CARRICK | READ
INSOLVENCY LAW FIRM

UPDATE

March 2016

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

Service of Bankruptcy Petition

A creditor served a Bankruptcy Petition on a debtor at Heathrow Airport. The debtor directed it be handed to a person with him and that person read out the contents of the Petition to the debtor and then the Petition was put in the bin.

The debtor applied to the Court.

The test was that the Petition had to be handed to the person to be served but if the person will not accept it the process server can tell him what the document contains and leave it with him or near him. The Court determined that the Bankruptcy Petition had been left with or near the debtor.

Fixed Costs

At the IPA annual lecture on the 28th January 2016 Lord Justice Jackson announced his proposals to move claims to a fixed costs regime.

The proposal includes a grid for fixed costs in respect of claims up to £250,000. The grid will be based on the value of the claim against ten different phases of litigation. The proposals are out for consultation.

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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Invalidity of an IVA under Section 262 IA 1986

A debtor attempted to set aside his modified IVA on the basis that it had not been validly approved by creditors at the creditors meeting. He argued that the Chairman had unlawfully cast HMRC's vote and that the irregularity was a material irregularity not caught by the saving provisions of Section 262(8).

The Court gave a detailed review of the authorities and confirmed a broader interpretation of Section 262. The Section assumes that material irregularity may include an irregularity which would be sufficiently serious to nullify the IVA. Even if there was material irregularity it did not invalidate the approval given at that meeting unless the Court chose to exercise its discretion to revoke the approval pursuant to Section 262(4).

See *Nirandas-Girdhar v Bradstock (2016) EWCA CIV88*

Wrongful trading

Joint Liquidators commenced proceedings against directors for wrongful trading. The claim failed against the directors because the continuation of trading by the directors after the date specified by the Liquidators had not caused any, or any material increase in the net deficiency of the company.

The case is useful also for its confirmation that the valuation of the assets in the Statement of Affairs should be amended to take into account true value at or about the time of the decision to continue to trade

See *Ralls Builders Limited (In Liquidation) 2016 EWHC 243*

Office holder decisions

A Trustee in Bankruptcy made an Application for directions to the Court as to whether to admit a proof of debt filed by Liquidators and whether a meeting of creditors should be convened at the Liquidators request.

The office holder was aware that any decision he made upon the proof of debt filed by the Liquidators of the company would be contentious and subject to challenge. As a result he applied to the Court.

The Court determined that office holders should make their own decisions no matter how difficult and should not use the Court in an attempt to avoid criticism. It was misconceived to make an Application for directions when an alternative mechanism for resolution was available.

See *Parker v Nicholson and Others 2015 EWHC 3881*

Potential for forfeiture

An Application was made by a landlord for leave to forfeit a lease in the Brunswick Centre London arising from the administration of the Strada Restaurant chain. The Administrators had applied for consent to assign the lease to a group company which was already in occupation and trading from the premises. The landlord had refused consent.

The landlord wished to forfeit and the Court held that granting the landlord leave to forfeit

the lease would not be detrimental to the administration. Although the lease was a valuable asset the Administrators were unable to unlock that value as there were strict contractual preconditions to assignment in the lease. The Administrators could not override or set aside those contractual provisions.

See *SSRL Realisation Limited (In Administration) 2015 EWHC 2590*

Prescribed part

Scottish Administrators sought an Order to avoid the obligation to appropriate out of floating charge realisations the prescribed part for distribution to unsecured creditors. They estimated a dividend in the range of 0.083p and 0.510p.

The Application was refused and the Court followed a number of English decisions in confirming that that if the Application had been successful the only beneficiaries would be the floating charge holder or the Administrators themselves. The Court was mindful of Parliament's intention to benefit the unsecured creditors and not deprive them of even modest returns.

See *Re Castlebridge Plant Limited (In Administration) 2015 CSOH165*

CFA claims

At a meeting of creditors to appoint a Trustee the claims of solicitors under a conditional fee arrangement were unascertained and therefore should have been valued by the chairman at £1 for voting purposes In fact the Official Receiver admitted the claim at a material amount procuring the appointment of the Trustee.

The decision was challenged and the Court determined that the claims should be admitted at £1 and the Court appointed an alternative Trustee with the consent of the parties.

See *Rowbury and Others v Official Receiver and Others 2015 EWHC 2951*

Transitional and saving provisions

The new bankruptcy applications regime comes into effect on 6th April 2016. From that date an individual will no longer be able to petition the Court for a Bankruptcy Order to be made against him. Debtors Bankruptcy Petitions presented to the Court on or before 5th April 2016 will continue to be determined by the Court and are therefore unaffected by the changes.

Bankruptcy Petitions presented by personal representatives of insolvent estates or partners on behalf of an insolvent partnership are not affected by the changes.

Duty of mortgagee

The Court of Appeal has reaffirmed the existing law that a mortgagee upon disposing of its security does not owe a duty to those without a recognised interest in the property. The Court also confirmed that while a mortgagee who seeks to buy a mortgaged property is under a duty to show it as an acted fairly to the mortgagors, the mortgagee is still in a position to decide the method and timing of the sale.

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See *Alpstream AG and Others v (1)PK Air Finance SARL (PK) and (2) DW Capital Aviation Services Limited 2015 EWCA SIV1318*

Costs liability

A Trustee in Bankruptcy sought directions as to the costs position in a situation where a bankrupt's claim for damages was vested in him but if the case was lost the Trustee would have to make up any shortfall to pay the costs in the case.

The Supreme Court determined that the bankrupt had been responsible for the entire conduct of the trial and the appeal to the Court of Appeal and the costs order made against him was a provable debt in his bankruptcy. It would be contrary to principle for the Trustee to be held liable for those costs in those proceedings. This is useful guidance in that it states that the Trustee should not necessarily be required to pay the other sides costs simply because of his adoption of the case.

See *Gabriel v BPE Solicitors and another [2015] UKSC 39*

Solicitors costs

Addleshaw Goddard acted on behalf of Boris Berezovsky. He died in March 2013 and the Defendants were appointed as general Administrators of his estate which was insolvent.

AG claimed success fees in excess of £12M and a charge under Section 73 of The Solicitors Act 1974 on any money recovered as a result of their involvement in proceedings against three Defendants.

The case had settled without admission of liability.

The Administrators of the estate indicated that they would resist AG's attempts to recover outstanding fees.

The Master ruled in favour of AG on all points and ordered that funds should be released to AG immediately and granted AG a charge over the funds held to the order of the Defendant Administrators.

Useful guidance was provided on the effect of Section 73 of The Solicitors Act 1974. The intention of the Act is that a solicitor would not rank with a general body of creditors. The claim of a solicitor to a fund which only existed through his endeavours should not be enjoyed by a third party.

See *Addleshaw Goddard LLP v Wood and Hellard 2015 EWHCB12*

Disputed winding up

The Court determined in an unreported case that simply because there is disputed evidence concerning a debt does not mean that an issue cannot be resolved by the winding up Court. The Court will not dismiss a Winding Up Petition on the basis that the matter ought to be dealt with at trial without arguments of substance.

See *PI Trustee Services 5G Limited v Northwest Landfill Limited (unreported)*

Security for costs

A creditor successfully applied to wind up a company which had, at one time, been involved

in running the Sherlock Homes Museum. The company was granted permission to appeal on the basis that the debt was disputed but before the hearing of the appeal the creditor applied for an Order requiring the company to provide security for the creditor's costs.

The Court dismissed the creditor's Application. There was not a general rule that a company that appeals against a Winding Up Order will be required to provide security for costs.

See *Aideniantz v Sherlock Homes International Society Limited 2015 EWHC2882*

Restoration of a company

Client Connection Limited was placed into Administration and Miss Sharma was appointed as Administrator.

Further to a prepack sale the company moved to dissolution.

Barclays Bank PLC discovered that large sums of money had been paid out prior to Administration and applied for the restoration of the company and its immediate winding up.

The Court agreed to the Restoration Order and refused an Application by the Administrator to set aside the Restoration Order.

See *Barclays Bank Plc v The Registrar of Companies and Others 2015 EWHC3140*

Common law duty of care

Two bankrupts made claims of professional negligence against their Trustees. At the time of the trial the Trustees had obtained releases.

The bankrupts' alleged that the Trustees were negligent because they failed to bring their bankruptcies to an end quickly and failed to pursue debts owed to the bankrupts. It was also alleged that the Trustees had poorly managed the properties belonging to the bankrupts. The bankrupts sought to recover damages of approximately £1.5M.

The Court held that the Trustees did not owe a common law duty of care to the bankrupts and the only duties being owed were the statutory duties set out in The Insolvency Act 1986.

See *Oraki v Bramptson and Defty 2015 EWHC 2046*

Validation Order

A Winding Up Petition was served upon a company which had applied for two Validation Orders both of which had been granted following private hearings. The third Application was again made requesting that the Application be heard in private in order to avoid commercial confidential details making their way into the public domain.

The Validation Order was made as it would further the interests of unsecured creditors by enhancing the chances of the company delivering on a financial restructuring. It was also appropriate to hear an Application for the Order in private where a public hearing would damage the confidential nature of negotiations.

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See Sahaviriya Steel Industries UK Limited v Hewden Stuart Limited [2015] EWHC 2726

Removal of Liquidators

The company went into creditors voluntary liquidation and at a late stage in the liquidation creditors sought to remove the Liquidators from office due to the level of fees charged (£1.2M) and concerns regarding the Liquidator's conduct.

The creditors applied to the Court for an Order directing the Liquidators to call a meeting to consider their resolution for removal under Section 112 IA or alternatively an Order for removal for cause shown under Section 271 IA 1986.

The creditors could show to the Court that with other creditors they would hold more than 50% of the creditor vote.

The Court made an Order under Section 112 IA 1986 directing the Liquidators to convene a meeting of creditors and stressed that this was a creditor led process.

The Court further ordered the Liquidators should be personally liable for the costs of the Application and should not be entitled to indemnity from the company's estate.

See *Re Overfinch Bespoke Vehicles Limited, Autobrokers Limited & Ors v Dymond & Ors (2015) [EWHC] 2691*

The contents of this Update provide only a brief overview of the more important changes introduced by the Act. If you should require any detailed advice concerning these changes then please do not hesitate to contact us.

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