# Wedding gifts won't make it to the church on time.

**We have recently acted on behalf of the directors of a wedding list company to place it into liquidation.**

The company operated a wedding list service for guests to purchase items selected by the bride and groom from a catalogue. The company would then purchase the items on behalf of the guests and arrange for them to be delivered to the bride and groom. Recently, several wedding list companies have failed. Once the company experienced financial difficulties, the directors sought advice and decided to place the company into liquidation.

The compulsory liquidation of the company was ordered by the High Court in January 2006 following our presenting a winding up petition.

At the time of liquidation, it was estimated that there would be some 4,000 creditors, waiting for their toasters.

# A cautionary tale for executors' solicitors.

**The decision *Re Voss [2006] BPIR 348* dealt with the administration of a deceased person's insolvent estate. Following the death of Mr Voss in 1992, the executors' solicitors sought advice from Counsel as to whether or not the estate was insolvent. Having received that advice in 1994, they continued to deal with the affairs of the estate and litigate with Lloyds who were a major creditor.**

Eventually in 2000, Lloyds presented a petition for an Insolvency Administration Order and, following the making of that order, a Trustee was appointed.

Since the date of death, the solicitors had handled a number of matters on behalf of the estate and had incurred and drawn substantial fees. The Trustee in Bankruptcy sought to recover those fees for the benefit of the estate and for creditors.

Following death, if it becomes apparent that an estate is insolvent, then the executors may continue to administer the estate. However they must do so in compliance with the bankruptcy rules for the benefit of the deceased's creditors, and not for those entitled under the will or on intestacy.

Alternatively, a creditor, or the executors may apply for an Insolvency Administration Order to be made in respect of the estate. Following the making of the order, an Insolvency Practitioner will be appointed to administer the estate, as Trustee in Bankruptcy.

In ***Re Voss***, the solicitors having received advice from Counsel in 1994 that the estate was insolvent, proceeded to ignore that advice and carried on dealing with the estate. That included litigating against the largest creditor in the estate.

The Administration of Insolvent Estates of Deceased Persons Order 1986, applies bankruptcy provisions to the insolvent estate, which includes section 284. This provides that any disposition of property in the estate from the date of death to the appointment of the Trustee is void unless ratified by the court. It covers payments made from the estate to the solicitors in respect of their fees.

The court held that all fees paid to the solicitors from the date on which they received advice from Counsel that the estate was insolvent in 1994 to the appointment of the Trustee in 2000 should be repaid to the estate in bankruptcy.

This case should be regarded as a clear warning to executers not to carry on regardless in administering a deceased's estate where there is a possibility that it is insolvent. It should be remembered that in determining whether or not an estate is insolvent, regard must also be had to contingent liabilities as well as debts outstanding at the date of death. Executors faced with a potentially insolvent estate should seek advice at an early stage in order to avoid the pitfalls of the decision in ***Re Voss***.

# Dealing with debt.

**As spring blossoms into summer it is tempting to think that everything in the garden is rosy. Despite a record number of bankruptcies and a huge increase in the number of individual voluntary arrangements, the economy appears to be able to soak up the ever increasing mountain of debt.**

Debt and the methods of dealing with it, have now become an every day part of modern life. Never before have so many adverts appeared on television for remortgages and debt management companies.

For those suffering from problems with debt, there is an army of organisations waiting to come to their rescue.

Unfortunately, for some debtors, the solution comes at a very high price, with refinancing packages being offered at high rates of interest with penalties attached.

Impartial advice can still however be found in the market place to assist debtors. The Citizens Advice Bureau and some debt charities provide a useful source of practical advice in addition to the advice available from insolvency

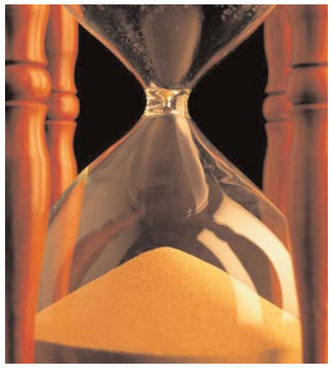

practitioners and solicitors, such as our firm which specialises exclusively in insolvency.

# Converting administration to liquidation.

**The recent decision Re E Squared Limited clarifies the procedure and timing of notice to be given by an Administrator to convert an administration into a creditors voluntary liquidation.**

The Enterprise Act 2002 brought in a new simplified procedure enabling Administrators to serve notice on the Registrar of Companies converting an administration into a creditors voluntary liquidation. It avoids the need to convene meetings of members and creditors and offers a simple and effective procedure for bringing administration to an end.

The Court had to consider two applications relating to the use of this




procedure where notice had been sent by the Administrator days before the automatic expiry of the administration. Unfortunately, in both cases, the notice, although received by the Registrar of Companies, was not registered until after the administration had come to an end and the Administrator had ceased to be in office. There was therefore considerable doubt as to whether or not the liquidations that followed were valid.

### A practical approach

Fortunately, the Court took a practical approach and held that it is the registration of the notice which brings the administration to an end and places the company into liquidation. If the administration had already come to an end by reason of other provisions of the Insolvency Act, i.e. the twelve month duration limit, then this did not invalidate the liquidation coming into effect on registration of the notice.

However, it is important to note that, in both cases, the notice was sent before the administration had come to an end, i.e. before the expiry of the twelve month period. A notice sent after the administration has come to an end will not be effective to place the company into creditors voluntary liquidation.

In reaching its decision, the Court were careful not to give any decision on whether or not the effect of sending the notice before the end of the administration extends the Administrator's appointment until such time as the notice is registered. The reason for this is that this may have implications in other areas in respect of time limits for proceedings.

There is uncertainty as to the company's status in the period from the date on which administration automatically ends up to the date of registration of the notice. Ideally significant actions should be avoided until the creditors voluntary liquidation is confirmed by registration of the notice.

Practitioners are advised to ensure that any notice served under paragraph 83 utilising this procedure is served well in advance of the automatic end of the administration. Proof of posting may also assist in the event that Companies House subsequently state that they did not receive the notice.

# **Quiz** – Win a Fortnum & Mason Hamper!


A Fortnum and Mason Weekender Hamper will be delivered to the door of one lucky reader. Perfect for a summer picnic, simply get all five answers correct and Email us with your entry. Good luck!

**1. Rugby Union:** Which team won the Guinness Premiership playoff at Twickenham in May this year? Which team did they beat? (Name both teams)

**2. Golf:** Name the woman who made history in May by making the cut in the SK Telecom *Men's* Open in Korea.

**3. Sailing:** In which class did Ben Ainsley win gold at the Athens 2004 Olympics?

**4. Tennis:** Name this tennis player.

**5. Football:** What was unusual about the ball used in the 1973 FA cup final between Leeds and Sunderland?

Please Email your answers to: **info@juliandobson.com** adding 'Quiz' in the subject bar

The winner shall get all 5 answers correct and be drawn out of a hat containing all correct entries. Entries close at 5pm Friday 30th July 2006. The winner will be notified by Email shortly afterwards. The winner will be drawn at random from all correct entries and Mr Dobson's decision shall be final with no correspondence being entered into.

# Non co-operating bankrupts.

We recently presented a seminar entitled "Non Co-operating Bankrupts" to insolvency practitioners. To accompany the seminar, a detailed handout was prepared which covers the various ways in which non-cooperation can be encountered by practitioners and the methods for dealing with it. Copies of the seminar handouts are available, free, by e-mailing your request to info@juliandobson.com.

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# Newsletter

## Ignorance of the law no defence to Liquidator's claim to recover illegal dividends.

**The recent decision of the Court of Appeal in *It's a Wrap (UK) Ltd v Gula* overturned the earlier decision of the High Court made on 16th December 2005.**

It's a Wrap UK Ltd was run by a Mr and Mrs Gula who were the sole directors and shareholders of the company. They worked full time in the business and drew remuneration from it in the form of dividends as opposed to salary. In consecutive years, the company paid dividends when there were no profits available for distribution. The dividends were paid on advice of the company's accountants as being the most efficient way of paying remuneration. The company went into liquidation and the Liquidator sought repayment of the dividends under Section 277(1) of the Companies Act 1985.

At first instance, the Court held that Mr and Mrs Gula were not aware that by paying and receiving dividends in that way they were contravening the provisions of the Companies Act and therefore the Liquidator's claim failed.

The Court of Appeal took a different view. It held that Section 277(1) of the Companies Act 1985 had to be interpreted in conformity with Article 16 of the EC directive on company law, (Second Council Directive 77/91.)

The directive provides a statutory remedy against shareholders to enable illegal dividends to be recovered. The rationale behind the directive and the provisions of the Companies Act being to prevent unlawful distributions to shareholders, to ensure that the capital of the company constitutes security for creditors. Distributions made other than from distributable profits or reserves detract from the capital available to creditors.

Article 16 only requires a shareholder to return a dividend to which they are not entitled if they -

(a) knew of the irregularity of the distribution, or

(b) could not in the circumstances have been unaware of it.

The Court of Appeal held that directives have to be interpreted in the light of general principles of community law, one of which is that a person is presumed to be aware of community law as soon as it is published. As such, ignorance of the law was no defence.

The Respondents knew that the accounts showed that the company had not made any profits and that, as such, they knew of the irregularity of the distribution. Any claim that they acted on the advice of the accountants would not amount to a defence.

The decision in this case will come as welcome relief to liquidators who may have otherwise delayed issuing proceedings following the decision at first instance. It provides a relatively simple statutory remedy for the recovery of illegal dividends, although it may in some cases be prudent to combine it with a misfeasance claim under Section 212 of the Insolvency Act 1986.

## Use it or lose it *cont.*

how that period might pass without the Trustee having taken one of the steps outlined above. Unless the Trustee realises his interest or applies to put a charge over the property, the most likely course of action will be to issue proceedings for an order for possession and sale. Those proceedings must be issued within the three year time limit.

### Last minute application may not get sympathetic hearing

In cases where a Trustee has not been able to establish accurately the extent of his interest, such an application made at the eleventh hour will attract little sympathy from the courts. The ultimate sanction is contained in Section 283A(4) which provides that, where an application for an order for possession and sale is dismissed, the interest will automatically

revest in the bankrupt. The courts may not hesitate to use this provision where, for instance, Form 6.83 has not been served during the requisite period or on the appropriate parties, i.e. a civil partner.

### Need to plan now

Going forward, Trustees need to plan now to ensure that all cases involving an interest in the bankrupt's dwelling house are progressed and can be pursued by means of proceedings for an order for possession and sale in the event that negotiations break down.

Some bankrupts may deliberately drag out negotiations to purchase Trustees' interest.

Whilst most Trustees will be well prepared and well aware of the deadline looming, bankrupts and their partners will also increasingly become aware of the provisions. In some cases, they may be hoping that protracted negotiations and/or delays may work to their advantage by either forcing the Trustee to issue an ill-prepared and hasty application shortly before the deadline or simply missing the deadline altogether, thereby allowing the property to revest in the bankrupt. Trustees should not allow negotiations to drag on and should be prepared to issue proceedings if they break down or do not reach a satisfactory conclusion.

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# Seconds out for use it or lose it.

**Time is running out! In cases where a bankruptcy order was made on or before 1st April 2004, the deadline for Trustees in Bankruptcy to act in respect of the matrimonial home expires on 1st April 2007. The time to act is now!**

The use it or lose it provisions contained in Section 283A of the Insolvency Act 1986 were brought into force by the Enterprise Act 2002 on 1st April 2004.

Where a bankrupt's estate contains an interest in a dwelling house which at the date of the bankruptcy was the sole or principal residence of the bankrupt or the bankrupt's spouse, civil partner or the former spouse or civil partner, the use it or lose it provisions will apply to that interest.

### Trustee must deal with home within three years

A Trustee in Bankruptcy must, within three years of the date of the bankruptcy, take one of the following steps:

(a) Sell the interest in the matrimonial home.

(b) Apply for an order for possession and sale.

(c) Place a charge on the property.

(d) Enter an agreement to incur a specified liability in return for the bankrupt's interest.

If the Trustee fails to take at least one of the above steps within the three year period, the property interest will automatically pass back to the bankrupt at the end of the three years.

### What types of property are affected?

In most cases, it will be easy to identify the property to which the provisions of Section 283A apply. However, it is possible to have more than one property to which the provisions apply, particularly where the bankrupt was divorced or was party to a civil partnership. It does not apply to buy-to-let property, holiday homes or business property.

### 1st April 2007 = D day

The new three year rule applies to both pre and post Enterprise Act bankruptcies. There will be a significant number of cases which, if not dealt with, will automatically revest property in bankrupts on 1st April 2007.

### Steps taken by Trustee to identify and protect interest in property

The Trustee's task of dealing with an interest in the matrimonial home begins at an early stage. Where the bankrupt holds an interest in property, the Trustee will seek to protect that interest by registration of appropriate restrictions at H M Land Registry in the case of registered land. Different provisions apply to unregistered land.

### Trustee's notice claiming interest in property

Having identified an interest in a dwelling house to which Section 283A applies, the Trustee must as soon as is reasonably practicable give notice to the bankrupt or the bankrupt's spouse or civil partner and former spouse or partner that the interest falls within that provision.

The serving of notice in Form 6.83 will often be the first step in the process of preparing and issuing proceedings for an order for possession and sale. The form must be served in any event no later than 14 days before the expiry of the three year period.

A Form 6.83 Notice should be served before proceedings for an order for possession and sale are issued.

### What is the Trustee's interest in the property worth?

From the outset, in order to serve Form 6.83, the Trustee will need to establish who is living at the property and what relationship they have to the bankrupt. As part of that process, the Trustee will also need to determine the extent of his interest in the property and that held by any other parties.

This process can often be time-consuming and frustrating. Nevertheless, an accurate assessment of the extent of the Trustee's interest at this stage may avoid costly abortive proceedings at a later stage.

The process of gathering information may require the Trustee to request parties to complete property questionnaires in an effort to establish how the property is held. Such questionnaires can cover the effect of improvements, possible claims for exoneration and the existence of exceptional circumstances. All of these matters may potentially have a significant impact on the value and extent of the Trustee's interest. Other less obvious issues may be identified as part of the valuation process but may also be established using questionnaires, such as subsidence or structural defect claims.

### What if the bankrupt does not co-operate?

In cases where co-operation is not forthcoming, the process can become lengthy. It may be necessary to apply for an order for the private examination of the bankrupt and/or others, or require the bankrupt to produce documents. These can range from solicitors' files to mortgage application forms.

### No claim if property interest worth less than £1,000

The Trustee will not be able to claim any interest in the property if it is worth less than £1000.

### Trustee must act within three years

There is less than a year to go before properties start to revest. It is easy to see

*continued on back page*