Newsletter September 2019

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.

Carrick Read attending Leeds Big Sleep!

On 28th November four members of Carrick Read will be attending the Leeds Big Sleep. The individuals attending the event will be sleeping outside for the evening in order to raise money for St. Gemma's Hospice, St. George's Crypt and the Leeds Rhinos Foundation. To find out more information or to donate to these three amazing charities please use the link below:

https://uk.virginmoneygiving.com/CarrickRead

Liability must be triggered for Statutory Demands

The court has reiterated that liability must be triggered before a statutory demand can be served under s268(1) Insolvency Act 1986 for a liquidated sum payable immediately.

Mr Martin had signed a Personal Guarantee guaranteeing

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payment or discharge of the debts of three companies to McLaren Construction Limited. In June 2018, a Statutory Demand was served on Mr Martin but was later withdrawn. In October 2018, a second Statutory Demand was served upon Mr Marin which was the subject of the proceedings. Mr Martin challenged the Statutory Demand as he considered McLaren had not made a proper written demand under the terms of the Personal Guarantee.

The court ultimately agreed with Mr Martin despite McLaren making a demand by email prior to the service of the statutory demand. The court considered that the Personal Guarantee did not provide for service of the demand in this format.

It is extremely important when relying upon a Personal Guarantee to consider the terms of the document and the required procedure.

Martin v McLaren Construction Ltd [2019] EWHC 2059 (Ch)

Insolvent Airlines following the Monarch collapse

Following the collapse of Monarch Airlines the Government commissioned the Airline Insolvency Review, which has recently published its final report. The purpose of the report was to assess the adequacy of protection for travellers, given that in the Monarch collapse some 110,000 passengers were stranded and over 300,000 bookings lost. A number of the stranded passengers were not ATOL protected and the Government intervened, instructing the Civil Aviation Authority ("CAA") to provide repatriation assistance to overseas passengers, the estimated cost of which was £60 million.

The key recommendation of the report is that a Flight Protection Scheme ("FPS") be introduced to ensure that UK based passengers with return flights are protected should an airline become insolvent. It is proposed that the scheme be funded by the private sector, with airlines making contributions to the FPS based on each airline's risk of insolvency, which on any given year is estimated to be between 0.1% and 3%. It is considered, in reality, the cost will be passed to consumers and the total cost is estimated to be between £0.40 and £0.50 for each UK originating passenger.

It is anticipated the report will be widely debated prior to any such scheme being implemented and we will continue to follow the progress the report makes.

Bankruptcy: Presumption of advancement between parent and child

In this recent High Court case Trustees in Bankruptcy sought to establish that the Bankrupt was the sole beneficial owner of three properties which he had purchased for his adult daughter.

The Bankrupt had been a successful entrepreneur dealing with start-ups and listings on the UK stock market. The Bankrupt's daughter, Ms Watkins had by her own admission had a fortunate upbringing and had received a monthly allowance of £320 paid from her parents Joint Account until she started employment in 2007. The Bankrupt's children were also able to invest in a number of the companies the Bankrupt was involved in. Any gains made or gifts from family members were paid into the Joint Account.

At the time of purchasing the properties (in 2003, 2006 and 2007) the Bankrupt did not appear to be insolvent. The properties were purchased from funds in the Joint Account and by way of mortgage from a third party.

The Bankruptcy Order was made in 2012 and the Trustees in Bankruptcy sought declarations that the Bankrupt was the sole beneficial owner of the properties, that the transaction defrauded creditors or in the alternative that the purchases were TUVs. As such the child/parent presumption of advancement was considered by the Court.

There were three significant observations made by the Court:

- The presumption is not limited to minor children as suggested by previous case law.

- The presumption is not limited to financially dependent children or where it is established that the parent is obliged to provide for the child. The presumption may be weaker in cases where a child is financially independent, but it may still occur.

- The presumption is not to be considered 'very weak' in the modern age and the Judge distinguished matrimonial cases from the parent/child scenario

The applicants failed to rebut the presumption of advancement in favour of Ms Watkins. The court concluded that Ms Watkins was always intended to be the sole beneficiary of the properties.

The presumption remained for the properties purchased in 2003 and 2006 as at this time Ms Watkins was still financially dependent on her parents. The court did not consider the argument that the Bankrupt would have appointed his daughter as trustee to make any sense, whereas the argument that Ms Watkins was always intended to be the beneficial owner did.

It was found that for the property purchased in 2007 the Bankrupt and his wife never intended to retain any beneficial interest in the property.

The Judge also rejected the submissions that there had been an attempt to place assets beyond the reach of creditors, and further rejected that there was any evidence of a TUV.

The Trustees were criticised for their poorly evidenced case. Office holders must ensure all relevant non-privileged documents in their possession must be exhibited to their supporting witness statement, otherwise the court may need to make an order for disclosure.

Nicholas Stewart Wood and David John Standish (as joint trustees in bankruptcy of Karl Eric Watkin) v Kate Rebecca Watkin [2019] EWHC 1311 (Ch)

<u>Change of position defence and section 127</u>

S127 of Insolvency Act 1986 ensures that any disposition of property between the presentation of a winding up petition and the making of a winding up order be deemed void unless a further order of the court is made.

Where there has been a disposition (other than the disposition of money) which is deemed void under s127, the company will remain the owner of the property and is entitled to recover the property by asserting its rights as owner. In the case where the property is money, the remedy is restitutionary and may lead to the recipient of the money raising the defence of change of position.

In a recent case, the court stated that it was “not easy to think of circumstances in which the court would decline to make a validation order, but nevertheless find it inequitable to order repayment of a benefit received”.

In the case, Nisa had taken payments of over £160,000 from MKG Convenience Ltd between the presentation of the winding up petition and the making of the winding up order. The liquidators sought to recover sums pursuant to

s127. Nisa cited a change of position defence relying on good faith of the validity of the payments.

The judgment makes clear that the representative of Nisa had been obstructive in the responses to liquidators and even attempted to avoid giving a full account in oral evidence.

The court concluded that Nisa did not show that the payments had been to the benefit of MKG's creditors. Counsel had not provided the court with case law where the defence had been successful against s127. The judge held that the defence is available in such claims but that its success is limited in the same way that the courts discretion to validate payments is restricted.

Dingley and others v Nisa Retail Ltd (Re MKG Convenience Ltd (in liquidation))

To pay a dividend or not to pay a dividend – that is the question

A recent High Court decision has considered the payment of dividend prior to insolvency and the key principles surrounding such distribution.

The case involved a holding company and a number of group companies. In October 2007, one of the group companies was demerged from the holding company and the shares were distributed by way of dividend in specie to the shareholders of the holding company, further to which some of the shares would be sold to a third-party buyer. Half of the sale proceeds were then loaned to the holding company to assist with cash flow.

In 2008 the holding company entered administration and entered compulsory liquidation in December 2009. The liquidators challenged the dividend payments and one of the main issues considered by the court was whether the liquidators had to prove that the directors knew or ought to have known there were insufficient reserves or if the payment of the dividend was a strict liability offence.

The Judge concluded that it was not a strict liability offence and the threshold was if the directors knew or ought to have known the facts that would have given rise to the dividend being unlawful, even if they did not realise this would result in the dividend being unlawful.

However, the Judge concluded that in this case there were sufficient reserves available but even if not the directors

would not have been liable as it was reasonable for them to rely on their finance colleagues and external advice to ensure the accounts justifying the dividend were properly prepared and the dividend could be justified.

Burnden Holdings (UK) Ltd (in liquidation) v Fielding [2019] EWHC 1566 (Ch)

Extended Bankruptcy Restrictions for Overdraft Happy Couple

The Insolvency Service have reported a case in which two bankrupts have had their bankruptcy restrictions extended for 8 and 9 years due to their abuse of their banking overdraft. The couple opened a Joint Account in December 2016 and deposited a total of £8 into the account. Within the same month the pair made a series of large transactions despite knowing they did not have the funds or the overdraft facility to make such payments.

Payments of around £165,000 were authorised by the bank in error. There were further attempts to make payments of £180,000 but this was declined by the bank.

When the couple were adjudged bankrupt the Official Receiver pursued bankruptcy restrictions due to the seriousness of their actions, and restrictions were granted for 8 and 9 years.

This means neither of the individuals will be able to obtain credit above £500 without disclosing their bankruptcy status.

Continuing the trend: More Women Insolvent than Men in 2018

The Insolvency and Restructuring Body R3 has reported that in 2018 54.3% of personal insolvencies involved women.

R3 have also reported that there is a higher concentration of bankruptcies in the North East and in coastal towns. The report has also highlighted the gender differences in the insolvency relief sought. A higher proportion of women sought Debt Relief Orders, which are targeted at low level debts, whereas a higher number of men faced bankruptcy which was often associated with their role as a director or due to a personal guarantee given in the course of business.

The report further established that there is a much higher rate of insolvency in coastal towns which are often dependant on tourism.

A copy of the R3 article can be found here:
https://www.r3.org.uk/index.cfm?page=1114&element=33691&refpage=1008

MVL and distributing surplus monies to members

The High Court has recently considered whether members of an incorporated club were able to sell the assets, wind up the club and distribute surplus monies amongst members. The alternative (especially if the club was part of a wider network) would be that any accumulated funds be allocated to achieving the objectives of the club. The court concluded that it was dependent upon the application of statute, general law and the club's own constitution. In this case the court concluded that distribution of the significant surplus monies was valid.

Qureshi (in her capacity as liquidator of Edgware Constitutional Club Ltd) v Association of Conservative Clubs Ltd [2019] EWHC 1665 (Ch)

Self-dealing rule not engaged by a sale by a receiver to a buyer connected with the mortgagee

A High Court decision has clarified that the self-dealing rule, which does not allow a mortgagee to sell to itself or a trustee for itself does not apply to a sale by a receiver of a company. This is because the receiver acts as an agent for the mortgagor. The High Court further stated that the fair dealing rule would not apply in these circumstances.

The case also confirmed that a mortgagee has no duty to sell, within a reasonable time or even at all. The receiver does not have a duty to sell but cannot remain passive if this would harm the interests of the mortgagee or mortgagor. The court stated that receivers must act in good faith and to secure the payment of the debt when exercising their power of sale. To breach this there must be intentional conduct by the receiver and negligence will not be sufficient to meet the threshold.

DCP Ltd v Barnett and Belcher [2019] EWHC 700 (Ch)

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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