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Tolley's Company Law and Insolvency

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Dear Subscriber,

Welcome to the latest newsletter. Following the news section this newsletter contains four analysis pieces drawn from LexisPSL. The first piece ponders how the government's changes to insolvency law will help to protect UK businesses. Louise Webb and Alexander Gee of Baker & McKenzie LLP argue that the government is seeking to reflect the increasing reliance on technology services in their recent changes.

The second piece questions the significance of the court's decision in *Sands v Singh* [2015] EWHC 2219 (Ch), [2015] All ER (D) 304 (Jun). Joseph Curl, barrister at 9 Stone Buildings considers the extent to which the judgment clarifies the law regarding the filing and service of applications under the Insolvency Act 1986 (IA 1986) and evaluates what practical lessons can be taken away.

The third analysis piece mulls on recent law reform activity. With the Insolvency (Amendment) Rules 2015 having come into force from 1 October 2015, Susan Kelly of Squire Patton Boggs considers what this will mean for insolvency practitioners and the lawyers who advise them.

This takes us to the fourth analysis piece. Provisions in the Deregulation Act 2015 (DA 2015) and the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) aim to modernise and strengthen the restructuring and insolvency processes. However, Simon J Murfitt, consultant solicitor at Keystone Law LLP, believes there is a real danger that the resulting increased regulation could lead to greater costs and delays.

There are five case summaries dealing with insolvency and company law issues. There then follows one legislation summary covering the Deregulation Act 2015 (Commencement No 3 and Transitional and Saving Provisions) Order 2015.

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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) Guidance on phoenix companies published

The Insolvency Service (IS) has produced guidance on the law relating to the practice of carrying on a business through a series of companies where each becomes insolvent, so-called phoenix companies. It has also provided information on its role in investigating director misconduct.

When a company becomes insolvent, the insolvent company's business, but not its debts, is transferred to a new company. This entity is known as a phoenix company. When a company enters liquidation, insolvency law restricts who can reuse the company's registered name and trading names.

Law

Anyone who was a director in the 12 months before the company went into liquidation cannot, for a five-year period, take part in the management of another business with the same name.

Investigation

The guidance explains the IS's role in investigating cases where businesses fail due to director misconduct. However, it also highlights where it cannot investigate, for example, where a company has been dissolved. Nor can it use its powers to investigate or resolve individual commercial disputes between companies and their employees, customers, creditors or shareholders.

(2) Insolvency Service: Director disqualifications—6 October 2015

A number of directors have been disqualified, and businesses liquidated, following investigations by the Insolvency Service.

- Philip Keith Hearne has been disqualified as a company director for seven years for disposing of assets to the disadvantage of company creditors while acting as director of PKH Salvage Solutions Ltd.

- Manuchehr Maleki-Dizaji, director of Cromwell Auto Trade Limited, a company which sold vehicles and was active in money transfer, has been disqualified as a director for nine years for causing or facilitating another to cause the company to fail to maintain, preserve or deliver up adequate records to explain over £1.5m in receipts and payments through its bank account, and for trading as a money transfer agent when it did not have the required HM Revenue and Customs (HMRC) licence to do so.
- Young Erumuse director of The London Carbon Credit Company Limited, a company which sold carbon credits, has been disqualified as a director for 15 years for selling carbon credits as an investment when they had no genuine secondary resale market, and for failing to keep adequate records.
- Marcus Julian Malanaphy, also known as Marc Malan and Marc Malanaphy, is the latest of three directors of Southern Ventilation Ltd to sign a Disqualification Undertaking for causing the company to trade to the unreasonable risk of creditors while knowing or having ought to have known the company was insolvent.
- Graham John Coate, director of prestige chauffeur service First Class Cars Ltd, has been disqualified as a director for eight years for causing the company to continue trading when he knew or ought to have known it could not meet its debts.
- Richard Price and Timothy Porter, directors of Recruit Investments Limited, a company which headed up a group of businesses specialising in labour recruitment, have been banned from being directors for six and five years respectively for transferring company assets for no consideration, including Arabian horses and money to one of the directors and parties unconnected with the company.
- Ronald James Preedy, a former bankrupt, has been found guilty and sentenced to nine months' imprisonment for fraudulently transferring his interest in a property to his children in an attempt to deny this asset to his creditors.
- Gurvinder Luthra, director of a restaurant in Covent Garden, has been disqualified from acting as a director for ten years for submitting false VAT returns, failing to keep records and filing incorrect accounts.
- Ian Brett Coombes and Karen Jane Coombes, directors of care home companies Alutarius Ltd and Carepro Ltd, have been disqualified from being directors for eight and four years respectively for their roles in providing documents to accountants detailing fictitious payments to HMRC.

- Mohamed Inam Anwar, director of computer supply company Land of Computers Ltd which went into liquidation owing £492,790 to creditors, has been disqualified from acting as a director for eight years for failing to keep proper accounting records.
- Tahseen Goni has been sentenced to six months' imprisonment after being found guilty of concealing property from the Official Receiver, following a trial at Luton Crown Court.

Liquidations

- New Horizon Energy Limited and New Horizon Energy LLC, companies which sought investment from members of the public for oil wells in the US, have been placed into provisional liquidations following an investigation by Company Investigations of the Insolvency Service

(3) Guidance on essential services for insolvency practitioners

The Insolvency Service has issued new guidance to clarify for insolvency practitioners and suppliers of 'essential services' provisions contained within the IA 1986 which have recently been amended. Guidance is provided on the difference between 'supply' and 'contract', the meaning of 'insolvency-related terms' as well as information to be given to suppliers.

The Insolvency (Protection of Essential Supplies) Order 2015, SI 2015/989 came into effect on 1 October 2015 and applies to contracts entered into on or after this date. The amendments made apply to England, Wales and Scotland in so far as they are concerned with the supply of essential services in corporate insolvency. Those related to personal insolvency apply to England and Wales only.

The guidance clarifies certain provisions in IA 1986 which have been affected related to:

- 'essential supplies';
- information to be given to suppliers;
- the difference between 'supply' and 'contract'; and
- meaning of 'insolvency-related terms'.

(4) Insolvency Service newsletter

The latest copy of the Insolvency Service's newsletter 'Dear IP' contains updates for insolvency practitioner including information on pre-pack administrations and SIP 16, estate accounts and scanning, transfer of

functions from Insolvency Practitioner Services, bills of sale, new Insolvency Service publications, mis-sold payment protection insurance and individual voluntary arrangements, and enforcement outcomes in June 2015.

The newsletter includes a section on the transfer of functions from Insolvency Practitioner Services, in which insolvency practitioners are requested to note that from 5 October 2015 the following areas of work will transfer to Official Receiver Services:

- objections to office holder release;
- residual sanction queries;
- applications, from Official Receivers, for Secretary of State appointments;
- requests for extensions of time for the calling of annual meetings of members and creditors;
- requests for the approval of trustee remuneration in Old Act cases;
- requests for Competent Authority status; and
- requests for local bank accounts.

(5) Insolvency Service issues revised SIP 16

A revised version of Statement of Insolvency Practice 16 (SIP 16) from the Insolvency Service, covering pre-packaged sales in administrations, will be effective from 1 November 2015. The SIP has been revised to take into account the recommendations included in a recent independent report into pre-pack administration, and will apply UK-wide.

The SIP has been revised to take into account the recommendations included in a June 2014 report by Teresa Graham CBE, which considered the full economic impact of the insolvency process and made recommendations for reform.

Next steps for insolvency practitioners

Following the introduction of the revised SIP 16, the Insolvency Service will cease its monitoring activities, and the monitoring of SIP 16 will be carried out by the recognised professional bodies (RPBs).

For appointments before 1 November 2015, insolvency practitioners (IPs) should still send their SIP 16 disclosures to the Insolvency Service. For all appointments from 1 November 2015 onwards, IPs should send a copy of their disclosure to their own RPB.

For joint appointments, only the lead IP needs to send the statement to their RPB, even if the joint appointees are licensed by different bodies.

(6) EU Insolvency Recommendation 'not having desired effect'

The European Commission says that, due to a lack of full implementation in a number of member states, its Insolvency Recommendation is not having the desired effect. The Recommendation was designed to ensure enterprises in financial difficulties in the EU have access to national insolvency frameworks. This, it was intended, would enable them to restructure at an early stage and prevent insolvency.

In recent years a trend has developed where companies establish business activities in EU countries other than their own. Where they become insolvent, it can have direct implications for the functioning of the EU internal market. The Commission looked to employ a new approach to helping businesses overcome financial difficulties, while also protecting creditors' rights. The idea, also, was to give entrepreneurs a 'second chance'.

In March 2014, the Commission formalised its Recommendation of a new approach to business failure and insolvency. It set about establishing common rules in relation to courts, applicable laws and recognition of the court's decisions.

By September 2015, the Commission concluded its assessment of the implementation of the Recommendation by member states. Twenty-four member states sent in information regarding implementation. Many of them felt they already largely comply with the Recommendation. However, as many member states have only partially implemented it, a number of problems still arise. These include:

- continuing legal uncertainty;
- additional costs for investors in assessing their risks; and
- continuing barriers to the efficient restructuring of companies.

(7) Press Release: New Insolvency Service publications

As part of its process of replacing Word and PDF guidance with web-based content, the Insolvency Service has published online guidance on dealing with debt and alternatives to bankruptcy.

The Insolvency Service is refreshing its guidance in phases. As part of this process, documents are being retired and new content published online. The latest documents to be retired are:

- how to deal with debt and pay your creditors (on debt dealing with your creditors); and

- bankruptcy: alternative options for people in debt (alternatives to bankruptcy).

The refreshed and consolidated online guidance covers:

- Debt Management Plans;
- Administration Orders; and
- Individual Voluntary Arrangements.

ANALYSIS

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

How will the government's changes to insolvency law help to protect UK businesses? Louise Webb and Alexander Gee of Baker & McKenzie LLP argue that the government is seeking to reflect the increasing reliance on technology services in their recent changes.

The IA 1986 is amended to prevent essential IT and utility suppliers to a business in formal insolvency procedures from exercising contractual rights to terminate the supply or to increase charges to the insolvent company on account of the insolvency. This change comes into effect on 1 October 2015.

How is insolvency law changing on 1 October 2015 and why?

Currently, key utility providers of gas, electricity, water and communication services are prohibited under IA 1986, s 233 from holding a corporate customer to ransom for outstanding charges, if it enters an insolvency process.

From 1 October 2015, the prohibition under IA 1986, s 233 will be extended by the Insolvency (Protection of Essential Supplies) Order 2015, SI 2015/989 (Insolvency Order 2015) to:

- extend the prohibition to a broader range of 'essential' service providers; and
- preclude reliance on any insolvency-related termination provision in any essential supply contracts, save in limited circumstances.

These amendments demonstrate the government's increased focus on business rescue. They also reflect the increasing reliance of modern businesses on technology services, such as website hosting, email servers and IT services.

Does the Insolvency Order 2015 affect all IT supply contracts and how?

Essential service suppliers to which the Insolvency Order 2015 applies are extended to suppliers of:

- point of sale terminals;
- computer hardware and software;
- information, advice and technical assistance with IT services;
- data storage and processing; and
- website hosting.

Card payment service providers are not currently captured.

Any contract entered into after 1 October 2015 for the supply of essential goods and services that contains an insolvency-related term (broadly defined as a clause that is triggered by the appointment of an administrator or approval of a company voluntary arrangement (CVA), but, importantly, not liquidation, receivership or a scheme of arrangement) ceases to have effect. The result of this is that a supplier of essential goods or services may only terminate their contract:

- with the consent of the insolvency office holder;
- with the court's permission; or
- if charges or fees following commencement of the administration or CVA are not paid within 28 days of their due date.

How does the Insolvency Order 2015 impact IT suppliers and how might they limit any risks in light of these changes?

IT suppliers under contracts entered into on or after 1 October 2015, who fall within the remit of the Insolvency Order 2015 may be compelled to continue to provide services to the insolvent company.

The Insolvency Order 2015 does not prevent suppliers exercising termination rights that are not directly related to insolvency—such as non-payment or material breaches of other non-insolvency-related terms. Additionally, the Insolvency Order 2015 only invalidates any insolvency-related term once the company has entered into administration or a CVA has taken effect. In other words, suppliers should be able to exercise termination rights triggered by pre-insolvency events occurring prior to the commencement of the administration or CVA.

IT suppliers should ensure contracts have a comprehensive suite of termination triggers not linked to insolvency, but often triggered in

parallel (eg non-payment), as well as pre-insolvency-termination provisions that allow for earlier termination (eg service of a statutory demand, discussions with creditors or non-investment grade credit rating).

IT suppliers should consider adding into their standard contracts monitoring or information provisions to allow regular monitoring of customers' financial status, and ensure credit teams are alive to the need to proactively monitor counterparties so that termination clauses can be exercised prior to commencement of administration or a CVA.

As under the original IA 1986, s 233, IT suppliers can and should require an insolvency office holder to personally guarantee payment of sums due following commencement of the administration/CVA.

(2) Use it or lose it—getting insolvency applications in on time

What was the significance of the court's decision in *Sands v Singh* [2015] EWHC 2219 (Ch), [2015] All ER (D) 304 (Jun)? Joseph Curl, barrister at 9 Stone Buildings considers the extent to which the judgment clarifies the law regarding the filing and service of applications under the IA 1986 and evaluates what practical lessons can be taken away.

The Chancery Division ruled that the claimant trustees in the bankruptcy of the first defendant had 'applied' for orders of possession and sale, within the meaning of the IA 1986, s 283A(3), within the three-year time period after which, failing such application being made, the property would have re-vested in the bankrupt. The trustees' attempt to issue the proceedings by delivering the application notice and tendering the relevant fee to the county court had been sufficient to engage s 283A(3), notwithstanding that the court had not issued the proceedings until a later date. Insolvency Act 1986, s 283A(3) was not dependent upon the court doing anything, but merely required that 'the trustee applies'.

What were the facts of the case?

A bankrupt's trustees in bankruptcy made an application for possession and sale of a property formerly belonging to the bankrupt. This gave rise to a statutory complication to do with IA 1986, s 283A. When a bankruptcy estate contains a property that was, at the date of the bankruptcy, the home of the bankrupt, or the bankrupt's spouse or civil partner, or the bankrupt's former spouse or civil partner, then the special provisions of IA 1986, s 283A come into play.

Insolvency Act 1986, s 283A is colloquially known as the 'use it or lose it' provision. Insolvency Act 1986, s 283A(2) provides that at the end of the period of three years beginning with the date of the bankruptcy, such a home will cease to be comprised in the bankruptcy estate and will automatically re-vest in the bankrupt. A trustee in bankruptcy can

prevent the automatic re-vesting by taking certain steps, which are set out in IA 1986, s 283A(3). One of these steps is taken if, during the three-year period, 'the trustee applies for an order for sale in respect of' the property. This case turned on what was meant by 'the trustee applies for' for the purposes of IA 1986, s 283A(3).

The facts were that a bankruptcy order had been made in the Coventry county court, as it then was, on 28 September 2011. The last day for making an order within 'the period of three years beginning with the date of the bankruptcy' was 26 September 2014. During the currency of the bankruptcy, there had been a contested application (see *Thandi v Sands (Trustees in Bankruptcy of Tarlochan Singh)* [2014] EWHC 2378 (Ch), [2014] All ER (D) 315 (Jul)). A case management order had been made that had transferred the proceedings up to the Birmingham District Registry of the High Court. Both Coventry and Birmingham had treated that order as if it had transferred the entire bankruptcy proceedings to the District Registry. Accordingly, the physical bankruptcy file was sent to Birmingham and the electronic record was changed to show the Birmingham District Registry as the appropriate court.

On 26 September 2014, the trustees went to the county court at Coventry with their application. It appears that the court staff at Coventry accepted the application over the counter but declined to issue it, because the system said that the bankruptcy was in the District Registry in Birmingham. There were various administrative delays and eventually the application was issued in Birmingham on 1 November 2014.

What were the main legal arguments arising?

At the first hearing in the Birmingham District Registry, the bankrupt spotted the date stamp showing an issue date of 1 November 2014 and raised the issue of IA 1986, s 283A. That preliminary issue was heard by HHJ Purle QC, sitting as a deputy High Court Judge. The question was, had the trustees applied for an order within three years for the purposes of s 283A(3)?

The trustees contended that IA 1986, s 283A(3) concerned limitation and could thus fall within the saving provision for limitation purposes in Practice Direction 7A, para 5 of the Civil Procedure Rules 1998 (CPR), SI 1998/3132 which provides that 'Proceedings are started when the court issues a claim form …but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is "brought" for the purposes of the Limitation Act 1980 (LA 1980) and any other relevant statute on that earlier date'.

Alternatively, the trustees argued that CPR 23.5 could save the day. CPR 23.5 provides that:

> 'Where an application must be made within a specified time, it is so made if the application notice is received by the court within that time.'

Both Practice Direction 7A and CPR 23.5 essentially provide that where a party has done everything in their power to commence a claim or make an application, they would not be penalised for subsequent events over which they had no control.

The bankrupt's primary argument was that the trustees were wrong to treat the question as one of limitation, because s 283A had a quite different effect. Limitation usually operates simply as a defence to a claim and does not affect the existence of the claimant's underlying right. Even in those cases where a right is extinguished by limitation, the LA 1980 does not reallocate vested rights—all that happens on expiry of limitation is that a claimant loses an undetermined right. By contrast, at the end of the three-year period in s 283A, a binary and conclusive once-and-for-all shift in proprietary rights from one ascertained party to another occurs.

The bankrupt argued that property rights had to be the same for all purposes at any given time and ascertainable both by the owner and third parties who might be affected. Such affected parties include those who might want to purchase or take security over the property. In any event, the limitation exception in Practice Direction 7A, para 5 concerned solely when proceedings were 'brought' for limitation purposes. Other authority was presented to show that proceedings were 'started' or 'commenced' or 'begun' only when they were issued. Thus, said the bankrupt, the limitation exception ('claim is brought') was narrow and did not assist the trustees in respect of the wording of s 283A(3) ('trustee applies for').

In respect of the argument on CPR 23.5, the bankrupt contended that the rule did not engage at all. This was because an application of the kind commenced by the trustees was equivalent to the commencement of a new claim—CPR 23 applied only to applications made in respect of a claim—rather than originating process of the kind represented by the trustees' application. In any event, the words 'must be made within a specified time' within CPR 23.5 showed that, even if Pt 23 could apply generally to the trustees' application, CPR 23.5 could not apply to s 283A. This was, the bankrupt said, because the question whether or not an application for possession and sale was made at all was a matter for a trustee in bankruptcy's judgment. Often a trustee in bankruptcy could properly form the view that no application in respect of a family home should be made at all, for example, the proceedings might be susceptible to unpredictable third party claims, or of insufficient value to be worthwhile when compared to the extent of creditor claims. It could not be characterised as a species of application that 'must be made', which was a precondition for CPR 23.5 to engage.

Emphasis was placed by the bankrupt upon the Court of Appeal's judgment in *Lewis v Metropolitan Property Realisation Ltd* [2009] EWCA Civ 448, [2009] All ER (D) 127 (Jun) in which their Lordships held that s 283A was intended to tilt the balance back towards domestic interests at the expense of doing the trustee the best deal for creditors (see para 167H per Laws LJ). Given the binary proprietary consequences of s 283A, combined with the special elevation of domestic interests that were fundamental to its operation, limitation principles were inapt and an independent interpretation of s 283A was required. An analogy was drawn by the bankrupt between s 283A and the conclusion of the Court of Appeal in *Salford City Council v Garner* [2004] EWCA Civ 364, [2004] All ER (D) 465 (Feb) which concerned rights under the Housing Act 1996, in the context of when proceedings were 'begun'. The Court of Appeal in that case had concluded that the relevant housing proceedings were 'begun' when they were issued. A similar approach, said the bankrupt, should be taken to IA 1986, s 283A, because it likewise concerned positive domestic interests in a person's home, rather than merely a limitation defence to an undetermined right.

Alternatively, the bankrupt argued that even if the trustees were correct that either Practice Direction 7A or CPR 23.5 applied, the trustees had not done everything in their power to start the proceedings, because they had not taken it to the court that had carriage of the proceedings. While the bankrupt accepted that the Insolvency Rules 1986, r 7.12, SI 1986/1925 provides that insolvency proceedings are not invalidated if they are commenced in the wrong court, the trustees' proceedings had not been commenced at all—they had taken the application to the wrong court—which had quite properly declined to issue it. By the time it reached the appropriate court, it was too late and the property had re-vested.

What was the decision of Judge Purle QC?

HHJ Purle QC found for the trustees. His lordship disposed of the 'wrong court' argument first. While it was true that any bankruptcy will be proceeding in one court, that was not determinative of where a particular claim arising that bankruptcy will be heard. On a careful construal of the transfer order, HHJ Purle QC concluded that the order provided only that one discrete dispute in the bankruptcy would be transferred to the Birmingham District Registry, while the county court at Coventry had maintained overall carriage of the bankruptcy as a whole. The fact that both courts had, from an administrative perspective, treated the entire bankruptcy as transferred did not come into it.

HHJ Purle QC noted *Salford v Garner*, but because the statutory wording in that case was different, i e when proceedings are 'begun' as distinct from 'the trustee applies', it was not conclusive. His lordship concluded that the

trustees 'applied' when they delivered the application notice and tendered the appropriate fee to the county court at Coventry. The trustees could not have done anything over and above what they actually did and it would be wrong to construe s 283A(3) as requiring something further to be done by the court. Practice Direction 7A was apt to apply to IA 1986, s 283A, because it was directed not only at LA 1980, but also 'any other relevant statute', which could include IA 1986, otherwise CPR 23.5 was readily applicable to s 283A.

To what extent is the judgment helpful in clarifying the law surrounding IA 1986, s 283A?

It is probably fair to say that, if presented with the facts of this case in advance, most insolvency lawyers would accurately have predicted the outcome, despite the lack of direct authority on the point. While attempts were made by the bankrupt to distinguish s 283A from the ambit of Practice Direction 7A and CPR 23.5, the appropriate analogy for s 283A was always likely to be those provisions.

The case does, however, bring certainty to the position, which is always useful. A more difficult case would arise if some innocent third party took an interest for value from a bankrupt at a time after three years had elapsed, but while the trustee's application was sitting in a 'pending' tray at court—although such a case is likely to be rare for obvious reasons.

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

Insolvency law is packed with time limits, many of which carry serious consequences if they are missed. If things are left until the last available day then unfortunate situations like this one have a habit of arising. It is a good idea to make sure adequate time is allowed to provide for the unexpected and avoid mishaps.

(3) Changing the rules

With the Insolvency (Amendment) Rules 2015 having come into force from 1 October 2015, Susan Kelly of Squire Patton Boggs considers what this will mean for insolvency practitioners and the lawyers who advise them.

The High Court will be able to transfer winding-up cases to the county court at Central London under changes to the Insolvency Rules 1986, SI 1986/1925. The rules also introduce new requirements for insolvency practitioners (IPs) in England and Wales to provide an estimate of the fees to creditors for approval.

What are the main provisions of the Insolvency (Amendment) Rules 2015?

With the implementation of the Insolvency (Amendment) Rules 2015, SI 2015/443, IPs seeking to charge on a time costs basis in an administration, creditors' voluntary liquidation (CVL), compulsory liquidation or bankruptcy, must provide creditors with an upfront estimate of their fees. The estimate has to be approved by creditors (including any subsequent increase in that estimate) prior to the IP being entitled to draw any funds from the insolvency. (Please see our earlier blog post—Tick Tock: What Fees Are On The Clock? Increased Scrutiny Of Insolvency Practitioners' Fees In England And Wales.)

Will these likely be successful in achieving their aim?

The aim of the new estimating process is to provide greater transparency for creditors and trust in the insolvency system. The provision of more detailed information upfront about what the IP will be doing and the time to be spent in doing it should hopefully achieve this. It should also enable IPs to demonstrate what they do and the value they deliver in return for their fees. In Australia, a similar (although non-legislative) regime has been working well since 2007 (through the Australian Restructuring Insolvency and Turnaround Association Code of Professional Practice and APES 330).

What are the most controversial elements?

It is a move away from the government's original proposals, which were to abolish time costs altogether where there is no secured creditor or creditors' committee. The changes will be compounded by the abolition of creditors' meetings (unless they are requested by ten creditors or 10% of creditors in number or value). This change will be brought into force sometime in 2016. It will be more difficult for IPs to engage with creditors over such questions as fee estimates without meetings.

What are the implications of the changes for IPs?

This will mean a new way of working for IPs. Usually the amount of work an insolvency appointment will generate is unknown at the outset, especially if the pre-planning phase has (of necessity) been relatively short and there is an incomplete understanding in the early phases of the issues an IP will have to deal with during the life of a matter. There will need to be a balance therefore, in providing a reasoned and realistic estimate and providing sufficient scope for dealing with contingencies.

Are there any grey areas or could there be any unintended consequences?

IPs should also comply with the best practice guidelines set out in Statement of Insolvency Practice 9 (SIP 9). The current SIP 9 is being

updated but the new version [was not] in place by 1 October 2015, leaving IPs in a very difficult position at the moment.

Has anything been missed out?

It would have been helpful if the new SIP 9 could have attached an approved format for IPs to use for their fee estimates to creditors so that there was an industry standard.

What should lawyers advising in this area take note of?

The IP will need to provide an indication of the anticipated expenses in each case. Lawyers advising in this area can expect to receive requests for estimates for their time costs for the work they think will be involved in a case. These estimates will be for creditors' information only and will not need approval so there will be no need to go back to creditors if the estimates are exceeded.

(4) The new insolvency processes—more or less red tape?

Provisions in the DA 2015 and the SBEEA 2015 aim to modernise and strengthen the restructuring and insolvency processes. However, Simon J Murfitt, consultant solicitor at Keystone Law LLP, believes there is a real danger that the resulting increased regulation could lead to greater costs and delays.

From 1 October 2015, the Insolvency Service is to introduce new measures to modernise and strengthen the insolvency process, aimed at helping those struggling with debt and ensuring company directors are held more accountable. Among other benefits, the changes are expected to reform the way insolvency practitioners gain authorisation to practice. Additionally, new measures are introduced to further deter company directors from acting improperly, including strengthening the disqualification process.

What are the main insolvency changes introduced?

DA 2015:

- reforms the way insolvency practitioners (IPs) gain authorisation to practice. IPs can now be authorised either in relation to appointments over companies, over individuals, or over both. IPs who are authorised before these changes take effect will continue to be authorised to take appointments over both types of entity. Any IP who takes an appointment over a member of a partnership that has outstanding liabilities to that partnership will need to be authorised in relation to both companies and individuals;

- simplifies when to report to creditors about appointing and releasing administrators through provisions which negate, in certain circumstances, the need to hold physical meetings; and
- strengthens the regulation of IPs and the role of the Secretary of State—through the Insolvency Service—as the primary oversight regulator in the sector. For example, DA 2015, Sch 6 allows the Secretary of State to request and require information directly from any person rather than simply an insolvency office holder in relation to the conduct of a potentially unfit director. Before this power was created, any such requests for information would have had to be made through the relevant insolvency office holder.

SBEEA 2015:

- creates a reserve power to make regulations to either prohibit administration sales to connected parties or make regulations to impose conditions or requirements on such sale to allow them to proceed. Such pre-pack administrations are not defined in the legislation. This issue, however, arises out of the 2014 Graham Review where the term is widely held to mean a special type of administration where the post-administration sale concerned is:
    - agreed prior to the appointment of the administrator; and
    - which is effected on, or shortly after the appointment of the administrator;
- contains further regulation provisions for IPs and a specific power to establish a single regulator of IPs (the Insolvency Service, acting for the Secretary of State); and
- removes the requirements for creditors' meetings in corporate and personal insolvency. However, if a prescribed number of creditors wishes a meeting to be held to make a decision, this must be provided for (SBEEA 2015, ss 122, 123). A by-product of this change is that the Insolvency Rules 1986, SI 1986/1925, Pt 15 will need amending to make provision for both decisions made without a creditors' meeting and decisions made with such a meeting—hence bureaucracy may be increased rather than lessened.

Will these likely be successful in achieving their aim?

DA 2015

In some cases (eg, the new regime of appointment of IPs), red tape and administration may be decreased. However, in others, such as removal of the requirement of certain creditor's meeting, the opposite might prove true. The key factor will be how the consequential changes to other secondary legislation such as the Insolvency Rules 1986 develop.

SBEEA 2015

In respect of both the pre-pack sales and single regulator powers, their success or failure will depend on the how and when the relevant authority intervenes and how they are deemed to have performed in such interventions.

For both stated aims of:

- to provide greater confidence to unsecured creditors and other affected stakeholders that a pre-pack represents the best outcome for them (for pre-pack reserve powers); and
- strengthen the regulatory framework for the regulator to deal effectively and efficiently with any IP's poor performance and abuse of the system and thereby to provide greater confidence in the insolvency profession (for the new single IP regulator).

To succeed, the regulator will need to act quickly and openly when asked to do so, and ensure they are clearly seen to be doing so for all interests and not just those of the directly interested parties.

Are there any grey areas or could there be any unintended consequences?

DA 2015

The aim to increase access to the IP profession through the new regime of partial authorisation may be considered laudable. However, others might be concerned about the risks of having these new authorised IPs acting in what is a complex and regulated commercial environment. These new 'mini-IPs' will not necessarily have a detailed or complete understanding of either the relevant personal or the corporate insolvency rules and regimes. There may be scope for greater, not less, misconduct and error.

SBEEA 2015

As with any effort to minimise red tape and administration, without a full and proper review of the existing framework, any deletion may lead to additional stop gap or 'band aid' legislation and reforms. If they occur too often this may result in a combined regime which is more complex and admin-heavy than the old one. Such a result would defeat one of the primary aims of SBEEA 2015.

Will the changes clarify and streamline the most cumbersome processes or has anything been missed out?

DA 2015

The insolvency provisions contained within DA 2015 are limited, but the changes are largely designed to cut down on red tape. DA 2015 also

clarifies procedural uncertainties that have arisen—in particular, the notice provisions relating to the appointment of administrators where there is no qualifying floating charge holder and the effectiveness of an appointment of an administrator, despite the filing of a winding-up petition issued after the notice of an intention to appoint.

In respect of what is missing, there are currently provisions in relation to appointments over a limited partnership (rather than over an individual partner). Presumably an IP who accepts an appointment over a limited liability partnership (LLP) will need to be authorised in relation to companies, given the corporate treatment of LLPs pursuant to the Limited Liability Partnerships Act 2000.

SBEEA 2015

The reduction of creditors' physical meetings will be welcomed as long as all the new requirements such as informing all known creditors of the anticipated IP's fees are met. While there does not appear to be a formal requirement in the new legislation, the next logical step is for the form of the IP's fee estimate and letters of engagement to follow those of the legal professional an include details of their complaints procedure.

Did you hope for any other changes to be made?

Yes, and they are contemplated by the phased enactment of the DA 2015 and SBEEA 2015 provisions. A whole area of secondary legislation such as an update to the Insolvency Rules 1986 is needed. In addition, the underlying recognised professional bodies (RPBs) of IPs will need to reassess their own constitutions, scope and charging structures, since all this additional regulation will need to be funded by the RPBs, who will need to pass such costs through to their members, the IPs.

What should lawyers advising in this area take note of?

Solicitors, interacting with both IPs and creditors, need to ensure the IPs are properly appointed under the new regime and that they have complied with the new fees regime. The latter is particularly relevant if the IP in question is instructing the solicitors and hence the latter's fees will be included as a disbursement on the IP's bill.

New care and attention for post administration sales will also be needed to ensure compliance in line with both the new legislation and the intention behind the Graham Review.

Finally, the implementation of these Acts, particularly SBEEA 2015, are phased—more changes are to come and hence all solicitors and IPs need to continue to watch this space.

Are there any detectable trends? What are your predictions for the future?

Even though a key driver behind these amendments is the previous government's Red Tape Challenge, the obvious key trend in both Acts is one of greater regulation and oversight by central government. This trend is a reversal of what in recent years has been a largely industry lead regulation regime for IPs. While not surprising after the 2008 financial crisis, there is a real danger that this increased regulation could lead to greater costs and delays.

The hope is that these changes and others, despite the potential increased costs, will create greater consumer confidence through its greater transparency and ease of use. IPs and RPBs should note that after the transitional period ending on 30 September 2016, the Secretary of State will no longer directly authorise IPs and hence full compliance with the new regime will be even more important.

CASE LAW

(1) Viscount St Davids v Lewis [2015] All ER (D) 73 (Oct), [2015] EWHC 2826 (Ch)

In the Chancery Division before Henderson J

Insolvency – Bankruptcy – Bankrupt's estate – Appeal – Trustee in bankruptcy serving bankrupt with notice claiming property acquired by bankrupt after commencement of bankruptcy (after-acquired property) – Bankruptcy applying for declaration that notice claiming after-acquired property being served out of time and, accordingly of no effect – Registrar dismissing application – Bankrupt appealing – Whether registrar erring – Date on which trustee acquiring actual knowledge of bankrupt's beneficial ownership of after-acquired property – Test of 'knowledge' for purposes of relevant legislative provisions – Insolvency Act 1986, ss 307, 309.

Facts:

The proceedings raised questions about how a court should approach the test of knowledge under ss 307 and 309 of the IA 1986, which concerned the service, by the trustee in bankruptcy, of a notice claiming property acquired by a bankrupt after the commencement of the bankruptcy (after-acquired property). The appellant (SD) became bankrupt on 17 June 2002. He submitted two bankruptcy questionnaires expressly denying the existence of any after-acquired property and he failed to disclose to the respondent trustee in bankruptcy (the trustee), the existence of his beneficial interest in the sole issued share (the Optional share) of a company incorporated in the Republic of Seychelles, as required by s 333(2) of the Act. On 19 May 2009, the trustee served SD with a notice,

pursuant to s 307(1) of the Act, claiming, for the bankrupt's estate, SD's beneficial interest in the Optional share. An issue arose as to whether the trustee had served the notice on SD within the statutory time limits. Section 309(1) of the Act provided that, except with the court's leave, a notice could not be served, under s 307, after 42 days, beginning with the day on which it first came to the knowledge of the trustee that the property in question had been acquired by, or had devolved on, the bankrupt. Since the notice was served on 19 May 2009, it would have been out of time, subject to the power of the court to extend time, (which had not been sought), if it had first come to the knowledge of the trustee, more than 42 days before that date, namely before 8 April 2009, that beneficial title to the Optional share had been acquired by SD after the commencement of his bankruptcy on 17 June 2002. SD contended that the trustee had first acquired knowledge of his beneficial entitlement to the Optional share on dates ranging from before 22 November 2006 to 18 December 2008. SD did not immediately object to the notice and the Optional share was transferred to the trustee by its legal owner (CNN). Some five-and-a-half years later, in November 2013, SD applied for a declaration that the notice had been served on him out of time and was, accordingly, of no effect. A registrar dismissed that application. SD appealed. He also applied for permission to adduce fresh evidence consisting of a handwritten attendance note of a telephone conversation, which SD contended, had to have taken place before August 2006, and, according to SD, constituted the first occasion by when it had to have come to the trustee's knowledge that the Optional share was his after-acquired property.

SD submitted that, while the registrar had correctly proceeded on the basis that actual knowledge was required, she had misdirected herself in holding that such knowledge had to be knowledge of facts which had been conclusively proved. He submitted that she had failed to appreciate that, otherwise, the provision for an extension of time for serving a notice would be redundant and/or meaningless, and had ignored a 14-day extension of time granted to the trustee by an order of deputy registrar, dated 14 September 2009. Secondly, consideration was given to whether the criteria in *Ladd v Marshall* [1954] 3 All ER 745 had been satisfied in respect of the fresh evidence, namely whether: (i) the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence was such that it would probably have an important influence on the result of the case, though it needed not be decisive; and (iii) the evidence was such as was presumably to be believed. Consideration was also given to CPR 52.11(2)(b).

Held:

The appeal would be dismissed.

For the purposes of ss 307 and 309 of the Act, subject to s 309(2)(a), the term 'knowledge' denoted actual knowledge. The relevant knowledge had to be knowledge of facts and not of mere claims or allegations. The onus was the party challenging the validity of the s 307 notice served, to prove, on a balance of probabilities, that the respondent knew at least 42 days prior to serving notice that: (i) the property was (in equity at least) property belonging to the bankrupt; and (ii) the property (or at least beneficial ownership thereof) had been acquired by, or had devolved upon, the bankrupt, since the commencement of his bankruptcy. In a case where a bankrupt had failed to co-operate with his trustee and had failed to disclose the existence of relevant after-acquired property to his trustee, the court should be slow to accede to a self-serving claim by the bankrupt that his trustee first obtained knowledge at a significantly earlier date of the acquisition by the bankrupt of the property, with the convenient result, if the claim was upheld, that the s 307 notice served by the trustee would be out of time. In practical terms, in such cases, a trustee should normally be held to have first obtained the relevant knowledge for the purposes of s 309(1) only when it had become clear to him, on cogent evidence verified to his reasonable satisfaction, that the property in question: (i) was acquired by the bankrupt; and (ii) was acquired by him after the commencement of the bankruptcy. If that test set the bar too high, the answer was obvious. In a situation where the bankrupt had failed to comply with his statutory duty, in relation to a matter within his personal knowledge, it was entirely reasonable that the standard of knowledge required from his trustee for the purposes of s 309(1) should be set at a fairly high level of certainty. The power to extend time threw no light on the quality of knowledge which was necessary to start time running for the service of a notice (see [29], [31], [32], [35] of the judgment).

The grounds of appeal would be rejected. The registrar had never explicitly held that knowledge for the purposes of s 309(1) had to be knowledge of facts which have been conclusively proved. She had not been setting the bar of actual knowledge too high. Her approach had been amply justified by the facts she had found, and was in accordance with the principles of law. On the material before her, the registrar had made no error of principle in her consideration of the question whether the trustee had acquired the necessary knowledge by 22 November 2006, and her findings of fact could not be faulted. In the present case, SD had conspicuously failed to comply with his statutory duty under s 333(2). He had never informed the trustee of his beneficial interest in the Optional share. In those circumstances, the court should be slow to accede to a self-serving claim by the bankrupt that his trustee first obtained knowledge at a significantly earlier date of the acquisition by the bankrupt of the property, with the convenient result, if the claim was upheld, that the

s 307 notice served by the trustee would be out of time. It followed that the appeal had to be dismissed (see [28], [29], [34], [49], [70] of the judgment).

(2) Applying the criteria in *Ladd v Marshall* and CPR 52.11(2)(b), the court was satisfied that, in all the circumstances, with reasonable diligence, the note could have been obtained for use at the trial. Further, it would probably not have had an important influence on the result of the case, nor would its admission have been likely to have any significant influence on the outcome of the present appeal. The third criteria in *Ladd v Marshall*, was satisfied, where there was no dispute that the note was genuine and, accordingly, was to be believed. However, since neither the first nor the second condition was satisfied, the application to adduce further evidence had to be dismissed (see [57], [58] of the judgment).

Ladd v Marshall [1954] 3 All ER 745 applied.

Peter Irvin (instructed by Smithfield Partners Ltd) for SD.

Tina Kyriakides (instructed by Isadore Goldman Ltd) for the trustee.

(2) Global Maritime Investments Cyprus Ltd v OW Supply & Trading A/S (under konkurs) [2015] All ER (D) 20 (Oct), [2015] EWHC 2690 (Comm)

In the Queen's Bench Division, Commercial Court, before Teare, J

Conflict of laws – Contract – Proper law of contract – Defendant company filing for bankruptcy and issuing proceedings against claimant in Denmark – Claimant seeking summary judgment with respect to five declarations – Whether sum payable by claimant to defendant – Whether Danish insolvency law affecting parties' contractual position – Whether proceedings having to be brought in England.

Facts:

The parties entered into ten cash-settled derivatives transactions relating to energy commodities on the terms of a written agreement (the general terms) governed by English law, pursuant to cl 13. They also entered into a credit support agreement (the CSA). On 7 November 2014, the defendant company (OW) filed for bankruptcy in Denmark, which amounted to an event of default under the general terms. OW's trustee in bankruptcy commenced proceedings in Denmark against the claimant company (GMI), seeking a ruling that GMI be ordered to accept that: (i) under s 58h(2) of the Danish Securities Trading etc Act (s 58h(2)), OW in bankruptcy could demand to be put in a position as if close-out netting, in compliance with the general terms, had taken place as at 7 November; and (ii) because of its bankruptcy, GMI could not rely on cl 3.3 of the

general terms (cl 3.3), which provided that 'Payments under this Agreement will only be required to be made by a party subject to the condition precedent that no Event of Default with respect to the other party has occurred and is then continuing'. The English court granted GMI permission to commence and continue with proceedings which had previously been issued in the court. GMI maintained that, pursuant to the general terms, OW's bankruptcy was an event of default and so no payments could be sought by OW from GMI. It also maintained that any claim for sums due under the transactions had to be brought in the English court. GMI sought summary judgment with respect to five declarations on the basis that there was no realistic defence.

It fell to be determined whether it should be declared that, under the terms of its contracts with OW: (i) no sum was presently payable by GMI, which depended on whether an obligation to transfer eligible credit support pursuant to the CSA was a 'payment' within the meaning of cl 3.3 (the first to third declarations); (ii) the provisions of Danish insolvency law on which the trustee relied could not affect the contractual position between GMI and OW (the fourth declaration); and (iii) any claim for US$1.6m alleged to be due pursuant to the process of close-out netting had to be brought in England, pursuant to cl 13.2 of the general terms (cl 13.2) (the fifth declaration).

Held:

The court ruled:

(1) The meaning which cl 3.3 would reasonably be expected to bear in its context was that 'payment' included transfers of eligible credit support. The commercial purpose of cl 3.3 had to be to mitigate counter-party risk and that commercial purpose made sense, not only for payments on a monthly basis, but also for transfers of eligible credit support in the form of cash which could be freely used and disposed of just as the monthly payments could (see [23] of the judgment).

The first to third declarations would be granted (see [25] of the judgment).

(2) It appeared that the fourth declaration was intended to do no more than state that, as a matter of English law, s 58h(2) did not alter or disapply the provisions of the general terms. There was very much doubt that that was in dispute. Accordingly, there was no real and present dispute between the parties as to the effect of s 58h(2) on the English law contract between the parties and the making of the fourth declaration would not serve any useful purpose (see [31], [34] of the judgment).

The fourth declaration would not be granted (see [35] of the judgment).

(3) In context, the obligation assumed by the parties to submit to the jurisdiction of the English courts would reasonably be understood as an

obligation to submit all claims relating to the general terms to the jurisdiction of the English courts. The factual context in which the claim for the fifth declaration had to be determined was that GMI had already commenced proceedings relating to the general terms in England and, therefore, even if cl 13.2 was not an exclusive jurisdiction clause, OW was obliged to submit to the jurisdiction of the English court and could not commence parallel proceedings elsewhere (see [50], [53] of the judgment).

Whether or not cl 13.2 was an exclusive jurisdiction clause, the fifth declaration would be granted (see [55] of the judgment).

BNP Paribas SA v Anchorage Capital Europe LLP [2013] All ER (D) 136 (Oct) applied.

Luke Pearce (instructed by Holman Fenwick Willan LLP) for GMI.

Camilla Bingham QC (instructed by Clifford Chance LLP) for OW.

(3) Dunbar Assets plc v Butler [2015] All ER (D) 138 (Sep), [2015] EWHC 2546 (Ch)

In the Chancery Division, before Mr Jeremy Cousins QC (Sitting as a Deputy Judge of the Chancery Division)

Guarantee – Enforcement – Statutory demand – Appeal against setting aside of statutory demand – Estoppel – Claimant company serving statutory demand on defendant guarantor – Deputy registrar setting aside statutory demand on basis company estopped from enforcing guarantees following representation allegedly given to defendant – Whether deputy registrar erring – Whether estoppel being established on evidence – Whether deputy registrar applying wrong test in ascertaining whether triable issue and in finding genuine triable issue as to guarantor's liability for sums claimed under guarantees.

Facts:

The claimant company (Dunbar) had made loans to two companies, Carson and Ritz, (the companies), under facility letters in March 2010 and September 2011. The defendant, B, who had played a prominent role in relation to the companies, had executed personal guarantees (the guarantees) in favour of Dunbar in respect of the debts of the companies. Dunbar made written demands on the companies for payment of the sums loaned. However, significant sums remained outstanding. Dunbar made a formal request to B for payment under the guarantees in respect of the companies. B failed to make payment. In February 2014, Dunbar served a statutory demand on B in respect of the sums due under the guarantees. B applied to set aside the statutory demand on the grounds that the guarantees were not enforceable because Dunbar had reached a compromise with him in about 2009, whereby it had been agreed that he

would continue to manage three development properties on the basis that the personal guarantees would not be called upon (the representation). A deputy registrar allowed the application to set aside the statutory demand. Dunbar appealed.

Dunbar submitted that: (i) the deputy registrar had applied the wrong test in ascertaining whether there was a triable issue; (ii) even making every reasonable evidential allowance in favour of B, there was no triable issue because nothing said, even on B's case, was capable of establishing a promissory estoppel; and (iii) the deputy registrar had failed to attach sufficient weight to contemporaneous documentation that had post-dated the alleged representation meeting and in finding that there was a genuine triable issue as to B's liability for the sums claimed.

Held:

The appeal would be allowed.

(1) For any dispute on the evidence to give rise to a triable issue, such evidence had to relate to a material matter in the sense that, if accepted, such evidence would disclose a defence to a claimant's claims (see [31] of the judgment).

While the deputy registrar had correctly proceeded on the basis that a genuine triable issue needed to be raised by B, he had not adequately considered whether the factual issues raised, even if giving rise to a triable dispute, were capable of affording B an answer to the claim on the guarantees (see [31] of the judgment).

(2) Applying settled law to the facts, the disputed representation, upon which B relied, was not arguably capable of giving rise to the estoppel for which he contended and there was no other ground for finding that Dunbar had not been entitled to enforce the guarantees. In respect of the alleged representation, any such statement meant no more than that, while B continued to provide assistance with the concurrence of Dunbar, enforcement action would not be taken. The statement could not reasonably be interpreted to mean that B unilaterally could prevent the taking of enforcement action by his continuing to undertake work on the developments even if Dunbar had made it clear that it was not required. It had been perfectly clear that a formal demand upon the companies had been in contemplation and that, ultimately, that might lead to the appointment of receivers, and a demand being made on B. A formal notice terminating the suspension of Dunbar's right to enforce the guarantees had not been required in circumstances in which B's work had already ceased. Even if B had still been undertaking work on the developments, no period of notice would have been required. Notice of termination of a suspension of one party's rights was usually required so as to allow a reasonable period for the party to whom notice was given to make alternative arrangements, but

B had not needed to make any such arrangements. All he would have had to have done, upon receiving notice, was to have ceased work (see [49]–[51], [62] of the judgment).

Hughes v Metropolitan Rly Co [1874–80] All ER Rep 187 applied; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 applied; *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256 applied.

(3) The deputy registrar had been wrong to conclude, in light of the evidence, that there was a genuine triable issue as to B's liability for the sums claimed. B had had no realistic prospect of making out the factual basis of his case (see [61], [62] of the judgment).

Joseph Curl (instructed by DLA Piper UK LLP) for Dunbar.

Paul Stevenson (instructed by Charles Russell Speechlys LLP) for B.

(4) Rowbury v Official Receiver [2015] All ER (D) 129 (Sep), [2015] EWHC 2276 (Ch)

In the Bankruptcy High Court, before Registrar Briggs

Bankruptcy – Meeting of creditors – Voting – Applicants seeking orders including to revoke voluntary arrangement proposed by bankrupt at meeting of creditors – Whether injustice being perpetrated by chairman's failure to suspend meeting – Whether claims being properly admitted to vote – Whether new trustee in bankruptcy should be appointed – Insolvency Act 1986, s 262 – Insolvency Rules 1986, SI 1986/1925, rr 5.22(5), 6.94.

Facts:

The applicants sought orders, under s 262 of the IA 1986 and, alternatively, under r 5.22(5) of the Insolvency Rules 1986, SI 1986/1925, to revoke a voluntary arrangement (the arrangement) proposed by a bankrupt at a meeting of his creditors. They also sought an order that certain proofs of debt at a creditors' meeting in the bankruptcy be reversed, pursuant to r 6.94 of the Rules and for the appointment of a specified person as trustee in bankruptcy in place of the second and third respondents.

The issues for determination were: (i) whether an injustice had been perpetrated by the chairman's refusal to suspend the creditors' meeting to obtain a revised proxy, to obtain a late vote and in admitting the vote of a person not a creditor; (ii) whether the claims made by creditors, Keystone and Fladgate, for specified sums had been properly admitted to vote, in particular, given a varied conditional fee arrangement (CFA); and (iii) whether a new trustee in bankruptcy should be appointed.

Held:

(1) There could be no exhaustive list of circumstances when a chairman should declare a suspension, but they included where one or more of those attending needed a short break in order to consider a modification or if a creditor's representative needed to take instructions. A suspension would probably be declared when a document was being faxed or emailed which might help the chairman put a value on a claim or decide whether to allow a creditor to vote. If a chairman was on notice of an obvious error which might be remedied within an hour, a suspension should be declared, allowing the creditor an opportunity to give voice to his true intention. As the Rules provided only a short period of suspension, a chairman should be slow to refuse a request, unless a suspension would serve no purpose. A chairman of a meeting had to act both in accordance with the governing rules and in a pragmatic way, ensuring that the votes counted and cast were not inaccurate. In circumstances where a chairman was informed of a mistake, he should take care to give an opportunity for the mistake to be rectified. If a proxy, when amended had no bearing on the outcome, the pragmatic chairman might consider that an adjournment was a waste of time and expense. However, the failure to suspend for an hour or give serious consideration to an adjournment would be more difficult to justify if rectification affected the outcome of the decision (see [41], [47] of the judgment).

The chairman had erred by: (i) having permitted a non-creditor to vote in favour of the individual voluntary arrangement; (ii) not having suspended the meeting when he had been informed that a revised proxy was being sent; and (iii) having failed to suspend to permit another creditor to vote. Those errors had been irregularities which had been material to the outcome of the creditors' meeting (see [47], [49], [50], [56], [99] of the judgment).

Debtor, a (No 222 of 1990), Re, ex p Bank of Ireland [1992] BCLC 137 considered; *Debtor, a (No 87 of 1993) (No 2), Re* [1996] 1 BCLC 63 considered; *Sweatfield Ltd, Re* [1997] BCC 744 considered; *Somji v Cadbury Schweppes plc* [2000] All ER (D) 2397 considered; *Chittenden v Pepper*; *Re Newlands (Seaford) Educational Trust* [2006] All ER (D) 299 (Jun) considered.

(2) Keystone and Fladgate had been entitled to vote for debts owed to them by the bankrupt, only in respect of work undertaken in accordance with the varied CFA. The chairman had permitted them to vote for all sums claimed, which had been an irregularity material to the outcome of the creditors' meeting (see [83], [90], of the judgment).

As a result of reversing the chairman's decision not to suspend the meeting and discounting the value of one vote, the arrangement would be revoked and the bankruptcy reinstated (see [94], [100] of the judgment).

Company, a (No 004539 of 1993), Re [1995] 1 BCLC 459 considered; *Bank of Credit and Commerce International SA (in liq) v Ali* [2001] 1 All ER 961 considered; *Rainy Sky SA v Kookmin Bank* [2012] 1 All ER 1137 considered.

(3) The bankruptcy petition had not been annulled. The bankrupt was a bankrupt and the trustee in bankruptcy was the second respondent. Further argument would be heard on the application to convene a new meeting of creditors for the purpose of appointing an alternative trustee in bankruptcy (see [101] of the judgment).

Joseph Curl* (*instructed by Pennington Manches LLP*) *for the applicants.

Sarah Bayliss* (*instructed by Keystone Law Ltd*) *for the fourth respondent.

(5) Wood v Lowe [2015] All ER (D) 133 (Sep), [2015] EWHC 2634 (Ch)

In Chancery Division, Leeds District Registry, before Judge Saffman sitting as a Judge of the High Court

Bankruptcy – Trustee in bankruptcy – Bankrupt's estate – Gift – Making of gift – Trustee in bankruptcy of first respondent bankrupt applying for declaration as to extent, if any, of bankrupt's proprietary interest certain items – Whether ownership of items being transferred to bankrupt's wife and/or daughter or whether vesting in trustee – Insolvency Act 1986, s 283.

Facts:

A bankruptcy order was made against the first respondent bankrupt (the bankrupt) in November 2013 on his own petition, in circumstances where the Revenue and Customs Commissioners sought to prove for over £2.67m and there were significant other creditors. The bankrupt contended that there were no material assets. At a creditors' meeting, the applicant trustee in bankruptcy (the trustee) was appointed, contrary to the wishes of the family of the bankrupt. A dispute arose as to the ownership of certain items which had been owned by the bankrupt. Section 283 of the IA 1986 provided that the bankrupt's estate comprised 'all property belonging to the bankrupt at the commencement of the bankruptcy' (s 283(1)), save for those items excluded, under s 283(2) of the Act, including such tools books vehicles and other items of equipment as were necessary to the bankrupt for use personally by him in his employment business or vocation. The trustee applied for a declaration as to the extent, if any, of the bankrupt's proprietary interest in some of the items set out in a document headed 'Further Inventory'. The second and third respondents, the wife and daughter of the bankrupt respectively, asserted ownership of some of the items in dispute, including items 1, 2 and 3 (the Beatles Memorabilia).

The respondents submitted that certain items on the schedule were tools etc of the bankrupt's trade and, therefore, fell within the exception to the general rule. The bankrupt was a director of a company and actively participated in construction work and management, and wished to continue to use tools in connection with his employment, business or vocation in the future. A question arose as to the manner in which ownership was acquired by gift. It was common ground that there had to be an intention on the part of the donor to make the gift, but that there had to also be delivery of the gift to the donee. It was submitted that item 2 had been gifted to the third respondent through words and by a symbolic gesture whereby she had touched the item. A question arose as to whether the act of touching the Beatles memorabilia had been enough to transfer ownership of it to the third respondent.

Held:

On the evidence, it was the bankrupt who was the real Beatles fan and it had been he who had predominantly had the wherewithal to make the purchases of the expensive items in order to build up a collection that was his. The contention that item 2 had been gifted to the third respondent would be rejected. She might well have been present when it had been purchased, but it was not accepted that, subsequently, an active decision had been taken to give it to her. It had remained exactly where it had been located before the alleged gift. Even if there had been an intention to gift some of the memorabilia to the third respondent, such a gift had not been perfected. The touching of the item to show the transference of ownership was not enough to transfer ownership. Applying settled law, it could not be said, even if words expressing a gift had been used, which was not accepted, that there had been any transfer of control (see [91], [92] of the judgment and Appendix 2).

It followed that, applying settled legal principles, the Beatles memorabilia belonged to the bankrupt at the date of his bankruptcy and, accordingly, vested in the trustee (see [91] of the judgment and Appendix 2).

Stoneham, Re, Stoneham v Stoneham [1918–19] All ER Rep 1051 applied; *Cole, Re, ex p Trustee of Property of Bankrupt v Cole* [1963] 3 All ER 433 applied; *Bishop, Re, National Provincial Bank Ltd v Bishop* [1965] 1 All ER 249 applied; *South Staffordshire Water Co v Sharman* [1895–9] All ER Rep 259 considered; *Cohen, Re, National Provincial Bank Ltd v Katz* [1953] 1 All ER 378 considered.

Simon Passfield for the trustee.

Douglas Cochran for the respondents.

LEGISLATION

(1) Deregulation Act 2015 (Commencement No 3 and Transitional and Saving Provisions) Order 2015

Legislation Affected

- Company Directors Disqualification Act 1986; Companies Act 2006 amended

SI 2015/1732: Certain provisions of the DA 2015 are brought into force on 1 October 2015 and 1 January 2016. The provisions coming into force on 1 October, among other things, introduce a new regime for the authorisation of insolvency practitioners, alter the notification requirements that apply when an auditor ceases to hold office and limit the scope of the duty of self-employed persons to ensure they do not expose themselves or others to health and safety risks through the conduct of their undertaking.

Summary

The DA 2015 is intended to reduce, or remove, burdens on businesses, civil society, individuals, public sector bodies and the taxpayer, including through the repeal of legislation that is no longer of practical use. It also gives those exercising specified regulatory functions a duty to have regard to the desirability of promoting economic growth.

Provisions coming into force on 1 October 2015

With effect from 1 October 2015, the DA 2015 will amend:

- the IA 1986, Pt 13, to introduce a new regime for the full and partial authorisation of insolvency practitioners (DA 2015, s 17);
- the Companies Act 2006, Pt 16, to simplify the notification requirements that apply when a company's auditor resigns, is removed from office or is not re-appointed in financial years beginning on or after 1 October 2015 (DA 2015, s 18, Sch 5); a saving provision in SI 2015/1732 prevents these amendments applying to limited liability partnerships, unregistered companies and companies authorised to register;
- the Health and Safety at Work etc Act 1974, s 3, to limit the scope of the duty of self-employed persons to ensure they do not expose themselves or others to health and safety risks through the conduct of their undertaking, so that it only applies to certain undertakings prescribed by the Health and Safety at Work etc Act 1974 (General Duties of Self-Employed Persons) (Prescribed Undertakings) Regulations 2015 (DA 2015, s 1);

- the Clean Air Act 1993, Pt 3, relating to smoke control areas, so that the Secretary of State's power to authorise fuels and exempt classes of fireplace is exercisable by reference to published lists, rather than by statutory instrument (DA 2015, s 15);
- the Control of Pollution Act 1974 to remove the power of local authorities to designate areas as noise abatement zones (DA 2015, s 59, Sch 13, Pt 5);
- the Education Act 1997 and the Education Act 2005 to remove the Secretary of State's powers to require governing bodies of maintained schools in England to set annual targets in relation to school performance and require local authorities in England to set annual targets in respect of the educational performance of pupils at schools they maintain (DA 2015, s 66); and
- the Licensing Act 2003, Sch 2, to give powers to licensing authorities to designate certain geographical areas, types of premises or time periods as exempt from the licensing requirements which would otherwise apply to the supply of late night refreshment (DA 2015, s 71).

In addition, various other pieces of legislation are affected by the DA 2015, s 19, Sch 6, which:

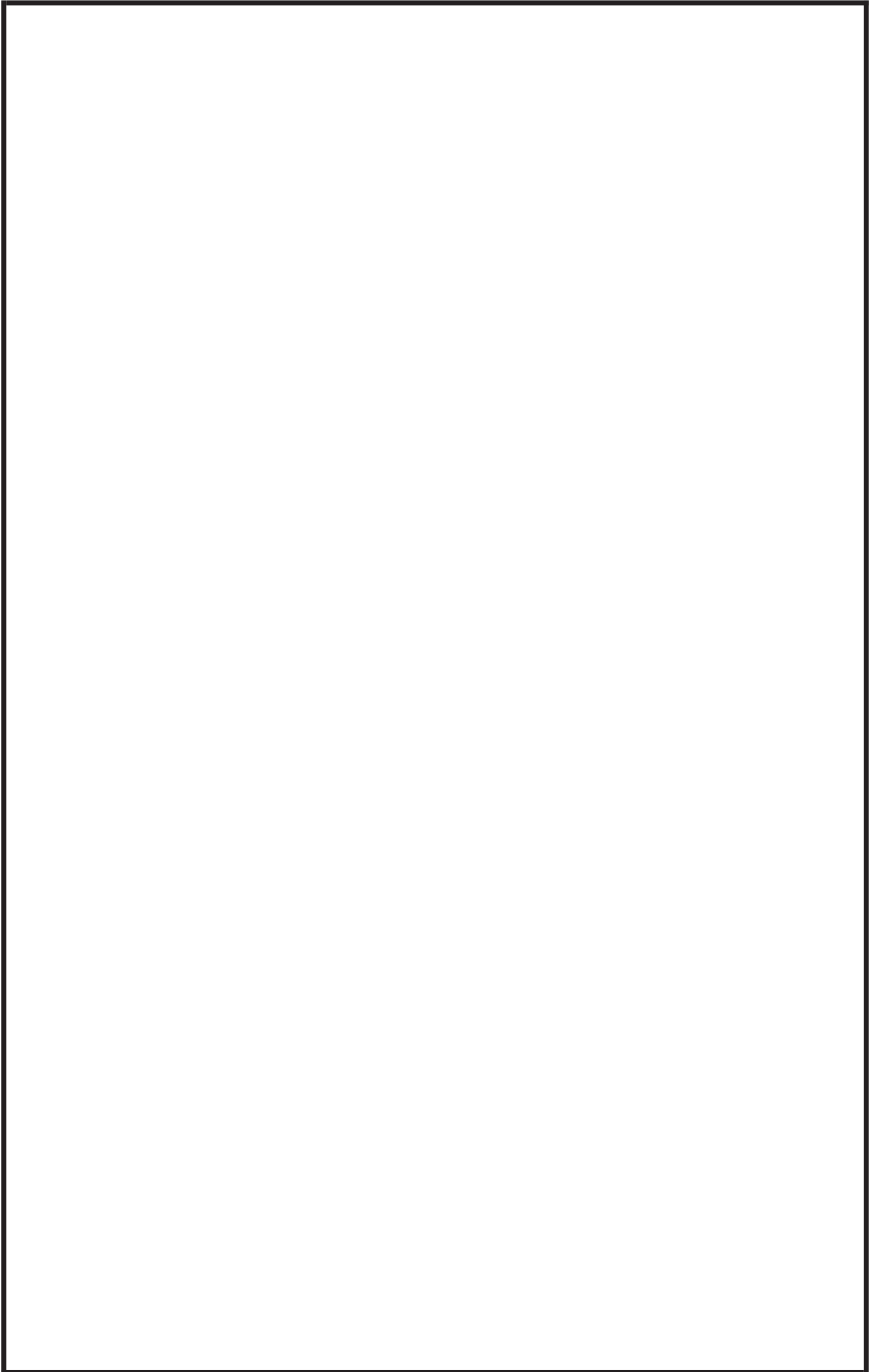
- repeals the Deeds of Arrangement Act 1914, so that deeds of arrangement are no longer an available alternative to bankruptcy;
- amends IA 1986, Sch B1, relating to the process for appointing and releasing an administrator;
- omits IA 1986, s 151, which enabled a court to order payment of money to the Bank of England on a company being wound up by the court;
- amends IA 1986, s 174, to provide for the release of a liquidator when the winding-up order has been rescinded;
- amends the Company Directors Disqualification Act 1986 so that the Secretary of State or the official receiver may request information relevant to a person's conduct as a director of a company, although there are transitional provisions in SI 2015/1732 in relation to these provisions;
- amends IA 1986, s 307, in order to facilitate the offer of bank accounts to undischarged bankrupts; and
- repeals provisions in IA 1986 that permit a competent authority to grant, refuse or withdraw authorisation to act as an insolvency practitioner and provide for the authorisation of nominees and

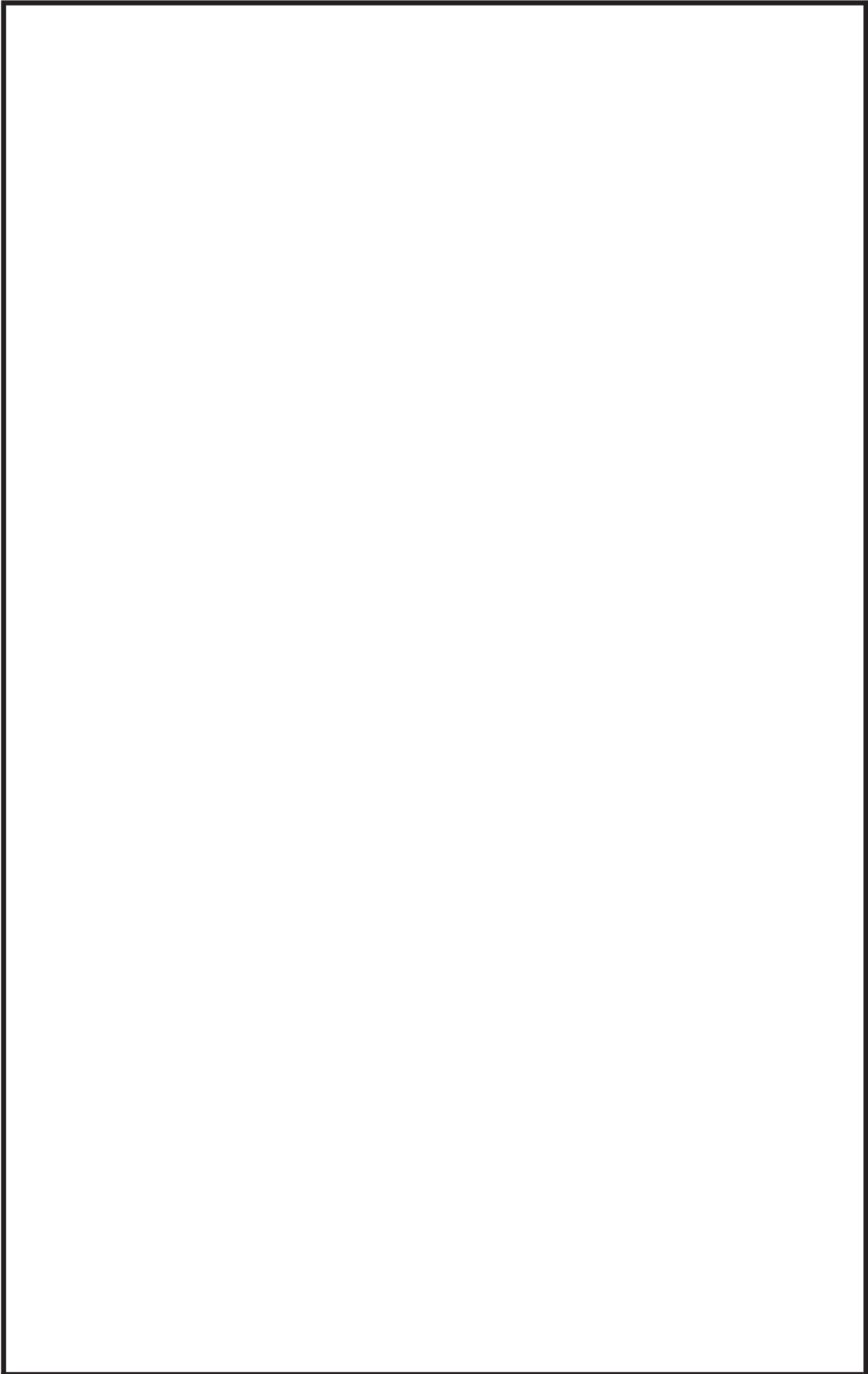
supervisors in relation to voluntary arrangements, although there are transitional provisions in SI 2015/1732 in relation to these provisions.

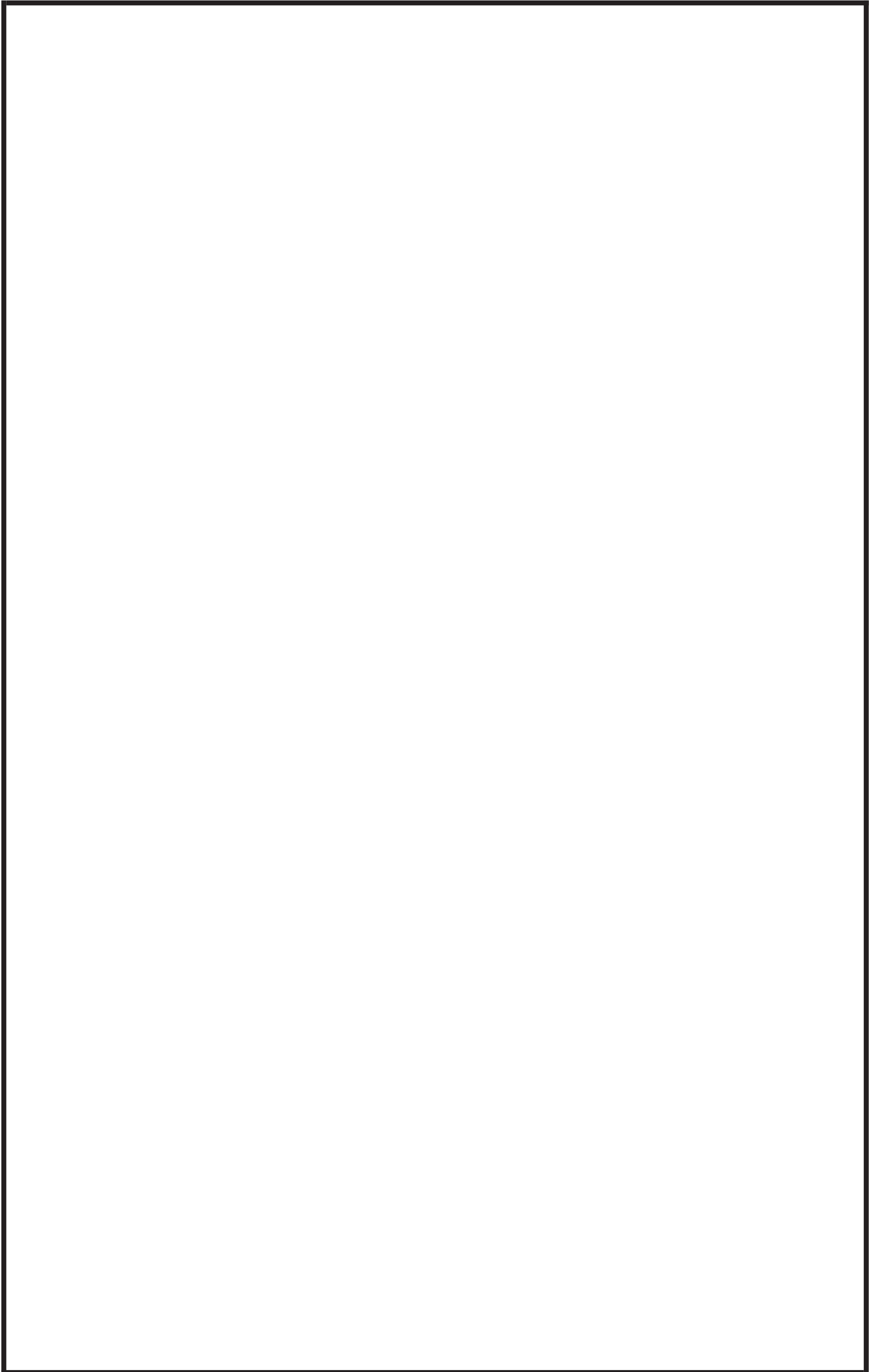
Provisions coming into force on 1 January 2016.

With effect from 1 January 2016, the DA 2015 will amend:

- the Education Act 2002, ss 35, 36, to remove the requirement for local authorities, governing bodies and head teachers of maintained schools in England to have regard to guidance when carrying out certain functions relating to school staffing (DA 2015, Sch 16, paras 4, 5);
- the Political Parties, Elections and Referendums Act 2000, Sch 1, to change the frequency at which the Electoral Commission is required to produce a five-year plan and to make associated changes to the role of Comptroller and Auditor General (the National Audit Office) in respect of the Electoral Commission (DA 2015, s 94); and
- the Local Democracy, Economic Development and Construction Act 2009, Sch 1, to change the frequency at which the Local Government Boundary Commission for England (LGBCE) is required to produce a five-year plan, to make associated changes to the role of the Comptroller and Auditor General (the National Audit Office) in respect of the LGBCE and to enable the LGBCE to appoint up to two independent members of its audit committee (DA 2015, s 95).







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