Technical Bulletin

Issue No 100. October 2012

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

Contents

Technical Bulletin 100

Aquiline-eyed readers will have noticed that this is Technical Bulletin 100. A telegram is awaited! The first issue was in December 1990 following the formation of SPI's Technical Committee, the forerunner of R3's General Technical Committee. The first article which is about committee membership, reveals that two current members of GTC, Alan Katz and Jonathan Birch, were members of that first committee. Gold watches are outside the budget but on your behalf we should like to record our thanks for their long service and dedication to the profession. Other articles cover such matters as VAT Bad Debt relief, the Data Protection Act and direct access to the Bar. With one or two exceptions (such as TBs on the 2010 rules and the recent insolvency practice direction) subsequent TBs have been similar compendiums of topical legal and practical issues. We hope that you have found them helpful and will continue to do so.

100.1 Information from HM Revenue and Customs

- HM Revenue and Customs has asked us to bring the following notices to the attention of members.

Contact Details

HMRC National Insolvency Unit, Liverpool – new contact details

The HMRC National Insolvency Unit (NIU) has now moved to the following address:

5th Floor
Regian House
James Street
Liverpool
L75 1AD

New Insolvency Helpdesk number is 0151 242 8793

New fax number is 0151 242 8267

The NIU e-mail address 'insolvencyhelpdesk@hmrc.gsi.gov.uk' has not changed.

Please note there will be a temporary redirection facility to forward any items posted to the old Queens Dock address to the new address shown above.

HMRC apologises for any inconvenience that may have been caused to its customers as a result of this change of office.

Contact details for members' voluntary liquidations

Although directors of a company entering members voluntary liquidation (MVL) are required to sign a Certificate of Solvency, HMRC processes MVLs in the same way as for other insolvency processes i.e. HMRC's claim for direct tax debts is submitted by the Insolvency Claims Handling Unit (ICHU) at Newcastle upon Tyne. The department's claim for VAT and any indirect tax debts is submitted by the National Insolvency Unit (NIU) in Liverpool. If insolvency practitioners wish to enquire as to the latest tax position regarding a company in MVL they should therefore contact ICHU and/or the NIU as appropriate, as those are the teams within HMRC equipped to provide such information.

At ICHU, the following contact points should be used:
Catherine.robertson@hmrc.gsi.gov.uk or Helen.malcolm@hmrc.gsi.gov.uk

The NIU may be contacted by ringing the Insolvency Helpdesk on 0151 242 8793.

Requests from Insolvency Practitioners for Taxpayer Specific Information

HMRC currently receives a high volume of correspondence from insolvency practitioners requesting specific information in relation to the taxpayer they have been appointed over. This requested information consists of copies of Corporation Tax returns, VAT returns, P35 and P14 forms etc sometimes going back several years.

HMRC is not prevented by law from disclosing such information, provided they have taxpayer consent to do so. However, providing such information routinely in a large number of cases imposes a significant resource cost on the public purse which cannot be justified in the current climate.

Whilst HMRC wishes to assist insolvency practitioners as far as possible in the execution of their duties, they will be unable in future to provide copies of taxpayer forms or correspondence on a routine basis. They will consider providing such information on a case by case basis where the insolvency practitioner can demonstrate why he needs the information requested and that he has been unable to obtain it from the taxpayer's own records.

It is also important that for any item of correspondence forwarded to HMRC that the appropriate reference number is shown for the head of duty that the correspondence relates to. This will enable their staff to deal with that item of correspondence more effectively by eliminating the need to trace the reference number, which can be quite time consuming.

VAT Deregistration process for Insolvent Taxpayers

It has come to HMRC's attention that some insolvency practitioners appear to be unaware of their responsibilities under VAT legislation for rendering post-appointment VAT returns up to and including the final VAT return before the business is deregistered. We would therefore like to take this opportunity to remind insolvency practitioners of HMRC's VAT deregistration process for Insolvent Tax payers, as set out at Section 6 of the Insolvency VAT Public Notice 700/56, and of the potential consequences of failure to render post-appointment returns by the due date.

For businesses in bankruptcy, sequestration or any type of winding up:

- A deregistration questionnaire (Form VAT 167) is issued to establish the level of taxable stocks and assets on hand
- Once deregistration occurs, a final return (Form VAT 193 which shows as 9999 in the period box) will be issued covering the period from the first day after the end of the last accounting period up to the day before the date of deregistration.

HMRC advise insolvency practitioners to complete this return, even if it is for a 'Nil' amount, and submit it by the due date stated on the form.

If at any time during the above process you advise that deregistration is not appropriate, the process will be suspended until HMRC can agree deregistration with you.

The VAT 193 must include all VAT charged in the period including on disposal of the assets of the business. HMRC will agree to delay cancellation of the registration if required in order to allow VAT on asset realisations to be accounted for on the VAT

193. If VAT is subsequently charged following submission of the VAT 193 this must be accounted for using form VAT 833 which must be accompanied by full payment.

HMRC treats insolvency practitioners as taxable persons of the businesses over which they have been appointed under the provisions of Regulation 9 of the VAT Regulations 1995. Consequently, completion of the post-appointment VAT returns, including the VAT 193, is a legal requirement. It is important to note that failure to complete and submit post-appointment VAT returns could result in your becoming liable for an assessment under S73 (1 and 5) VAT Act 1994. Repeated failure to render post-appointment VAT returns may also result in HMRC reporting this failure to comply to the insolvency practitioners' licensing body.

New Form VAT 426 – Insolvent traders' claim for input tax after deregistration

Please note a new version of the form VAT426 has been published on the HMRC website, which is to be used with immediate effect. The form and an explanation of its purpose may be accessed using the following link:

http://search2.hmrc.gov.uk/kb5/hmrc/forms/view.page?record=198Ees6LvBw&form Id=1014

Please destroy all previous versions of the form.

100.2 Conditional Fee Arrangements in Insolvency Cases – Implementation of Jackson Reforms Postponed

- Success fees and after the event insurance premiums will continue to be recoverable in insolvency cases until April 2015.

The Government has announced that success fees ('uplift') and after the event insurance premiums will continue to be recoverable from the losing party in insolvency cases until April 2015. Recoverability in all other types of cases is to be abolished from April 2013, following the recommendations of the Jackson report. The relevant legislation is contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

A statement by the minister said: 'Insolvency cases bring substantial revenue to the taxpayer, as well as other creditors, and encourage good business practice which can be seen as an important part of the growth agenda with wider benefits for the economy. These features merit a delayed implementation to allow time for those involved to adjust and implement such alternative arrangements as they consider will allow these cases to continue to be pursued.'

R3 had lobbied for full recoverability to be retained in insolvency cases.

100.3 Financial Support Directions and Insolvency – Statement from The Pensions Regulator

- The Pensions Regulator has issued a statement regarding the exercise of its powers to make financial support directions.

On 26 July The Pensions Regulator published a guidance statement for insolvency practitioners and the pensions industry setting out its approach to the use of the financial support direction power in insolvency situations in the light of the Court of Appeal decision in the *Nortel* case.

The statement is entitled ‘Financial support directions and insolvency’ and is available on The Pensions Regulator’s web site at:

http://www.thepensionsregulator.gov.uk/press/pn12-25.aspx

It is also available on the members’ section of the R3 web site.

Although the decision in *Nortel* has been appealed to the Supreme Court, it is not likely to be heard before 2013.

100.4 Moving from Administration to CVL – Companies House and Registration of Form 2.34B

- The Court of Appeal has handed down its judgment in the *Globespan Airways* case.
- The Court held that conversion from administration to CVL takes effect only on the registration of Form 2.34B by the registrar, and not before, and
- Where the term of office of an administrator would expire before the registration of the notice, it is automatically extended until the date of registration.
- This decision should not be taken to reduce the need to ensure that the form is correctly completed and filed as early as possible.

On 24 August the Court of Appeal handed down its judgment in the case of *Globespan Airways Limited* [2012] EWCA Civ 1159. The case concerns the processing of Form 2.34B when notifying Companies House of a move from administration to creditors’ voluntary liquidation under paragraph 83(4) of Schedule B1 to the Insolvency Act 1986. The registrar of companies had appealed from the decision of Briggs J handed down in February.

The Court of Appeal allowed the appeal, and held that:

- Conversion from administration to CVL takes effect only on the registration of the notice by the registrar, and not before, and
- Where the term of office of an administrator would expire before the registration of the notice, it is automatically extended until the date of registration. This avoids the problem of having a hiatus between the administration and the liquidation.

Briggs J had held that, although there may be a time delay between the registrar’s receiving a Form 2.34B and his processing and placing it on the register, the date of registration should be given as the date of receipt, so that the legal consequences set out at paragraph 83(6) take effect from the date of receipt.

Globespan had been in administration, and four days prior to the automatic termination of office the administrators filed a Form 2.34B with the registrar. The practitioners who acted as administrators were also proposed as liquidators. Their address details had been included in respect of the administration appointment, but omitted from the section of the form relating to the incoming liquidators. This prompted the registrar to reject the form on the basis that it was incomplete. Two further notices were submitted before the registrar finally registered the Form 2.34B, almost eight weeks after the administration had come to an automatic end. The question arose as to whether the administrators had been validly appointed as liquidators.

At first instance, Briggs J found that the first notice of conversion was valid and thus the further submission of other subsequent two were immaterial. The judge expressed surprise at the registrar's policy of rejecting incomplete forms as a matter of course, without considering whether or not to exercise his discretion under section 1073(1) of the Companies Act 2006, to accept the forms as they were and ignore the perceived defects. Paragraph 83(4) stipulates that 'on receipt of a notice….the Registrar shall register it', and paragraph 83(6) provides that conversion takes place 'on registration of the notice'. Briggs J therefore held that conversion to liquidation would occur upon the Registrar's receipt of the form, notwithstanding that for practical reasons some delay was to be expected between actual receipt and registration.

The Court of Appeal adopted a more literal interpretation, and held that conversion took place on the date the registrar actually registered the notice. It was not enough that the registrar should have registered it earlier.

With regard to the concern that the term of office of an administrator would expire before the registration of the notice, the Court held that an administrator's term of office is by implication from the words of paragraph 83(6) extended by filing a conversion notice from the date on which it would otherwise expire by effluxion of time until paragraph 83(6) comes into effect on registration of the conversion notice.

The text of the Court of Appeal judgment is available on the British and Irish Legal Information Institute website (*sub nom Cartwright & Anor v Registrar of* Companies [2012] EWCA Civ 1159) at:

http://www.bailii.org/ew/cases/EWCA/Civ/2012/1159.html

100.5 Companies House – Amendment of Forms Requiring Court Order

- Where errors are made in a form filed at Companies House, a court order may be required in order to rectify it. .

Members should be aware that if a document filed at Companies House subsequently requires amendment, it may be necessary to obtain a court order before the registrar can rectify the error.

This is because, under section 1095 of the Companies Act 2006 and the Regulations made thereunder [1], only certain specified documents may be rectified on application to the registrar. For rectification of other documents, section 1096 of the Companies Act applies, which requires a court order.

In a recent case a mistake was made on a Form 2.12B, which was only discovered after it had been registered. Companies House were unable to accept a request by the insolvency practitioner concerned to rectify the form. Companies House explained the position as follows.

'The registrar is required to accept any document that is properly delivered to him. He is not an arbiter of fact as to whether the information contained in the form is correct. In the present case the form met the requirements for proper delivery as the date shown on the form was a valid date, notwithstanding that the information on the form was factually incorrect. Form 2.12B is outside the scope of section 1095 and the associated Regulations, so section 1096 applied, which requires a court order for the form to be rectified.

'Where an application is made to the court in these circumstances, the registrar of companies should be added as a party to the application. The legal team at Companies House will be willing to consider a proposed application in draft, together with a draft

[1] The Registrar of Companies and Applications for Striking Off Regulations 2009 (SI 2009/1803)

order, so that the registrar can either approve the application and order, or suggest amendments which may be agreed between the parties.'

100.6 Rent as an Insolvency Expense - High Court Guidance on the Lundy Granite Principle Following Goldacre

- Two recent High Court cases provided some guidance regarding the scope of the rules on payment of rent as an insolvency expense following the decision in *Goldacre*.
- Landlords who sought to extend the scope of the *Goldacre* decision to include pre-appointment rent as an administration expense were unsuccessful.
- The High Court held that the key factor was the timing of when the liability fell due. It is immaterial whether the insolvent company uses the premises for all or only part of the period for which rent is due.
- The *Lundy Granite* principle also applies to provisional liquidations.
- Rent which fell due shortly after a liquidation commenced may not be an 'expense' where the liquidator has had insufficient time to ascertain the company's requirements

It is well established under the *Lundy Granite* principle[2] that rent should be treated as an expense of the liquidation where a property has been retained by the office holder for use following appointment or in order to secure an advantageous disposal. The Court in *Goldacre*[3] held that the principle also applied to administrations, where the landlords of tenants in administration were allowed to claim rent (for the whole quarter) as an expense where use of the premises was required for the benefit of the administration (see Bulletin 91.5).

The High Court had the opportunity to develop the principle further when it considered the scope and application of the rule in two recent cases.

In *Leisure (Norwich) II Ltd and others v Luminar Lava Ignite Ltd (in administration) and others*[4] ('Luminar'), Luminar entered administration and traded from the relevant premises, just after the rent fell due for the September quarter day. The rent remained unpaid. The claimant landlords sought an order to include all rents outstanding under the various leases as an expense of the administration.

The Court rejected the landlords' application. On a proper construction of the authorities, only obligations incurred after the commencement of an insolvency process were capable of being expenses. The landlords would have to prove for any existing arrears as an unsecured creditor notwithstanding the fact that the property had been used for the purposes of the administration during the September quarter.

The Court was of the opinion that it was immaterial whether the administrator used the property for all or part of the period in question. Had the rent fallen due after the company had entered into administration, rent for the entire period could be claimed as an expense.

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2 The principle derived from *In Re: Lundy Granite Co., ex p. Heaven* (1871) LR 6 Ch App 462

3 *Goldacre (Offices) Ltd v Nortel Networks UK Ltd* [2010] Ch 455; [2010] 2 BCLC 248

4 [2012] EWHC 951 (Ch); [2012]BCC 497

In *Re MK Airlines Ltd* [2012][5], the Court held that the *Lundy Granite* principle could apply to provisional liquidations but that rent which fell due after the commencement of the liquidation would not necessarily be treated as an expense of the liquidation.

The Court acknowledged that the case turned on its own facts, but in the present case it was unlikely that the provisional liquidator had had sufficient time to determine whether property was required and to take the requisite steps to affirm or disclaim the company's interest. The Court held that the provisional liquidator's motivation was critical to determining whether rent would rank as an expense and by retaining and securing property on the premises, this did not go far enough to bring the Lundy Granite principle into operation.

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

http://www.bailii.org/ew/cases/EWHC/Ch/2012/951.html

and

http://www.bailii.org/ew/cases/EWHC/Ch/2012/1018.html

100.7 Costs of an administration application where an order is not made

- Paragraph 13(1)(f) of Schedule B1 provides the court with a wide discretion to award costs where it deems necessary.
- Costs of a failed administration application may be payable as expenses of an administration.

In *Rohl v Bickland Ltd* [2012] EWHC 706 (Ch) the Court had to consider whether it had the jurisdiction to award costs as an expense of the administration in respect of an application for which an administration order was not granted.

The case involved a creditor (who was a director of the company) seeking a costs order in relation to his application to place the company into administration to facilitate his purchase of the company's business and assets. A fellow director had objected to the proposed pre-pack sale of the business and sought to block the purchase. She paid off the company's indebtedness to its bank and, taking an assignment of the bank's floating charge, she then appointed an administrator. The creditor's application for an administration order therefore failed and the applicant sought an order for his costs to be paid as an expense of the administration.

The main issues on which the Court had to decide related to whether it had the jurisdiction to make a costs order for the failed administration application and if so, what priority should be given to those costs.

The Court's interpretation of paragraph 13(1)(f) of Schedule B1 Insolvency Act 1986 and Rule 2.12, was that it did have the discretionary power to make such an order and if it chose to exercise that discretion, costs should be treated as if they were an expense of the administration.

The Court was persuaded that the pre-pack sale, which was the rationale behind the failed application, would have been in the best interests of the creditors. It was at least as beneficial as the sale eventually negotiated by the appointed administrators. An order was granted for the costs of the failed application to be paid as an expense of the administration.

5 Decision of N Strauss QC handed down on 16 May 2012. No neutral case reference available at time of writing.

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/2012/706.html

100.8 Rejection of Administrator's Proposals

- The High Court has confirmed that an administrator is under a duty to seek court directions where creditors reject his proposals.

In Re BTR (UK) Limited[6], His Honour Judge Behrens, in the Leeds District Registry of the High Court, confirmed that an administrator is under a duty to apply for court direction where creditors have rejected his proposals.

The case involved an application by creditors that the administrator be ordered to petition for the compulsory winding up of BTR. Creditors were concerned that company assets may have been transferred out of BTR, and they wanted proper inquiries to be made into the events leading up to and immediately following the company's entry into administration.

Several weeks after BTR entering into administration, some of the company's assets were sold in a deal under the terms of which much of the consideration was to be deferred over the six months following completion and supported by personal guarantees from four former BTR employees. The administrator subsequently circulated proposals indicating that there were insufficient funds to make a distribution to unsecured creditors and furthermore, proposed to dispense with the initial meeting of creditors.

However, a meeting was eventually convened, following requests from more than 10% of the creditor body. At the meeting, more than 50% of creditors rejected the administrator's proposals and also purported to vote that the administrator petition for the compulsory winding up of the company. The administrator reported the result of the meeting to the Court, but declined to apply for the winding up order. He asserted that there were insufficient funds and that the position of preferential creditors would be prejudiced as a result of the ad valorem duty which would be applied to estate funds in a compulsory winding up.

The applicant creditors argued that following the rejection of the proposals, the administrator had no other choice but to apply for court for directions.

The Court held that it was implied by Sch. B1 para 55(2), that in the instance that a creditors meeting failed to approve proposals, a hearing must follow and this would ordinarily be instigated by an administrator's application. Furthermore, as there is a duty for an administrator to manage the company's affairs in accordance with properly approved proposals (Sch. B1 para 68), where those proposals are rejected, it was difficult to see how this function would be fulfilled without making an application for directions.

It was indicated that the Court had a wide discretion to order what it felt to be appropriate given the circumstances (including further creditors meetings or voluntary liquidation). Despite an offer from the creditors to fund an application, the judge decided that the most appropriate course of action was to take the exceptional step of making an immediate order for the termination of the administration and for the compulsory winding up of the company. Creditors were thereby spared the expense and delay of a conventional petition.

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6 *Lavin & Others v Swindell* [2012] EWHC 2398 (Ch) (23 August 2012)

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/2012/2398.htm

100.9 Scots law – Administrators permitted to avoid Contractual Obligations in order to achieve purpose of the administration

- Under Scots law, administrators would not be prevented from allowing the company to terminate contractual obligations where non-performance helped to achieve the purpose of the administration.

In *Clark and Whitehouse (Joint Administrators of Rangers Football Club plc)*[7], the administrators sought directions on whether they could be prevented from allowing the company to terminate contracts in relation to the club's rights to income due from season ticket sales in the Ibrox stadium. The contract included an agency arrangement under which the purchaser ('Ticketus'), was entitled to part of the revenue from the sales.

In the instance that the contracts could be terminated, the potential income from any unfettered rights to ticket income could have formed an attractive part of any sale package of the club's business and assets. Ticketus, on the other hand, would have had a claim in the administration for damages suffered as a result of the contract being repudiated, and this would rank as an unsecured claim.

The contract with Ticketus related to future income streams which were deemed to be purely personal rights (from ticket sales in forthcoming football seasons). The Court of Session therefore held that notwithstanding the fact that the meaning of the contracts were to be governed by English law, the rights conferred under the contracts were proprietary in nature and therefore Scots law would apply. The administrators under Scots law could refuse to perform obligations under the contract where non-performance helped to achieve the purpose of the administration and benefited the creditor body as a whole.

Full text of the judgment is available on the Scottish Courts web site at:

http://www.scotcourts.gov.uk/opinions/2012CSOH55.html

100.10 High Court guidance on contingent claims in a solvent liquidation

- In a solvent liquidation, the office-holder is under a duty to place an estimated value on contingent claims prior to making a distribution. Retaining reserve funds to deal with claims of uncertain value was not the correct approach.
- If unsatisfied with the amount attributed by the liquidator in respect of the debt, the creditor has the option of an appeal to the Court.

The High Court recently commented on the correct procedure for a final distribution in a solvent liquidation when dealing with contingent claims that are difficult to value.

The issue in *Re Danka Business Systems Plc*[8] involved a tax indemnity which the company had provided in respect of a shareholding it used to own in Dutch subsidiaries. The tax claims were not admitted in full and no provision had been set aside in respect of the company's liability under the indemnities. An application was then made by the purchaser of the company's shareholdings in the Dutch subsidiaries

7 Paul John Clark and Whitehouse (Joint Administrators of Rangers Football Club Plc), Noters [2012] CSOH 55 (Lord Hodge, 23 March 2012)

8 [2012] EWHC 579 (Ch); [2012] All ER (D) 146

to determine if the liquidators were wrong to proceed with the liquidation, without having made such provisions.

Judge Pelling QC held that when dealing with a difficult claim the liquidators were obliged to deal with the claim in accordance with the statutory scheme set out in Rule 4.86 of the Insolvency Rules 1986. The liquidator was not under any obligation to retain funds for an indeterminate period. To do so would prolong the liquidation, introduce uncertainty and increase costs. Where a company is subject to a contingent liability, the correct procedure would be to place an estimated value on the debt. The creditor retained the right to challenge the liquidator's decision in court if they disagreed with the value assigned to the debt.

100.11 High Court considers the application of the *Eurosail* principles in relation to a default trigger in an ISDA Master Agreement

- The practical application of the *Eurosail* principles was examined by the High Court in the context of a freight forwarding agreement where the insolvency of one of the contracting parties would trigger an entitlement to early termination.
- It was held that for an event of default to occur the balance sheet deficiency had to be so severe that its finances had reached the point of no return.
- The decision is subject to appeal.

In *Deiulemar Shipping SpA and another v Transfield ER Futures Limited*[9], a dispute had arisen between two parties to a freight forwarding agreement ('FFA') which incorporated the terms of an ISDA Master Agreement.

The essence of the dispute was that one party had withheld payments under the FFA claiming that the other party had been insolvent during the relevant period. Insolvency of one of the parties to the agreement would be a default trigger which released the other of its obligation to pay.

The Court considered the balance sheet insolvency test outlined by the Court of Appeal in *Eurosail*[10] and applied the same principles in respect of the default trigger contained within Section 5(a)(vii)(2) of the ISDA Master. It held that in applying the test, an entity would only be regarded as balance sheet insolvent when it had 'reached the point of no return' because of an incurable deficiency in its assets. On the facts of this case, this was not seen to have been applicable as the balance sheet deficiency, although a substantial amount, was a small proportion of the companies turnover and did not persist in the long term.

It should be noted that the *Deiulemar* decision is subject to appeal, and *Eurosail* itself is due to be heard in the Supreme court in 2013.

9 [2012] EWHC 928

10 BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc & 7 Ors [2011] 1 WLR 2524 – see Technical Bulletin 95.1

100.12 Bankruptcy – Undrawn Pension Entitlements to be Treated as Income for the Purposes of an IPO Application

- The High Court held that payments which could be drawn from a bankrupt's pension fund should be viewed as 'income' for the purposes of an application for an income payments order, even though the bankrupt had not elected to exercise his right to take the payments.
- However, members should be aware that the decision is subject to appeal.

Section 11 of the Welfare Reform and Pensions Act 1999 reversed the High Court decision in *Re Landau* (1998) Ch 223, by providing that a bankrupt's rights in an approved pension scheme will not automatically vest in a trustee in bankruptcy. The 1999 Act does however provide that 'any payment under a pension scheme' may be included in the bankrupt's 'income' for the purposes of an application for an income payments order.

In *Raithatha v Williamson*, the debtor was 58 when the bankruptcy order was made and had a pension scheme from which he was entitled to draw an annual income and a lump sum payment worth almost £250,000. Although he had passed the minimum age at which he could elect to take payment of the pension, the debtor had decided to not draw either the lump sum or the regular income prior to his bankruptcy, and refused to do so afterwards. In his application for an income payments order, the trustee argued that both three years of annuity income and the lump sum formed part of the debtor's income because he was entitled to take payment, notwithstanding that he had not yet elected to do so.

The bankrupt argued that: there was no entitlement to payment because there had been no express election to receive it; the lump sum did not constitute payment in the nature of income; and an order compelling him to make an election would be an unwarranted interference with his human rights. The Court rejected the bankrupt's arguments. It acknowledged that such pension entitlements would not automatically transfer to the Bankruptcy estate, but that availability to creditors should not be curtailed simply because the debtor had decided not to draw down. Accordingly, it held that both the annuity income and lump sum entitlements were income for the purposes of the IPO application.

It should be noted that the decision is being appealed, although the timetable is not yet known.

Raithatha v Williamson [2012] EWHC 909 (Ch); [2012] 3 All ER 1028

100.13 Client Money – Supreme Court Decision on the CASS Rules

- The Supreme Court has upheld the Court of Appeal decision in the Lehman Brothers client money case.

On 29 February the Supreme Court handed down its judgment in relation to the treatment of client moneys under Chapter 7 of the Client Asset Sourcebook of the FSA Rules ('CASS7') in the case of Lehman Brothers International (Europe). For the background and the Court of Appeal decision[11] see Technical Bulletin 93.9.

The Supreme Court upheld the decision of the Court of Appeal, and held that:

[11] [2010] EWCA Civ 917; [2011] 2 BCLC 184; [2012] 3 All ER 1

- Client money is held on statutory trust imposed by CASS7 from the time of receipt by the firm, and not when it is segregated.
- Money identifiable as client money not segregated by the firm will nonetheless form part of the client money pool available for distribution to clients on insolvency.
- Clients are entitled to participate in the client money pool by reference to their claims rather than their contribution, i.e. according to the amount which ought to have been segregated on their behalf, rather than on the basis of the sum which had in fact been segregated.

The decision involved a detailed analysis and construction of the CASS Rules, and should not be taken to apply to trusts in a non-CASS context.

Re Lehman Brothers International (Europe) (No 2) [2012] UKSC 6; [2012] 1 BCLC 487; [2012] 3 All ER 1028. The full text is available on the British and Irish Legal Information Institute web-site at:

http://www.bailii.org/uk/cases/UKSC/2012/6.html

100.14 Parallel Bankruptcy Proceedings – Non-disclosure of Jurisdictional Issues

- Where there is more than one national court in which COMI issues could potentially be decided, jurisdictional precedence would be given to the first court to open proceedings where a divesture of the debtor's powers of management occurred.
- Full and frank disclosure of any other connected legal proceedings must be made to the Registrar in any petition for one's own insolvency.

In *McGuinness v McFeely and another*[12], the Court had to decide a number of issues in respect of jurisdiction and procedure in respect of an appeal against a bankruptcy order granted by a UK Registrar, where the debtor had failed to disclose details of parallel proceedings in the Republic of Ireland in his own petition.

The claimant was a creditor who had initiated insolvency proceedings in the Republic of Ireland against the debtor (a renowned property developer). Following an adjournment to allow preparation, the debtor petitioned for his own bankruptcy in the UK, omitting details of the Irish proceedings from his application. As a result of non-disclosure, the order made by the Registrar did not take into account the debtor's centre of main interests despite having considerable business interests in both the UK and Republic of Ireland.

The main issues to be decided by the Court pertained to the appropriate forum to determine the question of COMI, the effect of non-disclosure of the Irish proceedings and procedural questions (in relation to the applicants standing, the timing of the application and the correct process to address these issues).

The Court opted to exercise its discretion to allow the appeal to proceed, despite it being out of time as none of the parties appeared to prejudiced by the delay and important questions with regard to jurisdiction needed to be answered.

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12 *Theresa McGuinness v (1) Thomas McFeely (2) Trustee in Bankruptcy* (2012) Ch D 15 June 2012.

With regard to the jurisdictional issues, the EC Regulation on Insolvency Proceedings states that jurisdiction lies with the first national court to open proceedings. The Court held that 'opening proceedings' would require the divesture of the debtor's powers of management (over his own estate), not the mere presentation of the petition.

The Court was unable to conclude that there was any deliberate wrongdoing based upon the evidence at hand, but was of the opinion that the Registrar may have made a different decision had the details of the proceedings been included in the debtor's petition or statement of affairs.

The original order was therefore rescinded and the Court directed that a rehearing take place before the registrar, allowing the admittance of fresh evidence in relation to the debtor's COMI.

100.15 Court Approves Companies Act Scheme for German Company

- The High Court sanctioned a Companies Act scheme in respect of a German company where the affected creditors were located in EU member states outside the UK.

The High Court sanctioned a scheme of arrangement under Part 26 of the Companies Act 2006 in respect of Primacom Holding GmbH, a company incorporated in Germany, in circumstances where all, or most, of the affected creditors were located in EU member states outside the UK.

Hildyard J held that the English court had jurisdiction because all of the relevant loan agreements were expressly governed by English law and expressly nominated the English forum as the exclusive forum for adjudicating disputes.

The judge noted that there remained a residual concern, identified by Briggs J in *Re Rodenstock GmbH*[13], another German company, about the possible application of Council Regulation (EC) No 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Judgments Regulation).

The primary rule in the Judgment Regulation is that the appropriate forum for the adjudication of a dispute is, in the ordinary course, the forum of the domicile of the defendant and the question which troubled Briggs J was whether he therefore had to be satisfied that there were defendants who were domiciled in the UK. Briggs J had not found it necessary to decide this point in *Rodenstock*. However, in the present case, the judge tended to the view that the Judgments Regulation simply did not apply to schemes of this nature, and that it was a stretch to regard any of the parties as defendants within the intended meaning of the Regulation. However, even if this was wrong, the fact that the contracts were expressly subject to English law would bring them within the scope of Article 23, which provides that the court of a member state will have jurisdiction where the parties have agreed that it should do so.

Primacom Holding GmbH v A Group of the Senior Lenders and Credit Agricole [2012] EWHC 164 (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/2012/164.html

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[13] [2011] EWHC 1104 (Ch); [2012] BCC 459

100.16 TUPE and Pension Rights

- The High Court has clarified the extent to which pension rights transfer under TUPE in the context of a private sector sale.

In *The Procter & Gamble Company v Svenska Cellulosa Aktiebolaget SCA* and another,[14] the High Court provided some clarity on the extent to which pension liabilities transfer under TUPE. This was the first time that so-called 'Beckmann Liabilities' have been considered by an English court in the context of a private sector transfer.

The general rule is that rights under or in connection with an occupational pension scheme do not transfer under TUPE. However, this exclusion only applies to pension benefits that relate to 'old age, invalidity or survivors'. The ECJ in the Beckmann case held that this meant (for example) that rights in a public sector pension scheme to early retirement pensions payable on redundancy were capable of transferring under TUPE. Following the ECJ judgment there had been uncertainty about the extent to which it is possible to confine Beckmann to its facts.

The *Proctor & Gamble* case concerned liability for pension entitlements where there had been an asset sale and business transfer, and was concerned in particular with the operation of TUPE in relation to liability for enhanced pension rights (such as early retirement).

The Court held that the rights and obligations of scheme members insofar as they related to enhanced pension rights, transferred to the purchasing entity but early retirement benefits paid after 'Normal Retirement Age' would be seen as 'old age benefit', liability for which would not pass onto the purchaser.

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/2012/1257.html

[14] [2012] EWHC 1257; [2012] IRLR 733

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