Newsletter December 2019

CARRICK | READ
INSOLVENCY LAW FIRM

Update

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

Christmas and New Year

All of us at Carrick Read take this opportunity to wish all our friends and colleagues a very merry Christmas and a prosperous New Year

Appeal Denied – Indemnity Cost Order Against Joint Liquidators Upheld

The High Court has recently dismissed an appeal by Joint Liquidators to set aside an indemnity costs order against the liquidators which had been awarded by the trial judge.

In her reasoning the trial judge had considered the action brought by the Joint Liquidators to be “misconceived, vexatious and irresponsible”.

The Appeal Judge held that the grounds of appeal did not justify interfering with the trial judge’s discretion and as such the indemnity cost order still applied.

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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This affirms the position that Liquidators may be penalised by the court for bringing ill-founded claims.

Hellard & Anor (As Joint Liquidators of Guardian Care Homes (West) Ltd) v Graiseley Investments Ltd & Anor [2019] EWHC 2994 (Ch)

Increase in Insolvency Service Levy

From 31 December 2019 the Insolvency Service Levy will be increasing from £360 to £470.

The Insolvency Practitioners and Insolvency Services Account (Fees) (Amendment) Order 2019 SI 1427/2019

Disqualified Directors and Compensation Orders

The Compensation Order regime, which came into force 1 October 2015, aims to hold directors who are subject to a disqualification order or have provided a disqualification undertaking, financially accountable for their actions.

On 1 November 2019 ICC Judge Prentis handed down the first compensation order.

The company involved was a wine-broker often trading high end wine for investment purposes. In May 2015 Mr Eagling became the sole director and shareholder of the Company.

Between 2 November 2015 and 18 October 2016 funds totalling £559,484 were misappropriated from the Company. It was alleged Mr Eagling recommended wine purchases to customers with such wines never being received and also recommended customers sell wines, but proceeds were never received.

The Secretary of State issued disqualification and compensation proceedings in December 2018. At the hearing ICC Judge Prentis imposed the maximum period of disqualification of 15 years. Further, the full amount of compensation sought, £559,484 was awarded on the basis that Mr Eaglings conduct was of the "most serious sort". It was held that £460,067 be paid to 28 named creditors of the Company whose debts occurred post 2 November 2015.

The remainder of the monies were ordered to be paid to the liquidator of the Company as a contribution to the Company's assets.

It was recognised by the Judge that the compensation regime may encourage the settlement of cases and individuals should be mindful of the Secretary of State's ability to seek compensation. If it is the Secretary of States intention to apply for compensation it should inform individuals

when notifying them of their intention to issue disqualification proceedings.

Secretary of State for Business Energy and Industrial Strategy v Eagling [2019] EWHC 2806 (Ch)

Section 236 Application

An application under s236 of the Insolvency Act 1986 gives authority to the court to assist office holders in ascertaining the history of a company so that the office holder is able to carry out his duties.

It allows office holders to request information/documentation, so long as such requests do not impose an unnecessary burden on the respondents.

In this case there was debate as to whether s236 has an extraterritorial effect. The Respondent was based in the Republic of Ireland and was the bookkeeper to the Company. He was refusing to provide the liquidator with any records as his fees had not been discharged.

The Court held that s236 applies to all persons against whom an order may be made, regardless of whether they are in the jurisdiction or not. The court did however caveat this by stating the power is limited to make orders against those with a sufficient connection to the jurisdiction.

Phillip Stephen Wallace (as liquidator of Cara Meats (UK) Limited) and George Wallace [2019] EWHC 2053 (Ch)

HMRC Tax Clarification

Guidance has been issued on the tax implications of director loan accounts and distributions in MVLs

https://www.gov.uk/hmrc-internal-manuals/company-taxation-manual/ctm61559

SMEs with Mixed Gender Board Less Likely to become Insolvent

Research undertaken by the KSA Group Limited has shown that companies with a mixed gender board of directors are less likely to become insolvent than an all male or all female board.

The research focussed on 1.5 million companies between June 2018 and June 2019 and found that:

The rate of insolvency for male dominated boards was 0.63%

The rate of insolvency for female boards was 0.48%

The rate for mixed gender boards was 0.43%

The figures provide interesting results and suggest there are additional benefits particularly in terms of insolvency risk in having a mixed gender board of directions.

IPO Payments in Second Bankruptcy Provable Debt

The Appellant was adjudged bankrupt on 28 April 2015 and was automatically discharged one year later on 27 April 2016.

The day prior to the Appellants discharge his Trustee in Bankruptcy applied for an income payment order which was granted by the court. Before the end of the IPO the Appellant applied for his second bankruptcy.

The Respondent was appointed as the Debtors Trustee in Bankruptcy.

The question arose as to whether the IPO was enforceable under the second bankruptcy or whether those payments falling due after the second bankruptcy were provable debts in the second bankruptcy.

The court concluded that future payments under the IPO were not enforceable by the Trustee in her capacity as Trustee of the first bankruptcy.

This case affirms the position previously set out in Re Nortel GmbH (In Administration) [2013] UKSC 52

Azuonye V Kent (as TiB of the Appellant) [2019] EWCA Civ 1289

No Written Demand No Statutory Demand

The High Court has confirmed that a prior written demand is necessary for a statutory demand where the debt is based upon a personal guarantee which requires the same.

The Court refused to allow the Statutory Demand to stand despite the Respondents argument that the application to set aside would result in injustice.

It is welcome clarification following the obiter comments of David Richards J in *TS & S Global Limited v Fithian-Franks [2007] EWHC 1401* which suggested that the court ought not set aside a statutory demand if injustice would result. In particular in this case it was stated that Mr Martin had been aware for some time of his liabilities and the service of a written demand would not have made any difference.

Martin v McLaren Construction Limited [2019] EWHC 2059 (Ch)

High Court considers EBT Arrangements

Employment Benefit Trust ("EBT") Schemes are currently prominent in insolvency law. There have been two recent High Court

decisions in this field.

R Toone and another v W Ross and another [2019] EWHC 2855

In this case the Court held that funds paid into an EBT scheme were found to be illegal capital distributions. Although the payments of the Company's capital were made to the Respondents via a trust or interest in possession fund, they were in substance distributions.

Due to a failure to comply with the statutory code the payments constituted unlawful distributions and were deemed void.

The payment of employee expenses had been made at a time when the company was insolvent and as such the directors who authorised the payment were in breach of their duty to consider the interests of creditors.

PD Allen and another v A M Bernard and others [2019] EWHC 2885

In this case the director had adopted the EBT scheme in good faith and upon the advice of experts, and as such there was no dishonesty on the part of the director.

The two outcomes show how the decisions taken by the court regarding EBT schemes are wide ranging and the outcome will depend upon the factual circumstances of each case.

Wrongful Trading in Partnerships and s214A

Two members of the partnership Re C.J. & R. E. Eade LLP took drawings from the LLP in anticipation of profits materialising. The profits failed to materialise and the members also caused the partnership to repay a business loan.

The partnership was liquidated, and the liquidator sought to recover the drawings and also pursued a claim for breach of fiduciary duty in respect of the business loan.

This case is the first reported case of the application of s214A Insolvency Act 1986 to partnerships, namely the wrongful trading provisions and provided welcome clarification.

The court held that the members ought to have known of the partership's insolvency and should have stopped trading. Liability was imposed on the members under s212 and s214A.

The case affirmed that members are not able to set off liabilities under s214A against sums owed to them as members and that a payment held to amount to misfeasance cannot be set-off.

The decision also highlighted important variations in the application of s214A which is confined to withdrawals made by

members compared to the much wider application of s214.

McTear v Eade and anr (Re C.J. & R. E. Eade LLP (in liquidation)) [2019] EWHC 1673

The contents of this Update provide only a brief overview of the more important cases and reports and those issues which have caught our interest. If you should require any detailed advice concerning these changes or the cases and authorities referred to then please do not hesitate to contact us.

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