In this month's ebulletin...

Service update

Over the next month we will be making some improvements to our monthly ebulletin. We will still provide news and case law updates, but you may notice changes to some of the other sections. We hope to improve the content and make it more relevant to advisers in their day to day work. As always, we welcome any feedback which can be sent to SpecialistDebt@shelter.org.uk.

News and legal updates

PPI deadline – 29th August 2019
A reminder that an individual complaining about PPI has until 11.59pm on Thursday 29 August 2019 to refer a complaint to the lender or the Financial Ombudsman Service (FOS).

A complaint can still be made to FOS after the deadline if the complaint was made to the lender on or before 29 August 2019; the lender gives its final response on or after 29 August 2019. See FCA 'How to complain about PPI' for more information.

The FCA have confirmed in their Regulation Roundup June 2019 that they are encouraging all firms who receive PPI complaints to consider the following:

- Including the deadline date when giving positive responses to checking enquiries.
- Pragmatically treating postal complaints arriving up to 5 working days after the deadline as being in time (to allow for potential delivery delays).
- Ensuring phone lines are open late on 29 August and accepting voicemail complaints after that or treating calls on 30 August as if in time.

In addition, the FCA has started a campaign to raise awareness of the final PPI deadline by creating a PPI Deadline campaign partner toolkit. Amongst other things, the toolkit includes:

- Social media cards and suggested posts
- Leaflets and posters
- Web and newsletter copy
- A factsheet
- Wallet cards - these are business card sized and provide simple information about the deadline and where to go to for further information
- Collateral (leaflets, posters, wallet cards) request copy
- 'How to' videos
- Q&A (for use by staff/volunteers who help people – either in branch, in the community or via a helpline)

To login into the Toolkit:
Username: partner
Password: aN2FhPEV

Insolvency Service seeking views of the current insolvency regime

The Insolvency Service released their 'Call for Evidence' on 12 July 2019 and is seeking views on the impact of the regulatory objectives introduced in 2015 and whether any benefit in making changes to the current system including establishing a single regulator.

The Call for Evidence will close on 4 October 2019.

Ombudsman News – Issue 148
The latest Ombudsman News Issue 148 titled "Give us your views" has been published, which discusses the FOS Annual Review 2018/2019, new resources about fraud and scams, and 'A conversation about debt collection' on how to resolve and prevent problems that can arise.

You can read previous issues of the Ombudsman News, which often have articles of interest to debt advisers. The Financial Ombudsman Service also publishes all its decisions on its website, and these can be searched for relevant cases similar to clients'.

Aperture no longer taking IVA referrals
The IVA firm – Aperture has confirmed in an email to debt advice providers that they stopped taking on new IVA referrals from 1 July 2019. See Debt Camel for further details.

FCA consultation on treatment of vulnerable customers
The FCA has released a consultation setting out their view of what is required of firms to ensure that vulnerable customers are consistently treated fairly across financial service sectors.

The FCA is asking for comments on this first stage of the consultation by 4 October 2019.

Body-worn cameras to be made compulsory for certain enforcement agents
The government has announced that in an effort to ensure debt is collected in a fair and safe manner, body-worn cameras are required for High Court Enforcement Agents and certificated enforcement agents. This does not apply to County Court enforcement agents.

Case law

Court's powers to validate a defective service of a claim form

In the case of *Woodward and another v Phoenix Healthcare Distribution Ltd* [2019] EWCA Civ 985 the Court of Appeal considers whether the court should exercise its power retrospectively to the defective service of a claim form.

Background

Woodward issued a claim in June 2017 for a sum in excess of £5m against Phoenix for breach of contract and misrepresentation. The contract was for the sale of a drug that was allegedly still under patent, leading to financial loss. The contract was dated 20 June 2011 (when the cause of action accrued), therefore the claim was time barred from 20 June 2017. The claim was issued on 19 June 2017 and pursuant to CPR r7.5(1) should have been served no later than midnight on the calendar day four months after that date, being midnight on 19 October 2017.

The claim form, particulars of claim and response pack were sent to the defendant's solicitors by first class post on 17 October 2017 and emailed the following day. A read

receipt was sent to the claimant, confirming the claim form had been received. The defendant's solicitors were satisfied that service was ineffective because the solicitors were not authorised to accept service. They did not notify the claimant of their mistake until the deadline to serve the claim had passed.

The claimant then served the claim on the defendant by courier, first class post and email at 11am on 20 October. The claimants made an application seeking an order that service should be dispensed with, or that the court should validate the purported service, which Master Bowles did on the basis of precluding the defendant from procuring a windfall.

The Master took the view that the defendant's solicitor had a duty to the court to give effect to the overriding objective in CPR r1.3: "The parties are required to help the court to further the overriding objective". On appeal, Judge Pelling held that the Master had erred in law and that the defendant's solicitors were not under any duty to notify the claimant of their mistake, and that failing to do so was not "technical game playing".

The court's decision

The appeal was dismissed.

The Court of Appeal referred to the judgment in *Barton v Wright Hassall* [2018] 1 WLR and *Denton v T H White* [2014] 1 WLR 3926. In Barton, Lord Sumption JSC made clear that the defendant's solicitors were under no duty to give advice, they could not have done so, and it was inconceivable that they would have been authorised to do so. Barton had "courted disaster" by waiting until the very end of the limitation period to serve the claim form. The Court of Appeal upheld the decision in Barton.

Comment

This case is a reminder to issue a claim form in good time and check who is able to accept service.

Prioritising repayment of multiple writs

In the case of *365 Business Finance Ltd v Bellagio Hospitality WB Ltd and another; Court Enforcement Services (CES) Ltd v Burlington Credit Ltd* [2019] EWHV 1920 (QB), the High Court (HC) looks at how multiple writs are dealt with in relation to priority of repayment.

Background

Mr Handa (Mr H) had fallen into debt and two of his creditors obtained judgments that were enforced through the HC. He owed a sum of approximately £23,000 to 365 Business Finance Ltd and approximately £8500 to Alivini Ltd.

365 had instructed Burlington Credit Ltd and the writ was received by enforcement agent - Mr Badger, on 12th June 2018. Alivini had instructed Court Enforcement Services (CES) and the writ had been issued on 16th July 2018.

Mr Badger of Burlington attended Mr H's premises and secured goods by way of a controlled goods agreement. Mr H had agreed to make a payment of £10,000 within 30 days followed by instalments of £1,000 until the debt was cleared. The first payment was due on 22nd August 2018.

Subsequently, the day before payment was due, Mr H was visited by enforcement agent - Mr Wild of CES, who demanded repayment in full. Mr H contacted Mr Badger who then advised

Mr Wild that the writ he was executing took priority, but Mr Wild ignored this and took full repayment of £12,050 from Mr H.

Burlington successfully applied for an order to have the money paid to them, as the writ executed by Mr Badger held priority pursuant to CPR 83.4.

CES applied to set aside the order on several grounds but their main argument was that because they are High Court Enforcement Officers (HCEOs) and not enforcement agents (as defined in s63 of Tribunals, Courts and Enforcement Act 2007), Schedule 12 of the 2007 Act did not apply to them and therefore, neither did the CPR.

The court's decision

The court held that although HCEOs may face statutory limitations to act as an enforcement agent by virtue of s63 of the 2007 Act, this is unrelated to the fact paragraph 4(2) of Schedule 12, binds all the debtor's property from the time the writ is received by the person who is under a duty to endorse it.

Therefore, as the money was bound from the date Mr Badger received the writ, the £12,050 should be paid to Burlington as per the original order.

CES argued that 'binding' property simply protects the debtor's goods so they cannot be sold and this paragraph does not dictate there should be any priority between writs. The court rejected this and supported its argument with the relevant case citations (paragraphs 31 – 48).

The court also reminded HCEOs that as part of their required Level 4 Diploma in High Court Enforcement, they are provided with 'The Chartered Institute of Credit Management's Level 4 training material' which specifically states at Chapter 4, p.19:

"Priority of writs
Writs have an order of priority which is established by the date and time that the writ is lodged with the HCEO. Once lodged a writ has priority over any other writs that are lodged later, regardless of whether an earlier taking control of goods has been made.

There are many cases where an officer will find another officer enforcing at the same address. In these circumstances it is the priority date that determines which officer is entitled to the goods.

Where an officer finds another enforcement agent has taken control of goods under a writ at an address, it is the date of the lodgment of the writ that becomes the effective date"

The judge acknowledges that training material carries no weight of precedent but refers to the fact this supports his analysis of the law.

Other arguments were presented by CES which included:
- There is no way to determine priority between writs;
- There are no provisions for collecting fees where a writ has lower priority; and
- Payments were not to be considered as proceeds of enforcement.

However, these were all found to have no merit and were rejected by the court.

Comment

Despite this case being in relation to HC writs, pursuant to s62 of the 2007 Act, Schedule 12 applies where the enforcement agent is exercising power conferred by writ or warrant of control and therefore, this judgment can be applied to any situation where the enforcement agent is executing either.

This case will be important where you are dealing with clients who have several accounts being recovered by enforcement agents. Not only does it determine which writ/warrant takes priority and indicates who you should deal with first as an adviser, it would also help as a supporting argument to deter other enforcement agents pursuing recovery as their writ/warrant would be, in a sense, ineffective as the client's goods have already been bound.

Income payments order not enforceable in a later bankruptcy

In the case of *Azuonye v Kent* [2019] EWCA Civ 1289, the Court of Appeal considered whether a discharged bankrupt's income payments order (IPO) from the first bankruptcy was a provable debt in a later bankruptcy.

We featured this case in our December 2018 ebulletin where the High Court held that a second bankruptcy will not discharge the liability of an IPO from a first bankruptcy.

Background

Azuonye was made bankrupt on 28 April 2015. On the 26 April 2016 the trustee, Kent applied to the court for an IPO.

At the hearing on 22 November 2016 an IPO was made for £1000 per month as well as a disclosure order for A's income and expenditure. A failed to comply and the IPO was increased to £2500 per month at a hearing on 13 June 2017.

On 04 December 2017, Azuonye made himself bankrupt and argued the second bankruptcy order automatically discharged the earlier IPO. That argument was rejected at a hearing on 16 January 2018 and A appealed.

Kent argued the IPO was not a provable debt as per s.283(3) of the IA86 and relied on Booth v Mond 2010.

The High Court dismissed the appeal. Azuonye was given permission to appeal which now gives us this Court of Appeal decision.

The court's decision

The court explored the issue of whether the IPO continues and be enforceable for the benefit of the estate in the first bankruptcy, or whether the claim for payments falling due after commencement of the second bankruptcy is a provable debt in the second bankruptcy, as Azuonye submits.

The Court of Appeal held that an IPO from an earlier bankruptcy order of a discharged bankrupt is a provable debt and does not fall under rule 14.2(5) of the Insolvency Rules 2016.

Section 382(1) of the Insolvency Act 1986 defines what a bankruptcy debt is. Subsection 3 goes on to define liability for a bankruptcy debt. Rule 14.2 of the Insolvency Rules 2016 provides further clarity on a provable debt. Neither s382 or Rule 14.2 list IPOs as non-provable debts.

The court did not accept Kent's argument that s.335 allows for A to continue with the IPO, otherwise in order to avoid payments in an IPO a second bankruptcy could easily be made. Where an IPO is in place for a discharged bankrupt and a new bankruptcy order is made, the court may annul this (s.282(1)(a)) as the bankrupt may not actually be insolvent as there would appear to be surplus income available.

Comment

It is now clear that where you have a bankrupt who has been discharged but still has an IPO or possibly an income payment arrangement (IPA) in place, the Trustee or Official Receiver cannot expect the bankrupt to continue with it where there is a later bankruptcy. The Trustee/OR has the provisions to make a new IPO/A for the benefit of the creditors in the later bankruptcy.

Spotlight

In this month's Spotlight we will cover contingent liabilities, and why identifying them is so important when advising about insolvency options.

For our previous 3 spotlight article topics here:

Jun 2019	-	Complaining to the Financial Ombudsman Service (FOS)
May 2019	-	Charging Orders – Attaching conditions
Apr 2019	-	Shared Ownership

To see our other Spotlight articles please go to our website.

Celebrating success

If you have any successes that you've achieved for clients, we would love to hear about them and share them with other advisers. Please email us any success stories to SpecialistDebt@shelter.org.uk.

Networking & information sharing project

As part of our Networking and Information Sharing partnership with the Institute of Money Advisers (IMA), the Specialist Debt Advice Service produce a range of resources which are available to free sector money and debt advisers. IMA membership is not required, and you can sign up or log in to access these resources via a dedicated area of the IMA website.

Under the **'Shelter resources'** section you will find 40+ resources produced by the team, including monthly ebulletins & spotlight articles, quarterly debt updates, video recordings, technical resources, guidance documents and recorded webinars.

Our most recent additions are:

- June's ebulletin & spotlight article where we discuss the Financial Ombudsman Service
- Dealing with Judgment Debts - A comprehensive 40 page resource document
- Dealing with Judgment Debts – a recording of our recent webinar

The Networking & Information Sharing Project is funded by the Money and Pensions Service.

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Archived newsletters & spotlight articles

On this page, you will be able to access our library of monthly e-bulletins and Spotlight articles.

Who we are

We help millions of people every year struggling with bad housing or homelessness through our advice, support and legal services. And we campaign to make sure that one day, no one will have to turn to us for help.

Web enquiries can be made 24 hours a day, 7 days a week.
Click on this link to submit a web enquiry

Our telephone service is open 9am – 5pm Monday to Friday.
Call us now on **03300 580 404.**

Find us at www.shelter.org.uk/debtadviceservice
Thank you for reading,
The Specialist Debt Advice team