# IP Alerter

FEBRUARY 2019

## IP Alerter Highlights

- Costs of Rescission
- Limitation, Trusts and Insolvency
- Administration: selling free from secured interests
- What to expect in 2019?

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## What's new in the world of Insolvency?

Welcome to the first update of 2019

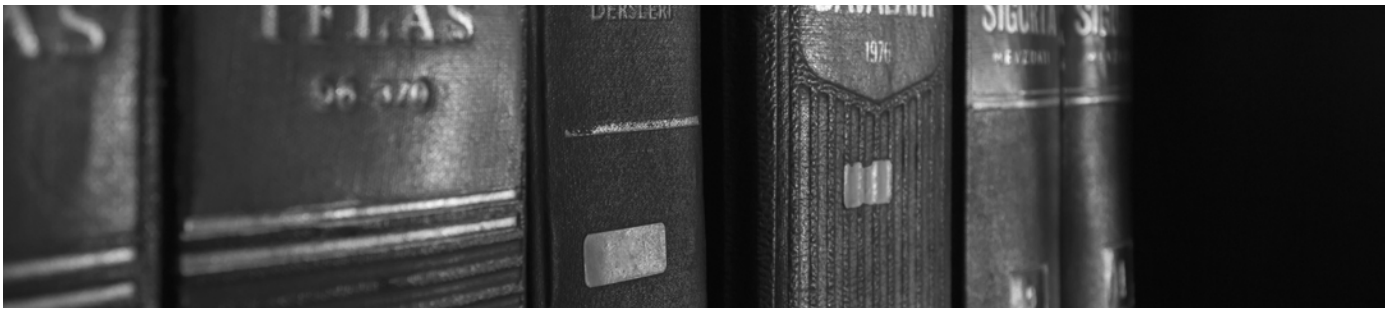
As always the IP Alerter provides you with a snapshot of the key developments and insight into key cases. The cases covered in this issue include:

- Cash Generator Limited v Fortune [2018] EWHC 674(Ch)
- The Towcester Racecourse Company Ltd (in administration) (2018) EWHC 2902 (Ch)
- Payroller Limited (in Liquidation) v Little Panda Consultants Limited [2018] EWHC 3161

### A DATE FOR YOUR DIARY

Our next **IP seminar** is taking place on Thursday, 25 April 2019 at Dorking Rugby Club, Kiln Lane, Brockham, Surrey. Times are 4:00pm to 6:00pm. The bar will be open afterwards so hopefully you can stay for a drink and a chat.

A formal invite will be sent in due course.



## Limitation , Trusts and Insolvency

**Burnden Holdings (UK) Ltd v Fielding [2018] UKSC 14**

The Supreme Court considered the application of Section 21(1) (b) of the Limitation Act 1980 in relation to the unlawful distribution of shares from the Claimants subsidiary company to its new holding company. The Defendants were the directors and controlling shareholders of the Claimant's previous holding company. They were also controlling shareholders in the Claimant's new holding company. A transfer from one of the Claimant's subsidiaries to the new holding company took place and the Claimant went into liquidation.

Six years later, the liquidator issued against the Defendants for unlawful distribution in specie of the Claimant's shareholding from the subsidiary. The liquidator's case was that the Defendants had received trust property belonging to the Claimant and had converted it to their own use.

The Defendants were initially granted summary judgement on the grounds that the liquidators claim was statute barred. However, the Court of Appeal set this aside and found that no limitation applied pursuant to Section 21 (1) (b).

The Supreme Court considered the question 'Did section 21(1) (b) of the Act prevent the Defendants from relying upon the six year limitation period defined in section 21(3) of the Limitation Act?' It found that section 21(1)(b) did preclude the Defendants reliance upon the limitation period set out in 21(3) of the Act.

In terms of the scope and application of section 21(1)(b) the Court found that its purpose was to give a trustee the benefit of the lapse in time where he had done something legally or technically wrong, but not morally wrong or dishonest. The provision was never intended to enable a trustee to gain something they never should have had. While section 21 was aimed primarily at express trustees it is also applicable, by analogy, to company directors.

## Appointment of liquidators: deemed consent procedure

**Cash Generator Limited v Fortune [2018] EWHC 674(Ch)**

The High Court has held that the appointment of joint liquidators in a CVL was valid despite a failure to fully comply with the nomination process.

The creditor applied for the nomination of two liquidators to be appointed over three companies to be reversed or removed because their appointment had not been properly carried out. The Creditor argued that the notices inviting the creditors to nominate a liquidator under the deemed consent process had not been delivered to the creditor. This failure to comply with rule 6.14 rendered the appointment of the liquidators invalid.

The liquidators argued that the directors had not appreciated that the creditor was a creditor at the time, hence the notice was not sent. They went on to argue that the failure to send the notices to each creditor did not render the appointment of the liquidators invalid.

The court held that failure to comply with the procedure was only a criminal offence. The appointment of the liquidators was therefore valid. The criminal element was not discussed further.

The mandatory language used in rule 6.14 and section 100 (1B) imposes a duty upon the directors to invite the creditors to nominate a liquidator. However, there is no express reference to the liquidators appointment being invalidated by a failure to comply with this duty.

The court went on to say that even if some creditors had not received their notice, rule 15.15 created a presumption that the deemed consent procedure had been correctly initiated and conducted. The deemed consent provisions are designed to promote creditor involvement rather than maximise participation.

The court reject submissions that the liquidators should be removed due to a conflict of interest or bad practice in relation to the disposal of the companies assets as there was no evidence to support the claim.


## Administration: selling free from secured interests

**Williams and another v Broadoak Private Finance Ltd and Others (2018) EWHC 1107 (Ch)**

The court has the power to order the disposal of a property owned by a company in administration free from certain secured interests. This power may only be exercised where the court believes that the disposal would be likely to promote the purposes of the administration.

In the normal course of proceedings, a person who has entered into a contract to buy a piece of land and has paid some or all of the purchase price to the seller will have an equitable lien over the property. This will secure the repayment of that amount should the contract fail to be completed through no fault of the buyer. Equitable liens are available to off-plan buyers. Priority of interest is usually determined by the date of creation of the relevant interest. However, completion of a registerable disposition made for valuable consideration by registration has the effect of postponing any interest that affected the estate or charge immediately beforehand whose priority was not protected at the time of the registration.

In the above case, joint administrators sought permission to sell a partially developed freehold property free of interests of a first legal charge and 54 contracting buyers. Each buyer had exchanged an agreement to buy a flat off the property plan and had paid substantial deposits. The deposits had been released to the developer on exchange.

The court held that the proposed disposal was likely to promote the purposes of the administration. The buyers were entitled to a buyer's lien over the property but only three had registered unilateral notices against the freehold title before the charge was registered. Of the fifty four, only the three who had registered would have a priority over the charge in relation to the sale proceeds. Though the case does not create new law, it should stand as a cautionary tale for those who buy a property off plan and a reminder for buyer's solicitors to register a protective unilateral notice promptly after exchange.

## Appointment of administrators: timing

**Re the Towcester Racecourse Company Ltd (in administration) (2018) EWHC 2902 (Ch)**

The High Court held that a company or director's notice of appointment of administrators is valid if it defines the date and time of appointment by reference to the time at which the notice is filed.

The Insolvency Rules 2016 require a company or directors notice to state the date and time at which the appointment was made. This can conflict with paragraph 31 of schedule B1 which states that an administrator's notice is effective when a valid notice is filed with the court.

In Re NJM Clothing, the High Court held that the directors' notice was defective because:

(a) The appointment needed to take place before filing and

(b) The notice needed to, but did not have to, specify the time of appointment to the second to show that it took place at least momentarily before filing.

In the case of Towcester, the directors had purported to have appointed an administrator by filing a notice at court that described the time of the appointment as "the date and time endorsed by the court below". The administrator applied for a declaration to confirm that the appointment was valid and for any order necessary to remedy the defect.

The court held that the appointment was valid. The court found that the appointment could take place at the same time as the filing and that there was no need to record the time of the appointment to the "second." A notice is therefore valid if it records the date and time of appointment by reference to the point of filing.

This has helped clarify the position that was established in the case of Re NJM Clothing.


## Business Contract Terms (Assignment of Receivables) Regulations 2018

The 2018 Regulations came into force on 24 November 2018

Businesses can often experience cash flow problems brought on by slow to pay clients. In order to raise cash, some businesses will assign unpaid invoices to finance providers. The finance provider lends money to the business and in turn will pursue the debtor for the unpaid amount thus covering the earlier loan to the business.

Unfortunately for some, many commercial contracts contain a boilerplate clause that prevents the assignment of any rights under the contract. This would prohibit the assignment of an invoice to a finance provider. Some contracts allow assignment provided consent is given, but the debtors often refuse to give such consent.

The 2018 Regulations nullify any term that prohibits or restricts the assignment of a receivable. A receivable is defined as a right to be paid any amount under a contract for the supply of goods, services or intangible assets.

The Regulations allow for commercially sensitive information to be protected and debtors can still enforce any confidentiality clauses, save for any information that is essential for the assignee to assess the receivable and the ability to enforce it. This clarified an issue with the previous incarnation of the regulations which was not clear as to how confidentiality provisions would interact with the right to assignment.

The Regulations exclude contracts where the supplier is a large enterprise which falls under the definition found in Section 464 of the Companies Act 2006.

## Appointment of administrators: timing

**Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd and Others (2018) EWCA Civ 1660.**

The Court of Appeal has held that it has the power to permit the service of a claim outside the jurisdiction, where the claim related to a transaction at an undervalue pursuant to section 423.

CPR 6.36 sets out that a Claimant may serve a claim form outside the jurisdiction with the courts permission. This can be done if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply, the claim has a real prospect of success and England is the most appropriate forum for the claim to be heard. Practice Direction 6B3.1 also allows proceedings to be brought under an enactment which is not covered by any of the other grounds referred to in paragraph 3.1 (20) (a).

Over the years there has been conflicting case law surrounding Section 423 claims and whether or not they fall within the jurisdiction gateway of Practice direction 6B 3.1.

Re Paramount Airways established that whilst section 423 is of unlimited territorial scope, the court has discretion to make an order and if the defendant has insufficient connection to England and Wales, it may refuse to exercise their discretion.

In Orexim Trading Ltd the Claimant sued the Defendant for damages and sought the setting aside of a transfer to another party under section 423 of the Act. The Defendant did not challenge the claim for damages but did issue an application challenging the jurisdiction of the English court in relation to the section 423 claim.

The High Court granted the set aside and the Claimant appealed. The Claimant was unsuccessful, but the Court of Appeal nevertheless rejected the basis of the High Court decision, that an enactment must expressly authorise the bringing of proceedings against individuals outside of England and Wales. As per previous case law the Court may make an order under section 423 if the Defendant has sufficient connection to England and Wales. In this case it was held that there was insufficient connection with England and Wales for the court to give permission to serve outside the jurisdiction.


## Costs of Rescission

**Amin v London Borough of Redbridge [2018] EWHC 3100 (Civ)**

Following Liability Orders for unpaid Council tax, and a subsequent Bankruptcy Order, the Liability Orders were set aside, the Bankruptcy Order rescinded, and the Court ordered Mr. Amin to pay Redbridge's costs of the Petition and Application, and the Official Receiver's costs.

Notwithstanding some criticism of Redbridge's reliance on its Liability Order, the Court on appeal made no Order for costs upon Mr. Amin's Application, but did not vary any other part of the Order relating to costs. The guiding point was that the Bankruptcy Order was properly made at that point in time.

## Section 423 Claim – What's a "transaction"?

**Payroller Limited (in Liquidation) v Little Panda Consultants Limited [2018] EWHC 3161**

Payroller had engaged in significant VAT fraud depriving HMRC of some £7.7 million. By the time of its liquidation, a significant sum had been paid to third parties. The Defendant contended that the payments were to satisfy bona fide debts, albeit that the payments were in relation to transactions between the controlling shareholders of the company and the Defendant.

The Judge rejected the Liquidator's Application for Summary Judgment upon the basis it was arguable that (a) payments to satisfy "bona fide" obligations were not transactions i.e. the recipients may be innocent, and that (b) the transactions must relate to some engagement between the parties, and not just the transfer of money.

We shall see more, and hopefully obtain clarification, if this case ever goes to trial. There has also been a major case on voidable preferences under section 340 – Abdulali v Finnegan [2018] which has lessened the previously held reliance on the statutory presumption relating to the Defendants "desire" or "Intention".

## What to expect in 2019?

**On the legislative front, we await primary and secondary legislation to implement:**

- Plans to make new corporate restructuring tools (being a standalone moratorium and new type of restructuring plan process) available.
- Separate plans to make a new statutory moratorium (aka breathing space) available to individuals, as well as a new statutory debt repayment plan.
- Corporate governance reforms, including new powers to take action against directors of dissolved companies under the Company Directs Disqualification Act 1986.
- The government's plans to restore elements of Crown preference and to tackle tax avoidance through phoenixism, with effect from 2020.

On a more imminent front, the primary and secondary legislation to implement a new insolvency regime for further education bodies has been published (in all but one case in final form) and will come into effect on 31st January 2019.


## Anticipated cross-border developments

On cross-border matters, we await clarification on:

- Whether the UK will exit the EU without a deal, in which case the Insolvency (Amendment) (EU Exit) Regulations 2018 will effect a number of amendments to domestic insolvency legislation from 29 March 2019.
- If the UK exists the EU with a deal, whether the UK will negotiate the retention of any benefits and obligations under the European Insolvency Regulation 2000 (EC/1346/2000) and the Recast Insolvency Regulation (EU/2015/848) during any transition period.
- Confirmation of when the UK will formally accede to the Hague Convention on Choice of Court Agreements 2005 in its own right, after it leaves the EU.
- Whether and when the UK will adopt an agreed amendment to the UNCITRAL Model Law on cross-border insolvency, and also adopt the new UNCITRAL Model Law on the recognition and enforcement of insolvency-related judgments.
- A potential appeal to the Supreme Court in the current Sberbank proceedings, deciding whether the Court has, despite "the rule in Gibbs", power to give effect to foreign restructuring proceedings that compromise English law debt without the relevant creditor's consent.
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## Changes in the regulation of insolvency practitioners

Based on developments in 2018, we anticipate movement in the regulation of insolvency practitioners (IPs), including signs of:

- Whether the Insolvency Service (IS) is moving towards a decision to remove the role of regulating IPs from the current recognised professional bodies (such as the ICAEW, and IPA etc).
- Whether the government intends to make regulations to impose conditions on sales to connected parties in administration including via a pre-pack.
- New guidance issued to IPs (and employers approaching insolvency) on how to deal with making large scale redundancies.

## Contact Us

**Dorking Office**
156 High Street
Dorking
Surrey
RH4 1BQ

T: 01306 880110
F: 01306 502283
DX:57300 Dorking

**Godalming Office**
The Tanners
75 Meadrow
Godalming
Surrey GU7 3HS
T: 01483 861848
F: 01483 861856
DX:58308
Godalming1

**Cobham Office**
15A High Street
Cobham
Surrey KT11 3DH

T: 01932 589599
F: 01932 867587
DX: 46102
Cobhamg

## The Team

For full details on our Corporate recovery and restructuring team please log onto: www.downslaw.co.uk/business-lawyers/corporate-recovery-and-restructuring/



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