Technical Bulletin

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Information issued by the Technical Committees of the Association of Business Recovery Professionals to members, associates and new professionals

Contents

96.1 Administration – Notices of Intention to Appoint and Notices of Appointment

> • With effect from 1 April there are changes to the procedure for filing notices of intention to appoint and notices of appointment of an administrator.

With effect from 1 April there are changes to the procedure for filing notices of intention to appoint an administrator (Forms 2.5B and 2.8B) and notices of appointment of an administrator (Forms 2.6B, 2.7B, 2.9B and 2.10B), which are as follows:

- All cheques for court fees must be made payable to 'HM Courts and Tribunals Service' or 'HMCTS'.
- The fee payable on the filing of a notice of appointment of an administrator or a notice of intention to appoint an administrator (if filed first), are increase from £30 to £35 (see Technical Bulletin 95.8).

Following some confusion it has been confirmed that the High Court in London <u>will</u> accept copies of any notice of intention to appoint an administrator or notice of appointment of administrator.

96.2 Invalid Administration Appointments – Important High Court Decision

> • The High Court held that an out of court appointment of administrators by the directors of a company was invalid because the decision of the directors was not made in accordance with the company's articles, and notice of intention to appoint was not given to the company.

In a judgment handed down on 8 April in the case of *Minmar (929) Limited v Khalatschi* [2011] EWHC 1159 (Ch) (unreported at time of writing), the High Court held that an out of court appointment of administrators by the directors of a company was invalid on two counts:

- The decision of the directors was not made in accordance with the company's articles at a properly convened and held board meeting.
- Notice of intention to appoint had not been given to the company.

A director of the company applied for an order setting aside the appointment of administrators by other directors in circumstances where there was conflict between different members of the board.

The decision of the directors

The Chancellor held that a decision of the directors to appoint an administrator must be made strictly in accordance with the procedures laid down in the company's articles. In the present case, the articles required decisions to be made either unanimously or at a properly convened and conducted board meeting. Although the decision to appoint had purportedly been made at a directors' meeting, it had not been properly convened or held in accordance with the articles.

The respondents relied on the wording of paragraph 105 of Schedule B1 to the Insolvency Act 1986, which says:

> ‘A reference in this Schedule to something done by the directors of the company includes a reference to the same thing done by a majority of the directors of a company’;

and on the commentary on this paragraph given by Sealy and Milman in their *Annotated Guide to the Insolvency Legislation*, which says:

> ‘References in earlier legislation to an act done by the directors have been construed as requiring either that the directors should act unanimously or that a meeting be duly convened at which a decision is reached by the requisite majority ... Under the present provision a meeting is not required.’

The Chancellor rejected this argument. The provisions of paragraph 105 did not dispense with the usual rules of internal management, and Sealy and Milman’s commentary was incorrect.

For this reason the appointment was invalid.

Notice of intention to appoint

The other reason the appointment was held to be invalid was that notice of intention to appoint was not given to the company.

Paragraph 26(1) provides that, where the company or the directors intend to appoint an administrator, notice of intention to appoint must be given to any person who may be entitled to appoint an administrative receiver or administrator under paragraph 14 (i.e. the holder of a qualifying floating charge). Paragraph 26(2) adds that notice must also be given to such other persons as may be prescribed. Rule 2.20 says that, in addition to the persons mentioned in paragraph 26, a copy of the notice of intention to appoint must be given, among others, to the company (if the company is not intending to make the appointment). The Chancellor rejected the argument that notice need only be given to the additional persons mentioned in Rule 2.20 where notice has to be given to the holder of a qualifying floating charge under paragraph 26(1).

It was noted that Form 2.8B, which is to be used for giving notice of intention to appoint, provides no space for recording that notice is given to the parties indicated in Rule 2.20(2) and that there is no prescribed form for cases where notice is required to be given to such parties.

This decision contrasts with the decision of HH Judge McCahill QC in the Bristol District Registry of the High Court in November 2010 in *Hill v Stokes* [2011] EWHC 3726 (Ch) (which was not referred to in *Minmar*).

In this case, the company was a retail chain, and administrators were appointed out of court. Notice of intention to appoint had been given to the holder of a qualifying floating charge and to the company. However, unknown to the administrators at the time, landlords at some of the stores had distrained. The company had not given them a copy of the notice of intention to appoint, although the list of additional persons to whom notice must be given set out in Rule 2.20 includes any person who, to the knowledge of the person giving the notice, has distrained against the company or its property.

Proposed sales of some of the properties were put on hold while the administrators applied to court, concerned that their appointment might be invalid.

The essential issue for the court was paragraph 28(1) of Schedule B1, which says that 'an appointment may not be made' unless the company 'has complied with the requirements of paragraphs 26 and 27...' The Judge held that this reference should relate only to paragraph 26(1), and not additionally to paragraph 26(2), which prescribes, via Rule 2.20, the other persons to whom notice must be given. He referred with approval to the commentary in Sealy and Milman which came to the same conclusion.

The Judge commented that, even if this conclusion was wrong, he would nevertheless have held that a failure to notify the prescribed person in a case where the qualifying charge holder had been properly notified and had consented, was not of a category and quality which would be fatal to an appointment.

These cases give inconsistent views on the importance of notifying the persons listed in Rule 2.20 of an intention to appoint administrators. However, pending further judicial clarification, the procedure, as interpreted by the Chancellor in *Minmar* should not be ignored.

Members should therefore be careful to check the articles to ensure that the meeting of directors is duly convened in accordance with the articles. It is also important to check whether any bailiffs or enforcement officers are taking action against the company's property, and to ensure that a copy of the notice of intention to appoint is given to the parties specified in Rule 2.20.

Until further clarification is provided regarding these conflicting decisions, in circumstances where there is no qualifying floating charge holder, each case must be carefully considered on its facts to determine how best to comply with the Chancellor's decision in *Minmar*.

96.3 Administration – Failure to Obtain FSA Consent Invalidates Appointment

- The High Court held that where there was a requirement to obtain the consent of the Financial Services Authority to the appointment of an administrator, failure to do so invalidated the appointment.
- However, in the present case the Court would exercise its jurisdiction to make a retrospective appointment.

Administrators were appointed to M.T.B. Motors Limited ('the company') by the directors under paragraph 22 of Schedule B1 to the Insolvency Act 1986. The company was authorised by the Financial Services Authority to carry on insurance mediation activities. Section 362A of the Financial Services and Markets Act 2000 provides that an administrator may not be appointed under paragraph 22 without the consent of the Authority. The consent must be filed at court, together with the notice of intention to appoint.

Before the administrators were appointed they made a search of the FSA register to see if the company was still authorised, but the search returned no match. It later turned out that the reason for this was that the search had been made against the correct name of the company, M.T.B. Motors Ltd (with full stops after each of the initial capital letters); it was only if the search was made against MTB Motors Ltd (without the full stops) that a match would have been found.

The error came to light some three weeks after the appointment, when the FSA, in response to a letter circulated to all creditors, wrote to the administrators indicating that the company was still authorised by the FSA and was in breach of its regulatory requirement to submit a return. Following discussions with the FSA, the administrators received a letter from the FSA consenting to their appointment.

The administrators applied for a declaration that their acts and decisions should be deemed to be valid, notwithstanding the failure to obtain consent from the FSA at the relevant time.

Paragraph 29 of Schedule B1 provides that:

> 'a person who appoints an administrator of a company under paragraph 22 shall file with the court
>
> (a) a notice of appointment, and
>
> (b) such other documents as may be prescribed.'

Counsel for the administrators submitted that the requirements of paragraph 29 had been satisfied, because the consent provided for by section 362A is not 'prescribed' in the Insolvency Act or Rules.

Judge Hodge QC rejected this submission. Paragraph 29 meant 'such other documents as may be prescribed' without limitation on the source of the prescription. The consent required by section 362A was 'prescribed', and failure to file it at court meant that purported appointment was invalid.

However, the Judge noted that, following the decision in *Re G-Tech Construction Ltd* [2007] BPIR 1275, the court had discretion to make an administration order with retrospective effect under paragraph 13 (2) of Schedule B1. In the present case, in view of the inconvenience and uncertainty which would be caused by holding the appointment to be invalid, it was right to make such an order, appointing the administrators with effect from the time of their original purported appointment.

Re M.T.B. Motors Limited (in Administration) 2010 EWHC 3751 (Ch).

The full text of the judgment is available on the British and Irish Legal Information Institute web site at:

http://www.bailii.org/ew/cases/EWHC/Ch/2010/3751.html

96.4 Administrators Allowed to Set Bar Date for Submission of Expense Claims

- The High Court held that it had power to direct administrators to set a cut-off date for the submission of claims which would be payable as administration expenses.

The administrators of Woolworths wanted to distribute funds to the second of two secured creditors (the first having been paid), after making provision for the payment of rent and business rates on various occupied premises as an expense of the administration. However, despite a number of letters having been sent by the administrators, there were a number of landlords and local authorities which had failed to submit claims. The administrators applied for directions to enable them to distribute the surplus to the second secured creditor, without any provision for claims for liabilities to be paid as expenses unless such claims were made by a specified date.

David Richards J held that there was well-established jurisdiction to make such orders in the case of liquidations pursuant to the power of the court to give directions to liquidators (now contained in section 168(3) of the Insolvency Act 1986), and there was no reason why the equivalent power to give directions to administrators, contained in paragraph 63 of Schedule B1, should not be exercised in the same way.

In the circumstances of the case, bearing in mind that the creditors had already had good opportunity to lodge their claims, that they were either commercial landlords or local authorities who could be expected to have a proper regard to their own commercial interests and knowledge of insolvency procedures, and provided that the final cut off date for claims was not less than 28 days after a further letter was sent, the proper balance would be struck between the proper working out of the administration on the one hand and the protection of the creditors on the other. It would therefore be appropriate to give the directions sought.

Re WW Realisation 1 Limited (in Administration) [2010] EWHC 3604 (Ch).

96.5 Special Administration Regime for Investment Banks

- Regulations creating a new special administration regime for investment banks came into effect on 8 February 2011. Supporting Rules came into effect on 30 June 2011

A new special administration regime for investment banks was introduced by the Investment Bank Special Administration Regulations 2011 (SI 2011/245), which came into effect on 8 February 2011. The Regulations are supported by the Investment Bank Special Administration (England & Wales) Rules 2011 (SI 2011/1301), which came into effect on 30 June 2011.

Under the Regulations an administrator must be appointed by court order, and must pursue the following special administration objectives:

- Objective 1 is to ensure the return of client assets as soon as is reasonably practicable;
- Objective 2 is to ensure timely engagement with market infrastructure bodies and the authorities; and

- Objective 3 is to either rescue the investment bank as a going concern, or wind it up in the best interests of the creditors.

The Regulations state that the order in which the objectives are listed is not significant. Nevertheless, the administrator is required:

(a) to commence work on each objective immediately after appointment, prioritising work on each as he thinks fit; and
(b) set out in his proposals the order in which he intends to pursue the objectives.

The Regulations allow the administrator to set a bar date for claims to client assets, and sets out rules for dealing with the position where there is a shortfall of client assets held in omnibus accounts. The costs of returning client assets are to be paid out of the client assets.

The Regulations also seek to ensure the continuity of supply of essential IT, infrastructure and financial data services by prohibiting termination of a supply except with the consent of the administrator, the permission of the court, or where charges remain unpaid for more than 28 days.

In other respects the procedure is the same as for Schedule B1 administrations under the Insolvency Act, subject to specific modifications and the inclusion of certain liquidation provisions. These include the power to disclaim onerous property.

There are special procedures for investment banks which are also deposit-taking banks falling within the operation of the Banking Act.

Members should refer to the legislation for the detailed provisions.

96.6 FSA Publishes Insolvency Cooperation Guidance

- The Financial Services Authority has published guidance on cooperation between recognised bodies and insolvency practitioners.

Part VII of the Companies Act 1989 modifies insolvency law to protect the actions of recognised clearing houses and recognised investment exchanges (‘recognised bodies’) in the event that one of their members defaults on their obligations. The guidance has been drawn up to facilitate a closer understanding of the Part VII regime, and to facilitate cooperation between recognised bodies providing central counterparty services and insolvency practitioners within the framework set out in Part VII. It covers communication, provision of information, prioritisation of tasks, and record keeping.

The guidance is available on the FSA web site at:

www.fsa.gov.uk/pubs/other/cooperation_guidance.pdf

96.7 English Court Sanctions Scheme of Arrangement for Foreign Company

- The High Court has sanctioned a Companies Act scheme in relation to a company incorporated, and based, in Germany.

In *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), Mr Justice Briggs held that the English court had jurisdiction to sanction a scheme of arrangement under Part 26 of the Companies Act 2006 in relation to a company incorporated in Germany, and with its centre of main interests (COMI) there.
A crucial factor was the choice of English law and English jurisdiction contained within the senior lenders' facility agreement. This was held to provide sufficient connection with England to give the English court jurisdiction.

For the facts of the case, and the Judge's reasoning in coming to his conclusion, members should refer to the full judgement, which is available on the British and Irish Legal Information Institute web site at:

http://www.bailii.org/ew/cases/EWHC/Ch/2011/1104.html

96.8 IVAs – Nominees' and Supervisors' Fees Held to be VAT Exempt

- The VAT Tribunal held that nominees' and supervisors' fees in an IVA constituted a single exempt supply for VAT purposes.
- HMRC is to issue a Business Brief in response to the decision.

In the case of *Paymex Limited v HMRC* [2011] UKFTT 350 (TC), the VAT Tribunal held that nominees' and supervisors' fees in an IVA constituted a single exempt supply for VAT purposes, falling within Article 135(1)(d) of the Principal VAT Directive (2006/112/EC). Although the case was concerned with consumer IVAs, the Tribunal's decision appears to apply to IVAs generally.

Article 135(1)(d) of the Principal VAT Directive provides:

> '1. Member States shall exempt the following transactions:
> ... (d) transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments, but excluding debt collection; …'

Counsel for HMRC submitted that in an IVA there is no underlying economic transaction taking place, but instead the operation of a statutory insolvency procedure, and that the nominee and supervisor is performing a professional service which should be standard rated for VAT.

The Tribunal held that the proper approach was to examine the economic substance of the activities carried out by the nominee and supervisor. The fact that a service was a professional service did not itself prevent it from being an exempt supply, if it fell within the terms of an applicable exemption.

The Tribunal found that the services provided by the nominee and supervisor (which were the same person in the present case), although comprising a number of elements, were essentially in economic terms a single service of the provision to the debtor of the means whereby his debts could be restructured so as to provide him with protection from his creditors, an achievable cash flow and debt repayment schedule, and, if the arrangement reached its planned conclusion, an element of release from part of his indebtedness. It was of no consequence that that this was the result of a statutory insolvency procedure, rather than a contractual arrangement, or that the process required a licensed insolvency practitioner to act as nominee and supervisor, or that the insolvency practitioner was a professional person, licensed by a regulatory body, carrying out his role subject to professional and ethical obligations.
Although there were other elements to the service, including advice on the suitability of an IVA, overall supervision of performance of the IVA and reporting to creditors and, up to 6 April 2010, the court, and those elements were themselves integral and key to the overall process, those aspects of the service were ancillary to the core elements of negotiation and payment handling. Accordingly, viewed overall, the supply was exempt as falling within article 135(1)(d) of the Principal VAT Directive.

It is understood that HMRC are not to appeal the decision.

HMRC will be issuing a Business Brief in response to the decision shortly. In the meantime we understand that the regulatory bodies are writing to their respective licence holders.

The full text of the decision is available on the Tribunals web site at:

http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j5580/TC01210.doc

96.9 ‘Books and Papers’ Includes Computer Records

- The Court of Appeal (Criminal Division) upheld the conviction of a director of a company for an offence of falsifying company books or papers contrary to section 206 of the Insolvency Act 1986 where the falsification related to computer records rather than hard copies.

Section 206(1)(c) of the Insolvency Act 1986 provides that where a company is wound up, a past or present officer of the company is deemed to have committed an offence if, within 12 months preceding the winding up, he has ‘concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the company’s property or affairs’.

The director was convicted for falsifying records held on a computer. The offence took place in 2006. The director submitted that ‘any book or paper’, an undefined expression, was limited to physical books and papers, as made clear by the word ‘paper’, which could not include a computer record. The Court of Appeal held that, on a true construction, records kept on a computer that affected or related to a company’s property or affairs were within the composite expression ‘any book or paper affecting or relating to the company’s property or affairs’. Whilst computer records could not be regarded as ‘paper’, the expression ‘book or paper’ should be given a practical meaning reflecting current usage.

It was noted that the ground raised by the appellant could not have been argued if the alleged offence had occurred after 12 October 2009. With effect from that date, new section 436B of the Insolvency Act provides as follows: 'A reference to a thing in writing includes that thing in electronic form.'

R v Taylor [2011] EWCA Crim 728.

The full text of the judgment is available on the British and Irish Legal Information Institute web site at:

http://www.bailii.org/ew/cases/EWCA/Crim/2011/728.html

96.10 Transfers of Undertakings – No Cap on a Week's Pay for Calculating Compensation

- The Employment Appeal Tribunal held that there is no cap on the amount of a week's pay for the purposes of an award of compensation for failure to consult in advance of a transfer.

The Employment Appeal Tribunal had to consider whether under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') there is a statutory cap on the amount of a week's pay for the purpose of an award of compensation where there has been a failure to inform and consult.

The case arose out of an administration, where an insolvent business was sold on the same day as the company went into administration. The employment tribunal upheld the claims against both the purchaser and the seller, jointly and severally, for breach of the duty under TUPE to inform and consult about the transfer. It awarded 13 weeks' pay to each affected employee, but applied the statutory cap on a week's pay, which at that time was £350. Three employees appealed, on the grounds that no such cap applied to awards under TUPE.

Regulation 13 of TUPE requires employers to inform and consult with employees in advance of a proposed transfer. Regulation15(8)(a) provides that where there has been a breach of the information and consultation requirements, the Tribunal may order the transferor to pay 'appropriate compensation' to affected employees, and Regulation 16(3) defines 'appropriate compensation' as 'such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable ...'. Regulation 16(4) also provides as follows:

> 'sections 220 to 228 of the 1996 Act [the Employment Rights Act 1996] shall apply for calculating the amount of a week's pay for any employee for the purposes of paragraph (3) ...'

Sections 220 to 228 constitute a group of sections which define the term 'a week's pay'. The key section for present purposes was section 227(1), which provides that for the purposes of calculating certain specified awards in relation to unfair dismissal, flexible working and redundancy, the amount of a week's pay shall not exceed £350.

The case for the respondent was that since regulation 16(4) expressly incorporates section 227 the rule-maker's intention can only have been to apply the cap provided for by that section in the calculation of appropriate compensation under regulation 15: otherwise the cross-reference would have no effect. The EAT did not accept this argument. It failed simply as a matter of literal construction. No doubt regulation 16(4) did cross-refer to section 227, in the sense that it referred to a group of sections of which it formed part; but all that that meant was that it was necessary to apply the provisions of section 227 so far as applicable. There was nothing in those provisions that referred to the award of appropriate compensation under regulation 15 of TUPE. The structure of section 227 (1) was that it identified specifically each kind of award or payment to which the cap applied. It did not apply to every kind of payment under the Act defined by reference to a week's pay. Accordingly, the appeal would be allowed.

Zaman and others v Kozee Sleep Products Ltd, UKEAT/0312/10/CEA.

The full judgment is available on the Employment Appeal Tribunal web site at:

http://www.employmentappeals.gov.uk/Public/Upload/10_0312fhwwSBCEA.doc

96.11 Transfers of Undertakings – Dismissal by Administrator was Automatically Unfair

- The Employment Appeal Tribunal held that a dismissal by an administrator was transfer-related and therefore automatically unfair, even though at the time of the dismissal no transferee had yet been identified.

The Employment Appeal Tribunal held that it is not necessary for the eventual transferee to have been identified in order for an employee, dismissed in the run up to a transfer, to claim automatic unfair dismissal by reason of a relevant transfer under TUPE.

Ultralon Holdings Ltd went into administration on 23 May 2008. The administrators dismissed Mr Baillavoine, the chief executive officer on the same day. Ultralon was sold as a going concern to Spaceright just over a month later and that sale amounted to a relevant transfer under TUPE. The employment tribunal had found that the administrators had dismissed Mr Baillavoine so that a purchaser would be able to acquire the business and assets without the continued employment of its Chief Executive. No purchaser of the businesses from the administrator would require such an officer, because the purchaser would either be an existing company with its own chief executive officer or it would be a new venture, where the chief executive officer would come from the ranks of the directors. It was therefore necessary for the administrators to dispense with the claimant's services. His salary of £120,000 may also have presented a problem for potential purchasers.

The tribunal therefore found that the dismissal was unfair. As a consequence, the liability of Ultralon to pay compensation for unfair and wrongful dismissal was transferred to the Spaceright. Hence it was Spaceright which appealed against the tribunal's finding.

The EAT held that the employment tribunal had been right to find that Mr Baillavoine's dismissal was connected with the transfer even though at the time of his dismissal the sale had not been agreed and no purchaser had yet been identified. The EAT also held that the dismissal was not for an economic, technical or organisational reason involving changes in the workforce. The dismissal did not relate to the continued operation of the business as a going concern. Nor was his dismissal by reason of redundancy. The business was always going to need a managing director and it was contemplated that any purchaser would have its own managing director in place and would not want to employ Mr Baillavoine.

Spaceright Europe Ltd v Baillavoine & another, UKEAT/0339/10/SM.

The full judgment is available on the Employment Appeal Tribunal web site at:

http://www.employmentappeals.gov.uk/Public/Upload/10_0339fhSBSM.doc

96.12 Licensing Act 2003 – Time Limits for Dealing with Lapsed Licences

- With effect from October 2010 there are new time limits for exercising the options available for dealing with a premises licence which has lapsed following the insolvency of the licence holder.

Under the provisions of the Licensing Act 2003, when the holder of a premises licence becomes insolvent, the licence automatically lapses. However, the licence will be reinstated if the insolvency practitioner appointed to the insolvent licence holder gives the relevant licensing authority notice ('an interim authority notice'). With effect from October 2010, the time limit for giving an interim authority notice was increased from 7 days to 28 days.

If there is no interim authority notice in effect, a person who is eligible to apply for a premises licence may apply for the lapsed licence to be transferred to them. With effect from October 2010, the time limit for making such an application notice was increased from 7 days to 28 days.

See the Legislative Reform (Licensing) (Interim Authority Notices etc) Order 2010 (SI 2010/2452).

For the Licensing Act 2003 and insolvency of licence holders generally, see Technical Bulletin 73.3.

96.13 EC Insolvency Regulation – Assets Held in UK to be Distributed According to UK Law

- Where a company was subject to main proceedings in Italy and secondary proceedings in the UK, assets situated in the UK were to be distributed in accordance with UK insolvency law.

The High Court held that where the main proceedings for an Italian company had been commenced in Italy, but secondary insolvency proceedings were instituted in the UK, the EC Insolvency Regulation required the distribution of the company's UK assets under the UK liquidation proceedings to be made in accordance with domestic law, i.e. the Insolvency Act 1986. Payments to unsecured creditors in the UK were therefore to rank pari passu with the company's other debts rather than in accordance with Italian law under which they would have been accorded priority.

Alitalia (‘the company’) became insolvent and was admitted to Italy’s extraordinary administration procedure. The company’s existing employees in the UK had their employment terminated and they entered into compromise agreements by which the company was to pay them sums in two tranches. By then, the trustees of the company’s pension and assurance scheme had issued secondary proceedings in the UK with a view to triggering a relevant insolvency event for the purposes of pension fund protection. A winding-up order was made on the petition and English liquidators were appointed. The company had two bank accounts in the UK which the Italian administrator had left open. The first tranche of the payments due to employees was made from the company’s current account. The administrator later wished to pay the second tranche from the bank account, but the liquidators applied for a declaration that those payments were unsecured and should rank pari passu with the company’s other debts for the purposes of the UK proceedings. The liquidators contended that the company’s UK assets fell to be distributed to unsecured creditors in accordance with the Insolvency Act 1986 and the terms of Articles 4 and 28 of the EC Insolvency Regulation.

The Italian administrator submitted that:

- the bank accounts should be used to discharge the outstanding indebtedness to the UK employees on the basis that money in them was held on trust for the employees;
- alternatively, the liquidators should be directed to discharge the debts to the UK employees either on the strength of the duty of co-operation between the liquidators in main and secondary proceedings, pursuant to the Regulation, or in accordance with the principle in *Ex parte James* to the effect that the arrangements of an existing office-holder, i.e. the administrator, ought to be complied with;
- under common law principles, where a UK liquidation was ancillary to a foreign liquidation, the UK liquidator could remit assets to the principal liquidator so far as was consistent with the Regulation.

Newey J held that:

- No trust had been created. The creation of a trust required the ‘three certainties’ of words, subject matter and objects. Whilst the administrator had intended to use money in the bank accounts to pay the UK employees, that was not of itself enough to establish a trust. He had neither opened a new bank account nor arranged for the existing accounts to be re-designated as trust accounts. The evidence proved no more than that he had thought it convenient to leave money in the bank accounts and seen no need to remove it.
- The difficulty with the administrator’s argument on co-operation was to be found in the terms of the Regulation itself: Article 28 stated that the law applicable to secondary proceedings was to be that of the member state within the territory of which the secondary proceedings were opened, and Article 4 likewise provided for insolvency proceedings opened in a member state to be governed by that state’s law, including in relation to the distribution of proceeds from the realisation of assets. Proceedings opened in the member state of a debtor's centre of main interests were regarded as the main proceedings, and the Regulation provided for assets within the scope of secondary proceedings to be disposed of in accordance with that member state’s law. What the administrator was suggesting was that the duty of co-operation extended to requiring liquidators to apply assets in a manner different from that for which the Regulation itself provided, which could not be right.

- The principle in *Ex parte James* was not applicable as, in that case, the trustee in bankruptcy had received money to which an estate was not in law entitled: that had not occurred in the instant case. The fact that the sums in the bank accounts were within the scope of the UK liquidation did not arise either from any conduct on the part of the liquidators or from events subsequent to the making of the winding-up order and there was, as the administrator acknowledged, no question of the liquidators having behaved 'in a dishonourable manner'.
- Although in *McGrath & anor v Riddell & ors, Re HIH Casualty and General Insurance Limited* Lord Hoffmann had expressed the view that the English court had jurisdiction at common law to direct remittal of the English assets notwithstanding any differences between the English and foreign systems of distribution, their Lordships were divided in their views in that case, and the directions to the liquidators were given under section 426 of the Insolvency Act rather than pursuant to any common law power. In the circumstances, *HIH Casualty and General Insurance* could not be taken as authority for the proposition that there is a common law power to order an English liquidator to remit assets to a foreign liquidator even where they will then be distributed otherwise than in accordance with the English rules. The decision showed the breadth of the discretion conferred by section 426, but that provision was inapplicable in the present case.

Re Alitalia Linee Aeree Italiane SpA, Connock & Boyden v Fantozzi [2011] EWHC 15 (Ch), [2011] BPIR 308.

The full text of the judgment is also available on the British and Irish Legal Information Institute web site at:

http://www.bailii.org/ew/cases/EWHC/Ch/2011/15.html

96.14 EC Insolvency Regulation – Jurisdiction

- The English court had no jurisdiction to override the judgment of a foreign court, even where it was clear that an order made by the foreign court ought not to have been made.

Eurodis Texim Electron SA ('Texim') was one of a group of companies incorporated in various jurisdictions which were in administration in the UK. Texim was a Belgian company, but was subject to English administration because its centre of main interests (COMI) was in England. It later transpired that the company had also been in liquidation in Belgium and that liquidation process had been completed and the company irreversibly dissolved. The administrators sought to argue that the Belgian dissolution should be ignored on the basis that the liquidation was contrary to the EC Insolvency Regulation and should be treated as being void.

The Court held that it had no jurisdiction to interfere in an order of an overseas court. The purpose of the Regulation was to produce a degree of uniformity and consistency of approach to insolvency matters across the member states that were subject to it. It worked by requiring the courts of one country to give effect to the orders of another, or to decline to make orders where they ought to be made in another. It did not give the courts in one country the power to determine that orders of another were actually invalid.

Whilst it was almost certainly the case that the winding-up order should not have been made in Belgium, it was made and had to stand as a valid order of the Belgian court until set aside. Further, neither English legislation nor the Regulation authorised the collection of assets of a dissolved company which was no longer in existence.

Since the administrators could no longer continue to be administrators of a company that did not exist, the court ordered that the company be wound up as an unincorporated company under section 221 of the Insolvency Act 1986 (which, inter alia, provides that an unregistered company may be wound up if it has been dissolved) and that the administrators be appointed as liquidators.

Re Eurodis Electron Plc & Ors [2011] EWHC 1025 (Ch).

The full text of the judgment is available on the British and Irish Legal Information Institute web site at:

http://www.bailii.org/ew/cases/EWHC/Ch/2011/1025.html

96.15 Bribery Act 2010

- The Bribery Act 2010 came into effect on 1 July 2011

As has been well publicised, the Bribery Act 2010 came into force on 1 July 2011.

The Government has produced guidance about the Act, the procedures which organisations can put in place to mitigate the risks of committing a Bribery Act offence, and the defences available. The guidance is available on the Ministry of Justice web site at:

http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf

The extent to which there may be a Bribery Act risk involved in an insolvency appointment is something that should be assessed on a case by case basis.

96.16 Retention of Title – Disposal of Goods by Administrator did not Amount to Conversion

- The Court of Appeal held that the disposal by a company in administration of goods subject to retention of title did not amount to conversion where the supplier had failed to exercise its contractual right to prevent re-sale.
- The decision depended heavily on the particular terms of the contract under consideration.

Isher Fashions UK('Isher') was a manufacturer of clothing. Jet Star Retail Limited ('Jet Star') was a retailer of women's fashion garments. Isher supplied Jet Star with goods under a contract which contained a retention of title clause. It was agreed that the contract implicitly gave Jet Star the right to deal with the goods notwithstanding the retention of title. The contract also explicitly gave Isher the right, by notice, to prevent Jet Star from selling or parting with possession of the goods if Jet Star became subject to formal insolvency Proceedings.

Jet Star went into administration, but Isher did not serve notice preventing the sale of the goods supplied. Jet Star's administrators traded the business for a few days, and then sold the business as a going concern to Internacionale Retail Limited. Isher brought proceedings, claiming damages for conversion of the garments delivered to Internacionale under the sale agreement.

Counsel for Isher admitted that Jet Star had authority to sell and dispose of the goods in the ordinary course of business, notwithstanding the retention of title clause, but maintained that it ceased to have such authority once it became insolvent and entered into administration. Accordingly, any sale and disposal of the goods that took place after the date of administration amounted to wrongful interference with Isher's goods.
Isher's case rested on two main propositions: The first was that in relation to Jet Star's authority to dispose of the goods before paying for them, the effect of the retention of title clause was broadly the same as that of an agreement for a floating charge. The second was that in the case of a floating charge, the company's authority to dispose of its assets was limited to disposals made in the ordinary course of business and ceased on insolvency.

Moore-Bick LJ said that the second proposition was not in dispute. However, the first could not be sustained. The existence and scope of any authority that Jet Star may have had to dispose of the goods before they had been paid for is to be gleaned from the terms of the contract and its commercial object. The retention of title clause proceeded on the assumptions firstly that Jet Star was entitled to dispose of the goods even though property had not passed, and secondly that the right continued after the appointment of an administrator, unless terminated by Isher. The parties had clearly had in mind that Jet Star could deal with the goods even after it had become insolvent or had gone into administration. Isher's contractual protection depended on its withdrawing Jet Star's authority to deal with the goods. By contrast, a floating charge crystallised on the insolvency of the debtor. Isher had reserved the right to decide whether, and when, to intervene in order to preserve its interest in goods for which payment had not been made, and in those circumstances it was not possible to construe the contract as restricting Jet Star's authority to dispose of the goods otherwise than as provided for by the contract. Isher had taken no steps to withdraw Jet Star's authority to dispose of the stock, and it followed that Jet Star had not wrongfully interfered with the goods. It remained liable to Isher for the price of the stock, but the disposal, having been made with authority, did not give Isher any other cause of action.

Sandhu (t/a Isher Fashions UK) v Jet Star Retail Limites & Others [2011] EWCA Civ 459.

The full text of the judgment is available on the British and Irish Legal Information Institute web site at:

http://www.bailii.org/ew/cases/EWCA/Civ/2011/459.html

96.17 The Future of Cheques – A Reprieve

- The target date of 2018 for the phasing out of cheques has been cancelled.

Members may be aware that the Payments Council has been consulting on the proposed phasing out of cheques. This exercise was originally expected to be completed by 2018. However, the timetable was thrown into doubt in the light of concerns expressed by the Treasury Select Committee in June. In a major change of policy, the Payments Council has now announced that cheques will continue after all. In a statement issued on 12 July, the Payments Council said:

> 'Given the continued confusion and alarm that the target date on cheques is causing customers and organisations alike, the Payments Council has decided that cheques should continue for as long as customers need them and the target for possible closure of the cheque clearing in 2018 has been cancelled.'