# Carrick Read Insolvency

Newsletter June 2017

## UPDATE

**June 2017**

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

**Gateway Statistics**

The Insolvency Service has published the latest figures for complaints against insolvency practitioners made to the complaint gateway during 2016.

29% of complaints were rejected in 2016.

The level of complaints indicates an increase in complaints against IP's since the creation of the gateway in June 2013. 2016 statistics also provide that 32% of the complaints received by the gateway related to SIP 3 (Voluntary Arrangements) 29% to communication breakdown and 28% breach of ethics.

Identified by specific insolvency process in 2016, IVA's accounted for 46% of complaints, liquidations 24%, bankruptcies 12A% and administrations 11%. This broadly mirrors the figures for 2015.

Sadly, the number of referrals made to the gateway by insolvency practitioners against fellow insolvency practitioners is increasing!

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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**Equitable Interest**

A married couple at all relevant times had lived apart. The wife had acquired a property in her sole name for herself and her children but the property was transferred into joint names when the house was remortgaged. The husband never paid any mortgage instalments or contributed in any way.

Upon being made bankrupt the Trustee applied for an Order for the sale of the house. At first instance the District Judge made an Order declaring that the Trustee was entitled to one half of the equity. The wife sought permission to appeal and although permission to appeal was refused the Court varied the Order for sale to provide for an equitable account. The Trustee contended that the wife should have paid occupation rent.

The Court determined that in these circumstances it would not be equitable to require the wife to pay an occupation rent purely on the basis that the Trustee had the husband's interest in the property vested in him. At no time during the entire history of ownership had there been any agreement that the husband would have a right to occupy or that the wife would pay rent.

*See Davis v Jackson (2017) EWHC 698 CH*

**Directors Duties**

A company which had gone into liquidation had two directors, a husband and wife, and subsequently a third director was appointed.

The Liquidator challenged three transactions:-

(1) The company's factory had been transferred to the husband for less than its market value,
(2) the company had purchased most of its shares from the shareholders for £2.5M but with the price left outstanding as a loan on the husband's directors loan account secured against the company's assets and,
(3) the company had sold subsidiaries to the husband for £1.

The company had been facing claims for environmental nuisance reducing its assets.

The Court considered that the factory sale was a transaction outside the authority of the husband as the quorum for a valid directors meeting to approve the transaction was two and as an interested director the husband could not count in the quorum. At the time there were only two directors. The transaction was void.

The share buyback was also found to be void as a company could only buy its shares as permitted by The Companies Act 2006. Under the Act shares were to be paid for on purchase. The loan arrangement did not count as payment. Additionally, a share buyback can be a transaction at an undervalue under Section 423 of The Insolvency Act 1986.

Finally the sale by the company of the shares in one of its subsidiaries was a transaction at an undervalue under Section 423 of The Insolvency Act 1986 but also voidable as the transaction was a substantial property transaction requiring the approval of the company's shareholders which had not been obtained.

Although all directors had been in breach of their duties the immediate cause of the company's loss was due to the fact that the husband had procured it to enter into transactions which he wanted to take place but did not get the authority of the board and neither of the two directors in those

circumstances was liable.

*See Dickinson v NAL Realisations (Staffordshire) Limited (2017) EWHC 28* CH

**Postponement of Order for Possession and Sale**

The bankrupt was declared bankrupt following an HMRC Petition. The Trustees intended to sell the matrimonial home.

The property was occupied by the bankrupt his wife and their three adult children, the eldest having a mental condition. That child could never live on her own.

Upon application to the Court an Order was made for the sale of the house with vacant possession but the Order was postponed until such time as the eldest child no longer resided at the property. No long stop date was provided.

Upon appeal, the Court of Appeal determined that the original Judge had been unduly influenced by the perceived lack of security for the eldest child if the family was to move into rented accommodation.

Additionally the family only needed a two bedroomed house giving the perceived independence of their two sons. Further the Judge had been wrong not to consider any alternative to indefinite postponement.

There was no evidence that the child's condition would improve and as such there would always been a need to remain living at the property.

In the circumstances there was no need for a postponement for any longer than it would take to find suitable alternative accommodation.

*See Grant & Another v Baker & Another (2016) EWCH 1782 (CH)*

**The Adjudicator**

An application was made by a debtor against the decision of the Adjudicator to refuse to make a Bankruptcy Oder.

The Adjudicator had refused the Order because she was not satisfied that the debtor's centre of main interest at the date of his application was in England and Wales.

Upon appeal the decision was overturned and a Bankruptcy Order was made. The registrar was satisfied on the basis of the material relied upon by the debtor that his centre of main interest was at the material time and remained in England and Wales.

It was determined that the nature of an appeal against the refusal of the Adjudicator to make a Bankruptcy Order is akin to an appeal from a decision of the office holder concerning a proof of debt, rather than an appeal of the type envisaged under CPR Part 52.

*Budniok v Adjudicator Insolvency Service Registrar Baister 17th February 2017*

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**Administration Moratorium**

The Court set out the principles as to when permission will be granted to continue litigation against a company in administration. In this case the purpose of the administration had been achieved and the Court determined that it was not necessary to carry out a balancing exercise between the Applicant and other creditors. In the circumstances where there is a surplus and a limited number of other creditors did not oppose the application these were powerful and compelling reasons to grant permission.

See *Safe Business Solutions Limited v Cohen and Nygate (2017) EWHC 145 CH*

**Refusal of Administration Order**

In this case the company was insolvent and the purpose of administration was established.

The directors had applied for an Administration Order arguing that the appointment of an Administrator would achieve a better result. At about the same time a Winding Petition had been filed for in excess of £3M.

After the presentation of the Winding Up Petition a tax refund of around £2M had been received by the company and those monies had been spent and in the circumstances those dispositions could be avoided by way of Section 127 The Insolvency Act 1986. The Judge ruled that the making of an Administration Order would have deprived the creditors of the provisions of Section 127.

*See Officeserve Technologies Limited (2017) EWHC 906 CH*

**Disclaimer**

The Trustee served two notices of disclaimer in respect of an underlease of which the bankrupt was a joint tenant.

One party argued that the service of disclaimer meant that the legal estate in the underlease had been determined and therefore no rent was payable after the date of the disclaimers. The Court agreed that the legal estate in the under lease did not vest in the Trustee, only the beneficial interest in the underlease. A Trustee can only disclaim what is part of the bankrupt's estate and the underlease was not part of the estate. Legal interest in the underlease remained in the names of the bankrupt and the joint tenant and it had not been disclaimed and as such rent continued to be payable.

See *Abdulla v Whelan (2017) EWHC 605 CH*

**Meetings of creditors**

A Liquidator refused to requisition a meeting of creditors on the basis that it was being called by potential Defendants arising out of his investigations. The Liquidator sought a direction not to summon the meeting.

The Court determined that it had jurisdiction to override the provisions of the relevant Insolvency Rules and intervene by restraining the calling of a meeting.

The burden of proof will be on the Liquidator to establish the direction he sought and that it was just and beneficial.

On the facts there was no or insufficient evidence that there were any claims to be stymied by removal from office.

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*Kean v Lucas (2017) EWHC 250 CH*

The above provide brief summaries and comments upon the cases and are the views of Carrick Read Insolvency alone. They do not provide a detailed synopsis of the relevant areas of law. If you should require any further information please do not hesitate to contact us.

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