Carrick Read Insolvency

Newsletter March 2017

The Insolvency Rules post 6 April 2017

Much has been discussed and commented upon in respect of the new Rules.

Helpfully, all statutory forms relating to insolvency procedures will be withdrawn from 6 April 2017.Even more helpfully the Insolvency Service has published a list of the forms that they have prepared for post 6 April 2017 at the following site

https://www.gov.uk/government/news/introduction-of-insolvency-rules-2016

Less helpfully this is only a list and access will be available to the actual forms only after 6 April 2017!

In parallel Scottish insolvency law is undergoing a transformation of its own with various amendments to the Insolvency Act 1986 and the existing Insolvency (Scotland) Rules 1986 already having been made.. The most recent amendments were introduced by the Public Services Reform (Insolvency) (Scotland) Order 2016 which took effect in April 2016. It was intended to bring devolved areas of insolvency law more into line with England and Wales. However, further to the introduction of the 2016 Order further required amendments have been identified. The proposed 2017 Order is currently in consultation.

The intention is that the 2017 Order will make the Scottish position more consistent with the law applicable in England and Wales.

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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Adjudicator determination

On 6 April 2016 debtor's bankruptcy petitions were abolished and replaced by online bankruptcy applications determined by an adjudicator.

The debtor applied to the adjudicator for a bankruptcy order and the adjudicator refused. The issue was that the debtor had moved to England from Germany in or about June 2014. The adjudicator doubted the debtors COMI.

The debtor exercised his right under IA 1986 s263 for a review but the adjudicator confirmed the initial assessment. The debtor appealed to the court.

The Chief Registrar determined that the adjudicator had made a mistake being satisfied that the debtor was resident in London and could amply demonstrate that his COMI was in England and Wales. As he could not pay his debts a bankruptcy order was made

Re Budniok [2017] All ER 02

Receipt after completion

In itself the decision in this case relates to a relatively insignificant amount but the consequences for the volume voluntary arrangement business will be widespread.

Basically, following a completed IVA the certificate of completion was served by the supervisor on creditors and the supervisor confirmed to the debtor's creditors that the debtor had fully complied with his obligations.

After completion, the debtor sought to recover compensation for mis-sold PPI policies. As a result, the former supervisor received approximately £24,000 in respect of two policies.

The supervisor issued an application for directions. Before the district judge and before HHJ Hodge QC the court determined that the monies belonged to the debtor.

The Court of Appeal decided otherwise. The IVA was an "all assets" IVA rather than a "defined assets" IVA.

The terms of the IVA provided that the trust created by it would terminate upon a certificate of termination, a bankruptcy order or the death of the debtor. None of these applied. There was no comparable provision that the trust was to cease on the issue of the completion certificate. Upon the issue of the completion certificate the debts of the debtor did not disappear. The position was analogous to the position in a bankruptcy. The release of the bankrupt from his debts upon his discharge had no effect on the trustees functions and the bankruptcy debts continue to exist for the purposes of proof in the bankruptcy and payment out of the realisation proceeds of the assets subject to the bankruptcy.

Green v Wright [2017] EWCA 111

The law of confiscation

Following a successful criminal prosecution for breach of section 216 IA 1986 it was determined that a confiscation order can be made against an individual and the court is entitled to hold that the total turnover (not just the net profit) for the entire period of trading under the restricted name is recoverable

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The director was charged with trading under a prohibited style without the leave the court and having been found guilty she was given a community sentence and disqualified for five years.

A formal order to confiscation was made in the sum of £100,000 being the amount of realisable assets. The director paid £100,000 but it was determined that a director could be ordered to pay a sum equal to the total turnover for the entire period of illegal trading. This would be in addition to any fine or prison sentence

R v Neuberg [2016] EWCA 1927

Football League Insolvency Rules

The Football League has announced the strengthening of its insolvency rules.

Clubs entering administration will face an increased 12 point reduction which could rise to 15 if they are found to have flouted new rules concerning repaying funds to creditors

The Football Creditors Rule guaranteeing 100% repayment of debts to clubs and players for transfers and wages will be retained but unsecured creditors will now receive a minimum of 25p in the pound payable upon the takeover of the club's assets or the sum rises to a minimum of 35p in the pound over three years.

Administrators will be required to market the club for at least 21 days during which time they will be required to meet with the club supporters trust and provide it with the opportunity to bid for the club. The requirement for a CVA has been removed. The League will transfer the club's share in the Football League to the preferred bidder subject to compliance with the League's requirements

Set-aside applications

The debtor lost an application to set aside a statutory demand at first instance on a particular ground, but then succeeded on a subsequent appeal on an entirely unrelated ground. The ground on which he had succeeded was neutralised by the creditor and the debtor sought to revisit the previously abandoned ground on the second application.

Where there had been a previous hearing on the merits, unless there had been a change of circumstances, or good reasons to do so, the debtor could not re argue points that had either been presented earlier, or where there had been an opportunity to present them earlier

Harvey v Dunbar Assets plc (No 2) [2017] EWCA

Chancery Court Guide revised

HM Courts and Tribunals Service (HMCTS) has updated the Chancery Court Guide. The changes include contact details and web addresses, as well as new information about the company insolvency pro bono scheme, and reference to the fact the e-filing scheme in the Rolls Building is to become mandatory on 25 April 2017 (para 6.1).

Directors claims

The former managing director and controlling shareholder of a company in liquidation brought a claim to recover various sums totalling about £1 million against the company.

The liquidators brought various counterclaims including avoidance of a transfer of the company's factory premises on the basis it was not properly authorised under section 18 Companies Act 2006. They also sought to set aside

or recover compensation for transactions in which the company bought back most of it's shares for £2.5 million which left outstanding as a secured loan and sold a subsidiary to the former director at an alleged undervalue . There was also a claim in respect of loans made to a related company in India of which the director was the majority shareholder.

The court analysed all the arrangements employed to effect the sale and lease back of the premises and held the transaction to be at an undervalue on the basis that the transaction was not in the best interests of the company.

The loan arrangement in respect of the share purchase was entered for the purpose of diluting the company's assets and by securing the loan debt in favour of the managing director put the assets out of reach of creditors. It was deemed to fall foul of s423 IA 1986

The share buyback and the sale of the subsidiary were both judged to have been sales at undervalue and part of the director's attempts to put assets out of reach. He was liable under section 423 IA 1986

However, the court found that the director's removal of approximately £2.5 million of net assets from the company's asset pool did not place the company on the verge of insolvency. It was trading healthily and had sufficient capital. The general duties of directors did not require directors to give priority to creditors simply because they recognised a threat of adverse events which may cause a liability leading to insolvency. There was no breach of fiduciary duty.

Dickinson v NAL Realisations (Staffordshire) Ltd [2017] EWHC 28 (Ch)

Matrimonial Causes Act applications

The case involved the well-known celebrity Trinny Woodall. After the death of her bankrupt former husband the trustee applied for a declaration that an ancillary relief consent order which provided for the less wealthy husband to pay maintenance to his wealthier former wife (who also claimed to be a substantial creditor) should be set aside as being void under section 284 IA 1986 and also that the bankrupt husband's spousal claims under the MCA had vested in him as part of the bankruptcy estate.The trustee succeeded on the former and failed with the latter

The trustee appealed an order that the claims under the MCA did not vest in the trustee.

The High Court dismissed the trustee's renewed application for permission to appeal. The death of the bankrupt brought to an end his rights under the MCA and the trustee could have no greater right than the bankrupt.

Robert v Woodall [2016] EWHC 2987

Directors disqualification

Mr Taylor was a qualified independent financial adviser.Further to his involvement as a director in Quintilion Asset Management Limited (in liquidation) the Insolvency Service wrote to him explaining that his disqualification for a period of 12 years would be sought.

Mr Taylor offered an undertaking for a period of 11 years which was accepted in August 2014.

Prior to giving the undertaking Mr Taylor had advised the Insolvency Service that he was not residing in the UK and that he had not been able to obtain legal advice on the matter. In the circumstances, and as he was living in Switzerland, he indicated that he had no option but to give the undertaking.

The disqualification received some publicity and Mr Taylor's new employers became aware of the situation. They terminated his employment and Mr Taylor stated that he was unable to obtain employment subsequently

He made an application to reduce the period of the undertaking to between two and five years. He stated that he had not envisaged when giving the undertaking that it would lead him to losing his job.

The Registrar found that Mr Taylor knew or should have been aware of the ramifications of the undertaking on his work. Mr Taylor ought to have foreseen that if the matter was to be disclosed to his employers he may lose his employment.

The Registrar indicated there was no new event to be taken into account and that no special circumstances existed to justify intervention in the bargain reached between the Secretary of State and Mr Taylor

Taylor v The Secretary of State for Business, Innovation and Skills. [2016] EWHC 1953

Public interest winding up

The High Court considered whether the business practices of two companies justified the winding up of those companies on the just and equitable basis

The companies had overpromised, used marketing material that was misleading and charged inflated commissions on the products such as markups of 170%-345%.

Further the companies were being conducted in a way which did not meet accepted minimum standards of commercial behaviour and the failings were serious and the sums involved significant.

An order was made winding up the companies

Re-Caledonian Ltd [2016] EWHC 2854

Challenge to administrators appointment

In another case involving an application seeking an order to terminate the administrators appointment on the basis of an allegation that the appointment was based upon an improper motive, the application was dismissed.

It was determined that a person appointing administrators had an improper motive where his motive was not in harmony with the statutory purpose of administration and was causative of the decision to appoint. The court would normally not exercise its discretion if the statutory purpose of administration was likely to be achieved notwithstanding the motives of the appointor.

Where the appointor deferred to the views and requests of another party to whom it was contractually bound to consult, provided that party's motivation betrayed no disharmony with the statutory purposes of administration, the appointor did not thereby have an "improper motive"

Frogmore Real Estate Partners GP1 Ltd v Thomas [2017] EWHC 25

Mental capacity

A debtor entered a voluntary arrangement which failed. The supervisors petitioned for bankruptcy. An order was made.

The debtor applied for an annulment on the basis that she had lacked mental capacity

The application was rejected by the district judge.

On appeal the application was dismissed. The test to be applied was whether the debtor had the capacity to absorb, retain, understand, process and weigh the information about the key features and effects of the voluntary arrangement and the alternatives to it, explained in broad terms and simple language.

Even if the debtor did not have mental capacity given the contractual nature of the voluntary arrangement the judge considered that the voluntary arrangement was not void. It was possible the application of the law of contract would make it voidable. If so it was arguable that this may be an irregularity in relation to the creditors meeting under section 262 (8) IA 1986 but it was not necessary to consider this because it was not argued that the creditors were or should have been aware of any lack of capacity

Fehily and anor v Atkinson [2016] EWHC 3069

Effect of fraud

The applicants were subject to a bankruptcy order. They applied to have the order annulleds on the basis that the judgement on which the order was based had been obtained by fraud.

The application was dismissed even though the judgement had been obtained by fraud. It did not follow that the bankruptcy orders were void. Where a bankruptcy order that ought not to have been made was annulled, acts done in the interim were valid not void. A bankruptcy order should not be automatically void even if based on a judgement obtained by fraud, because of the need to safeguard the interests of third parties other than the petitioner and the bankrupt, including the trustee in bankruptcy and the creditors. The court has a wide discretion under section 282 and section 375 (1) IA 1986
In re Oraki [2017] EWHC 11

Third-party funds

In a local case, an issue arose as to whether the funds provided by a third party to pay off the bankruptcy debts and expenses on behalf of the bankrupt to enable an annulment would attract the Secretary of State's administration fee.

The Official Receiver contended that where there were assets in the estate, it made no difference that the monies were paid by a third party and that the monies attracted the fee.

The court determined that funds provided by a third party did not form part of the debtor's estate and receipt of them was not part of the trustee's function The trustees were not obligated to pay these monies into the insolvency services account. These were not chargeable receipts and they were not relevant for the purposes of calculating the administration fee

Safier v Wardell [2017] EWHC 20

Meeting to remove a liquidator

A significant creditor and former director and shareholder of a company in liquidation requested the liquidator to convene a meeting of creditors under s 177 IA 1986 for the purposes of considering his removal.

The liquidator refused on the ground that the request was not supported by 25% in value of the company's creditors. He required "strict proof" in respect of one particular claim. He had carried out a detailed exercise into the merits of the claim and whether it should be included in the calculation of creditors claims or not. Included, the 25% threshold would have been met.

The director argued that the liquidator had adopted an incorrect approach by extensively analysing the merits of the claim

It was considered that there is no need to investigate the merits of any of the claims. Once a meeting has been called, the chairman may adjudicate on the proofs of debt at the meeting. It is only at this stage that an analysis of each claim should take place.

It was argued on behalf of the director that the liquidator should not have embarked on a detailed examination of the claim in question.

The court determined that the liquidator's conduct was not supported by statute or caselaw.

The degree of scrutiny of claims necessary at the requisitioning stage is low in comparison to the exercise undertaken at the creditors meeting. In the former case the liquidator's only task is to discount connected party claims and any claim that appears obviously wrong or male fide.

Kean v Lucas [2016] EWHC 2684

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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