Newsletter March 2020

CARRICK | READ
INSOLVENCY LAW FIRM

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.

Disqualification Proceedings Success

Carrick Read has achieved the rare distinction of successfully defending at court directors' disqualification proceedings instituted by the Secretary of State

In the case of *Secretary of State v Russell and others*, heard in the Manchester High Court, the Secretary of State abandoned his case after three days of the hearing, deciding that after proceedings lasting nearly 5 years he could not succeed in the application and agreed to pay the legal costs of Carrick Read's client, leaving the taxpayer to pick up a substantial bill.

This particular case was especially difficult due to the nature of the allegations made against the director which included fraud, forgery and financial irregularities.

We are extremely pleased to have succeeded in what was a complicated and technical set of proceedings and would like to thank Eleanor Temple and Lesley Anderson QC of Kings Chambers for their invaluable assistance

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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Further developments in appointment of administrators

Guidance has been provided in respect of the e-filing pilot and in particular in relation to the appointment of administrators outside of court hours.

The advice itself is short and sweet and states that when a Notice of Appointment (NOA) is filed outside of court hours it will be referred to a judge to ascertain whether the appointment is valid.

The court has recently considered two cases where the NOA was filed outside of court hours

In *Re Carter Moore Solicitors Ltd [2020] EQHC 186 (Ch)* the NOA was incorrectly e-filed as a new, rather than an existing case. The court notified the practitioner of the mistake. However this was after court hours. A second NOA was subsequently filed out of court hours.

The court held that as the document itself complied with all the requirements of the Insolvency Act 1986 and it had simply been filed incorrectly in the e-filing system that it should be treated as being validly filed on the first occasion.

In *Statebourne Cryogenic Limited [2020] EWHC 231 (Ch)* the NOA was initially rejected because it was headed with the incorrect court. Again the practitioner was notified out of court hours and a second NOA was filed. The Judge in this case concluded that it was not a requirement to specify a particular court centre, but if the NOA was defective due to its heading the defect could be waived pursuant to CPR 3.10(b).

As such it was held the NOA should be recorded as being filed on the date and time it was originally filed.

Data protection warnings

The Financial Conduct Authority and the Financial Services Compensation Scheme have warned FCA authorised firms and insolvency practitioners to act responsibly when dealing with personal data.

The statement notes that there have been instances where attempts have been made to sell personal data either before or after administration where FSCS compensation claims could have been made.

The lawful basis for processing data must be confirmed by IPs prior to processing data. IPs are being advised that if they are to sell personal data to satisfy themselves that the buyer will adhere to the DPA and GDPR in the processing of the data.

Directors Duties

The High Court has considered the nature of directors duties and whether those duties survive the company entering administration.

The case involved a company which had been placed into administration in 2012 and which subsequently entered creditors voluntary liquidation in 2013. The administrator was appointed as Liquidator. Throughout this time period there was a sole director of the company, Mr Michie. The company was dissolved in February 2016 but was later restored in April 2017.

In 2014 in unrelated proceedings the liquidator was found to be liable for misfeasance in office.

Subsequent Investigations showed that in 2014 whilst the company was in administration Mr Michie purchased from the company property at an undervalue. The price paid by Mr Michie was lower than the amount the company had

purchased the property for, less than the amount attributed to the property in the company accounts and lower than the value of the property in the Statement of Administrator's Proposals from August 2012 and the independent valuation obtained by the liquidator in 2012.

ICCJ Barber concluded that Mr Michie was aware that the property was worth more than the price that he had paid and he had failed to take into account the position of creditors despite the company being in liquidation.

The court therefore ruled that Mr Michie had breached his duties and was acting in his own interests. Further the court stated that although it was the liquidator that chose to sell the property to Mr Michie, this was not a defence for his actions.

The court ruled that Mr Michie held the Property on trust for the company with credit given for the purchase price.

This case clearly highlights that directors must take into account the position of creditors both pre and post entering an insolvency process. The practical implications of this case are that both insolvency practitioners and directors will need to consider creditors before entering into any sale of assets.

Re System Building Services Group Limited [2020] EWHC 54 (Ch)

CPR Changes

From 6th April 2020 the majority of the provisions in the 113th update to the CPR will take effect. One the changes included in the update is regarding Statements of Truth. A Statement of Truth will be required to include the contempt warning. The update also states that in respect of individuals for whom English is not their first language, the courts will require their witness statements to be translated and for a translator to be present at the hearing.

Criminal Proceedings

The joint liquidators of Paperback Collection and Recycling Limited (the Company) applied to court to stay criminal proceedings instigated by National Resource Body for Wales ("NRW").

On 6 June 2018, prior to the Company entering into liquidation, NRW served a statutory notice under s59 Environmental Protection Act, requiring the Company to remove waste unlawfully stored on leased premises at Penrhos. NRW did not serve a s59 notice in respect of other premises occupied by the Company at Deeside.

The Company entered voluntary liquidation on 25 June 2018. The liquidators served notices of disclaimer in respect of the leases at Penrhos and Deeside and the waste stored at both sites.

The criminal proceedings against the Company and its directors related to offences under s33(1)(b) and (6) of the EPA and Reg 38(1)(a) and (2) of the Environmental Permitting (England and Wales Regulations) 2016. The estimated clean-up costs of the Penrhos site were estimated at between £781k to £1.146m and around £2m at the Deeside site.

The applicant liquidators applied for a stay of the criminal proceedings, relying on s112(2) IA 1986

The court refused to grant the stay on the basis of the lack of jurisdiction but went on to state that even if it had the jurisdiction it would not have granted the stay in any event as the public interest outweighed the detriment to creditors
Re Paperback Collection and Recycling Ltd [2019] EWHC 2904 (Ch),

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BHS Investigation comes to an end

In its most recent newsletter the Insolvency Service has confirmed its investigation into the conduct of former BHS directors has now come to an end.

The four Directors who were involved in the investigation have provided undertakings not to run or to be involved in the promotion of another company until 2025.

Misprediction is not a mistake

Elston and his trustees in bankruptcy were parties to an Income Payments Agreement (**IPA**) under which sums were paid out from Elston's pension funds to his trustees as contributions to his bankruptcy debts.

The IPA was made under s310A Insolvency Act 1986, so that its provisions were capable of enforcement by the court as if they were provisions of an income payments order (**IPO**) under s310. The IPA was entered into in light of *Raithatha v Williamson*, a 2012 decision in which the High Court held that undrawn pension rights were income for the purposes of s310 and could therefore be the subject of an IPO.

A month after the IPA was entered into, the High Court in *Horton v Henry* declined to follow *Raithatha* and instead held that undrawn pension rights did not fall to be assessed as part of a bankrupt person's income for the purposes of s310. In light of this change in law, Elston brought a claim of unjust enrichment against the trustees, seeking restitution of the sums paid out from his pension funds.

He argued that the IPA had been concluded under a mistake of law and should be set aside and the payments made under the Agreement repaid.

The IPA was found to be a compromise agreement: it settled a pre-existing dispute in that it headed off an application for an IPO that would otherwise have been made by the trustees. The court observed that the rules of mistake apply to compromise agreements as they do to other contracts

The court observed that "*a mistake will more likely arise where a well-established and unquestioned rule of law is dramatically overturned than where a single decision on a new and difficult point is overruled*". The latter will be a case of misprediction. The primary requirement for setting aside a contract on grounds of mistake did not exist in this case

Jeremy Philip Elston v (1) Lawrence King (2) Sue Roscoe (trustees in bankruptcy of Jeremy Philip Elston) [2020] EWHC 55 (Ch).

Removal of reporting restrictions

The joint liquidators of Comet (formerly joint administrators) applied for directions permitting them not to carry out any further investigation into the validity of a fixed and floating charge held by a single purpose vehicle ("HAL") that had been granted by Comet under a year before it collapsed into administration.

The joint liquidators joined the Institute of Chartered Accountants of England and Wales ("ICAEW") as a respondent to the application on the ground that the ICAEW had threatened to report the joint liquidators to their licensing body if they transferred further funds to HAL

The joint liquidators were already subject to disciplinary proceedings that had been commenced by ICAEW in 2014 with complaints, inter alia, that when the joint liquidators accepted their appointment originally as joint

administrators they had not put in place sufficient safeguards to address conflicts of interest that they had as a result of their prior relationship with HAL and its ultimate owners.

Sir Nicholas Warren held in a judgment handed down on 7 June 2018 that, contrary to the advice that the joint liquidators had received, there were a number of issues surrounding the grant of the security to HAL that deserved investigation and that the joint liquidators, by reason of their perceived lack of independence as a consequence of their prior relationship with HAL, should not carry out those investigations. The Judge went on to hold that the investigations should be carried out by an independent additional liquidator, which the Judge appointed at a subsequent hearing. Reporting restrictions were imposed on the decision which were only lifted in January 2020 and the details of the judgement can now be made available

In the matter of Comet Group Limited (in Liquidation) [2018] EWHC 1378 (Ch)

Breathing Space Initiative

On 6th February 2020 the government issued an Impact Assessment and Press Release relating to its new breathing space initiative due to be introduced in early 2021.

The initiative will mean that individuals with a debt problem will be given a 60 day breathing space period during which they will be protected from enforcement action and interest payments frozen.

This is conditional on individuals instructing professional debt advisors to find a long term solution to their problem.

The breathing space will also be afforded to individuals with mental health issues whilst they are receiving NHS treatment and they will not be required to instruct debt advisors to be given this protection.

The scheme is to encourage individuals to seek professional advice and it is anticipated that over £400,000,000 of extra repayments will be made in the first year of the scheme.

Inference from an Omission

In a recent case the High Court has held that desire can be inferred when considering preferences pursuant to s239(5) Insolvency Act 1986.

In this case Mr Flatman ran a business in part as a sole trader and in part through his limited company. Two accounts were in operation, one account in the name of Mr Flatman and another in the name of the business. The accounts operated so that incoming payments were transferred to the company account and outgoing payments from the personal account. Funds were automatically transferred from the company account to the personal account to cover the outgoing payments and the personal account generally operated as being close to nil.

The company entered difficulties in 2013 and later went into administration. Prior to the administration, payments of over £375,000 were made from the personal account, which were ultimately funded by the company account by automatic transfer.

At first instance the court held that these payments were preferences and were recoverable from Mr Flatman with interest. Mr Flatman appealed on the basis that there was no evidence of desire, and one such reason supporting this was that the payments were made automatically.

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On appeal the High Court held there was an abundance of information from which the court could infer desire and ultimately that the transactions were preferences. One such example being the purchase of chicken feed when the company had stopped buying new chicks which meant that the feed was for the benefit of Mr Flatman, not the company.

Re Paul Flatman Ltd (In Creditors Voluntary Liquidation) [2019] EWHC 3338 (Ch)

Covid-19

Carrick Read will continue to operate as normal in providing the best possible service to its clients. We request during this time that clients primarily communicate with staff by either the main office telephone number 0113 2467878 or by email, details of which can be found at the end of this newsletter. We would like to send our best wishes to all our clients colleagues and contacts during this uncertain time.

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