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Tolley's Company Law and Insolvency

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Dear Subscriber,

Welcome to the latest newsletter. The analysis section contains seven pieces. First, will changes to the eligibility criteria make it easier for people to access debt relief orders (DROs)? Giles Frampton, president of R3, the association of business recovery professionals, considers how these changes will affect the personal insolvency landscape.

Second, James Morgan and Matthew Weaver, barristers at St Philips Chambers, consider the judgment in *Oakrock Ltd v Travelodge Hotels Ltd* [2015] EWHC 30 (TCC), [2015] All ER (D) 119 (Jan) and offer some practical advice on the drafting of a company voluntary arrangement (CVA).

The third opinion piece is written by Susannah Markandya of Enterprise Chambers. Ms Markandya comments on the recent decision in *National Asset Loan Management Ltd v Cahillane*; *Re John Christopher Cahillane* [2015] EWHC 62 (Ch), [2015] All ER (D) 171 (Jan) and examines the following questions – what does a debtor needs to show in order to set aside a statutory demand on the basis that the creditor is fully secured? And does the court's power in insolvency proceedings to review an order extend to appellate decisions?

Kathy Stones, solicitor in the Lexis®PSL Restructuring & Insolvency team, examines the recent judgment in *Re Northsea Base Investment* [2015] EWHC 121 (Ch), [2015] All ER (D) 202 (Jan) in the fourth opinion piece. Ms Stones queries what the relevant factors are that the court will assess when making a declaration on the centre of main interests (COMI) for shipping companies, and what will this mean in practice?

In the fifth opinion piece William Webb, a barrister at Keating Chambers, examines the legal and practical implications of contractor insolvency.

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In the sixth opinion piece Timothy Jarvis, a partner at Squire Patton Boggs, advises that the judgment in *Changtel Solutions UK Ltd* (*formerly Enta Technologies Ltd*) *v Revenue and Customs Comrs* [2015] EWCA Civ 29, [2015] All ER (D) 211 (Jan) is of wide-ranging application to all creditors, not just VAT and tax creditors.

The final opinion piece mulls on the question of what the insolvency implications are for technology startups. Frances Coulson, senior partner and head of insolvency litigation at Moon Beever, and Indradeep Bhattacharya, intellectual property associate, and Jonathan Little, partner at Jones Day, consider the issues.

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

Finally, the newsletter contains details on the new legislation including an analysis piece entitled: Unpicking the Finance Bill 2015 – the new ‘corporate rescue’ tax relief. When a company is in financial distress, it needs to act quickly and one factor in determining which restructuring route to pursue may be the relevant tax treatment of the deal. By extending the cases where tax relief is available, the government hopes to promote a greater range of options. Lara Okukenu, senior tax manager at Deloitte, explains the changes put forward.

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) Insolvency Service publishes Q4 insolvency statistics for 2014

Creditors’ voluntary liquidations in England and Wales have decreased to the lowest annual total since 2008, the latest Insolvency Service statistical release revealed. However, compulsory liquidations increased compared with 2013. The number of company administrations, receiverships and company voluntary arrangements also decreased. Individual insolvencies decreased to the lowest annual total since 2005, but individual voluntary

arrangements (IVAs) were the highest level since they were introduced in 1987. The statistics cover October to December 2014 (Q4).

The statistics release contained the latest data on company insolvency and individual insolvency. The figures showed:

Companies

- creditors' voluntary liquidations in England and Wales decreased to the lowest annual total since 2008 – 10,302 companies entered into creditor's voluntary liquidation in 2014;
- compulsory liquidations increased compared with 2013 – 3,738 companies were subject to a compulsory winding-up order in 2014, a 2.9% increase compared to 2013;
- a total of 14,040 companies entered into liquidation in 2014, 6.3% lower than the total in 2013;
- the number of administrations in 2014 was 24.3% lower than in 2013, and at its lowest level since 2004;
- receivership appointments decreased by 21.1% and were at their lowest annual level since 2007; and
- the number of company voluntary arrangements decreased by 2.4% to their lowest total since 2007.

Individuals

- there were a total of 99,196 individual insolvencies in 2014 – a 1.8% decrease compared to 2013 and the lowest annual total since 2005;
- there were a total of 20,318 bankruptcy orders in 2014, 17.3% lower than in 2013 –the number of bankruptcy orders has decreased each year since 2009, and was at its lowest annual level since 1998;
- there were 26,688 debt relief orders in 2014, which was a 3.1% decrease compared to 2013 and the lowest annual total since 2010;
- there were 52,190 IVAs in 2014, which was a 6.8% increase on 2013 – this was the second successive annual increase, and the highest annual total since they were introduced in 1987; and
- IVAs comprised 53% of all individual insolvencies in 2014, compared with 30% in 2005.

(2) Insolvency Service: Director disqualifications 16 February 2015

A number of directors have been disqualified from being directors, and a number of companies have been wound up following investigations by the Insolvency Service.

Disqualifications

- ***On Line Platform Management Consultants Limited***, based in Manchester, has been placed into provisional liquidation following a significant volume of complaints, including misrepresenting itself as Google.
- ***IPR Capital Ltd*** has been placed into provisional liquidation for selling partnerships in a limited partnership gold mining company in Ecuador, which it wholly controlled.
- ***Kevin Rogers-Davison*** has been disqualified from acting as a company director for six years for causing Delete (UK) Ltd to trade in breach of the statutory obligations governing its operation.
- ***Matrix Company 1 Limited*** has been ordered into liquidation on grounds of public interest.
- ***Windward Capital Limited***, based in London, has been ordered into liquidation with two related companies – Met-X Corp Ltd and Imarc Limited – for duping investors with false and misleading claims.
- ***Manmohan Gurtata***, director of mobile phone wholesaler Deandrake Ltd, has been disqualified as a director for ten years for involving the company in a scheme linked to VAT fraud.

(3) Insolvency consultation launched on EU's minimum standards

The Insolvency Service is seeking views on whether the European Commission's recommended approaches to business failure would have the desired effect. In March 2014, the Commission set out minimum standards for member states to implement which would enable the efficient restructuring of businesses in financial difficulty. Responses to the recommendation must be ***submitted by 17 March 2015.***

The Commission suggests there are discrepancies between national restructuring frameworks meaning businesses are discouraged from establishing themselves in different member states. It therefore claims minimum standards should be adopted across the EU so the difficulties in restructuring cross border groups of companies are removed.

The consultation is asking for comments on:

- whether the implementation of the minimum standards would have the effect the Commission desires; and
- how the UK currently compares against the minimum standards.

These responses will be used to inform the UK's response to the Commission's review of the Recommendation. This is likely to occur in autumn 2015.

Responses can be emailed to policy.unit@insolvency.gsi.gov.uk by 17 March 2015. A response form can also be filled out online.

(4) Businesses guaranteed essential supplies during rescue

The supply of IT and utility services to business undergoing insolvency rescue will be guaranteed following the announcement by the government to secure continuation of services. Suppliers of IT, water, gas, electricity and communications services will be guaranteed payment for services supplied during the rescue period will also be able to ask for personal payment guarantees from the insolvency practitioner. The changes will be subject to Parliamentary scrutiny before coming into force in October 2015.

The Enterprise and Regulatory Reform Act 2013 brought in new powers to help insolvency practitioners secure essential IT and utility supplies needed to keep a business going while it undergoes the rescue process. By turning around struggling but viable businesses, jobs can be saved and creditors stand a better chance of recovering some of what they are owed.

The government's plans will mean suppliers are prevented from terminating a supply or increasing charges as a result of insolvency. To safeguard suppliers:

- the supplier will be able to seek a personal guarantee from the insolvency practitioner at any time to give them more certainty that the supplies will be paid for;
- the supplier will be able to apply to court to terminate their contract on the grounds of 'hardship'; and
- insolvency practitioners will be issued guidance to urge them to make contact with essential suppliers at the earliest possible time following their appointment to discuss their needs in relation to supply.

ANALYSIS

(1) The future of debt relief orders

Will changes to the eligibility criteria make it easier for people to access debt relief orders (DROs)? Giles Frampton, president of R3, the association of business recovery professionals, considers how these changes will affect the personal insolvency landscape.

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 has confirmed. In addition, the 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.

What is the general impression of how DROs have performed since their introduction?

DROs have proven to be a useful addition to the personal insolvency landscape. Bankruptcy can be a good way of dealing with debts, but its consequences can be disproportionate for those with little or no assets and income and relatively low value debts. DROs are quicker, easier, and more appropriate debt solution for those in this situation.

How do DROs operate and how can they assist vulnerable people?

DROs are open to those with fewer than £300 of assets (not counting those assets which are 'excluded'), under £15,000 of debts, and less than £50 a month in spare income. If you're subject to a DRO, creditors can't recover their debts without the court's permission and you're usually freed from your debts after a year. While subject to a DRO, you can't borrow more than £500 without telling the lender about your DRO or act as a company director, among other things.

What have been the challenges when using DROs?

The biggest problem with DROs has been their restrictive entry requirements. These can be exacerbated by the way bankruptcy works.

For those trying to access bankruptcy, a big hurdle is the up-front £705 entry fee (made up of court and administration costs). There are potentially thousands of people who can't seek a DRO because they have too many assets or debts, but they can't afford to enter bankruptcy either. Being caught between insolvency solutions like this means people can often struggle to deal with their debts.

According to the government, in 2012/13, the median unsecured debt in bankruptcies was roughly £38,000. Given that 50% of bankruptcies involve individuals with few or no assets, it's reasonable to assume a fair proportion of financially distressed individuals have debts over £15,000 but few assets. Given their low level of assets, it's reasonable to assume they couldn't afford bankruptcy, but given their debts could not enter a DRO.

What is the significance of these increases?

The increases ease the entry requirements and will make it much easier for people to access a DRO. While R3 was hoping for increases in the asset limit to £2,000 and the debt limit to £30,000, the increases announced by the government are still welcome.

What is the thinking behind increasing the creditor petition limit for bankruptcy? What effect will this have?

While bankruptcy can be the most effective way for some people to deal with their debts, it is not appropriate in every situation – especially when debts are low in value or they have few assets.

Bankruptcy is a serious and life-affecting process. The threshold for creditor petitions is there to stop bankruptcy being used disproportionately as a debt collection tool for very low value debts. However, the threshold hasn't been changed since 1986 and its value has been slowly eroded by inflation, reducing the protection it offers to debtors. Raising the threshold to £5,000 not only repairs this erosion but adds a degree of 'future-proofing'.

How will this affect personal insolvency?

The raised creditor petition threshold should mean fewer bankruptcies. According to Insolvency Service analysis, 2,000 creditor petition bankruptcies in 2013/14 were for debts under £5,000 – about 20% of all bankruptcies in the year. Rather than using bankruptcy petitions to pursue low value debts, creditors will have to rely on procedures like county court judgments or attachment of earnings orders.

On the other hand, the changes to the DRO limits mean there are likely to be more people eligible for them. The Insolvency Service estimates the changes will mean another 3,600 DROs a year.

Both changes are positive. There are a range of insolvency options for dealing with debts and they're most effective when a debtor is in a debt solution most suited to their needs. The changes mean it is much more likely debtors will be able to end up in the right insolvency process for them.

(2) Drafting CVAs – it's all about the fine print

James Morgan and Matthew Weaver, barristers at St Philips Chambers, consider the judgment in *Oakrock Ltd v Travelodge Hotels Ltd* [2015] EWHC 30 (TCC), [2015] All ER (D) 119 (Jan) and offer some practical advice on the drafting of a company voluntary arrangement (CVA).

The claimant agreed to grant a lease of a hotel to the first defendant, Travelodge, on the understanding that Travelodge would carry out refurbishment work at the hotel. The Travelodge Group later entered into a

CVA, under which the rent for the hotel was reduced. The claimant brought proceedings against the defendants claiming, among other things, that the work had not been fully or properly carried out and seeking damages for loss of rent following the making of the CVA. The first defendant sought summary judgment against the claimant. The Technology and Construction Court dismissed Travelodge's application for summary judgment on the whole claim, but held that claims which were excluded by the terms of the CVA would be struck out.

What was the background to the summary judgment application?

Oakrock Ltd and Travelodge Hotels Ltd entered into a business sale agreement in November 2007 (the agreement). In short, the agreement provided for Oakrock to grant Travelodge a 35-year lease of its hotel and for Travelodge to undertake refurbishment works. Oakrock was to fund the refurbishment up to a maximum of £1.8m in return for which the rent payable by Travelodge would be increased by £7,000 for every £100,000 thereby spent by Oakrock. In September 2012, Travelodge's creditors approved a CVA. The CVA divided all Travelodge's hotels into five categories. Category 1 hotels were to pay rent as before, category 2 hotels were to have their rent reduced to 75%. The hotel in question was in category 2.

Oakrock claimed that the refurbishments had not been fully or properly carried out. It put its claim for loss in different ways and in summary:

- but for the failure on the part of Travelodge to properly carry out the refurbishment works and/or overcharging Oakrock for the same, the hotel would have been in category 1, thereby entitling Oakrock to receive full rent not 75% thereof, alternatively; and
- had the works been properly carried out, Oakrock would have given notice to vacate the lease (as provided for in the CVA) and re-let the hotel on the open market, receiving a rent greater than that payable under the terms of the CVA.

Travelodge applied for summary judgment on the grounds that the claims were caught by the CVA and, as such, bound to fail.

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

The judge was required to determine whether the claims advanced by Oakrock related to the lease and were therefore prohibited by the terms of the CVA which, by cl 3, imposed a moratorium on such claims by landlords.

What were the main legal arguments put forward?

Travelodge submitted that Oakrock's claims for losses amounted to the seeking of payment 'of any Liability relating directly or indirectly to a Lease … or other document supplemental to a Lease' which was barred by cl 3 of the CVA. The CVA defined 'Leases' (in respect of category 2 hotels) as 'real estate leases or agreements for lease'. Travelodge argued that either the agreement was a lease or a 'document supplemental to a Lease' and therefore caught by the CVA. Travelodge also relied on full and final settlement (cl 9.4) and waiver (cl 9.11) provisions in the CVA in relation to landlord claims.

What did the judge decide, and why?

The judge concluded that the claims for the 25% balance of the rent based on the failure to carry out the works properly, or overcharging for those works, preventing the hotel falling within category 1 (which would have entitled Oakrock to full rent) were caught by the terms of the CVA and, as such, bound to fail. The claims were under a category 2 lease and fell squarely within cl 9.4 of the CVA. They were therefore struck out.

However, in respect of the claim based upon the argument that Oakrock would have given notice to vacate and then re-let the hotel for more than the 75% of the contractual rent provided by the CVA, the judge concluded that this was not caught by the CVA. Clause 9.4 of the CVA could not apply to a claim which, in essence, proceeded on the basis that there would have been no lease in existence once the notice to vacate had taken effect.

Further, cl 9.11 of the CVA did not apply to such a claim because the judge concluded that a claim based upon a breach of the agreement, rather than a breach of the lease, was not excluded. Clause 9.11 prevented claims arising from a category 2 lease, defined as an agreement to lease or a lease itself. The judge determined, taking the provisions of the CVA as a whole, that this provision meant that claims under an agreement for a lease were only caught by the CVA unless and until a lease had been executed, at which point only claims under the lease were caught.

This claim was therefore allowed to proceed.

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

First, at para [9] the judgment contains a helpful confirmation of the relevant legal principles to be applied by the court when determining a defendant's summary judgment application.

Second, by reference to an unreported decision of Mann J in *Tanner v Everitt* [2004] EWHC 1130 (Ch), [2004] All ER (D) 192 (May), at

para [22] the judgment provides a useful reminder that CVAs may be deemed to include an implied term to the effect that the company will not rely on the expiry of limitation periods while the CVA is in force.

Third, the judgment emphasises that a CVA is a form of contract and therefore, in line with the approach to the construction of other commercial contracts or documents, stands to be construed so that it makes commercial (rather than literal) sense.

What practical lessons can those advising in such cases take away from this judgment – particularly in terms of drafting CVA proposals and the potential claims that could nonetheless be brought by creditors bound by a CVA?

On the basis of the arguments before the judge, the CVA provisions were not drafted widely enough to cover all claims under the agreement as opposed to under the resulting lease. This could have been avoided if the drafting of the relevant clauses had reflected the fact that, notwithstanding the grant of the lease, the agreement might not merge with it but rather continue to have an independent existence, particularly in circumstances where notice could be given to vacate the lease. It is not uncommon to find that CVAs contain terms which are inconsistent or fail to address foreseeable scenarios.

By way of footnote, cl 22.1 of the CVA did contain a very wide 'full and final settlement' provision which might be thought to bar even claims under the agreement because it expressly compromised any liability provable under the Insolvency Rules 1986, SI 1986/1925, r 12.3 as if Travelodge had been wound up at the date of the creditors' meeting (as to 'provable' debts see further *In re Nortel GmbH* (*in administration*) *and other companies and other appeals* [2013] UKSC 52, [2013] 4 All ER 887). But this argument was not pursued by Travelodge and the judge declined to make any conclusions about it.

(3) Setting aside a statutory demand – a question of jurisdiction

What does a debtor needs to show in order to set aside a statutory demand on the basis that the creditor is fully secured? And does the court's power in insolvency proceedings to review an order extend to appellate decisions? Susannah Markandya of Enterprise Chambers comments on the recent decision in *National Asset Loan Management Ltd v Cahillane*; *Re John Christopher Cahillane* [2015] EWHC 62 (Ch), [2015] All ER (D) 171 (Jan).

The claimant company served a statutory demand on the defendant. A judge dismissed the defendant's application to set aside the statutory demand and for an extension of time to adduce a supplemental expert

report. The claimant presented a bankruptcy petition against the defendant. It appealed against orders by a Chief Registrar, adjourning the bankruptcy petition and making directions on the defendant's application to rescind or vary orders of the judge. The Chancery Division, in allowing the appeal, held that the Insolvency Act 1986 (IA 1986), s 375(1) gave the court jurisdiction to review, vary or rescind the appellate orders of the judge. However, on the requirements imposed on the defendant by Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(c), the application under IA 1986, s 375(1) failed on the merits and was dismissed and the bankruptcy order was made.

Briefly, what was the background to the application?

The appellant (NALM) served a statutory demand on the debtor (Mr Cahillane), claiming to be a creditor for the shortfall between the debt which Mr Cahillane owed and the value of properties over which NALM had security. Mr Cahillane contended that there was no shortfall and that the statutory demand should be set aside. Mr Cahillane argued that NALM had a statutory duty to hold the properties for a certain period (possibly until 2020) in order to maximise the return to taxpayers.

Mr Cahillane sought to adduce evidence to show that by 2020 the value of the properties would have risen sufficiently to cover the amount of the debt. The Registrar dismissed Mr Cahillane's application to set aside the statutory demand, holding that the relevant value of the security was the present value, not some notional future value.

On appeal, HHJ Pelling QC (sitting as a Deputy High Court Judge) upheld the Registrar's order, and agreed that the relevant valuation was the present value of the security. The judge also commented that the expert evidence on which Mr Cahillane sought to rely did not show how expected future increases in the values of the property would affect the values now. Mr Cahillane subsequently applied under IA 1986, s 375(1) to rescind or vary the order of HHJ Pelling QC on the ground that his expert could – given more time – produce a schedule which showed this. Mr Cahillane also applied for specific disclosure of previous valuations of the properties (including a valuation obtained in 2009 when the debt and security was transferred from AIB to NAMA), and economic forecasts relating to the calculation of long-term economic values of the properties. NALM argued that the s 375(1) application was hopeless and that a bankruptcy order should be made.

Registrar Baister refused to make a bankruptcy order. NALM appealed against that refusal.

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

First, whether an order made on appeal (HHJ Pelling QC's order) could be the subject of an application to rescind/review under IA 1986, s 375(1).

Second, whether the s 375(1) application was bound to fail on its merits. This turned on whether Mr Cahillane's expert was going to be able to produce a report which showed that the value of the security equalled or exceeded the amount of the debt.

What were the main legal arguments put forward?

On the jurisdiction point – whether the court should follow *Appleyard v Wewelwala* [2012] EWHC 3302 (Ch), [2013] 1 All ER 1383 and *Sands v Layne* [2014] EWHC 3665 (Ch), [2014] All ER (D) 141 (Nov). On the merits of the s 375 application – whether the evidence which Mr Cahillane sought to adduce could show that the value of the security equalled or exceeded the amount of the debt.

What did the judge decide, and on what basis?

The judge decided that the court's jurisdiction under IA 1986, s 375 did extend to an order made on appeal. The interpretation of that section by the judge (Briggs J) in *Appleyard v Wewelwala* was obiter. The judge in *Sands v Layne* (Mr David Donaldson QC) had wrongly concluded that Briggs J's interpretation was not obiter and, accordingly, that he should follow it. In those circumstances, the judge was not required to follow the decision of Mr Donaldson either.

The judge held that, correctly interpreted, the section does give the court jurisdiction to review, vary or rescind appellate orders. On the merits of the application, the judge endorsed the previous decisions of Registrar Jones and HHJ Pelling QC that the relevant valuation for an application under the Insolvency Rules 1986, SI 1986/1925, r 6.5(4)(c) was the value at the time of the statutory demand or possibly the hearing (but not any future value). That was the case regardless of the identity etc of the creditor. The judge also held that the evidence that Mr Cahillane sought to adduce (which involved a prediction of future increases in value of the secured assets) could not show that the present value of those assets covered the sum that was owed.

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

The judgment is helpful in explaining the jurisdictional extent of IA 1986, s 375(1). The judgment also clarifies what a debtor needs to show in order to set aside a statutory demand on the basis that the creditor is fully secured.

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

An appellate order can be reviewed, rescinded or varied under IA 1986, s 375(1) by a court of the appropriate level. This is likely to be preferable to launching a second appeal. Evidence to support an application to set

aside a statutory demand on the basis that the value of the creditor's security covers the full amount of the debt, must address the present value of the assets that constitute the security.

(4) When a declaration on COMI comes in handy

Kathy Stones, solicitor in the Lexis®PSL Restructuring & Insolvency team, examines the recent judgment in *Re Northsea Base Investment* [2015] EWHC 121 (Ch), [2015] All ER (D) 202 (Jan). Ms Stones queries what the relevant factors are that the court will assess when making a declaration on the centre of main interests (COMI) for shipping companies, and what will this mean in practice?

The proceedings concerned an application, on behalf of the administrators for each of the applicant companies, for a declaration in relation to each company that the COMI was England and Wales, within the meaning of Council Regulation (EC) 1346/2000 (on insolvency proceedings). The Companies Court held that the legislation made it clear that the presumption was that the COMI of the company would be the state of its registered office, which was Cyprus. However, there was sufficient evidence to rebut that presumption and the declarations sought would be granted.

What were the jurisdictional factors?

Six ship companies were special purpose vehicles, each owning a single ship in the fleet. These six ship companies were themselves all 100% owned by the second applicant, Baltic Tankers Holding Limited (Baltic Tankers), which in turn was 100% owned by the first applicant, Northsea Base Investment Limited (NSBI). The sole shareholder of NSBI was Hamilton Corporation, incorporated in Nevis. The corporation was owned in broadly equal shares by three Nevis family trusts, each family trust settled by different individuals. All three of the settlors of these trusts were also directors of the shipping agent, Marine Cross Services Limited (Marine Cross).

There were connections to various jurisdictions, including:

England and Wales	Cyprus	India
The ship companies used a shipping agent (Marine Cross) incorporated in England to conduct their operations and management	Place of incorporation of all the companies	Commercial operations were subcontracted out (to Scorpio) and were carried out in India

The commercial management was subcontracted out (to Scorpio) and carried out in the UK	Freight invoices were made out to Scorpio (as agent for the relevant Ship Company) using the company's addresses in Cyprus	Charterparties were drawn up by Scorpio India
All payments demanded by trade creditors were paid by Marine Cross as agents; the agents directed payments to be made in England		Invoices were raised by trade creditors to Scorpio India
Charterparties were dealt with both through Scorpio UK and Marine Cross in the UK		
External queries raised with Scorpio India were answered by Marine Cross from London and enquiries from third parties were addressed ultimately to London		
Loan facilities were governed by English law and contained exclusive English jurisdiction clauses. The interest payments were always arranged by Marine Cross from the companies' bank accounts. The two loan agreements also used Marine Cross's UK address for notices and irrevocably appointed Marine Cross as agent for service of process. The bank mainly dealt with individuals based in London		

Why was a declaration on COMI sought?

The administrators were appointed over all eight companies in an out of court procedure (under the IA 1986, Sch B1, para 22) rather than

pursuant to an application to the court. Particular urgency arose from the fact that a ship was moving imminently into waters in and around the US, justifying the out of court application. Accordingly, there was no pre-existing court decision on COMI.

The English administrators of the companies sought a declaration on COMI for each of the companies under IA 1986, Sch B1, para 68(2). The declaration was sought to assist in the exporting of the administration to other jurisdictions and was urgent because the companies were operating vessels in international waters and it was likely that applications in other jurisdictions may be needed in the near future.

What did the court decide on COMI?

The court applied Eurofood and Interedil and noted that the Court of Justice of the European Union had emphasised the importance of considering each debtor (i e each member of a group of companies) as a distinct legal entity subject to its own court jurisdiction and also emphasised the importance of considering the COMI as being something identified by reference to criteria that are both objective and ascertainable by third parties.

Considering the matter overall, the court noted that there was a number of jurisdictions with which the operation of these companies was linked, which was unsurprising given the international nature of their business.

The court said that as the companies were all incorporated in Cyprus and had registered offices in Cyprus, there was a presumption that COMI was in Cyprus. Although none of the directors were based in England and board meetings were not held in England, from the point of view of facts ascertainable by a third party, there was no reason why a third party would have any knowledge of the location where directors meetings were held, nor, on the unusual facts of this case, would they regard the directors as being individuals of great significance. The only active director acted from either Nevis or Jersey but his actions were performed under the direction of the settlors, two of whom were based in London and all of whom were closely linked to Marine Cross.

As regards the COMI of the ship companies, the only realistic possible states were Cyprus or England. Although India was a possible candidate, no third party would seriously think the centre of administration of any of these companies was in India. The court concluded there was sufficient evidence relating to the administration of the ship companies to rebut the presumption in favour of Cyprus and establish that the COMI of the ship companies was England and Wales.

The COMI of NSBI and Baltic Tankers was less clear cut given that these companies carried out many fewer operational tasks than the ship companies. There were not the same links between Marine Cross in London

and third parties trading with NSBI or Baltic Tankers. Since neither NSBI nor Baltic Tankers had any operational function as such, the only relevant COMI factors relating to those companies were those relating to the banks. Looked at in that way, the registered office presumption was rebutted and the COMI of NSBI and Baltic Tankers was also England and Wales.

What are the practical effects of this case?

While not ground-breaking as this was a standard application of Eurofood and Interedil to decide COMI, this case shows the practical benefits of getting a subsequent declaration on COMI where administrators are appointed out of court and the insolvency process/administrators may need to be recognised in other countries at a later date.

(5) Going bust during the build

What happens when a contractor goes insolvent during the build? William Webb, a barrister at Keating Chambers, examines the legal and practical implications of contractor insolvency.

What are the legal implications if your contractor goes bust during a project?

The legal implications of a main contractor going bust are relatively simple:

- first, it will stop carrying out any work – this will be a breach of contract between the employer and main contractor; and
- second, it will stop paying its sub-contractors – this will be a breach of contract between the main contractor and sub-contractor.

Unfortunately, those breach of contract claims may not be worth very much.

How should a contract be structured to protect a developer against contractor insolvency?

There are two or three key structures that can be put in place to protect against contractor insolvency and they are generally standard on most large projects.

One common option is a performance bond so that money can be claimed from a guarantor bank at short notice, often simply on-demand.

A second option is to obtain a parent company guarantee – this is useful where a large contractor is using a regional subsidiary or special purpose vehicle to carry out a project.

A third and very common option is to obtain collateral warranties from as any many different people engaged on a project as possible. This will enable a direct claim to be made against these people in the event of a problem arising. However, these normally don't take effect until conclusion of a project. Thus, they are useful in the event of latent defects, but are of limited use if a main contractor becomes insolvent in the middle of a project.

Unfortunately, none of these options is a magic panacea. There is no way for a developer to completely insulate itself from loss flowing from contractor insolvency which is why the selection of the contractor in the first place is probably the most important step of all.

Does the loss of a contractor have knock-on effects on the other features of the project?

There is no inherent reason why the loss of a contractor should affect the end product being delivered. If the design was good to start with, the replacement contractor should be able to complete to the same specification. The only problem which can arise is that it may be difficult to work out who is to blame later on if a latent defect is discovered.

By contrast, the loss of a contractor will almost inevitably affect the timely delivery of the project. For a start, it is common for the insolvency to be preceded by a period during which fewer and fewer people turn up on site to carry out the works because the contractor is trying to cope with fewer staff or unpaid sub-contractors have started to walk away. Then, when the insolvency occurs there will be a period of no progress whatsoever. A replacement contractor will then need to be found and a basis for payment of that contractor will need to be agreed (probably on a cost-plus basis) before any work is carried out. Any new employees or sub-contractors will then need to get up to speed with the state of the development to date.

The only way in which you sometimes see a substantial delay avoided is if the developer steps in to take over all the sub-contracts to ensure sub-contractors continue to attend site to carry out the works. This can be a useful temporary solution to keep the project on track but a lot depends upon the amount of sub-contract labour being used and it generally comes at a price. It is only a short-term solution, unless the project is very near completion.

Does the position differ depending on the type of project?

The general legal position is unaffected by the type of project, but the risks of contractor insolvency do vary. While at the height of the economic downturn there were some big names going under, as a general rule the larger more well-known construction companies are less likely to

become insolvent. They tend to have in place experienced quantity surveyors who will make sure they do not under-price a contract and a single project that goes wrong will not ordinarily be sufficient to cause irreparable damage to their balance sheet. By contrast, a lot of smaller firms carrying out residential projects don't have enough working capital to weather the storm of a single project going badly wrong.

Where do developers stand in the list of creditors if a contractor becomes insolvent?

Developers ordinarily won't rank very highly in the list of creditors. Invariably they will be simple, unsecured creditors, meaning they are about as low down the pecking order as you can be. Secured creditors (those with a charge over an asset, such as a mortgage over a property) and preferential creditors (employees who have not been fully paid) will rank ahead of an unsecured creditor. The firm administering the insolvency will also take their fees out. By the time all this is done, there isn't normally much left for the unsecured creditor and it will be some time before they can get their hands on any small amount which may be available.

(6) A question of jurisdiction

Timothy Jarvis, a partner at Squire Patton Boggs, advises that the judgment in *Changtel Solutions UK Ltd* (*formerly Enta Technologies Ltd*) *v Revenue and Customs Comrs* [2015] EWCA Civ 29, [2015] All ER (D) 211 (Jan) is of wide-ranging application to all creditors, not just VAT and tax creditors.

The appeal concerned the question whether, when there was both an appeal against a VAT assessment pending in the First-tier Tribunal (Tax Chamber) and a winding-up petition pending in the Companies Court, the tribunal or the Companies Court was the appropriate forum to determine whether the petition debt was disputed in good faith on substantial grounds. The Court of Appeal, Civil Division, held that, when the tribunal had reached a conclusion on such an issue, that decision was normally likely to be a compelling factor in the Companies Court's exercise of discretion. That discretion was not, however, completely abrogated by the jurisdiction of the tribunal. It need not defer to the tribunal in every case, though it might often choose to do so.

What was the background to the case?

HMRC had raised VAT assessments against Changtel Solutions UK Limited (Changtel) on 25 March 2013. Changtel had submitted its VAT returns on the basis that it was due substantial VAT refunds from HMRC. Changtel's position was that it was entitled to VAT refunds because it had exported goods intra EU to business customers thereby crystallising a

refund of VAT input tax with no consequential obligation to account for VAT output tax. HMRC's position was that there had been no export of goods to EU business customers with the result that Changtel had no entitlement to a VAT refund. Therefore HMRC issued VAT assessments to recover the VAT which it perceived had been incorrectly refunded to Changtel.

Changtel made an application to the Tax Tribunal to make an out of time appeal against the VAT assessments. On 20 August 2013, the Tribunal Chair, Judge Kevin Poole gave Changtel permission to bring an out of time appeal because, on the evidence available to him, he held: 'I am not persuaded the appeals are hopeless'.

HMRC lodged a winding-up petition against Changtel in the Companies Court. On 21 March 2014 the High Court dismissed the winding-up petition. Two alternative reasons were given for the decision.

First, there was the jurisdiction issue. The High Court held that because the VAT assessments were under appeal before the Tax Tribunal (on account of Judge Kevin Poole's decision to allow the appeals against the assessments out of time) then it was automatically the case that the Companies Court had no jurisdiction over the matter until the Tax Tribunal had heard the appeal. The High Court based this aspect of its decision on two reasons.

The Tax Tribunal was self-evidently a specialist tribunal and, relying on the Supreme Court's decision in *Autologic Holdings plc v IRC* [2005] UKHL 54, [2005] 4 All ER 1141, the court should defer to a specialist tribunal. The High Court noted that the legal issue which was being considered in relation to the VAT assessments raised against Changtel was whether such assessments were being disputed in good faith on substantial grounds. The High Court noted that there had been changes in the procedural rules for the Tax Tribunal and the Tax Tribunal now had the power to strike out an appeal where it considers '… there is no reasonable prospect of the appellant's case …succeeding'. The High Court's judgment was that this change to the procedural rules gave the Tax Tribunal, in substance, the power to determine if the VAT assessments were being disputed in good faith on substantial grounds. And therefore the Tax Tribunal had exclusive jurisdiction over the matter because it had the ability to answer the question which would otherwise be heard by the Companies Court.

Second, and in the alternative, the High Court held that there was sufficient evidence available to it to conclude that the circumstances giving rise to the winding-up petition were being disputed in good faith on substantial grounds. Therefore the High Court concluded that there was sufficient evidence available for the petition to be dismissed in its own

right, even if it was incorrect in its judgment that the Tax Tribunal had exclusive jurisdiction over the matter.

What questions were put before the Court of Appeal?

The Court of Appeal had to answer two questions.

- Was it automatically the case that the Tax Tribunal had exclusive jurisdiction over this matter? In other words, was the Companies Court blocked from hearing the winding-up petition until the Tax Tribunal had heard the VAT appeal?
- If the Companies Court had jurisdiction over the matter was there sufficient evidence available to support the finding that the winding-up petition was being disputed in good faith on substantial grounds?

What did the Court of Appeal decide?

The Court of Appeal held that the High Court '… was wrong to say that the Companies Court must defer to the Tax Tribunal in a case of this type'. In other words, it was not automatic that the Companies Court must subordinate its jurisdiction to the Tax Tribunal. The Court of Appeal went on to hold that the Companies Court '… Need not defer to the tax tribunal in every case, though it may often choose to do so'. (In other words, the Companies Court had a wide discretion as to what to do.) Therefore the High Court's judgment was to be overturned because it did not exercise its discretion as to whether or not it was appropriate for the matter to be resolved by the Tax Tribunal; it had instead automatically deferred to the Tax Tribunal. There were two building blocks which underpinned the Court of Appeal's judgment.

The questions which the Companies Court and the Tax Tribunal were being asked to consider were not identical. The Companies Court was being asked to consider if there was sufficient evidence available to conclude that the circumstances giving rise to the winding-up petition were being disputed in good faith. The Tax Tribunal was, however, being asked to consider if an appeal against a VAT assessment could be made successfully. The outcome of one appeal did not necessarily determine the outcome of the other. For example, if a company is placed into liquidation its right to bring an appeal to the Tax Tribunal is not abrogated: the right simply vests in the liquidator. Therefore the Court of Appeal held that as the Companies Court and the Tax Tribunal were considering questions which, although similar, were not identical it was inappropriate for the Companies Court to abrogate its jurisdiction in favour of the Tax Tribunal.

The Court of Appeal also found the reasoning in the earlier Court of Appeal decision *Altomart Ltd v Salford Estates* (*No 2*) *Ltd* [2014] EWCA

Civ 1575, [2014] All ER (D) 102 (Dec) highly persuasive. In Salford the Court of Appeal had considered if a winding-up petition should be stayed pending the outcome of arbitration proceedings. The Court of Appeal held in Salford that it was correct to do so because the Companies Court had reached its judgment based on the exercise of its discretion: the Companies Court had not automatically abrogated its jurisdiction. Therefore the Court of Appeal concluded in Changtel that the High Court had applied the wrong test because it had not exercised its discretion and had automatically subordinated its jurisdiction to the Tax Tribunal.

The Court of Appeal held that in the context of a winding-up petition the Companies Court had a wide discretion as to what to do. Therefore, and in consequence of its erroneous conclusion that the Companies Court must abrogate its jurisdiction to the Tax Tribunal, the High Court had not focussed on the evidence with the necessary detail which was required. The Court of Appeal re-considered the evidence as to whether Changtel had genuinely made exports out of the UK. The Court of Appeal also heard new evidence. The Court of Appeal held that the winding-up petition was not disputed in good faith on substantial grounds. In effect, there was not sufficient evidence to support Changtel's assertion that the goods had been exported from the UK.

To what extent is the judgment helpful in clarifying the law in this area, and what can creditors learn from the judgment?

The Court of Appeal's judgment should be considered alongside its earlier decision in Salford. In summary, the Companies Court will not fetter its discretion as to what to do or not to do in the context of a winding up behind a specialist tribunal.

The judgment is of wide-ranging application to all creditors, not just VAT and tax creditors. This is because the judgment makes it clear that the Companies Court's discretion as to what to do is a wide one and that this jurisdiction will not automatically be subordinated to a specialist tribunal.

(7) Technology and insolvency – how can startups protect their IP?

What are the insolvency implications of technology startups? Frances Coulson, senior partner and head of insolvency litigation at Moon Beever, and Indradeep Bhattacharya, intellectual property associate, and Jonathan Little, partner at Jones Day, consider the issues.

The early stages of a tech startup can be a whirlwind. Amid the essential startup activity, intellectual property sometimes takes a back seat. What do tech startups need to understand about the different types of IP and how to protect them?

Indradeep Bhattacharya and Jonathan Little (IB & JL): For a tech startup, IP can be one of the most valuable (if not the most valuable) asset for the company. It may provide the foundation of the business, differentiate its offering from its competitors, and can often be used as leverage to secure funding to take the business to the next step.

Tech startups therefore need to have a clear understanding about the nature and scope of the IP assets the company owns and put in place robust systems to protect and commercialise the IP. The following points are key:

- It is important to formulate an IP protection strategy – early. If the company does not acquire appropriate and adequate rights to the IP right at the outset, the service or product offering can be compromised from the start. Fixing things later on can be tricky and very expensive.
- Companies should use appropriate ‘clean room’ procedures for handling third party IP. Some of the most common disputes in this arise in relation to competing claims for ownership of IP.
- The company should ensure that it has appropriate licences for the use of third party IP and that these allow the use of the IP by the company, and also apply to any end customer products.
- Watch the use of open source software as this will often have disclosure obligations and the licensing restrictions for derivative software.
- Put in place escrow protection from the outset.
- It is also essential the company not only puts in place the right procedures but also documents these appropriately. When the business is looking for investment or for an exit the investors will want to see executed agreements.

What are the relevant IP assets in technology startups?

IB & JL: Typically, the most important IP asset for a startup is the developed software, which may encompass patents, copyright and/or database rights protection. There is also likely to be a significant body of confidential information (trade secrets) underlying the use and operation of the software and technology which needs to be protected. It is also important to realise that the ability to market the business effectively and through the right channels will be key, and that it is therefore prudent to seek early trade mark protection over the chosen brand/business logos.

What are common problems for tech startups that lead to insolvency situations?

Frances Coulson (FC): Like any startups, companies may underestimate the investment needed to maintain cash flow in the early days. The old adage 'cash is king' holds true across businesses. Ensure proper capitalisation or a decent line or funding, and be realistic with your business plan and the time it will take to get into the black. R & D relief can be claimed to alleviate tax, and most startups will make losses in the first year or so. It is a false economy not to get proper advice in creating your plan and funding line. Protect your IP or you are pouring money into a black hole for someone else's benefit.

It may be wise to hold the IP in a separate vehicle subject to taking detailed advice and considering directors' duties. Ensure employee and officer contracts are tight – particularly restrictive covenants. Ensure data is properly managed and relevant consents obtained (where appropriate) for the right range of uses.

What options are out there for tech startups facing insolvency?

FC: Tech startups face similar issues, more often than not, to those that professional practices face in an insolvency situation. Depending on the extent of product development achieved, it is possible that there is little in the way of tangible assets to sell, and the value of the business is tied up in the minds and ideas of those who started the enterprise. The lack of assets can make restructuring a difficult prospect.

If creditors won't be patient (and bear in mind potential personal liability for trading insolvent for too long), then take advice from an insolvency practitioner or solicitor. If the advice is to continue trading, this will protect the directors and if not, they can best advise on the options. However, innovation and entrepreneurs were intended to be encouraged by the Enterprise Act 2002 and so an administration (probably a pre-packed admin) would be recommended, allowing the rescue of the business and the continuation of the idea. Other alternatives would be a company voluntary arrangement (CVA) (but creditors may be unlikely to agree as they will have zero track record with the company); or a liquidation where the directors could seek to buy the assets from the liquidator. The benefit of the admin over the liquidation would be to allow continuity and retention of key staff.

In the event of insolvency, what do insolvency practitioners need to take into account – for example when selling off IP assets such as databases and licences?

FC: Data protection can be an issue if personal data is held (e g customer data) and insolvency practitioners must consider what data they hold

(electronic and manual); the permissions given by the individuals when the data was supplied; whether the company was notified as a data controller – and other issues. Different considerations apply depending on the type of appointment, so take advice if unclear. IP must be properly valued by someone experienced in the relevant area and the insolvency practitioner needs to take care to ensure there is no current intellectual property right infringement. Licences may be non-transferable or contain certain qualifications, depending on the specific area – so be very careful about the details.

CASE LAW

(1) Thandi v Sands (Trustees in Bankruptcy of Tarlochan Singh) [2014] All ER (D) 315 (Jul), [2014] EWHC 2378 (Ch)

Chancery Division, Birmingham District Registry before HHJ David Cooke.

Trust and trustee – Creation of trust – Bare trust – S being registered proprietor of 16 properties – S being made bankrupt – S's father, T, applying to court, claiming to be sole beneficial owner of properties – Whether T being sole beneficial owner.

The judgment is available at: [2014] EWHC 2378 (Ch).

Facts:

S was made bankrupt in September 2011. At the date of the bankruptcy, he had been the registered proprietor of 16 properties in the Coventry area. T, his father, applied for an order that the properties be transferred to him on the basis that he was the sole beneficial owner of all of them. He claimed that the properties had never formed part of the bankruptcy order.

T submitted that the properties were held on a bare trust for him. He relied upon a deed of trust of August 2003, which was the date of the acquisition of the last of the properties.

Held:

The application would be dismissed.

On the balance of probabilities, the deed had not been created in 2003 but had been created in 2006 and backdated. On the evidence, both S and T would have been prepared to give any evidence that would assist them to keep the family assets away from creditors. Applying established principle, all or substantially all the finance for acquisition of the initial properties had been provided by T. He had chosen, however, to have them all transferred to, or purchased in the name of, S. It was possible that he had

intended to have them held on trust for him, but that was by no means the only possible interpretation. It was clear that all the properties had been treated by S as if they had belonged beneficially to him. Regarding the deed of trust, there was no evidence to show dealing with the properties or their income other than the basis that S was the beneficial owner. The evidence suggested that S had acted as he had done, with his father's full knowledge and approval, because neither he nor his father had considered him to be a trustee at all (see [67], [75]–[79] of the judgment).

There had been no trust established over any of the properties by the common intention of S and T at any time (see [80] of the judgment).

Stack v Dowden [2007] 2 All ER 929 applied.

(2) National Asset Loan Management Ltd v Cahillane; Re John Christopher Cahillane [2015] All ER (D) 171 (Jan), [2015] EWHC 62 (Ch)

Chancery Division before Mr Kevin Prosser QC (Sitting as a Deputy Judge of the High Court).

Bankruptcy – Insolvency – Petition – Order – Claimant creditor serving statutory demand on defendant – Judge dismissing defendant's application to set aside statutory demand and for extension of time to adduce supplemental expert reports – Claimant presenting bankruptcy petition against defendant – Claimant appealing against orders by Chief Registrar adjourning bankruptcy petition and making directions on the defendant's application to rescind or vary orders of judge – Whether chief registrar erring – Whether court having jurisdiction to review, vary or rescind appellate orders of judge – Whether application to vary or rescind judge's order failing on merits – Insolvency Act 1986, s 375.

Facts:

Section 375 of the IA 1986 provides, so far as material: '(1) Every court having jurisdiction for the purposes of the Parts in this Group [that is, the Parts of the Act relating to individual insolvency] may review, rescind or vary any order made by it in the exercise of that jurisdiction. (2) An appeal from a decision made in the exercise of jurisdiction for the purposes of these Parts by a county court or by a registrar in bankruptcy of the High Court lies to a single judge of the High Court …'.

Between 1999 and 2009, Allied Irish Bank (AIB) made loans to the defendant debtor, C, and to entities whose indebtedness he had guaranteed. The loans were to fund the purchase of a number of residential properties and undeveloped land in Ireland (the properties) and were secured on those properties (the security). In 2010, AIB transferred the benefit of the loans, including the security, to the claimant company,

NALM. NALM appointed B as receiver of the properties and later served a statutory demand on C, under s 268(1)(a) of the IA 1986. C applied to set aside the statutory demand, relying only on r 6.5(4)(c) of the Insolvency Rules 1986, SI 1986/1925 (the Rules), which provided that the court might grant such an application if the court was satisfied that the value of the security equalled or exceeded the full amount of the debt. Each party was allowed to adduce expert evidence in the field of chartered surveying in respect of the value of the properties. At a hearing before a registrar, C applied for a second extension of time to adduce a supplemental expert report and valuations. That application and an application to set aside the statutory demand were dismissed and NALM was given permission to present a bankruptcy petition. C appealed to the High Court. A judge dismissed C's appeal on the ground that the expert report did not support a contention that the present value of the security equalled or exceeded the full amount of the debt. In making that decision, the judge had held, in agreement with the registrar, that the relevant value of the security was the present value and not a future value. C applied to the High Court, under s 375 of the IA 1986 for an order to rescind or vary the judge's order. NALM presented a bankruptcy petition against C. C applied for that petition to be adjourned pending the hearing of his s 375 application. The Chief Registrar adjourned the bankruptcy petition, having considered that C had not had an adequate opportunity to obtain expert evidence and that if he could put in that further evidence, he might be able to fill in the gap identified by the judge. NALM appealed.

NALM submitted that the Chief Registrar's refusal to make a bankruptcy order was a wholly wrong exercise of his discretion in that the s 375 application was bound to fail, because, among other things: (i) s 375 of the Act did not confer jurisdiction to review, vary or rescind an appellate order; and (ii) the application was hopeless and doomed to fail on the merits.

Held:

The appeal would be allowed.

(1) Section 375(1) gave the court jurisdiction to review, vary or rescind the appellate orders of the judge (see [43] of the judgment).

Appleyard v Wewelwala [2013] 1 All ER 1383 not followed; *Sands v Layne* [2014] All ER (D) 141 (Nov) not followed.

(2) A debtor applying to set aside a statutory demand under r 6.5(4)(c) had to prove on the balance of probabilities that the value of the security, determined on a forced sale basis as at the time of the statutory demand or possibly at the time of a hearing, equalled or exceeded the full amount of the debt. Rule 6.5(4)(c) required such, irrespective of the identity, status, functions, objectives and policies of the creditor (see [47] of the judgment).

In the light of the requirements imposed on C by r 6.5(4)(c), the s 375(1) application was bound to fail on the merits. The further evidence sought to be adduced, namely a further supplemental expert report and valuations, could not realistically or arguably support a contention that the present value of the security equalled or exceeded the full amount of the debt. It followed that the Chief Registrar's suspicion that if C could put in that further evidence then he might be able to fill in the gap identified by the judge, was unfounded. The appeal would be allowed on that ground alone (see [47], [49], [52], [53] of the judgment).

A bankruptcy order would be made. The application under s 375(1) would be dismissed (see [58] of the judgment).

Jeremy Goldring QC and Susannah Markandya (instructed by Edwin Coe LLP) for NALM.

Hilary Stonefrost (instructed by Portner & Jaskel LLP) for C.

(3) Re Northsea Base Investment Ltd [2015] All ER (D) 202 (Jan), [2015] EWHC 121 (Ch)

Chancery Division, Companies Court before Mr Justice Birss.

Insolvency – Jurisdiction – Applicant companies being incorporated in Cyprus – Administrators on behalf of each of applicant companies seeking declaration that centre of main interests (COMI) being England and Wales – Whether evidence rebutting presumption that COMI being state of registered office, namely, Cyprus – Council Regulation (EC) 1346/2000, art 3, recital 13.

Facts:

All eight of the applicant companies were incorporated in Cyprus, shared the same company registered office in Cyprus and had, essentially, the same form of Cypriot corporate documents. The third to eighth applicant companies (the ship companies) were special purpose vehicles. Each company owned a single ship in the fleet. Those six ship companies were themselves all 100% owned by the second applicant, Baltic Tankers, which in turn was itself 100% owned by the first applicant, NSBI. The sole shareholder of NSBI was a corporation, incorporated in Nevis. The corporation was owned in broadly equal shares by three Nevis family trusts. All three of the settlors of those trusts were directors of Marine Cross. Marine Cross was a shipping agent incorporated in the United Kingdom, with its registered offices in London. The companies were the only client of Marine Cross. The witness statement of B, a director of Marine Cross, explained that the operations and management of each of the ship companies were devolved to Marine Cross. Applications were made on behalf of the administrators for each of the applicant companies for a declaration in relation to each company that the centre of main

interests (COMI) was England and Wales, within the meaning of Council Regulation (EC) 1346/2000 (on insolvency proceedings). The purpose of declaring the COMI was to assist in the exporting of the administration to other jurisdictions.

It fell to be determined whether the declarations sought should be granted. In so determining, the court gave consideration to the point of view of the banks, who were the largest creditors of the companies (see [25] of the judgment).

Held:

The legislation made it clear that the presumption was that the COMI of the company would be the state of its registered office, which was Cyprus. The burden was on the applicants to establish a different COMI and that would involve a comprehensive review of all the facts, with a particular focus on objective matters and matters ascertainable by third parties. On the evidence, it was clear that the only realistic possible states which represented the COMI for the ship companies were Cyprus or England. As between the two states, B's evidence established sufficient evidence relating to the administration of the ship companies to rebut the presumption in favour of Cyprus and establish that the COMI of the ship companies was England and Wales. Since neither NSBI nor Baltic Tankers had any operational function as such, the only relevant COMI factors relating to those companies were those relating to the banks. Looked at that way, the presumption was rebutted on the evidence of B. The COMI of NSBI and Baltic Tankers was also England and Wales (see [29], [30] of the judgment).

Accordingly, the declarations sought by the applicants would be granted (see [31] of the judgment).

Eurofood IFSC Ltd, Re: C-341/04 [2006] All ER (D) 20 (May) considered; *Interedil Srl v Fallimento Interedil Srl*: C-396/09 [2011] All ER (D) 195 (Oct) considered.

Felicity Toube QC (instructed by Proskauer Rose (UK) LLP) for the applicants.

(4) Sebry v Companies House [2015] All ER (D) 221 (Jan), [2015] EWHC 115 (QB)

Queen's Bench Division before Mr Justice Edis.

Negligence – Causation – Breach of duty causing or contributing to damage – Incorrect data being entered on companies register regarding liquidation of company – Company going into liquidation – Claimant director bringing action against defendants companies house and registrar of companies

regarding entering of false information on register – Whether defendants owing duty of care – Whether breach of duty of care causing administration.

Facts:

The claimant was the managing director of a company Taylor and Sons Limited (the company). The defendants were, respectively, Companies House which was an executive agency of the Department for Business, Innovation and Skills (the department), and the Registrar of Companies who was the chief executive of the first defendant. The two defendants were, effectively, the same person. A liquidation document examiner at companies house described the company as being in liquidation when it was not. A winding-up order was registered not against Taylor and Son (singular) but against the company. The error had two components: first a systemic failure to ensure that policies were applied and secondly an individual act of carelessness. That information was entered on the company register and although later removed, the information was then disseminated by word of mouth and many of the creditors and suppliers of the company acted on it without themselves ever seeing the original entry. The company went into administration in April 2009. The evidence was that the directors put the company into administration because it had run out of cash. The cash shortage was caused by the rumour that the company was in financial trouble, which was caused by the error. The administrators assigned any cause of action it might have had to the claimant who therefore brought a claim in the shoes of the company. The claimant alleged a breach of duty in respect of the defendants on the basis of a statutory duty of care said to have been owed by the defendants to the company that in discharging their functions and/or maintaining the register in accordance with s 1080 of the Companies Act 2006, the defendants owed a statutory duty in respect of which information was being entered or recorded, to take reasonable care and skill so as to ensure that incorrect information was not entered on the register relating to that company. An identical duty was also said to arise at common law.

The issues were whether the defendants owed the company a duty of care under statute or common law in the terms alleged (the duty issue); (ii) whether, if so, the defendants' breach of duty had caused the company to enter administration (the causation issue). Consideration was given to the nature of the 'special relationship' needed to have a duty of case in the sense used in *White v Jones* [1995] 1 All ER 691.

Held:

The claim would be allowed:

There were three approaches to the determination of the existence or otherwise of a duty of care at law. Incrementalism (essentially argument from precedent), assumption of responsibility and the 'three stage Caparo

test'. Where the Registrar undertook to alter the status of a company on the Register which it was his duty to keep, in particular by recording a winding-up order against it, he did assume a responsibility to that company (but not to anyone else) to take reasonable care to ensure that the winding-up order is not registered against the wrong company. That special relationship between the Registrar and the company arose because it was foreseeable that if a company was wrongly said on the Register to be in liquidation it would suffer serious harm. The system placed a degree of trust therefore in the Registrar's staff to ensure that it did not damage companies which had no way of defending themselves against errors. When such an exercise was performed in private and behind closed doors, those doing it had truly assumed responsibility for it. White v Jones made it clear that the class could be adjusted to meet considerations of practical justice and in my judgment practical justice suggested strongly that it should contain, but be limited to, the company whose record was being changed. A registrar owed a duty of care when entering a winding-up order on the register to take reasonable care to ensure that the order was not registered against the wrong company. That duty was owed to any company which was not in liquidation but which was wrongly recorded on the register as having been wound up by order of the court (see [79], [111] of the judgment).

Applying each of the three tests for the existence of a duty of care, the court concluded that on the facts there was a relationship between the company and companies house, at the time when the liquidation document examiner entered the winding-up order against it, which was a 'special' one. It followed that there was an assumption of responsibility and that the company was entitled to succeed on the duty issue. In the instant case, foreseeability of harm was obvious. Therefore the limbs of the 'three stage Caparo test' which were in play were proximity and whether it was fair, just and reasonable to impose a duty. Given that a duty was owed to one individual company whose identity was readily discoverable by the liquidator document examiner meant that it was fair and just to impose a duty. The class was limited and its members ascertainable at the stage when treatment was given. Further it was fair, just and reasonable to impose the duty of care. The evidence was that the company had gone into administration as a direct result of the false information published and therefore on the evidence causation had been proved (see [32], [48], [107], [114], [115], [118] of the judgment).

White v Jones [1995] 1 All ER 691 applied.

Clive Freedman QC and Neil Mendoza (instructed by Clyde & Co) for the claimant.

Paul Rees QC and Neil Sheldon (instructed by The Treasury Solicitor) for the defendants.

(5) Changtel Solutions UK Ltd (formerly Enta Technologies Ltd) v Revenue and Customs Commrs [2015] All ER (D) 211 (Jan), [2015] EWCA Civ 29

Court of Appeal, Civil Division before Lord Justice Longmore, Lord Justice Patten and Lord Justice Vos.

Company – Winding up – Petition – Appellant Revenue and Customs Commissioners (Revenue) making tax assessments requiring payment by respondent company in respect of VAT – Company applying to First-tier Tribunal (Tax Chamber) (FTT) for extension of time to appeal against assessments – Revenue presenting wind-up petition – Company applying to restrain advertisement and/or strike out petition – FTT granting permission to appeal out of time and not being persuaded appeals being hopeless – Companies Court hearing company's applications – Judge granting company injunction restraining advertisement of petition and dismissing petition – Whether judge erring in holding that Companies Court should defer to FTT in cases where winding-up petition being based on VAT assessment – Whether judge ought to have exercised discretion to wind up company – Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules , SI 2009/273, r 8(3)(c).

Facts:

The present proceedings concerned, in particular, six VAT assessments made in respect of the respondent company (the company). The appellant Revenue and Customs Commissioners (the Revenue) had raised those assessments for each of the six months between July and December 2012, on the basis that certain goods allegedly exported by the company had not, in fact, left the United Kingdom, as had been claimed by the company (the dispatch assessments). The Revenue wrote to the company warning that, if payment was not made in respect of 15 VAT assessments and interest (including the dispatch assessments), it would commence legal proceedings that might result in a petition to wind-up the company. The company issued a notice of appeal against the VAT assessments, including the dispatch assessments, seeking an extension of time in which to lodge the appeal. The Revenue presented a winding-up petition (the petition) against the company in respect of the debts. The company issued an application to restrain advertisement of and/or to strike out that petition. The First-tier Tribunal (Tax Chamber) (the tribunal) considered the company's application to extend time to appeal the outstanding VAT assessments in respect of which the petition had been presented. The tribunal indicated that it would grant permission to appeal out of time and that it was not persuaded that the appeals were hopeless. The judge sitting in the Companies Court later granted the company the injunction sought and dismissed the petition. On the basis of r 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules,

SI 2009/273, which gave the tribunal power to strike out an appeal, the judge decided that the Companies Court should defer to the tribunal to decide whether the petition debt was disputed in good faith on substantial grounds. The Revenue appealed.

It submitted, inter alia, first, that the judge had been wrong to have held that, after the introduction of r 8(3)(c) of the Rules, the Companies Court should defer to the tribunal in cases where the winding-up petition was based on a VAT assessment. Second, the judge ought to have decided that the debt in respect of the dispatch assessments on which the petition had been based had not been disputed in good faith on substantial grounds or, in other words, that the appeal against the dispatch assessment had had no real chance of success. The court considered new evidence which the parties agreed should be admitted.

Held:

The appeal would be allowed.

(1) It was true that the adjudication on the correctness of a tax assessment had been entrusted by Parliament to a specialist tax tribunal. However, that did not mean that the question that the Companies Court had to decide was the same or even substantially the same as the one that faced the tribunal. When the tribunal had reached a conclusion on such an issue, that decision was normally likely to be a compelling factor in the Companies Court's exercise of discretion. That discretion was not, however, completely abrogated by the jurisdiction of the tribunal. It need not defer to the tribunal in every case, though it might often choose to do so. Further, r 8(3)(c) of the Rules was merely a procedural mechanism to allow the tribunal to short-cut its previously somewhat lengthy processes. It did not change the substantive jurisdiction of the tribunal to decide on the validity of assessments, nor did it change in any way the substantive jurisdiction of the Companies Court to decide on whether a company should be wound up in the particular circumstances of each case (see [40], [45], [71], [74], [75] of the judgment).

The judge had been wrong to have said that the Companies Court had to defer to the tribunal in a case of the present kind. He had been influenced in what he had said by his strong reliance on the fact that the tribunal had already decided that the appeals against the assessments were not 'hopeless'. The judge had been quite right to have had regard to that decision, but its existence had not meant that, in a proper case, the Revenue could not present a petition. While the tribunal seemed to have considered the merits of the appeals, it had not had before it the same evidence as had been before the judge. It had not been considering whether the appeals should be struck out under r 8(3)(c) of the Rules, but only whether time should be extended for those appeals to be brought. While the judge had been right that the tribunal had considered the likelihood of success, it

had only reached the global conclusion that the appeals had not been 'hopeless'. It had not given reasons and it appeared that it had not been addressed, as the judge and the present court had been, on the detail of the transactions that had been in issue. Thus, the decision that the tribunal had reached had been relevant, but not conclusive. The view that the judge had taken had been significantly affected by his inappropriate view that it had been incumbent on the Companies Court to defer to the view taken by the tribunal. In those circumstances, his whole approach to the exercise of his discretion had been flawed and could not stand (see [46], [47], [49], [71], [74], [75] of the judgment).

Autologic Holdings plc v IRC [2005] 4 All ER 1141 considered; *Altomart Ltd v Salford Estates* (*No 2*) *Ltd* [2014] All ER (D) 102 (Dec) considered.

(2) The Companies Court was obliged to look at the matter in a common sense way and, on that basis, there was no possibility that any court at a trial would believe that the goods in question had been proved to have been exported from the UK. It had been appropriate for the judge to have had regard to the finding of the tribunal, but its determination could not affect the conclusion that ought to have been reached on the petition. The position had been the same before the judge, but the new evidence made it even less likely that the company's case could be believed. The judge had described the Revenue's case as 'prima face formidable'. That should have led him to have concluded that the dispatch assessment had not been disputed in good faith on substantial grounds. Accordingly, he ought to have exercised his discretion to wind-up the company (see [66], [67], [69], [74], [75] of the judgment).

The appeal would be allowed and: (i) the order restraining the advertisement of the petition would be discharged; (ii) the company's application to dismiss the petition and/or to restrain advertisement of the petition would be dismissed; (iii) the need for advertisement of the petition would be dispensed with; and (iv) an order would be made for the compulsory winding-up of the company (see [73]–[75] of the judgment).

R (*on the application of Teleos plc*) *v Customs and Excise Comrs*: C-409/04 [2007] All ER (D) 160 (Sep) considered.

Decision of David Donaldson QC [2014] All ER (D) 233 (Mar) Reversed.

Tina Kyriakides* (*instructed by Dass Solicitors*) *for the company.

Sarah Harman* (*instructed by the General Counsel and Solicitor to the Revenue and Customs Commissioners*) *for the Revenue.

(6) Secretary of State for Business, Innovation and Skills v PLT Anti-Marketing Ltd [2015] All ER (D) 122 (Feb), [2015] EWCA Civ 76

Court of Appeal, Civil Division before Lord Justice Richards, Lord Justice Ryder and Lord Justice Briggs.

Company – Winding up – Petition – Appellant company, PLT, providing service to eliminate or reduce unwanted marketing – Respondent Secretary of State seeking winding-up of PLT – PLT giving undertakings pending final hearing of petition – PLT applying to vary undertakings – Judge determining, as preliminary issue, that, for PLT to continue to trade and seek new customers without disclosing that telephone and mail preference services being provided to public for free would involve breach of applicable regulations – Application being refused – Whether judge's determination of preliminary issue being correct – Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 6 – Council Directive (EC) 2005/29.

Facts:

The appellant company, PLT, provided members of the public with a service to eliminate or reduce unwanted marketing. For a fee, PLT would procure the registration of its customer with the telephone preference service (TPS) and mail preference service (MPS). The respondent Secretary of State sought the winding up of PLT in the public interest on the grounds of, inter alia, breaches by omission of reg 6 of the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, which implemented Council Directive (EC) 2005/29 (concerning unfair business-to-consumer commercial practices in the internal market). In particular, it was alleged that PLT failed to inform the public, prior to entering into a contract and requiring payment, that those individuals could obtain a similar service free of charge through registration with the TPS and MPS. The Secretary of State's application for the appointment of a provisional liquidator was refused, but on terms. One term was that PLT would not sell its services to new customers before the final hearing of the petition without informing them that the services of TPS and MPS were available free of charge. PLT gave that undertaking. PLT applied to vary its undertakings and invited the judge to treat the question whether continued trading, including the recruitment of new customers, without having disclosed that the TPS and MPS services were available to the public free of charge would be a breach of reg 6 of the Regulations as a preliminary issue. The judge determined that question as a preliminary issue, which was to be binding at trial, and held that, for PLT for to continue to trade and seek new customers without disclosing that the TPS and MPS services were provided to the public free of charge would involve a breach of reg 6 of the Regulations. He found that the fact that TPS and MPS offered their services for free was material information, under reg 6 of the

Regulations (see [36] of the judgment). Consequently, the application to vary the undertakings failed. PLT appealed.

The main issue on the appeal was whether the judge's determination of the preliminary issue had been correct. In the circumstances, the court declined to consider whether, if PLT succeeded as to the preliminary issue, the undertakings should be varied.

Held:

The court ruled:

The judge's analysis had contained errors. However, it did not follow from the disagreement with the judge's analysis that the only correct conclusion was that the fact that TPS and MPS provided their services free was not material information, within the meaning of reg 6 of the Regulations, so that PLT could trade as proposed in its evidence in support of its variation application without breach of reg 6 of the Regulations. The answer to that question depended on all the features and circumstances of its commercial practice, viewed as a whole. The court could go no further than to say that the preliminary issue should not have been finally and bindingly determined against PLT on the basis that the information about the free availability of TPS and MPS's services had been material information within the meaning of reg 6 of the Regulations. Nor should it be determined that the information had not been material information, in advance of a trial. It was a contextual question for which the necessary contextual facts had yet to be established (see [37], [38], [44], [56], [57] of the judgment).

The appeal would be allowed to the extent of setting aside the judge's determination of the preliminary issue, upon the basis that it was an issue which should be determined only at the final hearing of the petition. However, the judge's order which refused to vary PLT's undertakings would not be disturbed (see [55]–[57] of the judgment).

Office of Fair Trading v Purely Creative Ltd [2011] All ER (D) 47 (Feb) considered.

Simon Popplewell and Adam Deacock (instructed by Leathes Prior) for PLT.

Jessica Simor QC and David Mohyuddin (instructed by Howes Percival LLP) for the Secretary of State.

(7) Hayes v Butters [2014] All ER (D) 248 (Dec), [2014] EWHC 4557 (Ch)

Chancery Division before Nugee J.

Bankruptcy – Trustee – Vesting of property in trustee – Claimant, H, being bankrupt – H bringing proceedings against first and second defendants for harassment – Third defendant trustee in bankruptcy, G, applying to strike out claim for damages – G submitting cause of action vested in him as part of H's estate and it being abuse of process for H to pursue it himself – Whether cause of action vesting in G – Whether application to be struck out – Protection from Harassment Act 1997, s 1(1).

Facts:

In 2005, CH, who was H's ex-wife and the second defendant, successfully petitioned for him to be made bankrupt. H was made bankrupt in March 2005, and discharged from his bankruptcy in spring 2006. The official receiver was originally made trustee of H's estate but, in June 2013, the third defendant, G, was made trustee. In November 2005, H issued a claim form against Mrs H and B, the first defendant, under the Protection from Harassment Act 1997. He claimed that B had carried out a campaign that had caused him and his wife anxiety and harm as well as substantial loss of earnings H sought both damages and an injunction. G responded that the cause of action vested in H's trustee as part of his estate; that the application was an abuse of process for H to pursue it himself, and that it should therefore be struck out.

G submitted that the claim was for financial loss as a result of harassment, which was a non-personal claim, with the result that the claim as a whole was a hybrid one and vested in the trustee, so that H was not entitled to bring the claim at all. Consideration was given to *Ord v Upton* (*as trustee to the property of Ord*) [2000] 1 All ER 193, which established that where a single claim gave rise to a claim both for personal loss within the exception and for non-personal loss that would prima facie vest in the trustee, and the claim was indivisible, the whole claim vested in the trustee, albeit any damages recovered in respect of the personal claim would be held on trust for the bankrupt.

Held:

The application would be dismissed.

(1) A claim for damages for harassment could not be characterised for the purposes of the law of insolvency as a purely personal claim in all circumstances. If, in a particular case, there was no question of any financial loss or any other resulting loss and the only claim that could be or was advanced was a claim for distress and anxiety, that was no doubt a purely personal claim. If, however, the harassment had caused financial loss, then it was no different to the claim for loss of earnings in *Ord v Upton*. There was no distinction between a medical negligence claim that led to both pain and suffering and consequential loss of earnings and a

harassment claim that led to both pain and suffering and consequential loss of earnings. If the former was a hybrid claim, so was the latter (see [36] of the judgment).

If H had a claim for financial loss it was, or ought to be assumed to be, a hybrid claim (see [37] of the judgment).

Ord v Upton (*as trustee to the property of Ord*) [2000] 1 All ER 193 applied; *Letang v Cooper* [1964] 2 All ER 929 considered; *Heath v Tang*; *Stevens v Peacock* [1993] 4 All ER 694 considered; *DPP v Dziurzynski* [2002] All ER (D) 258 (Jun) considered; *Huntingdon Life Sciences Ltd v Stop Huntingdon Animal Cruelty* [2003] All ER (D) 280 (Jun) considered; *Grady v Prison Service* [2003] 3 All ER 745 considered; *Young v Hamilton* [2010] NICh 11 considered; *Jones v Ruth* [2012] 1 All ER 490 considered.

(2) In *Ord v Upton*, the negligence complained of had taken place on a single occasion long before the bankruptcy in the matter. However, the cause of action under s 1(1) of the Act required a course of conduct that itself required conduct on at least two occasions. Moreover, it appeared that proof of two instances of conduct did not by itself amount to proof of a course of conduct. Where sufficient acts of harassment, necessarily at least two, had taken place and caused damage, whether in the form of anxiety and distress or financial loss or otherwise, the cause of action would be complete. If the campaign of harassment continued, each fresh act of harassment would be a continuation of the tort and would give rise to a new cause of action, at any rate if new damage was caused. It followed that, if it were established that (i) the defendants had committed at least two acts of harassment; (ii) those acts constituted a course of conduct; (iii) the acts had been in breach of s 1(1) of the Act; and (iv) the claimant had suffered losses of any sort as a result, the cause of action would be complete. If the only loss was personal, that remained vested in the bankrupt. If it included financial loss, it was a hybrid claim and formed part of his estate vesting in his trustee. If, further, a claimant had become bankrupt after acts A and B and the cause of action for those acts and the loss they had caused vested in the trustee as a hybrid cause of action, a claim in respect of act C taking place after the bankruptcy was a claim that belonged to the bankrupt and did not vest in the trustee, so long as it was: (i) a continuation of the course of conduct; (ii) wrongful and unjustifiable and hence in breach of s 1(1) of the Act; and (iii) causative of loss or damage (see [39], [55], [58] of the judgment).

In the present case, H had undoubtedly asserted that the harassment, both before and after the bankruptcy, had caused him financial loss, again both loss before and loss after the bankruptcy (see [51] of the judgment).

Therefore, the suggestion that the entire claim for damages brought by H was vested in G, and that it was an abuse of process for H to pursue it, was wrong. That in itself was enough to dispose of the application (see [61], [62] of the judgment).

Ord v Upton (*as trustee to the property of Ord*) [2000] 1 All ER 193 applied; *Majrowski v Guy's and St Thomas' NHS Trust* [2006] 4 All ER 395 applied; *Conn v Sunderland City Council* [2007] All ER (D) 99 (Nov) considered; *Jones v DPP* [2010] 3 All ER 1057 considered.

(8) Arif v Anwar [2015] All ER (D) 12 (Feb), [2015] EWHC 124 (Fam)

Family Division before Mr Justice Norris.

Divorce – Financial proceedings – Available assets – Wife issuing divorce proceedings – Wife holding family home subject to declaration of trust in favour of husband – Husband becoming bankrupt – Preliminary issues arising – Whether husband's son having beneficial interest in family home – Whether money in bankruptcy estate representing money taken for husband's benefit or money being owed to son.

Facts:

The husband and wife had lived together, with their child and the husband's son from his first marriage (RR) in an eight-bedroom house (the property) of which the wife was registered proprietor following a transfer to her in 2001. The property was valued at £1.75m. In 2003, the wife had executed a declaration of trust by which she had declared that she held the property in trust for the husband and agreed that she would, at his request and cost, transfer the property as he should direct (the 2003 declaration). In March 2011, the husband requested that the wife transfer the property and presented a form TR1 to her. The transferees were to be the husband and the second respondent, RR. The wife refused to sign the transfer and, in June, she presented a petition for divorce. She and the child moved into rented accommodation. In October, the husband was made bankrupt. A question in the divorce proceedings was whether there was sufficient in the bankruptcy estate for some modest financial provision to be made for the wife and child. RR had made a claim to a 50% share in the property, which he and the husband had allegedly agreed upon in 2006 in return for the investment of money held by the husband in RR's name that was used to carry out improvements to the property. RR further claimed that he was owed money from the bankruptcy estate. When his mother had died, her estate had included a property (Rifsons House). Rifsons House was vested in the husband and wife who declared that they held it as trustees and statutory owners for RR. Rifsons House was the subject of a charge in the sum of £245,000 which the husband later discharged. The husband later entered into an equity release loan secured on Rifsons House. The lender required a charge over a cash deposit of £245,000 to be made by the husband. The husband used £245,000 of the advance to meet that obligation. The judge directed the

trial of two preliminary issues: (i) whether RR had been, at the commencement of the divorce proceedings, the beneficial owner of a 50% share in the property or whether he was entitled to some other interest; and (ii) whether the borrowings had represented money from which the husband had benefited, whether RR could demonstrate that the borrowings had been paid off by him and whether the remaining borrowings represented money taken for the husband's personal benefit.

Held:

(1) Within families, many informal arrangements were made which were not intended to have legal consequences but to rest in familial obligations. Such an agreement had to be established on the balance of probabilities by clear evidence that survived appropriate scrutiny. In most cases that scrutiny would arise from the fact that the existence of the constructive trust or the estoppel would be a matter of contention between parties to the alleged agreement or understanding, whose respective cases would be tested at trial. But that was not so in every case. Where the issue as to the existence of the agreement or understanding was not (in reality) being argued out between the parties to it, then it was especially important to remember that the general policy of the law was that interests in land should be formally recorded and formally transferred and that that policy would be defeated if interests in property could be readily transferred simply by conversations between parties interested in a particular outcome which were not corroborated or otherwise soundly evidenced (see [43] of the judgment).

On the evidence, the 2003 declaration had been correct according to its terms and the property had been held by the wife upon trust for the husband and she had undertaken to transfer it at his direction. In the absence of any vitiating factor which might warrant the setting aside of that declaration, the court would give legal effect to that express trust. In 2006, it had been agreed between the husband and RR that RR could continue to share the property when he married, that the husband could use money held in accounts in his name but designated as RR's accounts to fund the necessary works and that the position as to what of RR's money had been spent and as to ownership of the property would be sorted out later once it was known what work had been done and what money had been used. There was no constructive trust as to 50% of the property by virtue of an agreement between the husband and RR. However, there was an entitlement by promissory estoppel in RR's favour. Money held by the husband to which RR could have lain claim had been used to pay for improvements to the property. RR had not objected because he was to receive some sort of interest at a later date in return for the use of his money. A number of conclusions were drawn from the evidence, and estimates were made regarding the sums contributed in the

absence of complete disclosure, which resulted in the judge holding that RR would be declared to have a 25% interest in the property (see [39], [47]–[66], [68]–[97] of the judgment).

(2) The husband had been entitled to recoup his £245,000 spent on redeeming the charge on Rifsons House and, insofar as the equity release loan had funded the payment of that £245,000, the husband had properly instructed his solicitor to treat the money as his own and the sums had represented proper borrowings by the trust to fund recoupment to the husband. The husband had not intended his discharge of the charge over Rifsons House to have been a gift; but had expected to be repaid; his right to recoup had neither been abandoned nor released (see [114]–[116] of the judgment).

Duncan Brooks and Marlene Cayoun (instructed by Hughes Fowler Carruthers Ltd) for the wife.

Valentine Le Grice QC (instructed by Zak Solicitors, Birmingham) for the husband.

Penelope Reed QC and Nicholas Fairbank (instructed by Saints Solicitors LLP, Birmingham) for RR.

Charles Russell Speechlys on behalf of the trustees in bankruptcy of the husband.

LEGISLATION

(1) Insolvency (Protection of Essential Supplies) Order 2015

SI 2015/Draft: The IA 1986 is amended to prevent essential IT and utility suppliers of businesses in certain formal insolvency procedures from exercising contractual rights to terminate the supply or to increase charges to the insolvent company on account of the insolvency. The Order comes into effect on 1 October 2015.

The IA 1986 is amended to give further protection to the essential supplies of insolvent businesses.

The purpose is to ensure that insolvency practitioners are able to secure supplies that are essential to facilitate a prospective rescue of the business. The instrument provides safeguards for those suppliers who will be affected to ensure they may terminate the contract or the supply in certain specific circumstances.

The amendments:

- extend the scope of IA 1986 to include a wider list of private suppliers of gas, electricity, water or communication services including the supply of utilities from a landlord to tenant;

- add to the present list of utility supplies to include the supply of goods or services that are for the purpose of enabling or facilitating anything done by electronic means, i e 'IT supplies'; and
- insert new sections which cause certain 'insolvency-related terms' in contracts to cease to have effect, thereby preventing a supplier from terminating a supply or contract, altering the terms of the contract or compelling higher payments for the supply, when a company enters administration or when a voluntary arrangement is approved in respect of a company or individual respectively.

(2) Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No 2, Savings and Transitionals) Amendment Order 2015, SSI 2015/54

SSI 2015/54: A minor clarification amendment is made to the Bankruptcy and Debt Advice (Scotland) Act 2014 (Commencement No 2, Savings and Transitionals) Order 2014, SI 2014/261, to substitute the word 'is' for 'was' in SI 2014/261, art 4(1)(b). The change comes into effect from 1 April 2015.

The minor clarification is in relation to the commencement of the Bankruptcy and Debt Advice (Scotland) Act 2014 (BDA(S)A 2014) and a savings provision by which most amendments in BDA(S)A 2014 do not apply to bankruptcies where the petition to court or debtor application to the Accountant in Bankruptcy for sequestration is presented or received before 1 April 2015.

(3) Insolvency Proceedings (Monetary Limits) (Amendment) Order 2015

SI 2015/26: Amendments are made to the Insolvency Proceedings (Monetary Limits) Order 1986, SI 1986/1996 to increase the level of debt and the total assets a debtor may have while still being eligible to apply for a debt relief order. The changes come into effect on 1 October 2015.

SI 1986/1996 sets out the eligibility requirements to be able to apply for a debt relief order. This includes the maximum level of assets and maximum debt that an individual may have. Debt relief orders were introduced in 2009 via an amendment to SI 1986/1996 to help those with small amounts of debt and limited assets obtain debt relief without the need to petition for bankruptcy.

The maximum level of assets and maximum debt that an individual may have is increased by this Order to reflect the current cost of living and corresponding debt.

(4) Insolvency Act 1986 (Amendment) Order 2015

SI 2015/Draft: From 1 October 2015, the minimum level at which a creditor may petition for an individual's bankruptcy is increased.

The Order amends the Insolvency Act 1986.

The bankruptcy level, ie the minimum debt or minimum total debts due to a creditor before that creditor can petition for bankruptcy of the debtor, is increased.

The increase applies only to petitions presented on or after 1 October 2015.

(5) Unpicking the Finance Bill 2015 – the new 'corporate rescue' tax relief

When a company is in financial distress, it needs to act quickly and one factor in determining which restructuring route to pursue may be the relevant tax treatment of the deal. By extending the cases where tax relief is available, the government hopes to promote a greater range of options. Lara Okukenu, senior tax manager at Deloitte, explains the changes put forward.

What changes does the Finance Bill 2015 make for companies in financial distress?

When an unconnected debt is released – ie the creditor waives the debtor's obligation to repay – amounts credited in the debtor's accounts in respect of the release will normally be taxable as loan relationship credits.

This requirement to tax the release credit does not apply where:

- the release is part of a statutory insolvency arrangement;
- the debtor meets certain 'insolvency conditions'; or
- the release is in consideration of ordinary shares issued by the debtor to the creditor (a debt/equity swap).

Despite this, however, until the draft Finance Bill 2015, no such relief was afforded for companies in financial distress for whom a debt/equity swap or formal insolvency processes were not appropriate. The government has sought to address this by introducing new provisions removing the need to bring into account loan relationship credits arising on a release of debt, where it is reasonable to assume that – but for the release – there would be a material risk that within the 12 months following the company would be unable to pay its debts.

What does 'financial distress' mean and what evidence must be provided to benefit from the tax relief?

The terms 'reasonable to assume' and 'material risk' should, when taken together, mean there must be a realistic likelihood of the company going into insolvency within 12 months of the date of the release if remedial action is not taken.

This is intended to hypothesise a position that would have happened but for the debt release. It is not intended to imply that the company's directors are currently in breach of their company law obligations by continuing to trade.

There is no prescriptive list of evidence that must be provided to benefit from the tax relief, however draft HMRC guidance does provide a list of the sort of circumstances one may look to, including:

- likely breaches of financial covenants, negotiations with third party creditors over release or restructuring of debt;
- enforcement actions taken by creditors;
- adverse trading conditions with no prospect of recovery, failure of a material customer or supplier, redundancies, business disasters, litigation that the company may be unable to meet;
- management accounts, reports and forecasts showing material cash flow shortfalls;
- qualified audit reports, accounts prepared on a break up basis; and/or
- an insolvent balance sheet (which is viewed by HMRC as the strongest evidence of the reasonable assumption test).

Given the subjective nature of this exemption, one would advise contemporaneous evidence is maintained. In many cases, the facts will be quite clear in practice.

When are the changes effective?

It is intended that the changes should be effective for any releases of a debtor relationship of a company on or after 1 January 2015.

However, as noted above, in applying the exemption it must be reasonable to assume that but for the release, there would be a material risk that within the 12 months following the release, the company would be unable to pay its debts.

How will the changes impact corporate restructurings?

The new general exemption is intended to facilitate corporate rescue without requiring a formal process or the uncertainties and restrictions

associated with debt/equity swaps. Hopefully, this will reduce the need for advance HMRC clearance which is currently viewed by companies (and their lenders) as a critical component of corporate restructurings.

The acid test will be whether it is feasible for companies and their advisors to conclude that as at the time of the release, the conditions are satisfied. In many cases, the facts will be clear. However, in boundary cases companies will need to assess whether clearance could be sought or, indeed, if they may need to revert to more familiar methods such as debt/equity swaps.

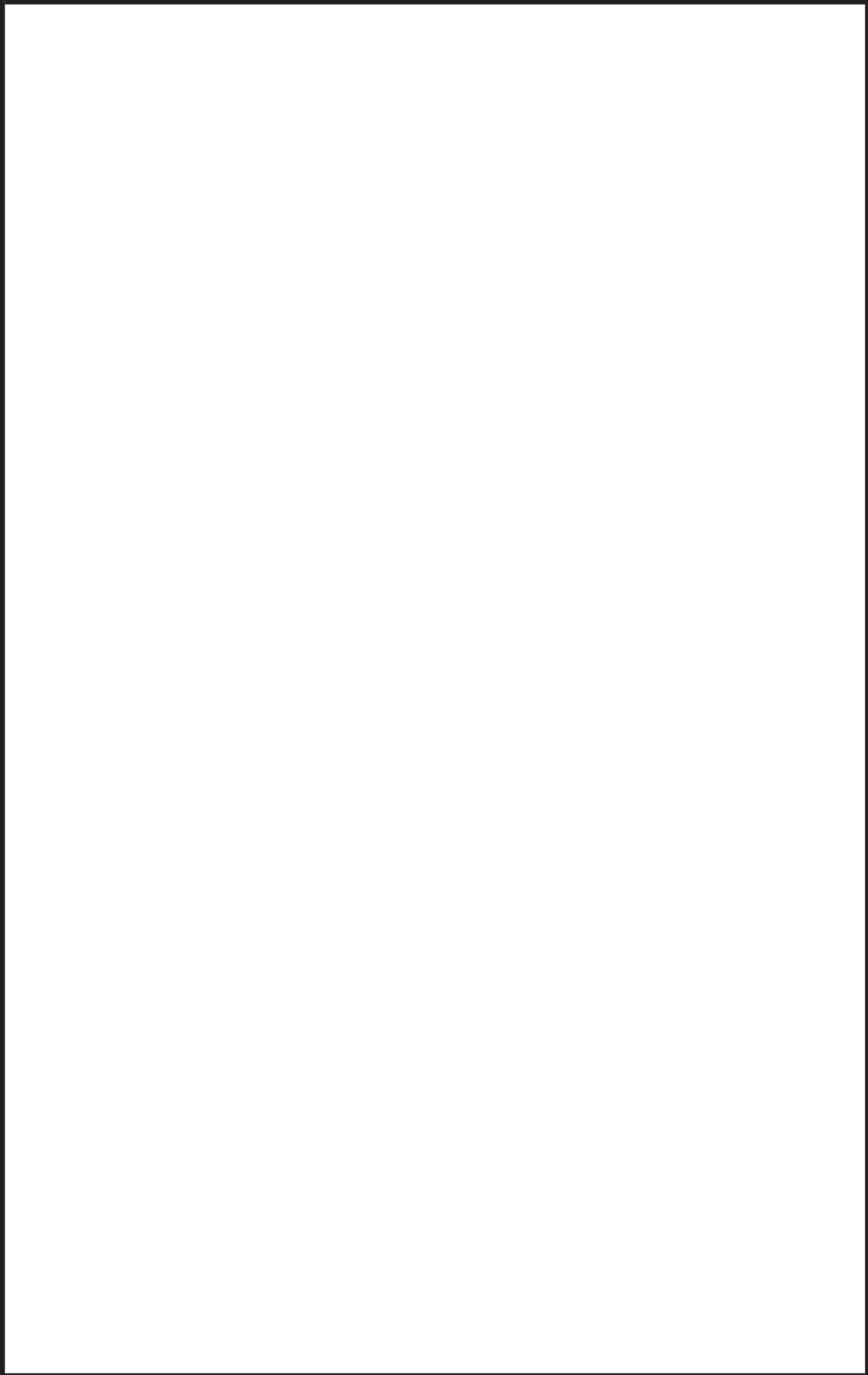
What other provisions of the Finance Bill 2015 should restructuring and insolvency lawyers be aware of?

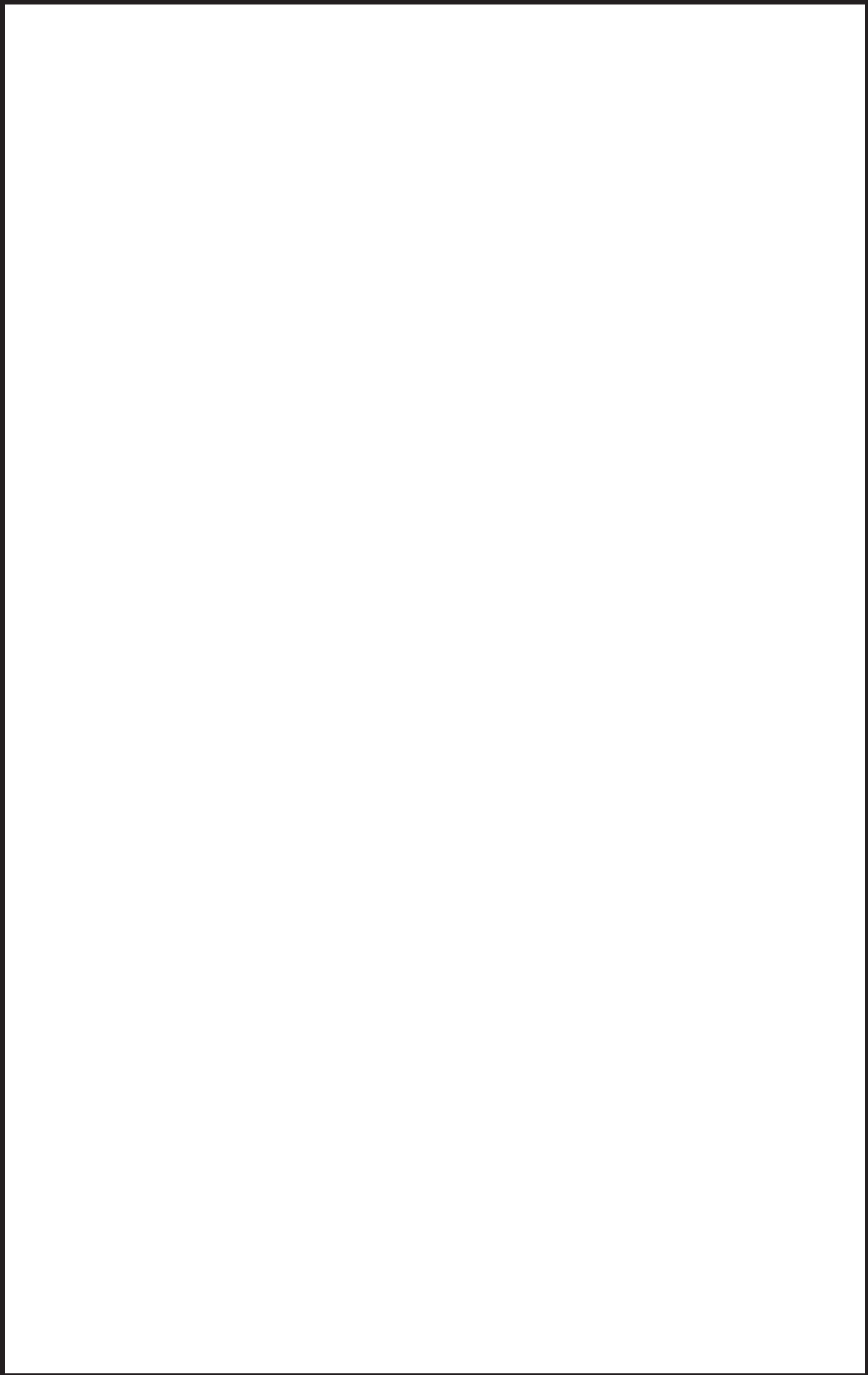
The proposed law changes are also intended to cover 'modifications' or 'replacements' of debts, sometimes referred to as 'amend and extend' exercises.

The terms 'modifications' or 'replacements' refer to the accountancy treatment whereby the debtor company realises a profit as a result of contractual terms having been changed.

In such a case, where it is reasonable to assume that but for the modification or replacement, there would be a material risk that within the 12 months following, the company would be unable to pay its debts, then again, no credit should be brought into account for tax purposes.

Equally however, any debit recognised on the reversal of an exempt credit will also be prevented from being brought into account. This prohibition does not apply to a release of debt on the basis that the debt no longer exists.





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