CARRICK | READ
INSOLVENCY LAW FIRM

Update

Newsletter March 2018

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.

Review of Pre-Pack Measures

The Insolvency Service has announced its intention to review the impact of the voluntary industry measures introduced in November 2015 to help improve administrative pre-pack sales to connected parties.

It will also review the Small Business, Enterprise and Employment Act 2015 and the ability for the government to impose conditions on connected parties in Administration, this power is due to expire in May 2020.

The Graham Review of 2014 found pre-pack sales were an effective tool but were less effective where the sale was to a connected party.

The review should help provide a valuable insight as to whether further measures are needed in this area.

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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Generous attitudes to conflicts of interests

Administrators had been appointed as office-holders of three connected companies. A creditor applied to remove the Administrators as office holders of one of the companies, as one company had a potential TUV claim against another. The creditor considered that it would be a conflict of interest for the same Administrators to be office holders of all three companies.

HHJ Stephen David accepted that the existence of a conflict of interest was not an absolute bar to the Administrators continuing appointment and in the instant case the conflict could be managed by a range of possible options.

This case highlights that the court's more lenient approach to conflicts of interests in the case of office-holders in multiple appointments in connected companies.

See Re TPS Investments Ltd [2018] EWHC 360 (Ch).

Preference payments

The court has recently held that the relevant date in deciding whether a person is 'connected' with a company pursuant to s249 IA 1986 is the date on which agreement was reached in relation to that transaction, not the date on which the assets were transferred pursuant to the agreement.

This may have a significant impact on who is considered to be a connected person, as in this case the director had resigned prior to receiving stock from the company. The court nonetheless held she was a connected person for the purposes of s249 as she must have had some involvement with the brokering of the deal prior to her resignation.

See Breese (liquidator of Flexi Containers Ltd) v Hiley and others [2018] EWHC 12 (Ch), [2018] All ER (D) 77 (Jan).

Duty owed to innocent Directors

Mr Al Sanea set up a company to deal with his personal assets. At all times he was sole shareholder of the company, but one of several directors. The bank where the company kept its bank accounts became aware that Mr Sanea's assets had been frozen by the Saudi Arabian Monetary Authority. The Bank subsequently decided no further payments should be made from the company accounts. However whilst the company was on the verge of insolvency the company allowed Mr Sanea to make several payments from the account which were subsequently held to be fraudulent.

The Company issued a claim against the bank for the total amount of transfers out of the account. The High Court found that the Bank breached its duty of care to the company not to make payments whilst the circumstances put it on enquiry.

On appeal the Court of Appeal upheld the decision stating that to attribute a director's fraud to a company the company must be a

one-man company with no innocent directors or shareholders.

See Singularis Holdings Ltd (in Official Liquidation) v Daiwa Capital Markets Europe Ltd [2018] EWCA 84 (Civ).

Ineffective service

A process server failed to correctly deliver a winding up petition, leaving the petition within the debtor company's building, but at an un-manned desk of another company. A winding up order was subsequently made against the debtor company; however, this only came to their attention upon it being served on them by the Official Receiver. The debtor company subsequently filed an application to rescind the order. The Judge ruled in circumstances where the petition is not served then the debtor company is entitled to treat it as nullity and set aside (applying Re Calmex Ltd (1998) 4 B.C.C. 761).

It was also ordered that the creditor pay the costs of the debtor company on an indemnity basis from the date that it should have been obvious to the creditor from the evidence that it was not realistic to contend there was valid service. The creditor was also ordered to pay the Official Receiver's costs.

See Re Southbourne (Unreported).

Contracting by email

Meem SL Limited ("the Company") had been incorporated to develop and sell a new type of phone charger but, unfortunately, was placed into administration. The business and assets of the Company were sold to an entity formed by a director and shareholder of the Company.

The inventor of the phone charger alleged the director and shareholder had conspired to place the Company in administration, so its assets would be sold at an undervalue. The Administrators sought to auction the claim. However, the inventor sought to prevent the auction on the basis that the emails that had passed between the Administrator and the inventors solicitors formed a binding agreement to assign the claim to the inventor and that any auction would cause unfair harm to the inventor's interests.

The court held no offer was made by the Administrator that was capable of acceptance, as the email exchange simply represented the parties exploring the terms of a potential deal and it was implied that their exchange was subject to contract.

The court further held that any such auction would not cause unfair harm to the inventor as he was not being treated any differently to any other creditor.

See Goel & another v Grant & another [2017] EWHC 2688 (Ch).

Strike out on substantially similar grounds

The Liquidator of Brady Developments Ltd ("the Company") brought a preference

claim and misfeasance allegations against two of its former Directors ("the Defendants"). During cross examination the Liquidator accepted none of the transactions he was complaining of had caused loss and subsequently filed a Notice of Discontinuance.

The following day the Liquidator issued a second claim against the Defendants in their capacity as partners in the firm as opposed to its directors. The Defendants made an application to strike out the second claim based upon three grounds.

Firstly, the Defendants argued the application fell within CPR 38.7. The Judge held CPR 38.7 was engaged as the second claim was against the same defendants and arose out of substantially the same facts.

Secondly the Defendants argued they should be afforded protection under the rule in Henderson v Henderson, being that the Liquidator should not be able to raise litigation points which could and should have been raised previously. The Judge held that as the first proceedings had been discontinued this point did not apply, but that the protection afforded under CPR 38.7 was sufficient for the facts in this scenario.

Thirdly the Defendants argued that the second claim was an abuse of process and the only person who would benefit from the action would be the Liquidator, as the funds received would go towards the payment of his outstanding fees rather than to creditors. The Judge held that although the Liquidator was pursuing his statutory duty as a liquidator it could not be said that he was pursuing the interests of creditors.

As such the Judge struck out the claim for the failure to comply with CPR 38.7 and a general abuse of process.

See Ward (acting as liquidator of Brady Property Developments Ltd) v Hutt and others [2018] EWHC 77 (Ch)

False IVA Proposals

Mr Camilleri put forward an IVA proposal to his many creditors, in which he pretended to set out his total assets and debts. He stated his total debts amounted to £5.7 million and his cousin would lend him £100,000 to fund the IVA. This would offer Mr Camilleri's creditors approximately 1.29 pence in the pound.

It transpired Mr Camilleri's debts and assets were substantially misstated and his proposed IVA was a sham. Mr Camilleri left the jurisdiction for Switzerland on the last day of his trial, and in his absence the Judge sentenced Mr Camilleri to a custodial sentence of 12 months, suspended for 12 months and a £10,000 fine.

See R v Andrew John Camilleri (2018)

Debenture Debacle

Capital Funding One Limited ("the Company") arranged short term loans for borrowers unable to obtain finance

elsewhere. Such loans were ultimately obtained from King Street Bringing Limited ("King Street"). The interest on the loans was high and there was an informal arrangement between the Company and King Street that this revenue was to be split on a 50/50 basis. There was no formal agreement between the parties and business was generally conducted over the phone or by email.

In 2013 the Company granted King Street a fixed and floating charges under a debenture to secure all monies owed to King Street. In 2016 two borrowers defaulted on loans totalling almost £700,00, King Street argued the Company was liable to repay these sums under their arrangement.

The Company refused to pay the outstanding sums and King Street appointed Administrators in 2017 arguing the refusal of payment constituted default under the terms of the debenture. The Company sought an order from the court that the Administrators had not been validly appointed under the debenture.

The court stated the critical issue was whether the terms of the agreement were on a 'paid when paid' basis. Although there was no formal agreement between the parties the court considered the past relations where borrowers had defaulted and there had been no consequences from King Street. The court held there was no obligation for the Company to repay King Street in the event of borrowers defaulting on their loans and as such there was no default on the part of the Company. The Administrators had not been validly appointed.

This case highlights the issues of appointing Administrators through the "out of court" route. Charges should be carefully examined to ascertain whether an Administrator can be appointed.

See Re Capital Funding One Ltd [2017] EWHC 3567 (Ch).

Low thresholds for winding up injunctions

The High Court has confirmed that when there is a dispute regarding a debt upon which a winding up petition is made the challenge must merely be made in good faith and have sufficient substance to justify it being determined in normal civil action in order for an injunction to be granted. The court held the threshold to grant an injunction is low and the court did not need to determine if the challenge to the debt was valid.

See Mulalley and Co Ltd v Regent Building Society Ltd [2017] EWHC 2962 (Ch).

Defective Administrator appointment cured

In a recent case the High Court made a retrospective administration order over a company subject to winding up proceedings after the directors of the company made an invalid out of court appointment of Administrators.

The Directors had filed a Notice of Intention to appoint Administrators ("NOI"), unaware that only a few hours earlier one of its creditors had issued a winding up petition. The NOI was defective and as such the company applied for a retrospective administration order. The administration order was granted on the grounds that it was likely to achieve a better result as a whole for creditors and the Administrators had already commenced work.

See Endersby and Coote v Astrosoccer 4 U Ltd 2017 WL 06271725

Committal for contempt

A recent case has considered the procedure for applying for a committal order on the basis of breaches of the Insolvency Act. A bankrupt repeatedly refused to co-operate with his trustee and took active steps to conceal his assets, as well as lying on affirmation. The trustee subsequently applied for the bankrupt's committal to prison for the contempt of court. The case provides helpful guidance to practitioners and the judge in the case recommended the procedure be considered by the Rules Committee as there is a lack of clarity under the Civil Procedure Rules.

See Simmonds v Pearce (A Bankrupt) [2017] EWHC 3126 (Admin).

Management Fees and Misfeasance

In a recent High Court case, two directors have faced a large judgment against them after continuing to draw management fees from a company after it had become clear the company was in a poor financial situation. The withdrawals by the directors totalled around £750,000.

The court found that the directors had breached their duties by not acting in the interests of creditors and were guilty of misfeasance. The directors were found joint and severally liable for the outstanding sums. Although it was not relevant to the facts of this case as the company was insolvent at all material times the Judge considered in length the point at which the duty to consider the interests of creditors becomes live in a misfeasance claims.

See Ball (liquidator of PV Solar Solutions Ltd) and another v Hughes and another [2017] EWHC 3228 (Ch)

Forced sales and creditor considerations

The Inner House in Scotland have confirmed one of the fundamental principles of insolvency and that when a company has no realistic prospect of continuing the considerations of the creditors should be paramount. In this case a struggling business sold one of its properties for £550,000, a fraction of its market value of £1.2 million to a long-standing business connection of one of its directors as a forced sale. 4 months later

the Company went into administration and the liquidators commenced transaction at an undervalue proceedings.

At first instance the Outer House of the Court of Session found the payment was adequate consideration for the purposes of s242 of the Insolvency Act 1986. The liquidators appealed. On appeal the Judge held that if a company's business is about to come to an end, the need for a forced sale and continuation of the business disappears and the considerations of the creditors should be of paramount importance. On the facts of this case there were no hopes that the proposed sale would save the company's business, and therefore there was no justification for the property being sold in the manner it was.

See Steward MacDonald and Pamela Coyne, the joint liquidators of Grampian Maclennan's Distribution Services Limited v Carnbroe Estates Limited [2018] CSIH 7

Registrars in Bankruptcy Title Change

On 26th February 2018 the Alteration of Judicial Titles (Registrar in Bankruptcy of the High Court) Order 2018 came in to force. The legislation has, among other things, renamed Registrars in Bankruptcy to Insolvency and Companies Court Judges.

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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