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INSOLVENCY LAW FIRM

Newsletter March 2019

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.

Court of Appeal confirms dividends can be considered as a TUV

The Court of Appeal have recently upheld the decision of the High Court and confirmed dividends can constitute transactions at an undervalue contrary to s423 Insolvency Act 1986.
Upon dismissing the appeal, the Court of Appeal held that the wording of s423 does not prevent its applicability to dividends. The payment of a dividend is a transaction of funds from the Company to the shareholders for which the Company receives no consideration, rather than being considered a gift. It was also held that s423 should not be read as being qualified by Part 23 of the Companies Act 2006 and as such s423 is applicable to lawfully paid dividends. The practical implications of this are that a lawfully paid dividend may be challenged as a transaction at an undervalue if it is thought the Company's assets are put beyond the reach of potential creditors or it is thought the transaction prejudices

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 interests of potential creditors.

In light of the decision Directors should consider the Company's long-term liabilities and exercise caution when paying dividends.

LLC v Sequana SA [2019] EWCA Civ 112

Return of Crown Preference

Further to the announcement made in the Autumn Budget of 2018 Crown Preference will be re-introduced on 6th April 2019. At the end of February HMRC issued a consultation paper seeking opinion regarding the re-instatement of Crown Preference. The proposed changes will result in HMRC's claims for VAT, PAYE, NIC and CIS ranking ahead of floating charge holders. HMRC's position in respect of company tax liabilities (income tax, CGT, corporation tax and employer NIC) will remain unchanged and these claims will remain as unsecured debts.

Crown preference was abolished in 2003 as it was considered that the regime was unfair to other creditors and the potential benefits to creditors outweighed the benefits received by HMRC. The reform came as part of a number of measures designed to improve business rescue.

It appears that this notion is no longer the case. HMRC have cited loss of revenue as the principal reason for the reform however the effects of HMRC receiving preferential treatment could be wide ranging for other creditors.
The consultation will remain open until 27th May 2019 for comment by interested parties.

Refusal to Set Aside Statutory Demand

The High Court have confirmed applications to set aside statutory demands must evidence that there is a substantial dispute of the debt in question which must have a real prospect of trial.

Often Respondents will seek to create the illusion of a dispute between the parties in order to set aside the statutory demand and to delay further legal action being taken by the Applicant. In this matter after a two day hearing the Judge considered that the Respondents arguments did not have prospects of proceeding at trial.

Wagner v White [2018] EWHC 2882 (Ch), [2018] All ER (D) 16 (Nov)

CE-Filing in the Business and Property Court at Leeds

From 30th April 2019 it will be mandatory for solicitors to file all new proceedings in the Business and Property Court in Leeds via the CE-Filing System. If you are unfamiliar with CE-Filing guidance is available at GOV.UK and in Chapter 6 of the Chancery Guide.

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Actions of a dissenting director

Directors are required to make their own decisions and are judged on a subjective and objective basis on their conduct if an insolvency event is on the horizon. If a Director is in the minority, he is encouraged to have his views recorded in any directors meeting and if necessary, resign from his role. In the recent case of *Tinkler v Stobart* the actions of a Director who had perhaps exercised too much independence from the board were considered. It had been found that the director in question had:

- Spoken to the Company's major shareholders and agitated the removal of the Chairman of the board
- Disclosed confidential information outside the board
- Discussed the dispute with shareholders and other non-board members
- Organising a petition and letter to the board from senior staff in the Company.

The Judge held the Director had indeed acted outside his role and suggested his actions were likely to "hinder rather than contribute to the boards management of the business". The key points to take away from this case were that confidential information should not be shared outside the board without clear prior consent, independent judgment is expected pursuant to the Companies Act 2006, dissenting directors should be extremely cautious of taking their qualms outside of the board and if an individual is a director as well as a shareholder or even an employee he should utilise the other options open to him but be clear that he is not acting in his capacity as a directors.

Chancery Guide Update

The Chancery Guide was updated on 21st January 2019. The updates to the guide include:

- Removal of standard directions at Case and Costs Management Conference
- Amendments to Insolvency Appeals (chapter 24) stating all appeals in individual insolvency proceedings (from a District Judge in the County Court or High Court and from ICC Judges) are to a High Court Judge in the Business and Property Courts.
- Amendments to the Insolvency and Companies List (chapter 25) reflective of the Practice Direction on Insolvency Proceedings. In particular confirming hearing bundles must be lodged for all hearings before all Judges and ICC Judges. Bundles are not required in winding up proceedings unless ordered by the court.

Removal of Trustee

Mr Birdi was made bankrupt in March 2012. Initially Mr Price was appointed as his trustee and later Mr Price vacated office (upon his retirement) and Mr Pettit was appointed in his place. Realising the

bankrupt's assets proved to be a particularly long and laborious task for both trustees. The last report showed total realisations of £595,053 but with total costs and distributions of £556,827. The total amount of claims against the bankrupt's estate was £1,048,373 (made up of claims from 26 unsecured creditors and HMRC). As such the estate was insolvent and no distributions were to be made to the 26 unsecured creditors involved.

Subsequently the applicants in this matter brought an action against Mr Price and Mr Pettit under s298 of Insolvency Act 1986 requesting Mr Pettit to convene a meeting of creditors to sanction his removal as trustee. The applicants also suggested the difficulties in realising the bankrupt's estate were the fault of the two trustees.

The court subsequently considered two issues; firstly should an order be made removing Mr Pettit as trustee and, secondly, should an order be made requiring Mr Pettit to convene a meeting of creditors?

In response to the first issue the court found no evidence to substantiate the applicant's allegations that the trustees had been at fault for the delays. The applicants had not raised any complaints throughout the recovery process and had not raised enquiries with the trustees. The court considered that the bankrupt had gone to extraordinary lengths to disrupt the bankruptcy process which could not be considered the fault of the trustees. The court did not consider that it was appropriate to order the removal of Mr Pettit as trustee.

Regarding the second issue, and the request for Mr Pettit to convene a meeting of creditors the court considered the threshold had not been met. The creditors in question comprised of 18%, less than the required 25% of creditors required under s298. The convening creditor had stated that the other creditors were in concurrence, rather than evidencing it as required by s298. Finally, the convening creditor failed to provide security of costs of the meeting as requested by Mr Pettit.

Re Kuldip Singh Birdi [2019] EWHC 291 (Ch)

Right to Adjudicate continues in liquidation

The Court of Appeal has recently reconsidered the TCC decision in Michael J. Lonsdale (Electrical) Limited v Bresco. The TCC held that Bresco was injuncted from proceeding with Adjudication as if the claiming company is in insolvent liquidation the adjudicator has no jurisdiction to deal with their contractual claim, because that claim ceased to exist at the liquidation and was replaced by the net claim under the Insolvency Rules.

The Court of Appeal has navigated the Insolvency Rules and the statutory right to

adjudicate very carefully and has stated that in theory the right to adjudicate survives an insolvency situation.

The Court of Appeal stated, "*If the contractual right to refer a claim to arbitration is not extinguished by the liquidation, then the underlying claim must continue to exist*" and as such there was no bar to the adjudicator's jurisdiction. However, the court went on to consider whether there was any value in the adjudication when the claiming company was in liquidation and the Responding party had a cross claim. The court considered this to be the "utility argument" and stated that ordinarily the court would not enforce the decision of an adjudicator in favour of a company in liquidation where the responding party had a cross claim. On this occasion the court upheld the injunction restraining Bresco from continuing with the adjudication as it would be an exercise in futility.

Michael J. Lonsdale (Electrical) Limited v Bresco Electrical Services Limited (in Liquidation) [2018] EWHC 2043

TUPE transfers considered by Court of Appeal

The Court of Appeal has recently considered a decision of the Employment Tribunal regarding TUPE transfers. In *Hare Wines Limited v Kaur* H&W Wholesale Limited *tra*nsferred its business to Hare Wines due to financial reasons, TUPE was engaged and all employees apart from Mrs Kaur transferred to Hare Wines. Upon further investigation Mrs Kaur was involved in a longstanding feud with another employee Mr Chatha, however H&W had considered that they were unable to dismiss Mrs Kaur on these grounds. When the transfer arose, it appears H&W/Hare Wines saw this as the opportunity to dismiss Mrs Kaur. The argument put forward by H&W was that Mrs Kaur had refused to transfer to Hare Wines, something Mrs Kaur denied. The Employment Tribunal was not swayed by the employer's arguments and concluded the transfer was the catalyst for the dismissal and as such automatically unfair pursuant to s7(1) TUPE. As H&W were now in liquidation Hare Wines became liable for her unfair dismissal. The Court of Appeal agreed with the Employment Tribunals reasoning.

Hare Wines Ltd v Kaur and another [2019] EWCA Civ 216

When must a dividend be regarded as unlawful

The Court of Appeal has recently confirmed in the case of *Global Corporate Limited v Hale* that it is at the time a distribution is made that its legality must be tested. In this case the Directors of the company had maintained a practice of paying a dividend throughout the year then assessing at the end of the financial.

year whether the company had sufficient distributable profits to pay the dividends In the years where the company did not have sufficient distributable profits the payments would be classified as remuneration and the necessary PAYE would be paid.

The question arose whether the legality of the payment should be assessed when the payment was made or at the year end when it was confirmed the payments would be classified as dividend or remuneration. The Court concluded the payments were clearly distributions and as such the legality must be assessed at the time the distribution was made.

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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