CARRICK | READ
INSOLVENCY LAW FIRM

December 2017

UPDATE

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

We take this opportunity to wish a happy and prosperous 2018 to all

STATEMENTS OF INSOLVENCY PRACTICE

A reminder that two new Statements of Insolvency Practice will be introduced in the New Year.

SIP 6 (deemed consent and decision procedures in insolvency Proceedings) and SIP 11 (the handling of funds in formal insolvency appointments) will come into effect on 1 January 2018

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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UNJUST ENRICHMENT

A recent case concerning remuneration to directors has caused some concern to Insolvency Practitioners bearing in mind the potential implications upon claims against directors for the return of unauthorised directors loan accounts.

The case is very fact specific and the director relied heavily upon the advice given to him by the accountant to the company . As with many companies the director had created a directors loan account which was normally set off against the award of dividends at the end of the year. The director indicated that he relied heavily upon the advice given to him by the company's accountant and that he saw the monies which he received as being remuneration for the work undertaken on behalf of the company.

A court will be reluctant to deprive employees of reasonable remuneration if it would unjustly benefit the company to do so.

In this case of misfeasance the principle was applied that services necessarily required by a company are supplied on the basis that they would be paid for and if there is no other claim, the law imposes an obligation to pay a reasonable sum for them. Failure to do so would deprive the recipient of the payment and unjustly enrich the company. Effectively the liquidators claim (which had been assigned to the Claimant) against the directors failed on the basis that it would have unjustly enriched the company if the director repaid monies taken by him from the company which he believed to be remuneration for the work undertaken by him on behalf of the company, even though at the time the monies had not been classified as salary. If a proportion of the monies received could be seen as reasonable remuneration for services supplied then this amount may not be recoverable by an office holder

There were other issues in this case too complicated to report in detail but one of the interesting issues was that the deed of assignment itself was insufficient to support one of the areas of claim against the director.

see Global Corporate Limited v Hale (2017) EWHC 2277

MISTAKEN DISCHARGE

In an interesting case a bank discharged a mortgage in error. Whilst the bank was successful in getting its charge reinstated at the Land Registry, it was not put back into exactly the same position as it would have been in had it not accidentally discharged the mortgage in the first place.

This case highlights the significant practical consequences that flow from the distinction between altering the Land Register to bring it up to date (which is what happened here) and altering it by way of rectification. It also illustrates the importance of having robust processes in place to ensure that similar errors do not occur when additional lending is secured by way of an existing charge.

***see NRAM Ltd v. Evans* [2017] EWCA Civ 1013**

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NON PARTY COSTS ORDERS

A recent case has been a helpful reminder of the key factors that will be considered when an application for a non-party cost order is sought.

Further to a dispute concerning an asset purchase agreement between the claimant and five defendants the net result was that the claimant had to pay the defendants more than £50,000. Both parties had some success but the judgement favoured the defendants some of whom were awarded their costs. By that stage the claimant was insolvent.

The defendants sought non party costs orders against associated companies. The court determined that it was appropriate to make a non party cost order against one of the associated companies but not the other. In respect of the former it was clearly the vehicle through which the litigation was funded by means of an unsecured interest-free loan not on commercial terms. It had much to gain if the litigation was successful. There was clear evidence that it was exercising control over the litigation. Further, existing case law supported an order being made where it could be established that the non party had promoted and funded proceedings solely or substantive for its own benefit. The claimant was a dormant company and the application was based primarily on funding and not on control. If control is absent it will not prevent an order being made if it would otherwise be just do so. If funding and control are established, justice will normally require a non party costs order to be made.

It should be emphasised that whether an order will be appropriate depends on if it can be shown that the non party is the real party to the litigation. Most cases are fact specific but this case is a useful guide as to when such an application may be appropriate

see ***Montpelier Business Reorganisation Ltd v Jones and Others (2017)***

WINDING UP REGULATIONS

A recent Court of Session case in Scotland has made it clear that a Scottish court cannot windup or make an administration order in respect of an English registered company and the same applies to English courts and Scottish companies.

There are occasions when a company registered in England conducts most of its business in Scotland and the query could arise as to whether the Scottish courts and Scottish procedures would apply. This case provides helpful confirmation that in these circumstances the Scottish courts are not in a position to deal with the company. In this case a secured creditor presented a petition to the Court of Session in Scotland seeking an administration order against an English registered company. It was contended that the Court of Session had jurisdiction because the company's centre of main interests as defined in the European Regulation on insolvency proceedings was in Scotland.

The relevant UK law is section 120 Insolvency Act 1986 which states that the Court of Session has jurisdiction to wind up any company registered in Scotland. Section 117 Insolvency Act 1986 provides the High Court with the same jurisdiction in respect of a company registered in England and Wales.

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The court made it clear that Article 3 of the European Regulation only determined jurisdiction between member states and not within them. The UK is treated as one jurisdiction for the purpose of the European Regulation. Within the UK, jurisdiction in insolvency proceedings is determined solely by where the company is registered

see Bank Leumi (UK) plc v Screw Conveyor Limited (2017) CSOH 129

THIRD PARTY FUNDER DISCLOSURE

The English court can order liquidators to disclose the identity of third-party litigation funders in order to facilitate an application for security for costs against the funders

The applicants in this case were defendants in litigation commenced by the liquidators of the company. The applicants suspected that the liquidators were being funded by a third party and applied for an order to disclose their identity. The liquidators argued that the power to order such disclosure was not available under the CPR.

The court ordered the liquidators to disclose the identity of any third party funders. Where there exists the power to grant a remedy (in this case, security for costs) there also has to be inherent in that power the power to make ancillary orders to make that remedy effective.

see In the matter of Hellas Telecommunications (Luxembourg) (2017) Unreported

HOLIDAY PAY and EMPLOYMENT DEVELOPMENTS

The Insolvency Service Redundancy Payments Service updated its holiday pay guidance in autumn 2017. This now specifies that employers should include contractual commission in the calculation of statutory holiday pay.

There has been a further recent Employment Appeal Tribunal case where it was found that voluntary overtime pay, out of hours standby payments and callout allowances should all be taken into account when calculating holiday pay, if these are paid with sufficient regularity to be classed as "normal"

All Insolvency practitioners should include such payments when calculating the value of holiday pay due to employees

Additionally, the Employment Appeal Tribunal has confirmed that employer pension contributions must be taken into account when calculating a "weeks pay". This is a statutory concept by which several types of payment and remedies are calculated

Where basic salary is below the statutory cap the following payments will all have to be made inclusive of employer pension contributions

-statutory redundancy pay
-notice pay for periods of statutory minimum notice
-basic awards (including unfair dismissal compensation)

The above have the potential to significantly increase payments due to employees

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NOTICES TO APPOINT

A company filing a Notice of Intention to appoint an administrator must have a settled intention to appoint an administrator and cannot use successive notices as a way to obtain a moratorium.

The company in this case was in substantial arrears of rent and the landlord had notified it of its intention to take possession of the premises. The director of the company filed four subsequent notices of intention to appoint an administrator at the same time as proposing a company voluntary arrangement. The company had the benefit of a continuing moratorium and the landlord was unable to bring possession proceedings. The landlords sought an order that the fourth notice of intention be removed on the basis that it was an abuse of process.

On appeal, the Course of Appeal found that the statutory requirement of a settled intention to appoint was not satisfied and the notice was invalidly given.

see JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Limited (2017) EWHC 267

RECEIVERSHIP AND GROUP RELIEF

Two companies operating Farnborough airport were members of the same "group" of companies as a third company Piccadilly Hotels 2 Limited.

A receiver was appointed in respect of Piccadilly and the question arose as to how the appointment of the receiver affected the tax grouping. It was thought that, unlike the appointment of a liquidator, entering receivership did not break the group. Farnborough airport claimed group relief to the extent of £10.5 million. This was rejected by HMRC

The Upper Tribunal, on appeal, confirmed that the receivers appointment had broken the group relationship and HMRC had correctly denied the group relief.

The case disturbs the generally held view that the appointment of a receiver should not break the group relationship between a company subject to a receivership and its shareholders.

see Farnborough Airport Properties Company and another v HMRC

APPLICATION FOR ANNULMENT

A house owner owned a rental property considered by Manchester City Council to be a house in multiple occupation and the Council obtained Liability Orders against her for the non-payment of council tax. She was made bankrupt on the basis of non payment.

Subsequently, a valuation tribunal found that the property was not in multiple occupation and the Council refunded her as she had at that point paid the Liability Orders.

Application was made for annulment of the bankruptcy order on the basis that it should not been made. The application was refused but instead the court rescinded the bankruptcy under section 375 (1) Insolvency Act 1986.

The decision was appealed but upheld by the

High Court. It was then appealed to the Court of Appeal who rejected the appeal on the basis that at the time of the bankruptcy order the Liability Orders were in place and therefore there was no ground to annul the bankruptcy on the basis that it ought not to have been made based on grounds "existing at the time the bankruptcy order was made". Rescission was the appropriate power to have applied

The decision is a useful authority and serves as a reminder to look back and consider the circumstances existing at the time the order was made, regardless of any subsequent change to those circumstances, before making application for annulment.

see Jenny Yang v (1) The Official Receiver (2) Manchester City Council (3) Joanne Sara Wright (2017) EWCA 1465

EXCEPTIONAL CIRCUMSTANCES

The question before the court was how exceptional the circumstances had to be to postpone an order for possession and sale of the property in which the bankrupt had a 50% interest.

The bankrupt shared the property with **her** husband who suffered from a severe autoimmune disease which had a debilitating effect on his health

At the first hearing the district judge accepted the evidence of the husband that the local authority would not rehouse him but might offer him bed-and-breakfast accommodation which would not be suitable. Only very limited evidence was tendered.

The district judge considered the circumstances of the husband to be so exceptional that they outweighed the interests of the bankrupt's creditors. An order was made postponing the sale of the property until the husband's death or earlier vacation of the property.

The trustees successfully appealed this order.

The High Court found that there had been no formal expert evidence concerning the husband's health or the lack of suitable accommodation. There was wholly inadequate evidence to justify the conclusions reached. The court was able to rely on the local authority to perform its statutory duties to adequately rehouse the husband. The court ordered that possession and sale be postponed for 12 months with the husband having permission to apply for a further postponement

see Pickard and another (Joint Trustees in Bankruptcy of Constable) v Constable **[2017] EWHC 2475 (Ch)**

SHARE BUYBACK SET ASIDE UNDER SECTION 423 IA

The court held that a share buyback could be a transaction at an undervalue under section 423 Insolvency Act 1986 on the grounds that it was equivalent to a dividend or distribution to shareholders in return for which the company received no consideration. A shareholders rights were only to participate in dividends (and in any distribution of assets on a winding up or return of capital) and were not equivalent to creditor claims, the discharge of which would amount to consideration received by the company.

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In this matter, after a partially successful claim had been brought against the company it went into administration and then liquidation. The liquidators brought claims against the controlling shareholder and two directors seeking to set aside various transactions including transactions in which the company bought back its own shares from the controlling shareholder and connected parties for £2.5 million which sum was left outstanding as a secured loan and, further, a transaction by which the company sold a subsidiary to the controlling shareholder for one pound.

The court held that the share buyback was void for lack of compliance with section 658 Companies Act 2006 and also that it was a transaction that was entered into for the purpose of putting assets beyond the reach of creditors and was liable to be set aside pursuant to section 423 (2) Insolvency Act 1986

see Henry George Dickinson -v- NAL Realisations (Staffordshire) Limited & Others [2017] EWHC 28 (Ch)

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