

SOLVENT THINKING

RESTRUCTURING & RECOVERY RISKS NEWSLETTER MAY 2015



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The Government makes U-Turn over Insolvency LASPOA exemption

The Ministry of Justice (MOJ) recently announced that insolvency will continue to enjoy the exemption from the provisions of Legal Aid Sentencing and Punishment of Offenders ACT (LASPOA) concerning the recoverability of After the Event (ATE) insurance premiums and success fees.

In April 2013, the LAPSPO Act removed the recoverability of ATE and success fees in litigation. There were some exceptions to this rule. The most notable being Insolvency. These exceptions were given a year year stay of execution until April 2015.

The government had appeared to signal in September 2014 that the exemption would be removed, stating that the

insolvency profession had “not come up with anything new” to demonstrate the need for the exemption. All recent activity and indications appeared to suggest that the exemption would be removed.

The insolvency profession led by some key stakeholders lobbied hard to encourage the government to maintain the exemption. The only piece of tangible evidence in this debate was an academic

report prepared by Professor Walton from the University of Wolverhampton. This report was commissioned by R3, ACCA, ICAEW, ICAS, Moore Stephens, Moon Beever and of course, JLT Specialty.

Many from within the profession wrote to their MP, frequently receiving a standard template response that did not specifically deal with the issues raised. R3 continually sought to keep the issue in

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Welcome to the latest edition of Solvent Thinking. It has certainly been an eventful few months since the last edition. Equally the coming months look packed full of intrigue and excitement.

We cover the most significant recent news in the world of insolvency; the retention of the LASPO Act exemption in insolvency litigation. The Recoverability of the ATE premium is crucial in the pursuit of returns for creditors. We are delighted that the government have reconsidered and listened to the profession.

We at JLT Specialty Limited (JLT) are specifically proud of having played our part. We of course co-sponsored professor Walton's report. This was a vital and perhaps the only tangible piece of evidence that demonstrated the necessity to preserve the LASPO Act exemption in insolvency litigation.

Whilst this was a significant decision it's now over to the solicitors and practitioners to demonstrate why they fought so hard to maintain their exemption. This can not be the end of the matter. Insolvency Practitioners (IP) and solicitors now need to make the most of their opportunities and litigate where possible to maximise returns to creditors, whilst protecting their position with ATE.

A further positive development is the move to increase transparency of IP fees. IPs conduct important and skilled work. Consequently they carry a high level of responsibility and trust. Therefore this move will ensure the public develop a greater understanding of the work and not just the price of an IP.

We also take a look at other issues and in particular the obligations and regulations concerning unoccupied commercial buildings. Are you compliant?

We hope this edition provides you with plenty of food for thought. We are always happy to discuss the issues raised so please do get in touch if you would like to discuss anything further.

Ed Brittain

Head of Restructuring & Recovery Risk



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the spotlight and those efforts have now been rewarded.

On 26th February 2015, Justice Minister Shailesh Vara confirmed that the exemption would remain in place for insolvency litigation.

The news was welcomed by many. It was believed that the removal of the

exemption could have cost HMRC as much as GBP 160 million per annum.

It was further speculated that many cases would not be pursued as the non-recoverable nature of insurance premiums and success fees would have meant that the financial threshold to make the pursuit of claims would have increased significantly.

THE STATEMENT IN FULL

Written Statement made by: The Parliamentary Under-Secretary of State for Justice, Minister for the Courts and Legal Aid (Mr Shailesh Vara) on 26 February 2015. Part 2 of the LASPO Act 2012 and insolvency litigation. My noble friend the Minister of State for Civil Justice and Legal Policy (Lord Faulks QC) has made the following Written Ministerial Statement.

"The Government has made a priority of addressing the high costs of civil litigation in England and Wales. To that end, Part 2 of the LASPO Act 2012 reforms the operation of no win no fee conditional fee agreements. Those reforms came into effect generally in April 2013, but were delayed until April 2015 in respect of insolvency proceedings (WMS 24 May 2012: Column 94WS). This delay was to give insolvency practitioners and other interested parties time to prepare for and adapt to the changes. However, the Government now agrees that more time is needed. The Government will therefore delay commencing sections 44 and 46 of the LASPO Act 2012 for insolvency proceedings for the time being.

Accordingly, no win no fee agreements in insolvency proceedings will continue for the time being to operate on a pre-LASPO Act basis with any conditional fee agreement success fees and after the event insurance premiums remaining recoverable from the losing party.

We will consider the appropriate way forward for insolvency proceedings and will set out further details later in the year."



Funding for Court fees

Following the recent astronomical rise in Court fees funding is now more significant than ever. Especially with regards to insolvency proceedings.

Comveen JLT are able to offer a comprehensive suite of solutions. JLT are working with a particular funder willing to fund disbursements and in some cases, even the costs of the insolvency practitioner.

Our funder is willing and able to provide the appropriate funding in order to pursue the debtor and recover monies owed to the estate. Alongside this we are able to provide the appropriate insurance meaning that a good claim can be confidently pursued without fear of adverse cover. We are of course able to obtain a fully deferred premium where

there is no money available to fund this. In addition to a deferred premium we can also obtain a self-insured premium, meaning that it is not payable in the event of an unsuccessful claim.

All new enquiries are vetted by our case managers. The team includes experienced underwriters and a qualified solicitor. Consequently the insurers we deal with have confidence in our approach and more significantly the due diligence already conducted on the case.

The product allows Insolvency practitioners and solicitors to pursue a maximum recovery, safe in the knowledge

that they have adequately protected their creditors' interests. This scheme will ensure cases go on risk in a more timely and efficient manner thus leaving the Insolvency practitioners and Solicitors to seek the appropriate redress without delay or wasted costs.

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Increase in transparency of fees charged in insolvency

On 3rd of March new rules were laid in Parliament that aim to increase the transparency of fees charged by insolvency practitioners.

In insolvency an hourly rate is generally charged for all work undertaken. The average charge out rate, according to government figures, for the profession is GBP 375.00.

Under the new rules, where an hourly rate is to be used as opposed to a fixed fee, insolvency practitioners will have to provide a budget for all of the work they are due to undertake. Details will need to be provided of the hourly rate an estimate of the expected time.

This will then act as a cap on the fees much in the same way as a budget filed in litigation matters. These fees can be altered even after they have been agreed. However, this can only be done so between the IP and creditors.

SOLVENT THOUGHTS

Potentially this should be an excellent move. IP's have an important job and are bestowed with a significant level of trust. This allows clients and IP's to have honest, expectation setting conversations at the outset.

Hopefully this will also enable the consumer to greater understand the significant levels of work undertaken and the required level of skill to perform the role of an IP effectively. This in turn should assist the wider public to greater appreciate the role of an IP.



THE STATEMENT IN FULL

House of Commons: Written Statement (HCWS325)
Department for Business, Innovation and Skills
Written Statement made by: Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs (Jo Swinson) on 3rd March 2015.

Measures to improve transparency in insolvency practitioner fees and handling of cases in the courts I am today laying regulations requiring insolvency practitioners to provide additional information to creditors about their fees and expenses. Insolvency practitioners are given strong powers by legislation to administer insolvencies. They take decisions and actions that can have a significant financial impact on those affected. Their fees are paid out of the assets in cases. It is important that there is confidence in the way that they charge fees.

After commissioning an independent review by Professor Elaine Kempson, we consulted with interested parties on what measures should be put in place to address shortcomings in the current fee regime. Where insolvency practitioners' fees are based upon time costs, they will be required to provide an upfront estimate of their fees for creditor approval, before they can take their fees. Insolvency practitioners will not be permitted to draw fees in excess of the approved estimate unless creditors give further approval. This will therefore act as a cap on fees.

These measures will increase transparency for creditors as they will have a much clearer indication of what the likely fees and costs of dealing with an insolvency will be. The provision of clear information, setting out what work will be done and what it will cost to undertake that work, will also give creditors more knowledge when agreeing fees and better equip them to challenge fees where they appear unreasonable.

The measures will give insolvency practitioners the opportunity to demonstrate to creditors what they do and the value they deliver in return for their fees.

Together with the measures contained in the Small Business, Enterprise and Employment Bill currently before Parliament strengthening the oversight regulation of insolvency practitioners, these steps should provide creditors with greater confidence in the insolvency regime through increased transparency and accountability.

The statutory instrument that will be laid today also amends how courts deal with insolvency cases. The new provisions will allow the High Court to transfer simple cases to the County Court at Central London so that the High Court can focus on more difficult complex cases. This will improve efficiency in the system.

Business Minister sees to improve redundancy consultations in insolvency situations

Jo Swinson, Business Minister has launched a call for evidence as the Government seeks to improve collective redundancy situations in insolvency situations.

During February 2015, Jo Swinson held a roundtable discussion with key stakeholders to understand how industry considered current legislation. Further, Ms Swinson sought to understand the difficulties around redundancy in insolvency situations as well as what support is available for employers and employees alike, stating:

“Whilst our current system generally works well and is effectively complied with and its benefits agreed upon, we want to explore in more detail how consultation operates in these situations and what are the challenges and best approaches.”

A copy of the Call for Evidence Response form is available at:

<https://www.gov.uk/government/consultations/collective-redundancy-consultation-for-employers-facing-insolvency>

The form can be emailed to: policy.unit@insolvency.gsi.gov.uk

Or post to:

Pabitar Powar, The Insolvency Service
4 Abbey Orchard Street,
London, SW1P 2HT

The call for evidence will run for 12 weeks concluding on 12th June 2015.

SOLVENT THOUGHTS:

This is potentially a really positive move. The redundancy process is difficult for both the employer and employee. When put in the context of an insolvency situation.

Scheme abusing insolvency process shut down amid loss of £26.5m in unpaid business rates

Following the winding up of 16 companies on 3rd July 2013 a further six companies were wound up on 18th February 2015.

The companies were a series of single purpose vehicle companies (SPV's) closed down by the High Court for abusing insolvency legislation.

Each company undertook a lease or leases of unoccupied commercial properties and entered into a members voluntary liquidation (MVL) with almost immediate effect. No liquidator was appointed nor did the businesses cease trading, contrary to the requirements of the Insolvency Act 1986.

The key benefit to the landlords was that they did not pay business rates on the properties. As the properties were in an MVL and a liquidator had not been appointed they were exempt from paying business rates. Therefore, had the companies not been in an MVL a total of GBP 26.5 million of business rates that should have been paid, was not paid.



JLT Specialty Limited provides insurance broking, risk management and claims consulting services to large and international companies. Our success comes from focusing on sectors where we know we can make the greatest difference – using insight, intelligence and imagination to provide expert advice and robust – often unique – solutions. We build partner teams to work side-by-side with you, our network and the market to deliver responses which are carefully considered from all angles.

We are a leading provider of bespoke insurance and risk management solutions for the corporate recovery profession. From investigation through to appointment, we advise turnaround advisors, insolvency practitioners, legal advisers, property receivers and their teams on all insurance, risk management including property risks, warranty and indemnity, litigation and claims issues. We also advise on litigation risk management for non-insolvency related matters.

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Unoccupied buildings

When a commercial property is left unoccupied it becomes exposed to all sorts of potential risks; fire, theft and damage, as well as the increase in liability issues are all important factors which owners should take in to consideration.

To someone who is looking for shelter, unoccupied buildings may be enticing, especially in the colder Winter months. In addition to the potential for vandalism, trespassers may set fires to provide heat. All combustible or hazardous material inside and outside the buildings should be cleared and properly disposed of within 30 days of your appointment. Failure to do so can expose the owner to potentially expensive litigation by intruders who claim to have been injured on the site and risk serious losses from fires started deliberately or accidentally.

Prevention of fire starting can also be assisted by removing sources of ignition and all electrical and gas supplies are to be turned off at the mains, unless there is operational fire and/or theft protection /detection equipment in place which requires the electrical supply to be maintained.

During the winter there are additional risks of owning vacant commercial property. Central heating and water systems should be drained down to prevent damage from freezing temperatures or heating system should be set to 'tick over' to prevent burst pipes and other damage. However, if you have a working sprinkler system then for the period 1st November to 31st March inclusive, the heating system should be kept operational to maintain a minimum temperature of 4°C/40°F.

There has been a marked increase in theft of fabric from a building, with copper and lead traditionally the choice of metal thieves, but scrap metal prices mean that cables, pipes, taps and boilers are also desirable. You should ensure locks and boundaries are strong and well maintained and that windows and skylights are secured or boarded

up, as well as ensuring that letterboxes are sealed. All keys should be accounted for and if necessary, locks should be replaced.

It is imperative for you and your Agents to know what to do to safeguard your property and to comply with the Unoccupied Buildings Condition (UBC)

You could be fined or imprisoned if you don't follow fire safety regulations

As well as adhering to the UBC, unoccupied commercial properties also require a Fire Risk Assessment to be undertaken.

Under The Regulatory Reform (Fire Safety) Order 2005, and the Fire (Scotland) Act 2005 and the associated Fire Safety (Scotland) Regulations 2006, the responsible person must carry out a fire safety risk assessment and implement and maintain a fire management plan.

Local fire and rescue authorities will visit premises to check the fire risk assessment and fire prevention measures are appropriate. Fire safety officers should help you understand the rules and comply with them. They can also take action if they think your fire safety measures aren't adequate.

Having an adequate fire risk assessment is a legal requirement, therefore, you could be fined or go to prison if you don't follow fire safety regulations. Minor penalties can be up to GBP 5,000. Major penalties can have unlimited fines and up to two years in prison.