CARRICK | READ
INSOLVENCY LAW FIRM

UPDATE

September 2016

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

Consumers to have preferential status?

Consumers could be set to jump up the insolvency hierarchy if Parliament backs the latest law commission recommendations.

The Law Commission's report Consumer Prepayments and Retailer Insolvency placed before Parliament on the 13th July 2016 recommends, amongst other things, that consumers who prepay for goods or services over £250 in the 6 months prior to a formal insolvency process should be paid as preferential creditors.

The general recommendations mean that consumers would become preferential if:-

a) The person is a consumer under Section 2(3) of The Consumer Rights Act 2015;

b) There is a prepayment by the consumer;

c) The prepayment amounted to £250 or more in the 6 months prior to insolvency; and

d) The consumer did not use a payment method which offers a charge back remedy (ie credit card).

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.

Carrick Read Insolvency Solicitors
12 Park Place, Leeds LS1 2RU
T: 0113 246 7878
F: 0113 243 9822
E: thepartners@carrickread.com

Carrick Read Insolvency

Newsletter September 2016

The proposed recommendations appear to have been generated by the number of recent large scale retail insolvencies.

IVA Chairman's Decision

A creditor (AB Agri) had served a bankruptcy petition on Mr Curtis who sought an IVA. The Chairman of the IVA meeting, Mr Maxwell, admitted the vote of the creditor for £1. The IVA was approved. If the creditor's vote had been admitted in full the IVA would have been rejected. The creditor challenged the decision.

Judge Behrens in the Leeds County Court decided that Mr Maxwell should have permitted AB Agri to vote for the full amount of its debt noting that the only provision of The Insolvency Rules 1986 permitting a Chairman to admit a vote for only £1 was Rule 5.21(3) which applies only in relation to unliquidated debts. The creditor's debt was liquidated.

The Chairman therefore had to approach the creditors entitlement to vote by reference to Rule 5.22 (4) which permits a Chairman to admit a claim for voting purposes but to mark it objected to. A Chairman should only reject if he is certain it is bad. If there was any doubt it should be admitted but marked as objected to.

The proposal was set aside and the Judge concluded that Mr Maxwell's conduct fell below the standard to be expected of an insolvency practitioner and ordered him to pay 50% of the costs.

See *AB Agri Limited v (1) Stephen John Curtis (2) Robert Alexander Maxwell (3) Rob Sadler (2016) EW Misc B18*

Validation Order

Validation Orders under Section 127 of IA 1986 will only be made:-

a) in special circumstances;
b)where a particular transaction is one that is in the interests of the creditors as a whole;
c)the circumstances warrant the overriding of the pari passu principle.

A company that supplied wholesale electrical goods to Edge Electrical Limited applied for a validation order where they had received payment after the issue of the Petition but before advertisement. Having failed at first instance to obtain the order the company appealed on the basis that the payment was made in good faith and the parties were unaware that the Petition had been presented.

However, the Appeal was dismissed on the basis that goods supplied were available to the company before payment had been made and it was not in the best interests of the general body of unsecured creditors.

See *Express Electrical Distributors Limited v Beavis and Ors 2016 EWCA CIV 765*

Bankruptcy Appeal Costs

A debtor appealed against a Bankruptcy Order made against him. The Appeal was dismissed. The debtor argued that Rule 12.2 of the Insolvency Rules 1986 precluded the Court from making an Order against him in respect of the costs because they were to be regarded as expenses of the bankruptcy.

The Court determined that Rule 12.2 was to safeguard persons who had incurred costs and expense which would promote the interests of

the creditors of the bankrupt. It was not designed for the protection of those who made unsuccessful claims and in the circumstances a costs order was made against the bankrupt.

See *Cooke v Dunbar Assets Plc (2016) EWHC 1888 (Chancery)*

Extent of Administration Moratorium

The Court of Appeal upheld an earlier decision allowing a third party to be joined to proceedings brought by MDL which had entered into administration.

The Court interpreted para 43(6) of Sch B1 of IA 1986 as not applying to applications of a defensive nature. Here the Applicant was not seeking any relief against the company and on that basis the moratorium did not apply.

See *Cooke v Mortgage Debenture Limited (2016) EWCA CIV 103*

Value of TUV Claim

A bankrupt transferred shares to family members after the presentation of a Bankruptcy Petition and, upon appointment, the Trustees in Bankruptcy sought to recover the shares as void dispositions.

The day before trial the Respondents conceded the transfers were void and agreed to retransfer the shares.

The Court held that the Trustees were entitled to the value of the shares as at the date of the transfer less any value remaining in the shares at the point they were retransferred back to the Trustees. The Court also held that the correct valuation of the shares was fair value rather than market value. The claim was not limited to the value of the shares at the date of retransfer

See *Ingram v Ahmed (2016) EWHC 1536 (Chancery)*

Liquidators' Costs

The Liquidators in the Ralls Builders case have had another attempt at Court recovery from the directors further to their previous failed application referred to in our June newsletter

On this occasion the Liquidators sought an Order from the Court that the directors contribute to the costs and expenses of the previous lost application primarily being the Liquidators' own time costs.

Once again the Liquidators were unsuccessful on the basis that office holders cannot recover their own fees and expenses unless they were bringing a particular expertise, akin to an expert, to the case. In this matter they were not.

See *Re Ralls Builders Limited (2016) EWHC 1812 (Chancery)*

Transaction at Undervalue Claim against Directors

The case is a further example of the difficulties faced by Liquidators bringing claims against directors where there is a lack of knowledge of the financial transactions taking place between the company and directors prior to appointment due to uncooperative directors.

The Liquidators initially brought a claim against Mr and Mrs Lawson for sums in excess of £100,000. Following the application Mr Lawson entered a Voluntary Arrangement and the claims against him were discontinued.

Carrick Read Insolvency

Newsletter September 2016

Further to the hearing of the case, (at which Mr Lawson represented Mrs Lawson) and explanations being given of numerous credits and transactions involving the parties the Court determined that only the sum of £12,700 represented a benefit to Mrs Lawson after the deduction of amounts including car expenditure and other payments made on behalf of the company.

See *Martin Smith and Nicola Hawksley (As Joint Liquidators of Kiss Cards Limited) Kiss Cards Limited (in Liquidation) and (1) Simon James Lawson (2) Kathryn Lawson*

Dishonest Assistance

Goldtrail was a tour operator which went into Liquidation with passengers stranded overseas and owing £20M for repatriation.

The Appellants in the case had dishonestly assisted the director to divert to himself £1.4M and they had also dishonestly assisted the director in misapplying £1.25M of Goldtrails money to a Seychelles company owned by the director.

On Appeal the Court had concluded that the Judge should have reduced the compensation payable by the Appellants by £500,000 for flight seat payments that had been recouped. Goldtrail had not suffered a loss for this amount because it was recouped prior to Liquidation and the directors misuse of this figure did not cause Goldtrail any loss.

See *Goldtrail Travel Limited (in Liquidation) v Aydin (2016) EWCA 371*

Pension Recovery

The debtor, a solicitor, was adjudged bankrupt in 2014. Between April 2007 and September 2010 he had made four payments into his pension scheme of £550,000.

The Trustees in Bankruptcy could show that the pattern of contributions were clearly different from his historical pension contributions.

The Court determined that there was no definition as to what is excessive and it was a question of fact on a case by case basis. It was also determined that it had to be a substantial purpose to put assets beyond the reach of creditors in making excessive contributions in line with similar wording in The Insolvency Act in relation to Section 423.

In this instance the Court determined that these were excessive contributions caught by Section 342 IA 1986.

See *Stanley and Barber v Wilson and Ors (Unreported)*

HMRC Notices

The Trustee in Bankruptcy in this case carried out extensive investigations and obtained documents. HMRC applied under paragraphs 2 and 3 of Schedule 36 to the Finance Act 2008 for approval to give the Trustee in Bankruptcy a third part notice in relation to those documents.

The Trustee applied to the Court under Section 303 of The Insolvency Act 1986 for directions as to which documents should be disclosed. The bankruptcy registrar proposed significant restraints on the operation of the notice.

On Appeal the Court determined that the registrar could not make an Order that the Trustee should not comply with an obligation imposed by another statute. The only guidance the bankruptcy registrar could give to the Trustee was to tell him what the third party notice said. To hold otherwise would

undermine the basis on which parliament had given powers to the Revenue

See *Revenue and Customers v Ariel (2016) EWHC 1674*

Making of Administration Order

Upon an application being made by third parties for an Administration Order, although the Court determined that the conditions set out in paragraph 11 of Schedule B1 Insolvency Act 1986 had been met, in the commercial judgment of the Judge on the assessment of the facts, another alternative was to allow the company time to turn its business around without the implementation and costs of an insolvency procedure. This, it was believed, would ultimately have better prospects for the company's creditors as a whole and the Administration Order would not be made.

See *Rowntree Adventures Limited v Oak Property Partners Limited (2016) EWHC 1523 (CH)*

Contingent Assets

The Court of Appeal considered the status of contingent assets within the balance sheet test for insolvency.

The Liquidator of Rococo Developments Limited sought recovery of director's loan repayments of £450,000. the directors argued that at the time the payments were made the value of the company's assets was greater than the amount of its liabilities taking into account its contingent assets and the action should fail. The contingent asset was an unlawful dividend of £75,000 made at about the time the preferential payments were made.

The Court of Appeal concluded that the claim against the directors with regard to the unlawful dividend payment was itself contingent on the company's subsequent insolvency. It was contingent on being discovered and being pursued neither of which was likely to happen so long as the directors remained in control. As a result the claim against the directors for unlawful dividend was so remote a contingency as not being capable of being taken into account.

See *Evans and Another v Jones and Another (2016) EWCA CIV 660*

Dividends Falling Under Section 423 IA 1986

The Court determined that Section 423 was efficiently widely drafted to include the payments of a dividend.

In this case the payment of a dividend satisfied the Section 423 purpose. There was evidence to show that the intention of the company through its directors in declaring the dividend was to remove from the group of companies a risk that the indemnity liability to a third party creditor would exceed the amount available to meet such liability.

On the basis of the above the payment of the dividend was a transaction defrauding creditors.

See *BTI (2014) LLC v Sequana SA and Others (2016) EWHC 1686*

Trustees as Shareholders

The debtor was declared bankruptcy in June 2014. Part of the estate was the husband's shareholding in a company. The Trustees were not registered as members until March 2015.

The Trustees presented a Petition alleging that the wife of the bankrupt had conducted the company's affairs in a way which was unfairly prejudicial to the Trustees' interests

as members.

The wife of the debtor argued that the Trustees had no standing to present the Petition because Section 124 (2) (b) of the IA 1986 prevents contributories from presenting a Winding Up Petition unless the shares have been registered in their name for at least 6 months.

The Court determined that the Trustees did not need to be registered as members of the company in order to avail themselves of shareholder relief because:-

a) Section 250 of IVA 1986 provides that a person to whom shares are transferred by operation of law is to be regarded as a member.

b) The Trustees were therefore regarded as members from the date that the shares vested in them by operation of law and Section 214 (2) had to be read accordingly.

See *Stratford Hamilton and James Dowers (Trustees in Bankruptcy of Charles Newall) v Maureen Francis Brown and C and MB Holdings Limited (2016) EWHC 191 (CH)*

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

Contact Details

For more information or to discuss how we may be able to assist with your insolvency law issues, please contact:

Andrew Laycock
T: 0113 3804313
F: 0113 2439822
E: ALaycock@carrickread.com

David Barker
T: 0113 3804312
F: 0113 2439822
E: dbarker@carrickread.com

Jennie Blagg
T: 0113 3804893
F: 0113 2439822
E: JBlagg@carrickread.com