Carrick Read Insolvency

Newsletter June 2018

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.

Insolvency Practice Direction 2016 now in force

The long-awaited new Practice Direction – Insolvency Proceedings (PDIP), which came into force on 25 April 2018, has now brought procedure into line with the changes introduced by the significant amendments to the Insolvency Act 1986 (the Act) introduced last year and the Insolvency (England and Wales) Rules 2016 (IR 2016), as amended. This has finally ended the agonisingly long period (over 12 months) in which the provisions of the previous Practice Direction have been at odds with the Act as amended and IR 2016.

A key point coming out of the PDIP is the distribution of court business. Paragraph 3.1 of the PDIP provides that all petitions and applications, save where stated otherwise, should be listed for an initial hearing before a Judge appointed to the Insolvency and Companies Court in the High Court or a District Judge sitting in a District Registry (although note paragraph 3.4 of the PDIP 2018 which provides that certain applications such as injunctions must be made in the High Court and not the District Registry).

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 PDIP replaces all previous Practice Directions, Practice Statements, and Practice Notes relating to insolvency proceedings. However, it does not affect the Practice Direction for Directors Disqualification Proceedings.

Other key changes include:

-clarity on the various routes to appeal in insolvency matters;

-changes to how bankruptcy petitions can be served where personal service is not practicable;

-provisions regarding e-filing in light of the current e-filing pilot scheme; and

-new guidance on unfair prejudice petitions.

Link to the PDIP: [*https://www.judiciary.gov.uk/wp-content/uploads/2018/04/pd-insolvency-proceedings-april-2018.pdf*](https://www.judiciary.gov.uk/wp-content/uploads/2018/04/pd-insolvency-proceedings-april-2018.pdf)

Litigants in Person – a special case?

The High Court recently struck out a claim brought by a litigant in person for a failure to comply with the requirement to obtain the court's permission before bringing a claim under s304 of the Insolvency Act. The court referred to the recent Supreme Court decision in 'Barton v Wright Hassall' in which it was decided that litigants in person ought not to be able to avoid procedural rules, unless a rule is particularly hard to find, difficult to understand or ambiguous. The court decided that this was not the case with s304 and confirms that the courts will not allow litigants in person to benefit from flexibility on procedural rules if this would produce an unfair result.

Reynard v Fox [2018] EWHC 443 (Ch)

Conflicts of Interest in Administration

The administrators had been contesting a removal application that alleged that they had a conflict of interest. This conflict of interest prevented them from properly investigating the circumstances of a pre-pack sale that they had facilitated to the insolvent company's directors. The court did not make findings on whether the pre-pack transaction gave rise to claims but made clear that there were significant issues to be investigated over the lack of transparency, marketing and pricing of the deal. The court found that the administrators had been subject to a serious conflict of interest from the moment of their appointment as administrators, given the questions about the benefit to creditors that the pre-pack transaction prompted. In these circumstances, the administrators should have sought the court's directions or suggested the appointment of an additional independent administrator. The administrators were removed from office.

VE Vegas Investors IV LLC and others v Shinners and others [2018] EWHC 186 (Ch) (8

Limitation period in breach of duty claim against director

A recent UK Supreme Court decision establishes that where a director unlawfully transfers property to a company he controls, a subsequent breach of duty claim will not be subject to a limitation period. Although the directors in this case had not *directly* received company property, the fact that they transferred company property to another

company they controlled placed them within the ambit of Section 21(1)(b) of the Limitation Act 1980. This meant that, in the circumstances, the company's claim for breach of directors' duties was not bound by any limitation period.

Burnden Holdings (UK) Limited (Respondent) v Fielding and another (Appellants) [2018] UKSC 14

Abuse of process

A liquidator, who had previously brought a claim for misfeasance and breach of fiduciary duty which had been struck out, brought a preference claim for the same amount and arising from the same facts. The court struck out the claim because of abuse of process, since the money that would be repaid by the partners would then be paid to the liquidator, whose costs would be deducted, and the surplus distributed back to those who would be subject to any judgment.

Ward V Loughlin & Hutt [2018] EWHC 77 (Ch)

Third party funds & the order of priority

The High Court has held on appeal that administrators who paid their fees and expenses from funds provided by a third party specifically for that purpose ahead of other expense creditors were not guilty of misfeasance under para 75 Sch B1 IA86.

MK Airlines Limited v Katz & Anor (Acting as Joint Liquidators of MK Airlines) [2018] EWHC 540 (Ch)

Landlord wins as CVA term not a penalty

In March 2016, after several years of losses, the retailer BHS negotiated a CVA with its creditors and members. A key feature of the CVA was to reduce the amount of rent payable for BHS's leasehold premises. A month after the CVA was agreed, BHS went into administration, and the terms of the CVA continued. The company moved into liquidation in November 2016 and the CVA terminated in December 2016. Following the liquidation, the High Court was asked to consider whether a landlord could claim full rent as an administration expense following termination of the CVA. Although this case turned upon the specific wording of the CVA termination provisions, it illustrates that:

CVAs are not contracts but are agreements enforceable under specific insolvency law. It may be possible for future CVAs to include provisions whereby any rent reductions continue should the CVA fail and the company subsequently proceeds into administration and/or liquidation.

If a rent reduction under a CVA is to be permanent, the tenant's interests might best be served by the completion of a deed of variation to the lease.

It also serves as a prompt to landlords to ensure they fully read and understand the terms of any CVA proposal made to them and, understand the effect that the CVA has on them should a company subsequently proceed into administration and/or liquidation

Wright and another (Liquidators of SHB Realisations Ltd) v The Prudential Assurance Company Ltd [2018] EWCH 402 (Ch)

Capital reduction was unlawful and directors breached their duties

The High Court found that two directors and one former director of a company were in breach of their duties by causing the company to implement a reorganisation and a capital reduction when they were aware there was a risk it would lose its source of income. In addition, the statutory statement of solvency supporting the capital reduction was invalid because the director had not formed the opinion set out in it. As a result, the capital reduction and a subsequent dividend were unlawful, and the directors were liable to repay the dividend.

LRH Services Ltd (in liquidation) v Trew and others [2018] EWHC 600 (Ch)

Failure to cooperate with the Official Receiver or your Trustees

Mr Brown's (the "Bankrupt") failed to provide information to the Official Receiver ("OR") under s.288 and s.291 of the Insolvency Act 1986 ("IA") and his Trustees in Bankruptcy under s.312 and s.333 of the IA, that ultimately saw him jailed for contempt of court by his non-compliance of his obligations to both the OR and his Trustees. Mr Brown disputed the underlying litigation which led to his bankruptcy and argued that the bankruptcy proceedings were void, which subsequently meant that he was not required to comply with his obligations under the IA, including attendance at court hearings. The High court disagreed and considered Mr Brown's behaviour so serious as to warrant an immediate custodial sentence of 8 months was appropriate (although by s.258(2) Criminal Justice Act 2003 Mr Brown would need to serve 4 months before being released). Mr Brown's subsequent appeal was dismissed and, although not common the case is a useful reminder that, where a bankrupt persistently refuses to comply and this results in significant prejudice to the OR and/or Trustee in Bankruptcy, a custodial sentence may still be imposed by the Court. *Official Receiver -v- Brown [2018] EWCA Civ 303*

Court denies security for costs to protect claimants

The claimants'/shipowner's vessel was declared a constructive total loss after it was involved in a collision and sank. The vessel had been insured by the defendant insurance company, Ingosstrakh Insurance Co. Ltd.

Following the collision, a third party appeared and claimed they were entitled to the insurance proceeds. The shipowners denied this and claimed the third party's case was false and fraudulent. In the event, the third-party claim was struck out by the Court. The insurance company, nevertheless, took the view that the claimants were not entitled to the insurance proceeds for the reasons given by the third party who'd had their claim thrown out. Both parties applied for security for costs under CPR r.25.12. Ultimately the court

held, where an order for security for costs might result in the oppression of a claimant (i.e. they may be forced to abandon their claim) as was determined in this case, the Court could refuse to make the order despite the possibility that, if unsuccessful, the claimant would be unable to pay the defendant's costs.

Deleclass Shipping Co. Ltd (2) MWI Shipping Services Ltd v Ingosstrakh Insurance Co. Ltd (2018)

Remedy for a void disposition under s284

The Court of Appeal has held that a trustee in bankruptcy cannot automatically recover additional compensation where property restored to the bankrupt's estate under section 284 of the Insolvency Act 1986 (*Restrictions on dispositions of property*) has suffered a loss in value. Instead, the trustee must establish the amount of the loss, which must follow from a breach of duty by transferees to whom the void disposition had been made. The court also held that the date from which the loss in value should be calculated was not necessarily the date on which the void disposition was made, nor the date of the appointment of the trustees in bankruptcy, but instead was the date on which the trustees in bankruptcy would have been able to sell the relevant property for the benefit of the estate if it had not been wrongly transferred. In the circumstances, this was some 14 months after the date of the bankruptcy order.

Ahmed and others v Ingram and another [2018] EWCA Civ 519

Duties of an Administrator

In a wide ranging and lengthy judgment, the High Court considered various allegations of misfeasance against administrators who were conducting an administration with the objective of realising the company's property to make a distribution to the appointing secured creditor. The court dismissed all the allegations but helpfully discussed the appropriate commercial and legal standards that administrators need to adhere to in a number of contexts, including; The administrators' choice of objective and any duty to consult with the company's directors over it, the administrators' choice of agents to sell property, the extent of the administrators' duties as agent and as fiduciary when selling property. The court also considered whether an appointing creditor could be liable for any breaches of duty on the part of the administrators by reason of its interference in the conduct of the administration.

Davey v Money and another; Dunbar Assets Plc v Davey [2018] EWHC 766 (Ch)

Validity of appointment of Joint Liquidators

Two recent cases have considered the issue of the valid appointment of joint liquidators. The first case concerns the ‘deemed consent’ procedure where the High Court has held that the appointment of joint liquidators was valid where the deemed consent procedure had not been fully complied with during their nomination

process in a creditors' voluntary liquidation. However, the directors were held to have committed a criminal offence; their liability being prescribed by the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016.

Cash Generator Limited v Fortune and others [2018] EWHC 674

The second case concerns a failure to give notice to a qualifying floating charge holder of a resolution to wind up invalidated the liquidator's appointment. The High Court held that a company is required to give notice to the holder of a qualifying floating charge (QFCH) of a proposed resolution to wind up (as required by section 84(2A) of the Insolvency Act 1986 (IA 1986)) even if the relevant floating charge is not enforceable at that point. Although the requirement to give this notice is to enable a QFCH to intervene and appoint an administrator (which would require the charge to be enforceable), it is for the charge holder not the debtor to assess whether the charge is enforceable.

However, a company's failure to give such notice does not invalidate the winding-up resolution or the related appointment of a liquidator.

Bevan and another v Walker and others [2018] EWHC 265

Directors Privacy

The introduction of The Companies (Disclosure of Address) (Amendment) Regulations 2018 SI 2018/528 came into force on 27 April 2018 and permits directors not to disclose their residential address to the public.

The Companies (Disclosure of Address) (Amendment) Regulations 2018 SI 2018/528

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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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