtual Meeting](#) - the IS have confirmed that providing a contact number or email address for creditors to obtain access information is sufficient to meet R15.5 requirements.



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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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