CARRICK | READ
INSOLVENCY LAW FIRM

**September 2017**

# UPDATE

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

**Insolvency Service Criminal Enforcement Team**

In January 2017 the Criminal Enforcement Team of the Department for Business Energy and Industrial Strategy transferred to The Insolvency Service.

Recent statistics published state that they successfully prosecuted 97 defendants in the year to March 2017. The focus is on breaches of company law rather than wider offences of fraud.

Of the individuals prosecuted two thirds received immediate or suspended custodial sentences providing a stark message to individuals that the Court will take breaches of company law seriously.

In addition one third of the individuals convicted of a criminal offence were also disqualified from being directors.

By way of interest, in 2016/2017 The Insolvency Service took steps to have a total of 1,214 directors disqualified and 430 referrals to prosecuting authorities were made where it was considered criminal conduct had taken place.

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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# Carrick Read Insolvency

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**Challenge to appointment**

The company granted a fixed and floating security in favour of Nationwide in breach of a negative pledge contained in a prior ranking debenture. The breach of the negative pledge resulted in the automatic crystallisation of the floating charge in the first debenture.

Administrators were appointed with the prior secured lender's consent. However creditors challenged the appointment and argued that it was invalid because at the time the second debenture was taken there were no assets which could be charged by way of floating charge and/or that the floating charge was not enforceable.

The Court of Appeal rejected that claim. It was determined that the validity of the floating charge was not dependent on the existence of any uncharged assets owned by the company. Particularly in cases where a prior fixed charge has been granted, this still leaves a subsequent floating charge to attach to the company's equity of redemption under the fixed charge.

*See Saw Limited v Wilson & others (2017) EWCA CIV 1001*

**Trustee's Conduct**

A bankrupt had potential claims against a firm of solicitors vesting in his appointed Trustee in Bankruptcy. The debtor wrote to both the Official Receiver and the Trustee in Bankruptcy after appointment and offered to buy the claims. The Trustee disclaimed the claims.

The debtor alleged that the claims had already re-vested in him following his notice to both the Trustee and the OR.

The debtor brought proceedings against the Trustee challenging the disclaimer.

The Trustee contended that the claims could be onerous property and that legal costs would be incurred in bringing them. There would be a risk of an adverse costs order.

The Judge agreed with the Trustee that the asset had already vested in the Trustee under The Insolvency Legislation and the debtor had no interest in the asset and it could not re-vest in him.

The Judge struck out the proceedings.

*See Frosdick v Fox and Baker Tilly Creditor Services LLP (2017) EWHC 1737 (Ch)*

**Bankruptcy Annulment**

The bankrupt appealed an order dismissing his application for annulment of his bankruptcy order.

The application for annulment had been made on the grounds that the English Courts did not have jurisdiction to make the order.

On the application to annul, new evidence was provided by the debtor not available at the bankruptcy hearing. The Judge did not consider this as he did not consider it "new".

On appeal the Judge granted an annulment recognising the previous Judge had not attempted to assess the material and to compare it to that previously provided or make findings in relation to it. This was a serious procedural irregularity and the debtor had not had a fair hearing.

*See Richards v Vivendi SA [2017] EWHC 1581*

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**Non Application of the Duomatic principle**

A director of a company appointed administrators. Creditors with a charging order appealed against the administrators' appointment. They claimed the appointment was invalid.

At the first instance the Judge had determined that the administrators' appointment was valid even though the director had been the sole director making the decision and the Articles of Association had required two directors for its board meeting to be quorate. The Judge had applied the Duomatic principle. He also believed that there had been an acquiescence by the applicants.

The Court of Appeal determined that statutory powers had to be exercised in accordance with the Articles. It also confirmed that the Articles could only be varied by a properly constituted shareholders' meeting. The Duomatic principle was only applicable where all of the shareholders have given formal consent to a course of action. That did not apply in this case.

*See Randdhawa & another v Turpin & another (2017) EWCA CIV1201*

**Deed of Settlement**

A winding up petition had been presented against the company. After issue but before the order was made the respondent and the company concluded a settlement agreement further to claims which had been brought against the respondent by the company. The company agreed that it would waive any claims against the respondent. In return the respondent gave to the company his shares, other benefits and rights including all employment claims.

The company by its liquidators sought directions as to whether claims it may bring would be barred pursuant to the terms of the Settlement Agreement.

The Court determined that the Settlement Agreement did not on its true construction release the respondent from his obligations to the company and even if the agreement did have that effect, Section 127 of The Insolvency Act 1986 would render such releases of the respondent's obligations void and if the dispositions were void then the Court would not validate any such releases.

*See Officeserve Technologies Limited & another v Anthony-Mike (2017) EWHC 1920(CH)*

**The New Debt Recovery Protocol**

The new debt recovery protocol ("the Protocol") comes into force on October 1st.

The Protocol does not apply to business-to-business debts (unless the debtor is a sole trader) and sets out the conduct that the courts will expect of parties to a debt claim prior to the commencement of court proceedings. Importantly, a Creditor may face sanctions, including staying proceedings to remedy failures and further limitations on costs and interest recovery, if the Protocol and the timescales contained within are overlooked and/or ignored.

The Protocol will , undoubtedly, increase the time between a debt becoming 'due' and the commencement of proceedings where a Debtor indicates an intention to dispute or requires documentary evidence in support.

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**Factoring costs**

Cobra was a company in administration. It had previously agreed a receivables finance agreement with the defendant.

At the time of administration it owed substantial sums to the defendant under the finance agreement.

At the time of the administration the claimant BHL entered into a written indemnity agreement with the defendant and Cobra's administrators and agreed to indemnify the defendant in respect of any sums due under the finance agreement.

The defendant took over collection of Cobra's receivables. The money included a collection fee which the defendant had charged at a rate of 15% of all receivables. In total the defendant had collected just over £8M which had yielded a fee of £1.2M. The fee fell within the claimant's indemnity obligation.

The defendant demanded the outstanding collect out fees and the claimant had paid to it a total amount exceeding £950,000. The defendant contended a further £271,382.69 was due.

The claimant brought a claim alleging that the defendant was not entitled to charge a collection fee of 15% and that the claimant had paid £950,000 to the defendant by mistake of law and the defendant should repay the sum.

The Court decided that the defendant had a right to charge a fee but did not have discretion to simply charge what it wanted. Provisions allowed the defendant to charge a fee which represented captured or estimated its future costs and expenses in respect of the collection.

As a matter of construction discretion had to be exercised in a way which was not arbitrary.

The defendant's actual collect out costs amounted to £33,260 and the maximum that the bank could have charged in the circumstances was 4%.

On the evidence the Court determined that there had been a mistake to the extent that the £950,000 paid by the claimant exceeded the sums which the bank could properly have charged and the claimant was entitled to recover excess monies paid over.

The case is a useful authority bearing in mind the concerns which often arise at the level of fees charged by receivables financiers when insolvency intervenes. Whilst a decision on the interpretation of this agreement the principles established may well help in future arguments over factoring agreement costs.

*See BHL v Leumi ABL Limited (2017) EWHC 18714 (QB)*

**Legal professional privilege**

Upon an application by the former Trustees in Bankruptcy of a bankrupt for directions concerning the use of documents held by solicitors who had acted for the bankrupt in other proceedings it was decided that privilege was a fundamental human right and a Court had no jurisdiction to direct a bankrupt to waive privilege in any documents.

The principle that legal professional privilege of a predecessor enured for the benefit of

his successor had no application in the case of the passing of property to a Trustee in Bankruptcy.

*Re Lemos: Leeds & another v Lemos and others (2017) EWHC 1825 (Ch)*

**Business and Property Courts**

The Business Property Courts of England and Wales launched on the 4th July 2017. The formal go live date of the Courts will be the 2nd October 2017. This is a renaming of existing Courts in the hope of streamlining the service provided by the Court service.

**Money paid into Court**

A company involved in litigation had paid money into Court.

The company had gone into liquidation and subsequently the Liquidator has made an application for directions to determine the effect of a charge granted to the company's solicitor. The purpose of the Charging Deed was to secure payment for the sums owed in return for legal services.

At the time of liquidation $1.2M was owed to the solicitors.

A sum in excess of $11.5M had been paid into Court by the company. The liquidators had settled the court proceedings and that sum was paid out of Court to the company as one of the terms of the settlement. The Liquidators argued that the whole sum fell outside the Charging Deed.

The Judge decided against the Liquidators. The sum was subject to a floating charge and Section 245 Insolvency Act 1986 applied. Relying on Re Spectrum Plus the Judge had determined that there was insufficient control over the monies covered by the Charging Deed to create a fixed charge.

*See Peak Hotels and Resorts Limited (in Liquidation) (2017) EWHC 1511 (Ch)*

**Insolvency statistics**

The Insolvency Service release for Q2 2017 showed that there had been an increase in company insolvencies primarily caused by 1,131 connected personal service companies entering into liquidation on the same date. Other than this, the estimated underlying number of company insolvencies fell to the lowest quarterly level since comparable records began in 2000.

The number of individual insolvencies decreased primarily by decreasing numbers of individual voluntary arrangements.

**Construction debts**

In a case where a winding up petition had been issued in respect of construction debts the Court struck out the petition applying established principles and confirmed that it is generally not appropriate to present a winding up petition to recover sums due under a construction contract, particularly where those sums are disputed or there is a legitimate cross claim.

*See Breyer Group Plc v RBK Engineering Limited (2017) EWHC 1206 (Ch)*

**Suspension of discharge**

The bankrupt appealed a Section 279(3) Order suspending her discharge from bankruptcy until the Trustee had confirmed that she had complied with her duties under The Insolvency

Act 1986.

On appeal the Court set aside the Order and gave guidelines in respect of the making of such orders. In particular it confirmed that such an order was not wrong in principle, being suspension of discharge until fulfilment of a specified condition analogous to a Section 279(5) Order but such an order should not be made by default and should reflect the seriousness of the bankrupt's failures. Here it was not considered that the defaults were of such a serious nature

*See Michelle Anne Weir (Trustee in the Bankruptcy of Claire Elizabeth Hilsden) v Claire Elizabeth Hilsden (2017) EWHC 983 (Ch)*

*The contents of this Update provide only a brief overview of the more important cases and reports. If you should require any detailed advice concerning the above then please do not hesitate to contact us.*

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