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Tolley's Company Law and Insolvency

Bulletin Editor
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Dear Subscriber,

Happy New Year!

Welcome to the latest newsletter. I hope you had a refreshing break. There have been plenty of developments over the Christmas and New Year period in the fields of company law and insolvency law—no rest for the wicked!

In this newsletter the analysis section contains five pieces. The first takes the form of a question and answer session. Chris Laughton, partner at Mercer & Hole, and Mark Sands, partner at Baker Tilly Creditor Services LLP, share their corporate and personal insolvency thoughts and predictions for 2015.

The second piece examines what the political agreement between the European Council and European Parliament on the reforms to the European Regulation on Insolvency means in practice. Kathy Stones, solicitor in the Lexis®PSL Restructuring and Insolvency team considers the developments.

The third analysis piece is contributed by Rory Brown, a barrister at 9 Stone Buildings. Rory considers why Mr Registrar Jones decided not to allow the respondents in *Re Harvest Finance Ltd* to charge for the time incurred in delivering documents and electronic files to the liquidators of Harvest Finance Ltd pursuant to an order made under the IA 1986, ss 234 and 236.

The fourth analysis piece examines in what circumstances the court will exercise its discretion to extend the time limit to challenge the remuneration and expenses of appointed administrators. James Morgan and Matthew Weaver at St Philips Chambers take a look at the decision in *Re Calibre Solicitors Ltd* (*in administration*) [2014] Lexis Citation 259, [2014] All ER (D) 187 (Dec).

LexisNexis®

The fifth and final analysis piece examines what is next for the law of security in England and Wales. Professor Louise Gullifer, barrister, professor of commercial law at the University of Oxford, and executive director of the Executive Committee of the Secured Transaction Law Reform Project, explains the need for law reform.

This newsletter contains four summary reports of case law apposite to the jurisdictions of insolvency law and company law.

Finally, the newsletter contains details on some new companies legislation.

I would be pleased to hear from subscribers who have any comments or suggestions regarding the content of this Newsletter, or any comments or queries on company law, insolvency law and practice and procedure in general in those areas. Letters which raise issues of interest may be published in the Newsletter. Please address letters to the editor of this newsletter: Dr John Tribe, Kingston Law School, Kingston University, Kingston Hill, Kingston upon Thames, Surrey, England, KT2 7LB, Email: j.tribe@kingston.ac.uk.

Dr John Tribe

Newsletter Editor

NEWS

(1) Changes to DROs and bankruptcy debt threshold

The minimum level of debt for which a person who is owed money can force another person into bankruptcy will be increased from £750 to £5,000, the Department for Business, Innovation and Skills (BIS) has confirmed. In addition, the debt relief order (DRO) eligibility criteria will be changed to increase the maximum debt level from £15,000 to £20,000 and the asset limit from £300 to £1,000. No change will be made to the maximum level of surplus income allowed. Statutory instruments have been laid to give effect to the changes from 1 October 2015.

In August 2014, the Insolvency Service sought views from industry, debt charities and other interested parties on the operation of DROs and bankruptcy debt threshold. The consultation document suggested the bankruptcy debt threshold, which was last revised in 1986, was set too low.

The Insolvency Service received 50 responses. The evidence suggested the DRO competent authority and intermediary model is working well and that DROs have a significant impact on the wellbeing of debtors.

However, there was overwhelming support for an increase in the maximum amount of debts and assets a debtor can have to apply for a DRO. The evidence also confirmed the creditor bankruptcy limit should be increased.

BIS confirms the following changes will be introduced:

- bankruptcy creditor petition level increased to £5,000;
- DRO limits raised to £20,000, enabling around 3,600 more people with low level debt to use DROs instead of the bankruptcy process; and
- DRO asset limits raised to £1,000, plus a vehicle (worth not more than £1,000).

The maximum surplus income a person can have to qualify for a DRO will remain at £50 per month.

In addition, the government plans to ensure those at risk of violence are sufficiently protected when applying for a DRO and will undertake monitoring to ensure consistency on process between competent authorities who assist debtors in their applications.

More options of how payments can be made when applying for a DRO will be provided and the government is contributing to work to ensure common guidance across all financial organisations with regards to how surplus income is calculated for different debt relief purposes.

The policy changes will be reviewed after two years of operation.

(2) Redrafted pre-pack statement of practice planned

Insolvency practitioners must recognise the high level of public and professional interest in pre-packaged sales in administration, a redrafted statement of insolvency practice (SIP) 16 makes clear. Views are sought by the Joint Insolvency Committee (JIC) on the redrafted SIP 16, which largely adheres to the draft included in the Graham review, including retaining emphasis on a comply or explain methodology. The consultation is open until 2 February 2015.

Pre-packaged sales refer to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly after, appointment.

In March 2014, the government commissioned a report from the Insolvency Service on existing pre-pack administration arrangements. The review was led by Teresa Graham.

In June 2014, Graham presented the final report, which included a redraft of SIP 16 and a recommendation that the JIC consider the redraft. The government accepted all the recommendations in the report.

The JIC subsequently reviewed the draft contained in the Graham report and has produced a revised version of SIP 16, which is now issued for consultation.

Views are sought solely on whether it will be practical for an insolvency practitioner to comply with the requirements contained in the revised version of the SIP.

The JIC's draft is broadly similar to that set out in the Graham report. It retains the emphasis on a comply or explain methodology with particular emphasis on the role of marketing and the use of appropriately qualified valuers.

The draft also acknowledges the existence of the pre pack pool and preparation of a viability statement by a connected party purchaser. The SIP also makes clear:

- transparency in all dealings is of primary importance;
- an insolvency practitioner must be seen to be acting in the interests of the company's creditors as a whole;
- an insolvency practitioner should recognise the high level interest the public and the business community have in pre-packaged sales in administration; and
- an insolvency practitioner should differentiate clearly the roles associated with an administration that involves a pre-packaged sale and the functions and responsibilities of the administrator following appointment.

Responses should be sent by email to jic_sip_consultation@icaew.com.

(3) Amendments to the Takeover Code

The Takeover Code, a binding set of rules which apply to UK listed companies to ensure shareholders are treated fairly in cases of a takeover, has been amended by the Code Committee of the Takeover Panel. The amendment concerns changes in interests in shares or other transactions effected by the use of resolution tools, powers and mechanisms, and will take effect on 10 January 2015.

The EU Takeover Directive deals with the treatment of mergers and acquisitions under European company law. It concerns the standards takeover bidders must comply with regarding how long a bid stays open to, who they offer to, and the information companies must give to the public about the bid.

The Code Committee of the Takeover Panel has published, on the Panel's website, Instrument 2015/1, which introduces a new Note 19 on r 9.1 of the Code. The new Note 19 provides that, in the case of a company to which the Takeover Directive applies, r 9.1, which deals with the mandatory offer requirement, does not apply in relation to any change in interests in shares or other transaction which is effected by the use of resolution tools, powers and mechanisms.

The new Note has been introduced as a consequence of the Bank Recovery and Resolution (No 2) Order 2014, SI 2014/3348, art 216, which provides that the Companies Act 2006 (CA 2006), Part 28, shall have effect as if a new sub-s 943(1A) had been inserted after sub-s 943(1).

This requires that rules of the Code giving effect to the Takeover Directive, art 5.1, must provide that they do not apply in relation to any change in interests in shares or other transaction which is effected by 'the use of resolution tools, powers and mechanism'. Together, these changes implement the new final sub-para of art 4.5 of the Takeover Directive, which has been introduced by the Bank Recovery and Resolution Directive, art 119.

As the new Note 19 on r 9.1 is a consequence of changes to relevant legislation, the amendment to the Code has been made by the Code Committee without formal consultation.

The electronic version of the Code on the Panel's website will be updated on Monday, 12 January and the relevant amended pages will be sent to Code subscribers.

(4) New Insolvency Service chief executive

The Insolvency Service has announced the appointment of Sarah Albon as its new chief executive. Having worked as Director of Strategy and Change at HM Courts and Tribunals Service since 2011, Ms Albon has led a portfolio of major change projects and played an integral part in securing significant investment for the reform of the administration of courts and tribunals services. She will take up her appointment in February 2015.

Prior to this she was Director of Civil Family and Legal Aid Policy at the Ministry of Justice in 2009–2011, and Deputy Director of Criminal Legal Aid Strategy, Ministry of Justice in 2005–2009. She was Principal Private Secretary to the Lord Chancellor, 2001–2003.

She joins the Insolvency Service as it implements a five-year strategy to improve service to its customers, lower its costs and further strengthen the UK's insolvency regime.

ANALYSIS

(1) Corporate and personal insolvency predictions for 2015

As a new year begins, Chris Laughton, partner at Mercer & Hole, and Mark Sands, partner at Baker Tilly Creditor Services LLP, share their corporate and personal insolvency thoughts and predictions for 2015 with Stephen Leslie.

Where did the majority of your instructions come from in 2014?

Chris Laughton: Most of our corporate insolvency instructions come via professional advisers, often solicitors or accountants who see the need for our specialist skills, but ultimately we are instructed by management, creditors or other stakeholders. Our sources of work in 2014 were similar to previous years, although the continued decline in bank instructions to firms on their panels led to more competition in the non-bank sector as bank panel insolvency practitioners (IPs) looked for work elsewhere.

Mark Sands: We are a largely creditor-led practice so most of our bankruptcy instructions came from creditors in 2014. These include high street banks, financiers, trade suppliers, local authorities and individuals—in many cases introduced to us by their legal advisors.

Are you expecting workloads for the insolvency profession in 2015 to increase, decrease, or remain the same?

Chris Laughton: The current trend is for fewer corporate insolvencies. I estimate a total of around 33,000 for 2014, which is about 75% of the peak in 2009. Interest rates are generally expected to start to rise in late 2015 and UK GDP growth is currently expected to be slightly lower than in 2014. However, neither factor is sufficiently soon or severe to reverse the downward corporate insolvency trend. Some industries will face challenges. Oil and gas production and distribution start the year with uncomfortably low commodity prices, while new retail delivery demands caught out City Link in an example of the impact of rapid structural change, which will not always be technology related. 2015 will bring uncertainties—and hence more risk of insolvency—caused by the general election, continuing economic weakness in Europe, tensions in the Middle East, the risk of financial collapse in Russia and unforeseen events. However, overall, corporate insolvency numbers are most likely to decrease.

Mark Sands: Broadly speaking, the trend over the last year has been a small gradual decline. I am expecting the levels of bankruptcy cases to stay on a similar level throughout 2015, again with a very slight downward trend. During 2015, we expect to see interest rates creeping up, although this is unlikely to cause any upturn in bankruptcy cases until at least the following year, with any material impact likely to be delayed until base rates achieve their new expected norm of 3%.

Where do you expect the majority of new instructions for insolvency practitioners will come from in 2015?

Chris Laughton: There is no particular reason for the main sources of corporate insolvency instructions to change.

Mark Sands: I expect debt purchasers to continue to play an increasingly large role in bankruptcy appointments in 2015. We may also see a return to local authorities pressing for bankruptcies as pressures mount on councils to balance the books at a time when central funding is being squeezed. The new lenders to smaller corporates will also increasingly find themselves as creditors influencing the bankruptcy of directors and others who have provided personal guarantees.

What issues and challenges do you anticipate for the profession in 2015?

Chris Laughton: Regulation, legislation, communication and competition head the list:

Regulation

Our regulatory system is being tinkered with, but it needs to be and also be seen to be more effective. For that it needs a more robust design. At present it neither gives confidence to the public nor serves the profession well, often appearing to act too slowly or opaquely and with insufficient unanimity. The profession must be believed to be one of integrity, and that integrity has not only to be delivered by the profession but to be validated by a regulatory regime on which the public and the profession can rely.

Legislation

'Tinkering' also describes the current legislative approach to insolvency—rarely a good model for effectiveness and efficiency. Separate corporate and individual insolvency licensing is an astonishingly wasteful and regulatory introduction in the Deregulation Bill, although it is likely to have little impact on the profession. The crass removal in the Small Business, Enterprise and Employment Bill of IPs' ability to convene a physical creditors' meeting (without significant creditor support) is inefficient and costly—again the opposite of what was apparently intended—and this will affect the profession. We will lose many opportunities to obtain information from and engage with the creditors in whose interests we act. We will also face enquiry and hostility from creditors who have lost money, are deprived of the opportunity of challenging those responsible and cannot fully participate in meetings by telephone or video link. Another challenge is likely to be getting to grips with the Insolvency Rules 2015 (although they are not expected to come into force until 2016). Then there are the lost opportunities to address the conflicts between employment law and the rescue culture, not to mention the creeping extension of the reach of insolvency expenses, when what is needed are better mechanisms to facilitate business rescue through insolvency procedures.

Communication

IPs are at the sharp end of an increasingly complex system that is understood by few outside the profession. We have to explain, clearly and succinctly, what we do and why, and we have to do so over and over again. If we or the system in which we work are misunderstood, we have to explain ourselves better. We owe it to the creditors in whose interests we act—and who are responsible for approving our remuneration. We failed to communicate the benefits of pre-packs as they grew in popularity a few years ago and as a result they are widely misunderstood and risk being regulated out of existence. Our next communication failure, if we are not careful, will be of the value of the work we do, as the level of disquiet about IPs' fees continues to rise and the risk of legislative interference increases.

Competition

The insolvency market is small and shrinking. 33,000 corporate insolvencies a year will produce something like 20–30 cases each for those who take corporate appointments. That number of small liquidations is unlikely to make a viable practice. However, we face the challenge of retaining experience while bringing new blood into the profession as the market shrinks. Successful IPs in 2015 will:

- be flexible;
- provide alternatives to insolvency solutions;
- be real experts in some areas;
- distinguish themselves from their peers; and
- be efficient and operate profitable practices without excessive costs.

Mark Sands: I anticipate a two-pronged challenge for the profession next year. First, several changes to the regulatory environment are coming into play, so the challenge for insolvency professionals will be to quickly adapt the way they operate to comply with the new/amended regulations. Second, continued costs challenges mean that practitioners will need to work out ways that they can add value, or try to do things differently, or simply find yet more efficiency savings in their processes.

Regulatory changes include:

- Deregulation Bill—partial licensing, no automatic need for a statement of affairs in bankruptcy cases where the bankrupt petitioned, the Secretary of State no longer to licence IPs, IPs to be allowed to be appointed as interim receivers, and improved access for bankrupts to bank accounts;
- Small Business, Enterprise and Employment Bill—meetings of creditors not to be required to be face to face, requirements for final meetings to be removed, creditors to be able to opt out of receiving correspondence, removal of need to seek sanction for various actions and simplification of admission of small creditor claims;
- Debt Relief Orders—review of criteria; and
- Financial Conduct Authority—regulation of consumer credit advice.

What are you looking forward to in 2015?

Chris Laughton: A busy year of challenging, different and interesting assignments, solving problems and delivering solutions by doing what I do best. I wouldn't be in this job if I didn't thrive on such challenges and I'm confident that enough people value my particular skills and experience—European cross-border insolvency, the insolvency issues in interest rate hedging product mis-selling, acting as an expert witness on insolvency practice and the constructive use of formal insolvency procedures—to make it happen.

Mark Sands: In 2015, I'm looking forward to improvements in the property market. Increases in property prices, in particular in London, have made the headlines in 2014. I'm looking forward to continued improvement in property prices, preferably nationwide and gradual so as to avoid a bubble which may then burst. This will increase the number of cases where IPs and their legal teams can achieve realisations for creditors. Both routine property cases, as well as investigations into antecedent transactions where a property is the target for the IP, will be a more attractive proposition with increased values and so is likely to result in better outcomes for creditors.

What are you not looking forward to?

Chris Laughton: Not much—I usually see challenges as opportunities—but we all have our bêtes noires and I am determined to better mine.

Mark Sands: The cricket world cup. Cricket is my passion, and while I hope England's youth will rise to the challenge, I fear I will have to cheer on another team in the final. The insolvency profession needs to learn from cricket selectors and ensure we give our up and coming talent every chance to succeed and develop despite a market in which many experienced players may prefer to keep the interesting cases for themselves.

How will the insolvency profession be affected if the insolvency exemption to the Jackson reforms comes to an end in April 2015 as currently planned?

Chris Laughton: Creditors will lose out because the threshold for economically viable claims will rise. There will be less litigation, less settlement and fewer claims, especially in no or low asset estates. It will be bad enough that in cases with assets the creditors will bear the cost of the risk of losing, when almost by definition the action will be against a party responsible for the creditors' losses—the creditors lose twice. Worse will be the no asset cases, where ending the exemption unconscionably invites the profession to bear all the risk. Larger claims will still be pursued, but the cost to creditors of covering the risk will significantly reduce overall returns.

Mark Sands: If the insolvency exemption comes to an end, as we expect it to in April 2015, then there will be less incentive to litigate, as the benefit to creditors in a win situation will be less. I think the changes will encourage more alternative dispute resolution—such as mediation—or simply without prejudice offers of settlement. Nonetheless, as practitioners, we will still need to build our litigation case to strengthen our position in any negotiations and, if the other side fails to produce an acceptable offer, to maximise the prospects during litigation. The fundamentals will not have changed—if a bankrupt has sought to put assets beyond the reach of creditors, then we have and will use powers to go after those concerned. They will still be found culpable where wrongdoing has taken place, will still be divested of the assets they have sought to deny creditors of, and will still in many cases be held liable for the costs of pursuing them through the courts. The reforms may lessen the net result for creditors—that will not deter me from pursuing the best outcome for creditors.

If you could bestow one piece of advice on insolvency professionals in 2015, what would it be?

Chris Laughton: IPs are privileged to have a statutory monopoly and much is expected of us—it isn't and shouldn't be an easy job. Insolvency professionals should always act properly, in creditors' interests and at proportionate cost, remembering to explain what we're doing and the value we're adding. That may well require sophisticated thinking to cope with our complex regime and the multitude of situations we face, and to enable us to deliver results simply and efficiently.

Mark Sands: Despite the current market, the constant changes to regulation, the cost pressures and the unhelpful approach being taken in the Jackson reforms, the insolvency profession (the combined skills of IPs, solicitors, barristers, forensic specialists and valuers) bring to bear on difficult situations an unprecedented set of skills and an energy and passion to tackle wrongdoing head on. Let's face the year ahead with confidence and together focus on outcomes for our creditor clients.

(2) What's the latest on reforms to the European Regulation on Insolvency?

What does the political agreement between the European Council and European Parliament on the reforms to the European Regulation on Insolvency means in practice? Kathy Stones, solicitor in the Lexis®PSL Restructuring and Insolvency team considers the developments.

New EU insolvency rules follow a 'rescue and recovery' approach which aim to give viable businesses a second chance when facing cross-border financial difficulties. Ministers on the EU Justice Council reached agreement on 4 December 2014 on modernised rules to make it easier for businesses to restructure and for creditors to get their money back, and to ensure procedures for cross-border insolvencies are effective and efficient.

When will the reforms be effective?

Following extensive three-way discussions between the European Commission, European Parliament and Council throughout November and December, the latest draft of the reforms to the European Regulation on Insolvency (EC) 1346/2000 was published by the Council on 4 December 2014. It will be known as the Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast). References to articles in this analysis are references to articles and recitals of the recast regulation.

The text of the agreement will be revised by the legal linguists and the Council is due to formally adopt the recast regulation in March 2015. It will then be passed to the European Parliament in April or May 2015 with a view to an approval by the plenary, without amendments in second reading, meaning the text above should be in near-final form. The recast regulation will be effective upon publication in the Official Journal (expected around May 2015).

Once adopted as a regulation, it will have direct effect in each member state (apart from Denmark, which has opted-out) without the need for separate enactment at a national level.

However, the majority of the provisions will not be effective for another two years (ie around 2017) after the recast regulation comes into force. This is to allow member states to familiarise themselves with the new provisions. The original regulation will continue to apply to proceedings opened before the recast regulation comes into force (art 84(2)).

The exceptions are:

- the description of national insolvency law and procedures to be provided by each member state (particularly the matters governed by the law of the main proceedings under art 7(2)) which shall apply 12 months after the recast regulation comes into force (arts 86 and 91(2)(a));
- the establishment of national insolvency registers, which shall apply 36 months (ie three years) after the recast regulation comes into force (arts 24(1) and 91(2)(b)); and
- the interconnection of national registers, which shall apply 48 months (ie four years) after the recast regulation comes into force (arts 25 and 91(2)(c)).

What will the recast regulation cover?

Proposed reform

Relevant proceedings will cover public collective proceedings, including interim proceedings, which:

- are based on a law relating to insolvency; and
- for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
    - o the debtor is totally or partially divested of his assets and an insolvency practitioner (IP) is appointed;
    - o the assets and affairs of the debtor are subject to control or supervision by a court; or
    - o a temporary stay of individual enforcement proceedings is granted by a court or by operation of law in order to allow for negotiations between the debtor and his creditors, provided that the proceedings in which the stay is granted:
        - ☐ provide for suitable measures to protect the general body of creditors; and
        - ☐ are preliminary to one of the proceedings referred to under points (a) or (b) if no agreement is reached.

Rationale

The introduction of the word ‘public’ clarifies that certain confidential negotiations are not included (recital 12), meaning French mandataire ad hoc and conciliation proceedings are not covered. Recital 15 confirms that proceedings are not based on a law relating to insolvency when based on general company law not designed exclusively for insolvency situations. This provides welcome clarification that UK schemes of arrangement (based on the CA 2006, s 885) do not fall within the scope of the recast regulation.

Collective proceedings are also defined to mean proceedings including all or a significant part of creditors to whom the debtor owes all or a substantial proportion of its outstanding debts. Recital 13 differentiates between:

- liquidation/cessation of business—which should involve all creditors; and
- rescue—which may not include all creditors.

The recast regulation may cover proceedings triggered by non-financial difficulties (eg loss of a key contract) if a real and serious threat to the debtor's actual or future ability to pay debts as they fall due (ie cashflow) within a period of several months or longer (recital 16).

Recital 9 clarifies that the list of proceedings in Annex A is exhaustive and it is clear that debtor in possession proceedings are included. However it is unclear whether netting agreements are covered as a prior carve out extending art 6 to them does not appear in the recast regulation.

How is centre of main interests (COMI) defined?

The new definition of COMI in art 3(1) draws a three-way distinction between:

- companies and legal persons—where the place of the registered office is presumed to be the COMI in the absence of proof to the contrary (however, the presumption will only apply if the registered office has not been moved to another member state within a period of three months prior to the request to open proceedings);
- individuals exercising an independent business or profession—where the place of the principal place of business is presumed to be the COMI in the absence of proof to the contrary (however, the presumption doesn't apply if the principal place of business is moved in the prior three months); and
- any other individuals—where the COMI is presumed to be the individual's habitual residence in the absence of proof to the contrary (however, the presumption doesn't apply if the habitual residence is moved in the prior six months).

Special consideration should be given to creditors and their perception as to where a debtor conducts his business (recital 27). In the event of a shift in COMI, this may require informing the creditors of the new location (eg by drawing attention to the change of address on an invoice or otherwise making the new location public through other appropriate means). For corporate entities, there is no mention of the controversial look-back period proposed by the European Parliament.

Courts must actively examine COMI (recital 26 and art 4(1)) and must set out their reasoning. This means a written judgment must be given in all COMI cases. Where an IP is entrusted to determine COMI, they must also set out their reasoning (art 4(2)).

What changes are made to secondary proceedings?

The new definition of establishment is set out at art 1(2)(10):

> '[…] any place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets.'

This should help counter abusive forum shopping, particularly in the three months prior to opening proceedings.

The introduction of synthetic secondaries may help the liquidator in main proceedings to avoid secondary proceedings if they provide a unilateral undertaking to treat local creditors as they would be treated under secondary proceedings when distributing those assets or their proceeds (recital 40 and art 36). It must specify the factual assumptions made, particularly regarding the value of the assets located locally (at the time the undertaking is issued) and the options available to realise these assets. The law applicable to the distribution of proceeds and ranking of creditors' claims shall be the law of the state where secondary proceedings are opened.

The undertaking must be in writing in the official language of the state where secondary proceedings could have been opened (art 36(3)). A balance needs to be struck between the flexibility of the undertaking and the interests of local creditors. Somewhat controversially, the undertaking must be approved by the known local creditors based on applicable rules on qualified majority and voting for the adoption of restructuring plans (art 36(5)). Recital 42 clarifies that national law applies for the approval of the undertaking. Where there are different rules for adopting restructuring plans, each member state must designate the relevant specific procedure. However, it is unclear why local creditors should have stronger rights than other creditors and this adds another unwelcome burden and possible delay where the IP in main proceedings needs to act quickly.

Other additions include the requirement on the IP in main proceedings to give local creditors advance notice of any distributions (art 36(7)). Local creditors are expressly given the right to apply to the courts where main and secondary proceedings are conducted to ensure compliance with the undertaking or seek provisional protective measures (arts 36(8) and 36(9)). The IP is expressly liable for any damage caused to local creditors as a consequence of his non-compliance with these requirements (art 36(10)).

The IP in the main proceedings is given the right to judicial review of the opening of any secondary proceedings (art 39). However, overall the benefits of the undertaking and synthetic secondaries as originally proposed have been significantly watered down.

What about the new registers?

This is a two-step process:

- creating national electronically searchable databases; and
- linking them up to create a central European database.

The information must be published as soon as possible after the opening of proceedings (art 24(1)). The following 'mandated information' must as a minimum be made available (art 24(2)):

- the date of the opening of proceedings;
- the court and any case reference number;
- the type of proceedings in Annex A and sub-type of any insolvency proceedings opened (where applicable);
- which article jurisdiction for opening proceedings is based upon (art 3(1) (main proceedings), art 3(2) (secondary proceedings) or art 3(4) (territorial proceedings));
- for companies—the company's name, registration number, registered office or if different, postal address;
- for individual debtors—their name, any registration number and postal address (or where that is protected, their place and date of birth)—as a compromise to deal with data protection concerns, where the individual does not exercise an independent business or professional activity, this information either:
    - o need not be published in the registers provided that know foreign creditors are informed of the information, or
    - o may be subject to supplementary search criteria (e g conditional on a request to the competent authority and/or conditional on verification of a legitimate interest in the information) (recital 75 and art 24(4));
- the name, postal address or email address of any IP appointed;

- any time limit for lodging claims or the criteria for calculating time limits (recital 74 suggests hyperlinks could be added to link to the criteria for calculating those time limits);
- the date of closing main proceedings, if any; and
- the court before which decisions to open proceedings can be challenged and the applicable time limits (or the criteria for calculating the time limits).

Additional information may also be included in the national registers (eg directors' disqualifications) (see recital 73 and art 24(3)). Although the mandated information must be available free of charge, member states may charge for any additional information or documents (art 27). The Commission must submit a study on the cross-border issues in directors' liability and disqualifications by 1 January 2016 (art 89(3)).

It remains to be seen how accurate the central European database will be and how the issue of searching in different languages will be resolved.

How are group companies affected?

Liquidators of (and courts involved with) group companies will be obliged to cooperate and communicate. However, this is subject to conflicts of interest, any procedural rights of the parties and any confidentiality issues (recital 49 and arts 56–58). The costs shall be regarded as costs and expenses in the respective proceedings (art 59). IPs and courts should take best practices for cooperation into account as set out in the UNCITRAL guidelines on cooperation in cross-border insolvency cases (recital 45).

A single IP can be appointed over several group companies, subject to local qualification and licensing issues (recital 47).

Where a group is involved, an IP has various rights to facilitate the administration of proceedings:

- to be heard in any proceedings opened regarding another group company (art 60(1)(a)); and
- to request a stay (of up to three months, extendable to six months) of any measure relating to the realisation of assets of another group company if (recital 56 and art 60(1)(b)):
  - a restructuring plan for all or some group members has been proposed and has a reasonable chance of success;
  - the stay is necessary to ensure proper implementation of the plan;
  - the plan would benefit creditors in the proceedings for which the stay is requested; and

- o neither the insolvency proceedings where the IP has been appointed nor the proceedings over which the stay is requested are subject to group coordination proceedings.

What are group coordination proceedings?

A new concept called 'group coordination proceedings' is introduced in art 61. Any IP appointed over a group company may request the opening of group coordination proceedings by filing a request (art 61(1)) containing the information below at any court having jurisdiction over the insolvency proceedings of any group company:

- the name of the proposed coordinator (details of eligibility, qualifications and consent to act)—note they cannot be an IP appointed over any of the existing group companies and must have no conflict of interest regarding the group members, their creditors and the IPs appointed over any group companies (art 71(2));
- an outline of the proposed group coordination and why the court has jurisdiction;
- a list of the IPs appointed over all group members and (where relevant) the names of all courts and competent authorities involved; and
- an outline of estimated costs and the share to be paid by each group member.

In general, the court first seised of a request to open coordination proceedings has jurisdiction and other courts must decline jurisdiction (art 62). As soon as possible, the court first seised will give notice to all other group members if it is satisfied that:

- coordination proceedings are appropriate to facilitate the effective administration of the insolvency proceedings relating to different group members;
- no creditor of any group member anticipated to participate is likely to be financially disadvantaged by its inclusion in group coordination proceedings; and
- the proposed coordinator fulfils the relevant requirements (art 63).

This may well lead to a race to the courts to take control of the new group coordination proceedings. The criteria for opening proceedings takes no account of which member state is conducting main proceedings for the parent company. However, at least two-thirds of all IPs appointed in insolvency proceedings of group companies may agree in writing that another court has exclusive jurisdiction (art 66).

IPs of the other group companies may object within 30 days to either:

- the inclusion of their company in the coordination proceedings; or
- the identity of the proposed coordinator (art 64).

The objecting IP will still be subject to any local requirements to get approval from his creditors' committee or local court (if required by the law where his proceedings have been opened) before taking the decision whether to participate or not in the coordination proceedings (art 64(3)).

However once an IP has objected, he will not be included in the coordination proceedings (art 65). He may later request to opt-in to the coordination proceedings (subject to the group coordinator being satisfied the criteria for jurisdiction still exist or all IPs involved agree (art 69)). Although this, together with the fact that any IP is not obliged to follow the group coordination plan (though must give his reasons to the coordinator and any persons or bodies he reports to under his national law), severely reduces the strength of coordination proceedings and results in unpredictability for creditors and other stakeholders.

The group coordinator has various powers to:

- recommend coordinated conduct of the insolvency proceedings;
- propose a group coordination plan;
- be heard and participate in any creditors' meetings of the group companies;
- mediate any dispute between IPs; and
- request information from IPs to help identify coordination strategies (art 72).

The coordinator also has the power to request a stay of any insolvency proceedings for any group member of up to six months if it:

- is necessary to ensure implementation of the group coordination plan; and
- it would benefit the creditors of the proceedings for which the stay is requested (art 72(2)(e)).

Unfortunately consolidation of the proceedings or various estates is expressly prohibited under art 72(3) (in contrast see Practice Note: US substantive consolidation).

The coordinator must give notice to the participating IPs if there is a significant increase in costs or costs exceed 10% of estimated costs (recital 55 and art 72(6)). In the absence of any objections, participating IPs must pay within 30 days or file an objection with the court which opened the coordination proceedings (art 77)—which may lead to delay and uncertainty.

The coordinator must communicate with the IPs (and courts) in either any language agreed with them or, failing that, the official language of the proceedings opened for that group member (art 73).

The court which appointed the coordinator may revoke his appointment if he acts to the detriment of creditors of a participating group member or fails to comply with his obligations (art 75).

The Commission must present a report on the application of group coordination proceedings within five years (art 89(2)).

What are the new rules on location of assets?

Welcome clarification is given on the location of various assets (art 1(2)(9)):

(i) registered shares (in companies other than those referred to in (ii))—the member state where the company which issued the shares has its registered office;

(ii) financial instruments (where title is evidenced by entries in a register or account maintained by or on behalf of an intermediary (book entry securities))—the member state where the register or account in which the entries are made is maintained;

(iii) cash held in accounts with credit institutions:

- o with an IBAN, the assets are situated in the member state indicated in the account's IBAN; and
- o without an IBAN, the assets are situated in the member state where the credit institution has its central administration or, if the account is held by a branch, agency or other establishment, the member state where that branch, agency or other establishment is located (this is in line with the Eurasian Patent Organisation (EAPO) proposals);

(iv) property and rights registered in other public registers—the member state under the authority of which the register is kept;

(v) European patents—the member state for which the European patent is granted;

(vi) copyright and related rights—the member state within the territory of which the owner of the rights has its habitual residence or registered office;

(vii) tangible property (other than (i)–(iv))—the member state where the property is situated; and

(viii) claims against third parties (other than relating to (iii))—the member state where the third party required to meet the claim has their COMI as determined by art 3(1).

The new wording assists in cases where an asset falls within two or more categories (e g a ship is tangible property which also must be registered, so falls within categories (iv) and (vii)). The recast regulation clarifies that the asset is located in the member state under the authority of which the register is kept.

What's the impact on forum shopping?

Forum shopping through abusive COMI relocation had previously been identified as one of the main shortcomings of the existing regime.

New recitals 5 and 28–31 specifically set out the safeguards aimed at preventing forum shopping, which include:

- presumptions as to COMI are rebuttable (and do not apply if the registered office/principal place of business/habitual residence is moved in the relevant period before the request to open proceedings), and the court should carefully assess whether COMI is genuinely located in that member state; and
- in all cases, where the circumstances give rise to doubts regarding the court's jurisdiction, the court should ask the debtor to supply additional evidence to support his assertions and give creditors an opportunity to present their views (where the applicable law allows).

Abusive COMI relocation is discouraged, though it seems to leave the door open for consensual COMI relocations that do benefit the general body of creditors. The Commission must submit a study on abusive forum shopping within three years (art 89(4)).

What do the new annexes cover?

The annexes have been revamped as follows:

- Annex A—extra proceedings included (the Commission says around 19 new national procedures will benefit from the wider scope of the recast regulation). Recital 9 confirms the annexes are definitive on whether the regulation applies to a particular type of proceeding;
- Annex B—list of insolvency practitioners (old Annex B listing winding up procedures is replaced);
- Annex C—lists the historical amendments to the EC Regulation (old Annex C listing liquidators is replaced); and
- Annex D—is a destination (or correlation) table showing where the old articles can be found within the recast regulation.

For details of the history of the reforms, see Practice Notes: Reforms to EC Regulation on Insolvency 1346/2000 proposed by the European Commission, European Parliament proposes significant changes to reform the EC Regulation on Insolvency and European Council's views on reforms to EC Regulation on Insolvency 1346/2000.

(3) Sections 234 and 236 orders—who pays for the costs of complying?

Why did Mr Registrar Jones decide not to allow the respondents in *Re Harvest Finance Ltd* to charge for the time incurred in delivering documents and electronic files to the liquidators of Harvest Finance Ltd pursuant to an order made under the Insolvency Act (IA) 1986, ss 234 and 236? Rory Brown, a barrister at 9 Stone Buildings, discusses the court's decision in *Re Harvest Finance Ltd* (*In Liquidation*); *Jackson v Cannons Law Practice LLP* [2014] EWHC 4237 (Ch) [2014] All ER (D) 216 (Dec).

Following successful application for relief by liquidators under the IA 1986, ss 234 and 236, the Companies Court considered whether it had jurisdiction to order payment of expenses incurred by the respondent solicitors in complying with an order for the delivery up of documents and electronic files. The court held that, in the circumstances, it should not, in the exercise of its discretion, allow the respondents to charge for the time incurred.

What was the background to the application?

The applicants were liquidators of a company suspected to have been used as a vehicle for a massive international fraud, relating to loans charged on securities with apparently artificially inflated values. The respondents were a solicitors' firm and its solicitors personally who had acted (or had in a previous incarnation acted) for many of the special purpose vehicles created in pursuance of the scheme under investigation. The application (made under the IA 1986, ss 234 and 236) was, broadly speaking, for identification and retrieval of documents under the respondents' control and required by the liquidators to investigate that suspected fraud.

It is important at the outset to note that it was not found by the court that the respondent solicitors had any knowledge of, or any hand in, any fraud.

What were the legal issues that the Registrar had to decide in this application?

The application threw up various issues, in particular:

- whether the court should override any legal privilege attached to files sought by the applicants and controlled by the respondents;

- whether, once orders against the respondents were made pursuant to the court's powers under IA 1986, ss 234 and 236, the court had jurisdiction to order payment of the respondents' costs of identifying and retrieving files retained in their electronic archives (compliance costs), and if so;
- whether the court should order payment by the applicants of the respondents' considerable compliance costs; and
- what orders should be made in respect of the parties' legal costs of the application.

Why did these issues arise?

The question of waiving privilege arose because the respondents refused to produce client files without protective orders from the court in circumstances in which the contents were or might have been privileged.

After compulsory orders were made pursuant to IA 1986, ss 234 and 236, the dispute about compliance costs arose because there were conflicting or at least tricky-to-reconcile High Court authorities on whether the court had power to award such compliance costs (*Re Aveling Barford* [1988] 3 All ER 1019 (Hoffman J) and *Re Cloverbay* [1989] BCLC 724 (Vinelott J)). Furthermore, while the liquidators were content to pay the solicitors £500 to locate and deliver up relevant client files, they considered the sum of circa £40,500.00 (ex VAT) sought by the solicitors to be wildly disproportionate to the administrative task concerned. (In pre-action correspondence, the respondents had made an undertaking to pay these costs a pre-requisite of provision of the material sought.)

Finally, the litigation is ongoing—the incidence and amount of legal costs to be awarded (if any) remains finally to be determined. Both parties have made applications for the other to bear their legal costs of and incidental to the application.

What did the Registrar decide?

After surveying and applying the authorities to the insolvency context, the Registrar determined that, when considering displacing privilege, the court should ask whether the evidence plainly established a strong prima facie case for the investigation by the liquidators of criminal or fraudulent conduct. In respect of the particular legal privilege of the unrepresented clients or former clients of the respondents, he found the applicants' evidence established a strong prima facie case of criminal or fraudulent conduct. (It is noteworthy that the total security for the material loans had been valued at £161m and yet the properties had been sold for only circa £8m.) In the circumstances, any privilege that existed in the documents controlled by the respondents should be displaced.

As for the compliance costs, after hearing argument on the authorities and on the interpretation of the statute and relevant rules (see the Insolvency Rules 1986, SI 1986/1925, r 9.6), the Registrar initially proceeded on the basis that he had jurisdiction to award the respondents their compliance costs. However, he then stated that he may not need to choose whether or not there was jurisdiction, given that the practical effect for the application before him was the same. That is to say, even if he had such a power, he would not award the solicitors their time costs of complying with the order.

To what extent are the judgments helpful in clarifying the law in this area? Do they have wider practical application?

The judgments contain a detailed and careful treatment of both the facts and the authorities on:

- the displacement of legal privilege in the context of fraud; and
- the nature of the public duty to identify and produce (or allow access) to information and documents.

The judgment on privilege advances the jurisprudence on the fraud exception to privilege in the context of the court's exercise of its compulsory powers under the insolvency regime. It does so by formulating a test for the court to apply when considering overriding privilege. The first trilogy of judgments is therefore required reading for practitioners in that field. More generally, the authority will be relevant wherever the court must consider whether to override the legal privilege of unrepresented parties.

As for the judgment on the court's jurisdiction to award compliance costs and the circumstances in which such costs will be awarded, in light of the deferential approach of the Registrar to the views of Vinelott and Hoffman JJ, advocates may still argue the court has no jurisdiction to award such compliance costs. That said, the reasoning of the Registrar, elaborated in the exercise of the jurisdiction of the High Court, and based on a thorough survey of the authorities and painstaking analysis of the rules, is likely to command considerable respect in any superior tribunal. However, before placing reliance on the judgment on compliance costs, advisers will wish to check it has not been appealed by the respondents.

If so, what practical lessons can those advising take away from this case?

- The court is eager to facilitate investigation into potential frauds and will readily set aside legal privilege to do so, where the test set out above is satisfied.

- The public duty to assist those undertaking such an investigation is not to be taken lightly. Any failure to act in accordance with that duty will expose a respondent to such an application to adverse costs consequences. Furthermore, the public duty arising in respect of information needed by liquidators to carry out their statutory duties creates a strong reason per se for not awarding costs of compliance.
- The quantum of compliance costs with such orders and the very jurisdiction of the court to award such costs can be expected to be a future battleground, not least given:
  - the Registrar's decision not to decide whether jurisdiction exists;
  - the potentially stifling effects of such costs on liquidators' investigations into illegal use of company assets; and
  - the potential burdens both in terms of time and expense of the public duty to assist.

(4) High Calibre thoughts on extensions of time

In what circumstances will the court exercise its discretion to extend the time limit to challenge the remuneration and expenses of appointed administrators? James Morgan and Matthew Weaver at St Philips Chambers take a look at the decision in *Re Calibre Solicitors Ltd* (*in administration*) [2014] Lexis Citation 259, [2014] All ER (D) 187 (Dec).

A company in administration applied, under the Insolvency Rules 1986, SI 1986/1925, r 2.109 to challenge the remuneration and/or expenses of the appointed administrators on the ground that they were excessive. The issue was whether that application, in addition to challenging remuneration detailed in a first report, could also challenge remuneration and/or expenses detailed in a second progress report, or whether a second application and an extension of time to make it were required. The Companies Court held that, on the true construction of the Insolvency Rules, the eight-week period within which to challenge remuneration and expenditure applied to the specific report which detailed the remuneration and expenses challenged. Accordingly, the company could not rely upon the first report to challenge the remuneration and expenses detailed in the second report. A second application was required and the court granted an extension of time in which to make it.

What was the background to the application briefly?

Administrators were appointed in respect of Calibre Solicitors Ltd. Their first progress report to creditors was dated 6 September 2013 and, within the eight-week time limit, on 31 October 2013 a creditor (JC) issued an application under r 2.109 to challenge the remuneration and expenses set out therein as 'excessive'. The administrators' second progress report was dated 5 February 2014. On 13 June 2014, JC issued a second application to challenge the remuneration and expenses on the same grounds. The second application was made well outside the eight-week time limit prescribed by r 2.109(1B). JC had also made an application, within the eight-week time limit, to challenge the remuneration and expenses set out in the administrators' third progress report.

The total remuneration (not expenses) claimed in the three progress reports was £291,000. This was against an estimate for the administration of £150,000. The parties' estimated costs for the three applications were £175,000.

What were the legal issues that the Registrar had to decide in this application?

The Registrar was required to deal with three issues:

- whether the second application was necessary for the purposes of challenging the remuneration and expenses set out in the second report;
- if it was necessary, whether he had power to extend time for the second application pursuant to r 12A.55(2); and
- if so, whether he should exercise his discretion to extend time in favour of JC.

Why did these issues arise here?

The issues arose because JC had not made the second application within the prescribed eight-week time limit. Rule 2.109(1B), which was inserted as part of the 2010 amendments to the Insolvency Rules, provides that:

> 'The application must, subject to any order of the court under Rule 2.48A(4), be made no later than 8 weeks after receipt by the applicant of the progress report which first reports the charging of the remuneration or the incurring of the expense in question.'

Rule 2.48A(4) applies to an application by a creditor for further information about remuneration or expenses, but there had been no such application in this case.

What were the main legal arguments put forward?

In relation to the first issue, JC argued that the first application was sufficient because the matters it raised were essentially the same for both reports. The administrators relied on the plain wording of r 2.109(1B) and argued that the eight-week period applied to the specific report, which details the remuneration and expenses being charged. In other words, that an application must be issued in respect of each report in which the challenged remuneration and expenses is set out.

As to second and third issues, JC relied on r 12A.55(2) which provides that:

> 'The provisions of CPR 3.1(2)(a) (the court's general powers of management) apply so as to enable the court to extend or shorten time for compliance with anything required or authorised to be done by the Rules.'

JC contended that there was no prejudice to the administrators in extending time. The administrators disputed that the rule applied to a limitation provision such as the eight-week period here or that the court should exercise its discretion in favour of JC.

What did the Registrar decide?

The Registrar decided the issues as follows:

- the second application was necessary in order to challenge the remuneration and expenses set out in the second report; but
- he did have power to extend time for that application; and
- it was appropriate for him to exercise his discretion to so do in favour of JC.

Why did he reach these conclusions?

In relation to the first issue, the Registrar relied on the plain wording of r 2.109(1B) as reinforced by r 2.109(1A), which refers to remuneration 'charged' and expenses 'incurred' rather than to the future. This being the case, an application under r 2.109 can only challenge already incurred or charged expenses and remuneration.

As regards the second issue, the Registrar held that the purpose of the eight-week time limit was to provide certainty to administrators and creditors within a short-time scale but that, while this was important, he could not conclude that policy prohibited him from applying the wide words of r 12.55A(2) to r 2.109(1B). That was so even though the latter provision was expressed in mandatory terms, using the word 'must'.

The Registrar also resolved the third issue in favour of JC. He took into account that allowing the second application would probably not have any significant effect in relation to certainty when the first and third applications would in any event proceed and the principles of challenge were the same in relation to all three applications. As r 2.109(1B) applied a sanction, the Registrar also considered the Court of Appeal's decision in

Denton v TH White Ltd [2014] EWCA Civ 906, [2014] All ER (D) 53 (Jul) but held that an extension should nevertheless be granted largely for the foregoing reasons.

To what extent is the judgment helpful in clarifying the law in this area?

So far as the writers are aware, this is the first reported decision on these important issues in relation to challenging the remuneration and expenses of administrators. In relation to the first and second issues, the Registrar has confirmed that the courts should apply the ordinary meaning of the wording of r 2.109(1B) and r 12.55(2). The third issue will always be fact sensitive, but the Registrar's judgment identifies that an important consideration will be whether the policy of certainty within a short-time scale will be significantly undermined by an extension of time.

What practical lessons can those advising take away from this case?

For those advising creditors, the simple message must always be not to leave matters to chance but to make any application under r 2.109(1B) within the eight-week period. However, if the deadline is missed then an application can be made for an extension of time. Whether an extension will be granted will depend on the facts, but an important consideration is whether the application will materially delay the resolution of the amount of the office holder's remuneration and expenses.

A lesson for all arises out of the Registrar's further comments towards the end of his judgment that, given it was not difficult to envisage that a minimum sum of £175,000 was unchallengeable, only some £112,000 was in fact in issue as against estimate costs of £175,000 and therefore the current approach of the parties was 'disproportionate'. He therefore proposed a streamlined procedure with strict costs budget guidelines.

(5) Banking and Finance—reforming the law of security

What next for the law of security in England and Wales? Professor Louise Gullifer, barrister, professor of commercial law at the University of Oxford, and executive director of the Executive Committee of the Secured Transaction Law Reform Project, explains the need for law reform.

Where are we now with reforming the law of security?

There have been several reports in the UK recommending reform of the law of secured transactions. The most recent was the work done by the Law Commission culminating in a report in 2005 (LC296), which recommended a scheme based on the Personal Property Security Acts in

Canada and New Zealand, though more limited in scope. These recommendations were not enacted, but since then there have been some reforms to the law relating to registration of company charges.

First, overseas companies are no longer required to register charges created over their UK property at Companies House, but are required to keep a register of certain charges if they have an establishment in the UK (the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009, SI 2009/1917 as amended by the Overseas Companies (Execution of Documents and Registration of Charges) (Amendment) Regulations 2011, SI 2011/2194).

Second, a new registration regime has been introduced by the Companies Act 2006 (Amendment of Part 25) Regulations 2013, SI 2013/600. All charges are now registrable unless specifically exempt, and electronic registration is now a possibility. These reforms, however, are still narrow in scope.

The Secured Transactions Law Reform Project is looking at the need and shape of future reform much more widely. We are taking, as our starting point, the Law Commission's consultative report (CP176), which sets out a scheme based on the Saskatchewan and New Zealand Public Sector Accounting Standards (PPSAs). The working groups of the project are examining four areas of secured transactions law:

- registration;
- priorities;
- insolvency; and
- financial collateral.

Work is still in progress in assessing both the need for reform and what form reform should take, although it has become apparent that there are particular areas causing concern in the lending market. Two of these are the law relating to the ban on assignment clauses in the context of receivables financing, and the distinction between fixed and floating charges. The Financial Law Committee of the City of London Law Society is also looking into these two areas, particularly the latter, and we continue to discuss the issues with them.

Receivables financing is a very important source of finance for small businesses, so anything which limits the availability of this type of financing, or which increases its costs, requires examination. Concern has been expressed by the industry that the inclusion of ban on assignment clauses in supply contracts is inhibiting the financing of the invoices resulting from those contracts.

The project has issued a survey on ban on assignment clauses and the preliminary results indicate that the presence of these clauses does cause some problems and increased costs in certain contexts. The UK government has included a power to make regulations providing that a ban on assignment clause has no effect, either generally, or in relation to persons of a prescribed description, or only for prescribed purposes, in its Small Business, Enterprise and Employment Bill (clauses 1 and 2), which is the first step towards a limited control of such clauses.

The law concerning the distinction between fixed and floating charges raises particularly complex issues. The distinction relates particularly to the funding of insolvency proceedings, and one of the project's working groups is considering this issue, with particular regard to how the issue is dealt with in other jurisdictions, particularly Australia.

Australia reformed its personal property security law by the Australian Personal Property Securities Act 2009, and, recently, a review has been instigated. The project is closely in touch with experts from all PPSA jurisdictions (as well as other jurisdictions where the law has recently been reformed) and is monitoring the Australian review closely. These comparative viewpoints are helpful in assessing the benefits of future reform, as well as any possible risks.

What does the future hold? Will the proposed reforms be adequate?

One of the aims of the Secured Transactions Law Reform Project is to investigate how the law can be made more modern and able to deal with the challenges faced by financiers and borrowers in the future, both in this country and internationally. Advances in technology now mean that transparency can be achieved more cheaply and easily than before, and we are investigating techniques such as communication between registers and simpler electronic registration.

It is imperative for efficient commercial activity that the law is as clear and simple as possible. The existing law is complex and not readily accessible to non-lawyers or those in other jurisdictions. The object of the project is to seek to put the law in this area into an up-to-date and coherent form—easier and simpler to understand and operate than the existing and (in some cases) somewhat outdated systems. The project seeks to engage all those involved in secured lending in its work, and welcomes comments and offers to be involved. More details of the work of the project can be found on the Secured Transactions Law Reform Project website.

CASE LAW

(1) Re Harvest Finance Ltd (In Liquidation); Jackson v Cannons Law Practice LLP [2014] All ER (D) 216 (Dec), [2014] EWHC 4237 (Ch)

Chancery Division, Companies Court, before Mr Registrar Jones.

Company – Liquidation – Disclosure of documents – Liquidators applying for disclosure of files from respondents – Respondent solicitors seeking expenses incurred in complying with orders – Whether court having jurisdiction to order payment of such costs – Insolvency Act 2006, ss 234, 236 – Insolvency Rules 1986, SI 1986/1925.

Facts:

The applicant liquidators had successfully sought relief under ss 234 and 236 of the IA 2006 and an order had been made requiring, among other things, the delivery up of documents and electronic files. The application was based upon the contention that the respondents as successors to a limited liability partnership of solicitors who acted in conveyancing transactions held documents either belonging to the company in liquidation, or which would provide information concerning the company relevant to its liquidation. The liquidators suspected that those transactions had been fraudulent. The application returned to the court to determine whether the respondents should be paid the expenses incurred in complying with the order and to determine the payment of legal costs. The costs of compliance claimed were £40,381. Those costs were largely attributable to time spent by the first respondent in his capacity of a solicitor in identifying and retrieving files retained electronically.

In respect of the costs of compliance, the issues were: (i) whether the court had jurisdiction to order payment of such costs; and (ii) if so, whether it should do so. In respect of (i), the liquidators contended that the court should follow the decision in *Re Cloverbay Ltd* ([1989] BCLC 724) that there was no jurisdiction to make provision for payment of the costs of compliance of a s 236 order. The respondents contended that the court should instead follow the decision in *Re Aveling Barford Ltd* ([1988] 3 All ER 1019) that there was such jurisdiction (see [6] of the judgment). In respect of the legal costs, consideration was given to, among other things, whether the parties' costs should be an expense of the liquidation. Consideration was given to r 9.6(4) of the Insolvency Rules 1986, SI 1986/1925.

Held:

(1) The ratio of *Re Cloverbay Ltd* was that while r 9.6(4) made no provision for the payment of the costs of compliance, the court could achieve that result by a conditional order but should only do so in exceptional circumstances because of the public duty to assist the office holder. In *Re Aveling Barford Ltd* the judge had held that the words 'a person summoned to attend for examination' in r 9.6(4) included a person required to given information under s 236(3) of the Act. However, the question of whether the costs of compliance should be paid was adjourned because it was premature when there was no presumption that costs would be awarded and the existence of a public duty to assist made

the examination more analogous to a subpoena duces tecum or ad testicandum. Accordingly, while there was conflict between the two decisions upon construction of r 9.6(4) and therefore the jurisdiction to award of costs of compliance, the practical result of those decisions for the present application was the same provided a 'very exceptional circumstances' test was not applied. Whether approached from the basis that jurisdiction was only achieved by making a conditional order or from the basis that jurisdiction existed under the rule, the court in exercising its discretion did not presume costs of compliance would be paid and, to the contrary, would take account of the fact (which the authorities established was very important) that compliance was pursuant to a public duty. That approach was sufficient for the purposes of deciding the present application (see [31], [32], [35], [36] of the judgment).

Aveling Barford Ltd, Re [1988] 3 All ER 1019 considered; *Cloverbay Ltd, Re* [1989] BCLC 724 considered.

(2) The respondents had had control of the files relevant to the transactions in issue. Their public duty had required them to provide the files and relevant information to the liquidators subject to the issue of legal privilege. Their difficulties had been in identifying the relevant files and achieving transfer but, whether applying the approach to *Re Cloverbay* or *Re Aveling Barford*, in the circumstances, the court should not in the exercise of its discretion permit them to charge for the time incurred whether as solicitors or not (see [46], [47] of the judgment).

(3) Rule 9.6(4) or s 51 of the Senior Courts Act 1981 provided a wide enough discretionary jurisdiction to order that the respondents' legal costs should be an expense of the liquidation but it was to be remembered that, as an expense, the legal costs would rank ahead of other expenses including the liquidators' remuneration. That might therefore have an adverse effect upon others which needs to be taken into account (see [56] of the judgment).

Costs would be awarded as set out in the judgment (see [57], [60], [61] of the judgment).

Rory Brown* (*instructed by Francis Wilks and Jones*) *for the liquidators.

Andrew Fletcher QC* (*instructed by Barker Gilette LLP*) *for the respondents.

(2) Horton v Henry [2014] All ER (D) 193 (Dec), [2014] EWHC 4209 (Ch)

Chancery Division, before Robert Englehart QC sitting as a Deputy Judge of the Chancery Division.

Bankruptcy – Trustee in bankruptcy – Power to require bankrupt to crystallise pension policies – H being bankrupt – H's assets including four *pension policies – H not wishing to crystallise policies – Precise value of the policies impossible to determine without crystallisation – Trustee in bankruptcy applying to court, seeking H be ordered to crystallise policies and to exercise elections in manner desired by trustee – Whether power existing to require H to elect in any particular way.*

Facts:

Section 310(7) of the IA 1986 provides, so far as material: 'For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment and (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies.'

H was adjudged bankrupt on his own petition on 18 December 2012. The official receiver's schedule of creditors disclosed creditor claims in excess of £6.5m. H's assets on the date of the bankruptcy included four pension policies: a self-invested pension policy (SIPP) and three further personal pension policies. The policies did not form part of the bankruptcy estate. H did not wish to crystallise the policies, and, without crystallisation, the precise value of the policies could not be determined. The applicant trustee in bankruptcy sought to have money potentially payable under the policies made the basis for an income payments order (IPO). He applied to the court under the IA 1986 (the 1986 Act), effectively seeking that H be ordered to crystallise his SIPP and policies and to exercise his elections in a manner desired by the trustee.

The essential question was whether a bankrupt would become 'entitled' to a payment under an uncrystallised pension, even though (leaving aside all questions of bankruptcy) he would not be receiving any payments from the pension trustees and would have no enforceable claim for payment against them. Consideration was given, in particular, to the judgment in *Raithatha* (*as Trustee in Bankruptcy of Michael Roy Williamson*) *v Williamson* [2012] 3 All ER 1028, in which a trustee sought an IPO concerning a number of pension policies, some of which were not in payment but capable of crystallisation. In that case, the judge held that a bankrupt did not have an entitlement to a payment under a pension scheme where, under the rules of the scheme, he would be entitled to payment merely by asking for payment. Consideration was also given to the Welfare Reform and Pensions Act 1999 (the 1999 Act).

Held:

The critical sub-s was s 310(7) of the 1986 Act. Payments made to a bankrupt under a pension in payment were plainly within the first part of the sub-s. The second part of the sub-s then dealt with payments to which the bankrupt 'from time to time becomes entitled'. The word 'entitled' suggested a reference to a pension in payment under which definite amounts had become contractually payable. There was no obvious wording in s 310 of the 1986 Act which would give the court power to decide how a bankrupt was to exercise the different elections open to him under an uncrystallised SIPP or personal pension. Nor was there any obvious route for a trustee in bankruptcy to be said to have the power. Indeed, to say that a trustee in bankruptcy could decide how the bundle of contractual rights inherent in a SIPP or personal pension was to be exercised was not easy to reconcile with the evident primary intention of the 1999 Act to remove pensions in general from a bankruptcy estate. It was difficult to accept that the parenthetical words in s 310(7) of the 1986 Act were intended in large measure to reverse in practical effect what s 11(1) of the 1999 Act had provided. If the parenthetical words were merely intended to ensure that there was no obstacle to actual payments from pension trustees being temporarily available for creditors, no such difficulty arose. Section 310 of the 1986 Act did not provide a basis for an IPO in respect of an uncrystallised pension (see [27]–[29], [31] of the judgment).

H was not entitled to payment under his pensions 'merely by asking for payment'. There was a considerable variety of options available to him. It would only be after he had made elections that any payment would be due to him. Only then would he become entitled to any payment. There was no power in the court under s 310 or in the trustee to require H to elect in any particular way (see [32] of the judgment).

Landau (*a bankrupt*) *Re, Pointer v Landau* [1997] 3 All ER 322 applied; *Krasner v Dennison, Lawrence v Lesser* [2000] 3 All ER 234 applied; *Barclays Bank V Holmes* [2001] OPLR 37 applied; *Raithatha* (*as Trustee in Bankruptcy of Michael Roy Williamson*) *v Williamson* [2012] 3 All ER 1028 not followed; *Huddersfield Police Authority v Watson* [1947] 2 All ER 193 considered; *Lornamead Acquisitions Ltd v Kaupthing Bank HF* [2011] All ER (D) 214 (Oct) considered.

Simon Passfield* (*instructed by Edwin Coe LLP*) *for the trustee.

Laurent Sykes and Deborah Clark* (*instructed under the Direct Access scheme*) *for H.

(3) Secretary of State for Business, Innovation and Skills v Combined Maintenance Services Ltd [2014] All ER (D) 181 (Dec), [2014] Lexis Citation 262

Chancery Division, Manchester District Registry, before HHJ Pelling QC sitting as High Court Judge.

Company – Winding-up – Petition – Petition for winding up of company in public interest – Application to dispense with advertisement of petition – Whether application should be allowed – Whether petition should be granted.

Facts:

The claimant Secretary of State presented a petition for the winding up of a company (the company) on the basis that the company had been used as an 'engine of fraud'. The operation of the company had been to enter into agreements under which, in return for trade leads for maintenance works at properties owned by customers of the company, an engineer was required to pay a fee to the company. An application was made for the appointment of a provisional liquidator over the affairs of the company, which had ceased trading; for advertisement of the petition to be dispensed with; and for the company to be wound up in circumstances where the petition had been presented at the same time that the application for the appointment of a provisional liquidator was issued and where the only step remaining to be taken before the petition could be heard was the advertisement of the petition.

The issues for consideration were: (i) whether the court should dispense with the advertisement of the petition, particularly where the statutory director of the company had indicated that it would not defend the petition; (ii) whether or not it was generally appropriate to accelerate the hearing of the petition to the present date, namely the hearing of the present application, and to vacate a later hearing; and (iii) whether the company should be wound up in the public interest.

Held:

(1) The court had jurisdiction to make an order dispensing with the advertisement of the petition. The present was not a creditors' winding up petition, but a petition presented by the Secretary of State in the public interest, on the basis that the company had been used as an 'engine of fraud'. In those circumstances, advertisement was unlikely to be as important as it would be in relation to a creditors' petition because the principal function of advertising a petition was to enable other creditors to support or oppose the petition so that if, for example, a petitioning creditor wished to discontinue the petition, a supporting creditor could be substituted as petitioner in his or her or its stead. That was unlikely to arise in a public interest petition. The position adopted by the statutory director of the company was also recorded (see [2] of the judgment).

In all the circumstances, it was entirely appropriate to dispense with the advertisement of the petition (see [2] of the judgment).

(2) Once the advertisement of the petition had been dispensed with, there was no logical reason for not accelerating the hearing of the petition other

than perhaps for the protection of those who were members of the company. In all the circumstances, it was highly unlikely that the interest of the shareholders as members of the company would be prejudiced by accelerating the hearing of the petition (see [4] of the judgment).

The court was satisfied that it was appropriate to vacate the later hearing and hear the petition at the present date (see [4] of the judgment).

(3) Substantial sums of money had been obtained from engineers in circumstances where false representations had been made as to the availability of business to engineers and in circumstances where no substantial relevant business had ever been provided. That of itself was sufficient to justify winding up of the company in the public interest. On the facts, the present was manifestly a case where the company should be wound up in the public interest (see [7], [8] of the judgment).

A winding up order would be ordered (see [9] of the judgment).

Giles Maynard-Connor for the Secretary of State.

The company was not represented.

(4) Re Calibre Solicitors Ltd (in administration) Justice Capital Ltd v Murphy (Administrators of Calibre Solicitors Ltd) [2014] All ER (D) 187 (Dec), [2014] Lexis Citation 259

Chancery Division, Companies Court, before Mr Registrar Jones.

Company – Administrator – Remuneration – Company challenging remuneration and/or expenses of administrators on ground that excessive – Company relying on first report – Whether company could also challenge remuneration and/or expenses detailed in second progress report made outside eight-week time limit prescribed by relevant Rules – Whether second application required – Insolvency Rules 1986, SI 1986/1925, rr 2.48A(4), 2.109, 12A.55(2).

Facts:

The claimant company (the company) was in administration. On 31 October 2013, the company issued an application (the first application), pursuant to r 2.109 of the Insolvency Rules 1986, SI 1986/1925 (the Rules), challenging the remuneration and/or expenses of the administrators (the administrators) of the company on the ground that they were in all the circumstances excessive (the first application). Rule 2.109(1B) of the Rules provided that an application had to be made no later than eight weeks after receipt by an applicant of a progress report which first reported the charging of the remuneration or the incurring of the expenses in question. The remuneration and expenses challenged on the first application were detailed in a progress report dated 6 September 2013 (the first progress report). A second progress report was made dated 5 February 2014 (the second progress report). On 13 June 2014, the company issued a second application (the second application) to challenge the remuneration and expenses in the second progress report.

The issue for consideration was whether the second application was necessary. The company contended that the first application was sufficient to also challenge the remuneration and/or expenses of the administrators detailed in the second progress report because the matter it raised would be the same for both reports and there was little practical point in having two separate applications. A second question arose as to whether there was power to extend the time and whether time should be extended in all the circumstances. Consideration was given to r 2.48A(4), which conferred power on the court to extend the eight-week time limit in r 2.109(1B), and to r 12A.55(2) of the Rules, which conferred on the court a power to extend or shorten time for compliance with 'anything required or authorised to be done by the Rules' (see [12] of the judgment).

Held:

(1) Rule 2.109(1B) had to be construed within the context of r 2.109 read as a whole, together with the other relevant rules concerning remuneration. It was plain from the statutory scheme that each progress report would deal with the remuneration charged and expenses incurred for the period it covered. It was equally plain from the wording of r 2.109(1B) that the eight-week period within which to challenge remuneration and expenditure applied to the specific report which detailed the remuneration and expenses being challenged. That was the ordinary meaning of the words used and there was no other purposive construction or other rule to gainsay those conclusions. It was consistent with the fact that r 2.109(1A) referred to remuneration charged and expenses incurred rather than to future remuneration and expenses (see [7], [8] of the judgment).

It followed that there had to be one application for each report. The company could not rely upon the first report to challenge the remuneration and expenses detailed in the second report (see [10] of the judgment).

The company had to apply for permission to extend time for the second application (see [10] of the judgment).

(2) While r 2.109(1B) of the Rules contained an express reference to one occasion when the eight-week time limit was extended, namely when the court had made an order extending time under r 2.48A(4), there was no express power to extend time conferred by the rule itself. The policy behind the eight-week time limit was to achieve certainty of liability and entitlement within a short-time scale subject to the right of challenge. However, that policy did not prohibit rules conferring a power to extend

that time even if they did not to expressly refer to r 2.109. Rule 12A.55(2) plainly included such a power. On its natural construction, it applied to the eight-week time limit. Rule 12A.55(2) was not limited to case management powers for issued claims (see [11], [14], [18]–[20] of the judgment).

Applying settled law to the facts of the present case and in the exercise of the court's discretion, an extension of time should be granted (see [27] of the judgment).

Denton v TH White Ltd; *Decadent Vapours Ltd v Bevan*; *Utilise TDS Ltd v Davies* [2014] All ER (D) 53 (Jul) applied.

Jonathan Lopian (instructed by Field Fisher Waterhouse LLP) for the company.

Thomas Robinson (instructed by Squire Patton Boggs (UK) LLP) for the administrators.

LEGISLATION

(1) Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015, SI 2015/17

The list of characters which can be used in a company name has been extended, under changes coming into force on 31 January 2015. The extension is one of several amendments to come into effect, following the consolidation of rules relating to the naming of companies, limited liability partnerships (LLPs) and trading disclosures.

The modifications have been made following the government's Red Tape Challenge. The scheme recognised that companies can have proposed names rejected leading them to spend more time and money in the re-application or justification process.

The following changes have been made to the Company and Business Names (Miscellaneous Provisions) Regulations 2009, SI 2009/1085, the Company, Limited Liability Partnership and Business Names (Miscellaneous Provisions) (Amendment) Regulations 2009, SI 2009/2404, the Company, Limited Liability Partnership and Business Names (Public Authorities) Regulations 2009, SI 2009/2982, the Companies (Trading Disclosures) Regulations 2008, SI 2008/495 and the Companies (Trading Disclosures) (Amendments) Regulations 2009, SI 2009/2615 concerning company and business names:

- the list of characters that can be used in a company name has been extended—currently businesses can only pick from the Roman alphabet and a few additional characters;

- the rules concerning how to deal with company names which may be considered the same have been changed—for example, Stone Company Ltd will now be treated the same as Stone and Company Limited;
- the list of words and expressions to be ignored when considering whether names are the same has been reduced—the terms 'export', 'group', 'imports' and 'international' have all been removed; and
- if six or more companies operate from one location, they will no longer have to display the company name at all times—they will, however, have to make sure the information is available for inspection by a visitor.

(2) Companies Act 2006 (Amendment of Part 18) Regulations 2015, SI 2015/Draft

From 6 April 2015 changes are being introduced to the CA 2006 relating to the purchase by a company of its own shares (ie share buy backs), in particular the authorisation and financing of share buy backs and the holding of repurchased shares 'in treasury'.

The Regulations amend CA 2006, Part 18 (acquisition by limited company of its own shares). The amendments ensure that changes introduced by the Companies Act 2006 (Amendment of Part 18) Regulations 2013, SI 2013/999, operate effectively.

The Regulations:

- provide that a company that buys back its own shares may finance the purchase in accordance with Ch 5 or, without Ch 5 applying, under CA 2006, s 692(1ZA);
- remove the requirement to deliver a statement of capital to the registrar when shares are cancelled under CA 2006, s 708(2) following a purchase by a company of its own shares for the purposes of an employees' share scheme, if the statement of capital would be identical to that delivered under CA 2006, s 720B(1);
- insert a new subsection into CA 2006, s 709 to provide that Ch 5 is subject to the procedure in CA 2006, s 692(1ZA);
- amend CA 2006, s 723 so that where a company buys back its own shares for the purposes of, or pursuant to, an employees' share scheme, the time limit for the return of the shares to the company, such that the obligation to pay arises, is specified in relation to the date the resolution approving such a buy back is passed;
- ensure that shares bought back under CA 2006, s 692(1ZA) and those bought back under Ch 5 of Part 18 are treated consistently in accountancy terms; and

- prevent shares bought back under CA 2006, s 692(1ZA) from being held in treasury.

(3) Draft the Companies Act 2006 (Amendment of Part 17) Regulations 2015, SI 2015/Draft

Amendments are made to the CA 2006 to prohibit a company from reducing its share capital using a scheme of arrangement in connection with the takeover of that company.

CA 2006 contains the main statutory basis for UK company law and corporate governance. Takeovers and mergers are given effect either by a contractual offer to the target company's shareholders to purchase their shares, or by means of a scheme of arrangement, a long established court sanctioned process for making changes to a company's share or debt structures.

The instrument contains a transitional provision restricting the application of the Regulations to takeovers announced on or after the date that the Regulations come into force, or where the offer is not subject to the Takeover Code, to takeovers where the terms are agreed between the parties on or after the date that the Regulations come into force.

The instrument amends CA 2006, s 641 to restrict the ability of a company to reduce its share capital as part of a scheme of arrangement by virtue of which a person would acquire all the shares, or all the shares of a particular class, in that company.

The acquisition may relate to a person acting alone, or together with its associates. The prohibition does not apply to schemes of arrangement where there is no substantial change in the ultimate shareholders in the company.

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