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85.1 Insolvency Notices to High Court Enforcement Officers – Change of Address

- The address for sending insolvency notices to High Court Enforcement Officers has changed.

In Technical Bulletin 63.5 (April 2004) members were advised of new arrangements for the submission of insolvency notices to High Court Enforcement Officers, and the address of the Nicesheriffs register to which such notices should be sent. That address has changed, and insolvency notices to Enforcement Officers should now be sent to:

Nicesheriffs
173-175 Cleveland Street
London
W1T 6QR.

Tel: 020 7380 0133
Fax: 020 7388 0672

This is the address of Registry Trust Limited, which operates the Nicesheriffs register.

85.2 Unoccupied Property Rates in Administrations – Wales

- The relief from unoccupied property rates for companies in administration has now been extended to Wales.

With effect from 1 November 2008, relief from liability for unoccupied property rates applies to properties in Wales which are owned by companies in administration. This brings the position in Wales in line with that in England – see Technical bulletin 82.5.

For details, see the Non-Domestic Rating (Unoccupied Property) (Wales) Regulations 2008 (SI 2008/2499 (W.217)).

85.3 Prescribed Part – Court Disallows Selective Disapplication

- The High Court held that an order for the disapplication of the requirement to make a prescribed part of a company's assets available for unsecured creditors must apply equally to all creditors.
- There was no jurisdiction to disapply the requirement only in part.

In *Re Courts Plc(In Liquidation)* [2008] EWHC 2339 (Ch) the Court held that an order to disapply the requirement to make a prescribed part of the company's assets available for the unsecured creditors must apply equally to all creditors. The Court had no jurisdiction to make an order that the requirement should be disapplied to some creditors but not to others.

The company had 297 unsecured creditors, of whom 260 had claims of £28,000 or less. The joint liquidators had calculated the prescribed part at £600,000 less costs. They had further calculated that the cost of processing claims of £28,000 or less would exceed the value of those claims. They therefore applied to the Court for an order that the requirement to make the prescribed part available should not apply to creditors with claims of less than £28,000.

The requirement to make a prescribed part available for unsecured creditors is set out in section 176A(2) of the Insolvency Act 1986. The power to disapply section 176A(2) is conferred by section 176A(5). An order under section 176A(5), if made, is 'that subsection 176A(2) shall not apply'.

Blackburne J held that the correct interpretation of section 176A(5) was that section 176A(2) applies either in its entirety or not at all. The Court had no jurisdiction to make a partial order of the sort requested by the joint liquidators. This was supported by the principle of pari passu distribution which underlay the treatment of unsecured creditors in an insolvent liquidation. Subject to the claims of preferential creditors, the company's debts were to rank equally between themselves. That was so however small the claims of some creditors might be as compared with others, and whatever the overall spread of claims might be. By contrast, the effect of the qualified disapplication order sought by the joint liquidators would be to enable the 37 largest creditors to take the prescribed part in its entirety leaving the remaining 260 creditors to receive nothing. There was no legislative intention that the power to disapply section176A(2) conferred by section176A(5) could be capable of producing that result. The application was therefore refused.

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/2008/2339.html

85.4 Administration – Meaning of 'unfairly harm'

- The Companies Court refused an application for an order that administrators of Lehman Brothers International (Europe) provide certain written information in respect of securities held for four private investment funds.
- The administrators' refusal to supply the information did not 'unfairly harm' the interests of the applicants for the purposes of paragraph 74(1)(b) of Schedule B1 to the Insolvency Act 1986, nor would it be right for the court to interfere in the day to day management of the administration.

The applicants were private investment funds which were parties to brokerage agreements and margin lending agreements with (among others) Lehman Brothers International (Europe), which went into administration on 15 September. Certain securities belonging to the funds were held by the company in administration. Blackburne J, the judge in the case, had earlier given directions to the administrators as to how they should identify and deal with property that might be subject to trust or proprietary claims.

The administrators had already provided the applicants with the information that was readily available in relation to their securities. However, the applicants maintained that they needed more detailed written information in order to make decisions regarding the management of the funds failing which the funds would suffer economic loss. The administrators claimed that they had already supplied the applicants with the information that was readily available without the making of specific and very time intensive bespoke enquiries. They were concerned that they should not be required to devote a disproportionate amount of time to one particular counterparty, and that if they were to attempt to do this for each counterparty which wanted them to do so, the task of returning client assets would take far longer than if conducted in the methodical ordered manner envisaged by the earlier directions. Furthermore, the applicants' predicament was shared by many other clients and was not unique.

The applicants maintained that the court had jurisdiction to make the order sought under –

- paragraph 74 of Schedule B1 to the Insolvency Act 1986, which allows the court to grant relief where the conduct of the administrator unfairly harms the interests of the applicant;
- paragraph 68(2) of Schedule B1, which requires the administrator to comply with any directions given by the court; or
- its general jurisdiction with respect to trusts.

The judge dealt with the unfair harm claim first. He said that in order to establish whether there had been unfair harm, it has first to be shown that the administrator's conduct would cause harm to the applicant. In the present case the judge was not in a position to gainsay the claims of the applicants, so he proceeded on the footing that the administrators' refusal to provide the information sought would be harmful to the applicants. That led to the consideration of what constitutes 'unfairness'. Where, as in the present case, there was no suggestion that the administrators were acting other than in accordance with their obligations under Schedule B1 and the court's directions, it was exceedingly difficult to see how the unwillingness of the administrators to devote more time and resources than they had already to answering questions put to them by a particular group of creditors directed to eliciting information about assets which the creditors claimed were theirs could be said to be unfair, even if it could be said to be causative or likely to be causative of harm. If the administrators were seeking in good faith to carry out their functions in the interests of the creditors and asset claimants as a whole and were endeavouring to avoid being deflected from that course by devoting what they fairly regard as a disproportionate amount of time and resources to dealing with requests for information from a particular group, such as the applicants, he felt unable to conclude that any case of unfair harm was established within the meaning of paragraph 74.

With regard to the reliance on paragraph 68, the judge said that, now that the administrators' proposals had been approved, any directions which he gave on the present application must be consistent with those proposals and take account of the administrators' approach to the management of the company (this was on the assumption that the applicants were in fact qualified to make such an application). The scheme of the legislation affecting administrations was to vest the management of the company's affairs, business and property in the administrator and require him to perform his functions so as

to achieve the statutory purpose. Within the confines of his duties and subject to whatever proposals were approved by the creditors, the administrator had to be accorded a wide measure of latitude in the way he went about the exercise of his powers so as to achieve the statutory purpose. His task would become quite unmanageable, particularly in a large and complex administration, if he was to be at the beck and call of each and every creditor or each and every asset claimant wishing to be informed about his claim or asset and who expected the administrator to turn aside from the general conduct of the administration and devote time and resources to responding to his enquiries. In the absence of any suggestion that the administrator was acting improperly, it would be contrary to the nature and purpose of an administration if the court were to interfere in the detailed day to day management of the administration in the way that the applicants sought. In the circumstances there were no grounds for criticising the course that the administrators had taken and no reason to require them to go further than they had in seeking to meet the applicants' requests for information. It was for the administrators to decide whether to take up time and therefore resources to deal with the applicants' points, and their failure to do so would not justify the court's intervention requiring them to respond.

With regard to the court's equitable jurisdiction in respect of trusts as a basis for requiring the administrators to provide the information sought, if the court was not willing to exercise its power under paragraph 68(2) by giving directions which required the administrators to respond to the applicants' wish for further information, recourse to some wider jurisdiction in order to secure the same objective would not put the applicants in a better position.

Re Lehman Brothers International (Europe) (In Administration); Four Private Investment Funds v Lomas, Pearson, Schwarzman & Jervis [2008] EWHC 2869 (Ch).

The full text is available on the British and Irish Legal Information Institute web site at: http://www.bailii.org/ew/cases/EWHC/Ch/2008/2869.html

85.5 Bankrupt's Home – Realisation for a Deferred Consideration

- The court held that a sale by a trustee in bankruptcy of the debtor's interest in his dwelling house for a deferred consideration constituted 'realisation' of that interest for the purposes of section 283A of the Insolvency Act 1986.
- However, it is understood that the decision is going to appeal.

Mr Lewis, a former bankrupt, applied for a declaration that his interest in his dwelling house, which had formed part of his estate in his bankruptcy, had reverted to him under section 283A of the Insolvency Act 1986 because the disposal of his interest by his joint trustees for a deferred consideration did not amount to a realisation of that interest within three years of the bankruptcy order.

Section 283A provides that where a bankrupt's estate comprises an interest in a dwelling house which is the sole or principal residence of the bankrupt, his spouse or former spouse, the interest will revert to the bankrupt after three years from the date of the bankruptcy order unless the trustee realises the interest (or takes various other steps) within that time.

A bankruptcy order was made against Mr Lewis on 12 July 2004. Metropolitan Property Realizations Limited ('MPRL') was a major creditor in the bankruptcy. On 11 July 2007 the joint trustees and MPRL entered into a deed, under the terms of which the trustees assigned the estate's interest to MPRL for £1 and in the event of MPRL effecting a sale of the property it would pay 25 per cent of the net proceeds to the trustees.

Mr Lewis contended that the word 'realise' in section 283A meant not just a sale, but a sale for an immediate monetary consideration. The issue was whether realisation takes place when the interest is finally and effectively disposed of, or when the proceeds of the disposal are actually received in the form of money (rather than merely a promise to pay) in the hands of the trustee.

After a review of previous cases, the uses of the word 'realise' in various sections of the Insolvency Act, and the wide powers available to trustees under the Insolvency Act, Proudman J concluded that a sale for a deferred consideration is a realisation provided the trustee has assigned the estate's interest absolutely. In the present case, the joint trustees had therefore realised the interest by a sale, notwithstanding that the consideration was deferred and notwithstanding that the tenure of the bankrupt and his family in the property remained precarious. She noted that although all the steps referred to in section 283A had to be taken within the three year period, they did not all have to be *resolved* within that period.

As for the policy considerations behind section 283A, the judge commented that the legislative policy behind the insertion of the section was to protect the bankrupt and his family, not the creditors. It was hard to see why deferred consideration was any more contrary to the policy of the section than immediate consideration paid for the interest, since in either case the person acquiring the interest could go (or attempt to go) through the hurdles of realising the interest at any time in the future. In short, there was nothing to suggest that the section was designed to prevent an application for sale by a purchaser being made after the three year period rather than to prevent the trustee from retaining his preferred position for many years.

However, it is understood that the decision will be going to appeal.

Lewis & Anor v Metropolitan Property Realizations Limited [2008] EWHC 2760 (Ch).

The full text is available on the British and Irish Legal Information Institute web site at:
http://www.bailii.org/ew/cases/EWHC/Ch/2008/2760.html

85.6 Block Transfer Orders – Court of Appeal Decision

- The Court of Appeal has confirmed that the courts have jurisdiction to make block transfer orders for replacement office holders in bankruptcies and compulsory liquidations.

In *Donaldson v O'Sullivan and Official Receiver* [2008] EWCA Civ 879, [2008] BPIR 1288, the Court of Appeal rejected an appeal against an order appointing a replacement trustee in bankruptcy. The appeal had been made on the grounds that the court lacked jurisdiction.

A block transfer order was made in the High Court in 2006 on the application of Mr Gilderthorp removing him from office in a number of insolvency cases, and appointing Mr O'Sullivan in his place. The cases concerned were bankruptcies, creditors' voluntary liquidations, members' voluntary liquidations and individual voluntary arrangements. Mrs Donaldson was a discharged bankrupt, and Mr Gilderthorp had been her trustee. She applied for the block transfer order to be set aside, so far as concerned her bankruptcy, on the grounds that the court lacked jurisdiction. The application was dismissed, and the matter came before the Court of Appeal.

The grounds of the appeal were that there was no express provision in the insolvency legislation for the court to appoint a replacement trustee in bankruptcy proceedings where the previous trustee had resigned or been removed. There was express provision for appointment by the court only in the special circumstances set out in section 297 of the Insolvency Act 1986. Otherwise a replacement trustee had to be appointed by a meeting of creditors. In previous block transfer cases the basis of the jurisdiction had been found in section 303 of the Insolvency Act, which concerns the general control of the trustee by the court, and in particular subsection 303(2) which allows the trustee to apply to the court for directions in relation to any matter arising under the bankruptcy. However, it was submitted that this was not a legitimate construction because it could not override the express provisions of section 297. Accordingly, although the court could remove a trustee, it had no power to appoint a replacement. The position in compulsory liquidations was analogous, in that there are provisions for appointment by the court in the specific circumstances set out in section 140, but not otherwise. This contrasted with the provisions in voluntary liquidations, voluntary arrangements and administrations, where there are specific provisions for the appointment of replacement office holders by the court.

Dismissing the appeal, Lloyd LJ drew a distinction between bankruptcies and compulsory liquidations on the one hand, and other types of insolvency proceedings on the other. Bankruptcy and a compulsory winding up were wholly dependent on, controlled by and administered by the court, in a way and to an extent that was not true of other insolvency processes. That distinction was relevant to the issue of interpretation of the relevant parts of the legislation. In relation to bankruptcy, the court had wide powers, exercisable for the purpose of the insolvency process as a whole, which were not limited to those conferred expressly by the relevant legislation. The 1986 Act provided for the court to appoint a

trustee in bankruptcy in certain specific circumstances and to be able to remove him in any circumstances, but was silent about the replacement of a removed trustee by a court. The replacement of a trustee was plainly capable of being a 'particular matter arising under the bankruptcy' for the purposes of section 303(2), and it was right to conclude that that section confers power on the court to appoint a new trustee. It followed that it was also right in relation to compulsory liquidations under section 168.

To conclude otherwise would lead to an extraordinary anomaly, namely that the court has less power in relation to trustees in bankruptcy and liquidators under compulsory liquidations than it has in relation to liquidators under voluntary liquidations and other office holders in insolvency proceedings, despite the fact that the former are regarded as officers of the court and that the former processes are entirely court-administered whereas not all the others are.

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/2008/879.html

85.7 TUPE – Guidance on the Disclosure of Employee Information

- The Information Commissioner has issued guidance issued on the disclosure of employee information under TUPE.

Under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the transferor employer is required to provide the transferee with specified details about the employees who are transferred. Details of the information which must be provided were set out in Technical Bulletin 77.

This obviously raises data protection issues, and the Information Commissioner has issued a Good Practice Note explaining what organisations need to do in order to comply with the Data Protection Act 1998 when providing employee information under TUPE.

The Good Practice Note is available on the Information Commissioner's web site at:

http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/gpn_disclosure_employee_info_tupe_v1.0.pdf

85.8 Pensions Act 2008 – Extension of the Regulator's Powers

- The Pensions Act 2008 contains important extensions to the Pensions Regulator's 'moral hazard' powers.

The Pensions Act 2008 contains provisions which drastically extend the powers of the Pensions Regulator to issue contribution notices and financial support directions, which were originally introduced by the Pensions Act 2004 (see Technical Bulletin 70 for the original provisions).

In summary, the principal changes are as follows:

- Contribution notices may be issued where the Regulator is of the opinion that the effect of an action has detrimentally affected in a material way the likelihood of accrued scheme benefits being received. This means that the Regulator no longer needs to prove intent on the part of a party to avoid properly funding the scheme, provided the 'material detriment test' is met. The Regulator has issued draft guidance on the proposed use of the material detriment test – see below.
- The previous provision in the legislation which stated that a contribution notice may not be issued where a party had acted in good faith has been removed.
- It is now provided specifically that the issue of a contribution notice can be triggered by a series of acts, not just a single act. This change is backdated to 27 April 2004.
- The resources of the whole group of companies may be considered when judging whether to issue a financial support direction. This will broaden the scope of companies within a group which could be subject to such a direction.
- Where the rights of two or more scheme members are transferred to another scheme, the Regulator may issue a contribution notice or financial support direction in relation to any transferee scheme.

The changes are retrospective to 14 April 2008, except for the provision which is backdated to 27 April 2004 as noted above. The changes are introduced by section 126 of the Pensions Act 2008, and are set out in Schedule 9 to the Act, to which members should refer for details.

The Regulator has issued a draft code setting out the circumstances in which it is expected that the 'material detriment test' will be met. They are:

- The transfer out of the jurisdictions of the United Kingdom of the scheme.
- The transfer out of the jurisdictions of the United Kingdom of the sponsoring employer if by doing so there is a material reduction in the level of employer support or legal and regulatory protection for scheme members.
- The severing of employer support for the scheme so that employer support is removed, substantially reduced or becomes nominal.
- The transfer of liabilities of the scheme to another scheme or arrangement which does not have sufficient employer support or is not sufficiently well funded.
- A business model or the operation of the scheme in such a way that is designed to create a financial benefit for the employer or some other person from the scheme, but where inadequate account has been taken of the interests of the members of the scheme, including where risks to members are increased.

The draft code is available on the Pensions Regulator's web site at:
http://www.thepensionsregulator.gov.uk/pdf/PowersCodeDraftContent.pdf

85.9 Employment Rights Act – Increases in Limits

- Changes to the limits to payments under the Employment Rights Act 1996 come into effect on 1 February 2009

With effect from 1 February 2009 the following limits apply to payments under the Employment Rights Act 1996:

- The limit on the weekly amount payable under the insolvency provisions of the Act is increased to £350.
- The limit on the statutory guarantee payment payable to employees laid off work is increased to £21.50 a day.
- The maximum compensatory award for unfair dismissal is increased to £66,200.
- The maximum amount of a week's pay for calculating the basic or additional award for unfair dismissal or for redundancy payment is increased to £350.

For details see the Employment Rights (Increase of Limits) Order 2008 (SI 2008/3055).

85.10 Delberry Judgment now Reported

The decision in *Re Delberry Limited* [2008] EWHC 925 (Ch) (see Technical Bulletin 84.10) has now been reported at [2008] BCC 653 and [2008] BPIR 1277.