Carrick Read Insolvency

Newsletter September 2015

UPDATE

Welcome to the CRI Insolvency Law Update, a summary of recent judgements and insolvency related reports and news items which we hope you will find of interest

CFA 's upheld

Although the case is not an insolvency case the Fen Tigers case is important to insolvency litigation in that it upholds the legality of conditional fee agreements and after the event insurance. These were challenged before the Supreme Court as being contrary to European Law. It was argued that the liability to pay a success fee and ATE premium was inconsistent with rights under the European Convention on Human Rights ("ECHR") - specifically Article 6. If it had been successful then considerable confusion would have arisen in respect of all previous instances of payment of the same and would have led to potential carnage in the costs market.

In a decision having more than an element of public policy the Supreme Court determined the Act's costs regime to be compatible with the ECHR. There were two powerful dissenting judgements asserting that the regime was disproportionate and discriminatory because it imposed liabilities, far beyond the bounds of what may be reasonable or proportionate, on a specific class of defendants who happened to have been opposed by CFA/ATE-funded litigants.

The decision is important in an insolvency context as the changes to the legislation preventing recovery of ATE premium and success fees do not apply at the present time in insolvency cases

***See* Lawrence and others v Fen Tigers Ltd and others (No 3) (Secretary of State for Justice and others intervening)**
[2015] UKSC 50; [2015] WLR (D) 332

Carrick Read Insolvency is a specialist insolvency law practice providing legal and technical advice to insolvency practitioners, debtors and creditors involved in the insolvency process.

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Burden of Proof under s214

A recent case has clarified that once the liquidators could establish that the directors knew or ought to have known that there were no reasonable prospects for a company to avoid insolvent liquidation, it was for the directors to establish that they had done everything in their power to minimise the potential loss.

Further, the liquidators did not need to prove that the directors had the knowledge at a particular date; it was sufficient to show that the directors had this knowledge at some time before the winding up took place. There was no duty not to trade while insolvent if the directors predicted the company would achieve profits in the foreseeable future

***See* Philip Anthony Brooks and Julie Elizabeth Willetts (Joint Liquidators of Robin Hood Centre Plc) v Keiron Armstrong and Ian Walker [2015] EWHC 2289 (Ch)**

s 236 has no extra territorial effect

Administrators applied for an order under section 236 of the Insolvency Act 1986 against a French registered company. The order sought the production of documents and a full description by way of witness statement . The court held that section 236 did not have extra-territorial effect and therefore an order could not be made under it against the company

***See* Fleming and others v LHC.Clearnet Ltd [2015] EWHC 2319 (Ch)**

The contents of this Update provide only a brief overview of the case law and changes in the law . If you should require any detailed advice then please do not hesitate to contact us.

The test to be applied under s 172 CA 2006

In a case brought by a liquidator against directors for misfeasance the court considered the standard applying to director's duties under s172 CA 2006

The test to be applied in deciding whether there has been a breach of the CA 2006, s 172 duty is subjective in that a court will ask itself whether the director in question honestly believed the act was in the interests of the company. Although, this only applies where there is evidence that the director actually considered the best interests of the company. Where there is no such evidence the proper test is objective, namely, whether an intelligent and honest man in the position of the director could, in the circumstances, have reasonably believed that the transaction was for the benefit of creditors.

What this judgment demonstrates is that the courts are becoming increasingly willing to look to the interests of the creditors as a whole when a company is insolvent. The directors were ordered to make repayments of monies transferred prior to liquidation

***See* Re Micra Contracts Ltd (in liquidation)] [2015] All ER (D) 24**

Refusal to set aside Demand where debt less than £750

The debtor appealed against a decision of a district judge dismissing his application to set aside a statutory demand. The debt itself was not disputed but the appellant relied on a cross-claim which did not equal the debt but fell short

of it by less than £750.

The Chancery Division held that a statutory demand should not necessarily be set aside under the residual discretion under rule 6.5(4)(d) of the Insolvency Rules 1986 (IR 1986), SI 1986/1925, simply because the undisputed part was less than £750. On the facts of the present case, the appropriate course was not to set aside the statutory demand under IR 1986, r 6.5(4)(d).

It has often been thought that all a debtor needed to do in order to set aside a statutory demand was demonstrate that the debt was disputed to the extent that any undisputed sum was below £750, or that there was a cross-claim which would have the effect of reducing the demand debt which was not the subject of the cross-claim to below £750. This judgment clarifies that in respect of statutory demands this is not the case (even though it remains so in relation to the bankruptcy petition itself).

See **Howell v Lerwick Commercial Mortgage Corporation Ltd [2015] EWHC 1177**

Wife's entitlement to the Equity of Exoneration

A wife was entitled to an equity of exoneration where she had charged her share of the matrimonial home to secure a loan made to enable her bankrupt husband to re-acquire his interest in the property from his trustee and the equity was not necessarily displaced when the non-bankrupt spouse had enjoyed indirect benefits from the borrowings of the bankrupt secured over the joint property

The court considered the formulation of the equity and determined that

the principle applies where a person charges his or her interest in jointly owned property, to secure the debt of the other joint owner and:

the equity gives the chargor not just a right to an indemnity from the debtor, but a proprietary right to require that the debtor's beneficial interest in the charged property bears the primary burden of the debt and:

the equity does however depend on the actual or presumed intention of the parties, and the circumstances of the particular case.

See **Cadlock (TiB of Anthony Dunn) v Dunn & anr [2015] EWHC 1318 (Ch), and Armstrong v Onyearu & anr [2015]EWHC 1937 (Ch.)**

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