Newsletter December 2020

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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

We take this opportunity of wishing all of our friends and colleagues a very Happy Christmas and hopefully a prosperous New Year after what has been an interesting nine months. It appears that the profession will be extremely busy when the furlough scheme terminates and there is certainly a pent-up demand in the Courts due to the effective ban upon the issue of Winding Up Petitions and the delays in Court process arising from illness and social distancing.

We look forward to being of service in what will be a challenging time for all concerned.

Brexit

Without further agreement between the UK and the EU, the Insolvency (Amendment) (EU Exit) Regulations 2019/146 made on 30th January 2019 and the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 will take effect at the end of the transition period on 31st December 2020 and significantly change the restructuring and insolvency framework in the UK.

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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The Exit Regulations will amend the retained Recast Insolvency Regulation that is incorporated into domestic law after the end of the transition period by disapplying virtually all of its provisions so that the UK would not be obliged to recognise insolvency proceedings in EU member states (in the absence of other regulations applying). In essence pursuant to the Insolvency EU Exit Regulations, the UK will retain a modified version of the Recast Insolvency Regulations jurisdictional tests of COMI and establishment as a basis for jurisdiction.

In the absence of agreement, the reciprocity existing between the EU and the UK in relation to the recognition and enforcement of judgments in civil and commercial matters will be lost.

Temporary Suspensions

As most will be aware, the temporary suspensions upon the application of the wrongful trading regime and the issuance of Statutory Demands and Winding Up Petitions has been extended until March 2021. It is worth remembering that prior to the suspension of Winding Up Petitions, the Insolvency Court was already facing a backlog of hearings due to Covid. All 306 Winding up Petitions scheduled for hearing from 25th March 2020 onwards were adjourned because adequate arrangements for remote hearings had not been put in place. They were then scheduled to be heard remotely each week from 17th June 2020 in blocks of 20.

The above only goes to illustrate the difficulties the Courts have faced and there are unavoidable delays throughout the system. One recent application made by us in October was not touched for six weeks and then has been listed for April 2021!

Bearing in mind all of the above the number of interesting new cases is limited - we will try our best.

Administration Appointment

The company was a parent company with subsidiaries operating within the energy sector. Part of its role was to raise finance and lend money to its subsidiaries. It obtained funds from certain parties that took fixed and floating security from the company and its subsidiaries (the junior creditors). Other parties that advanced funds only took floating security from the company itself (the senior creditors).

There was a Deed of Priority under which terms it was agreed that the qualifying floating charge held by the senior creditors would rank ahead of the floating charge security held by the junior creditors in respect of the assets of the company. The junior creditors also agreed that they would not take any step to enforce any security interest without the prior written consent of the senior creditors.

Despite this in September 2020 the junior creditors purported to appoint administrators over the subsidiary companies without obtaining consent. The company argued that by failing to obtain consent the floating charges had not become enforceable and the appointments did not comply with Paragraph 16 of Schedule B1 of The Insolvency Act 1986. The Court indicated that the Deed of Priority could not be ignored and the agreement to obtain consent represented a condition precedent to the enforcement of the security. The Court also made it clear that the appointment of administrators under an unenforceable floating charge constituted a fundamental defect and subsequent consent could not be provided because the appointments were a nullity and the defect could not be cured.

Re Arlington Infrastructure Limited and Anor V Woolrych and Others (2020) EWHC 3123 (Ch)

Assignment

An office holder has the power pursuant to Section 246 ZD Insolvency Act to assign certain rights of action together with the proceeds of such action.

In this matter, the Claimant was an assignee of rights of action arising in the liquidation of Totalbrands Limited.

The Defendants were directors of the company and argued that the power to assign office holder rights of action could be not exercised in a way that conferred the sole entitlement to the proceeds of such rights of action to the assignee in deprivation of the insolvent estate.

The High Court rejected the argument stating that on its plain wording Section 246 ZD Insolvency Act 1986 envisages an outright assignment of the entire right of action and all the proceeds to the assignee. It was in the public interest that Section 246 ZD be introduced to facilitate claims being brought against fraudulent or miscreant directors.

It was also emphasised that the insolvency estate would have benefited as the assignee would have had to pay a price to purchase the claim.

Re Cage Consultants Limited v N.Iqbal et al 2020 (EWHC 2917)

Directors Loan Accounts

There have been a significant number of cases relating to the recovery of directors loan accounts.

In this case the Defendant director was the former sole director of St George Investment Holdings Limited and owned 81% of the shares in the company.

The DLA was overdrawn by £1,365,422 at the date of administration. The assignee of the claim sought various declarations based upon breach of duties which the director owed to the company under Sections 171 to 176 of The Companies Act 2006.

The director had made a statement indicating that the loan was taken over a period of years and was intending to be declared as a dividend.

Not surprisingly the Judge held that the director owed a clear and important duty and, in the circumstances, where the director did not dispute that the payments were made in respect of personal expenditure on a long-term basis he was in breach of such duty.

The director had failed to regularise the situation over a period of many years and the monies had to be repaid.

Re Manolete Partners v Dr Amair Shaf IK Matta and Others 2020 (EWHC 2965) (Ch)

Notice Requirements

Notice of intention to appoint an Administrator must be given in the prescribed form under paragraph 26 (1) of Schedule B1. Five business days written notice must be given to any person who is entitled to appoint an Administrator under Paragraph 14.

In this case the QFCH did not receive the required notice of intention to appoint and sought an order that the Administrators appointment was void. It was determined that the breach should be treated as an irregularity allowing the charge holder to apply to court for appropriate discretionary relief. Although the Judge was satisfied the appointment was valid, it remained the case that it should not have occurred and, in those circumstances, and bearing in mind all of the surrounding facts an order was made that the current Administrators were to be replaced by the QFCH choice of Administrators.

Re Tokenhouse VB Limited 2020 (EWHC 3171) (Ch)

Crown Preference

Despite the fact that for nearly twenty years the Crown has been an unsecured preferential creditor in respect of all sums owing to it the situation has now returned to how it used to be (as some of us will remember) from the 1st December 2020. From that date certain debts owning to HMRC are to be included in the category of secondary preferential debts such that HMRC will be entitled to repayment of these debts from estates ahead of both floating charge

Creditors and unsecured non preferential creditors.

The situation could become complicated for secured lenders and it will be interesting to see how the reversal of the position effects the insolvency market.

All that is required now is the return of fixed charges over book debts.

Members Consultation in MVL's

A member of a company made an application, in association with a former liquidator, to set aside a restoration order in respect of three companies. In respect of each new liquidators had been appointed.

Although at first instance the set aside application was dismissed, on appeal it was allowed.

The Court stated it should have considered whether and if so how the members should be consulted in the context of an MVL. In this case the wishes of the members should have been ascertained before the Court reached a final decision. This had been a case where one member with a small shareholding in each company supported by a member with a small shareholding in one company had invited the Court to reverse the effect of resolutions already made by the members as a body.

The crucial issue had been as to whether the members wanted the new liquidators to undertake investigations. The levels of support for the new liquidators were not such as to justify not holding meetings.

What should have happened was that meetings of members should have been convened of each company to consider resolutions addressed to whether that company was to remain restored to the register and whether the new liquidators should remain in office. Once the meetings had been held the Court would decide whether to confirm or set aside the previous orders.

Re Fakhy v Pagden 2020 (EWCA CIV1207)

Statutory Disclaimer

Following an insolvent liquidation, Buzzline Coaches Limited was struck off the Register of Companies and on the 7th January 2020 it was dissolved. On 17th March 2020 the Treasury Solicitor filed notice of disclaimer of leasehold property. The solicitor did not serve notice on the Claimant until 19th May 2020.

The Claimant brought proceedings seeking a declaration that it remained entitled to a legal mortgage of the property the subject of the disclaimer as mortgagor. It also sought a claim for an order restoring the company to the register and in the alternative a vesting order. After commencement of the proceedings but before the hearing the Registrar of Companies had restored the company to the Register so as to dispense with the need for a restoration order.

The Court determined that the Claimants rights under its charge over the property survived the disclaimer whether or not the disclaimer ever took effect. It can now be taken to be law in England and Wales that a disclaimer of land does not survive the restoration of the dissolved company following which its property is revested subject to any third party rights or encumbrances.

Re Mistral Asset Finance Ltd v (1) The Registrar of Companies (2) HM Attorney General (2020) EWHC 3027

Challenges to Office Holders Conduct

The Court of Appeal handed down judgment on two appeals deciding whether appellants had standing to challenge the conduct of a Trustee in Bankruptcy in one case and joint liquidators in another.

The general findings in the bankruptcy case were that merely being a bankrupt was not enough on its own to give standing to apply. The bankrupt has to show he has a substantial interest which could include the existence of a surplus. In this instance the Court of Appeal allowed the bankrupt to bring the challenge.

With respect to the liquidation appeal the Court of appeal determined that the appellants were neither contributories or creditors in the liquidation and did not otherwise have a substantial interest in the relief sought such as to render them aggrieved for the purposes of Section 168(5) Insolvency Act 1986.

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Re Brake and Others v Lowes and Others 2020 (EWCA CIV1491)

Adjournment of Bankruptcy Petition

This was the first case to address a scenario where a debtor sought an adjournment of a Bankruptcy Petition on the basis that there was a reasonable prospect of payment within a reasonable time but there were in addition to the Petition debt undisputed debts owed to supporting creditors.

The Court determined that in such a scenario it will be necessary for the debtor's evidence as to ability to pay to cover both the petition debt and the undisputed debts owed to supporting creditors.

Re Robertson v Wojakovski (2020 EWHC 2737)

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