CARRICK | READ
INSOLVENCY LAW FIRM

September 2018

UPDATE

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

Revised Insolvency Practice Direction

On 4 July 2018, a new Practice Direction – Insolvency Proceedings (PDIP) came into effect, revising and replacing the PDIP that came into effect on 25 April 2018 considered in our previous newsletter.

Most of the changes made by the new PDIP relate to the types of applications that can be heard in county court hearing centres that are not located at a Business and Property Court nor in central London. These types of hearing centres, although they may have insolvency jurisdiction, are treated as non-specialist centres and the PDIP (April) 2018 had severely curtailed the types of insolvency application they could hear. However, as this did not reflect the reality of how insolvency business is dealt with in county courts around the country, the new PDIP expands the insolvency jurisdiction of such courts. The new PDIP also provides an option for more complex insolvency proceedings filed in a non-specialist county court hearing centre to be transferred to one five new specialist county court hearing centres. These exist in addition to the new Business and Property Courts and are located at Brighton, Croydon, Medway, Preston and Romford.

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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Views requested about the non-recoverability of success fees and ATE premiums

The government is undertaking a post-implementation review (PIR) of Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act (LAPSO) this year and published its initial assessment on 28th June 2018. Following publication, the Government sought views from stakeholders (including the insolvency sector) on the impact of its reforms to ascertain if stakeholders were aware of categories of cases where the number of meritorious cases has increased or decreased because of the non-recoverability of the success fee and ATE premiums. The closing date for responses was 24th August 2018 and we wait to see if the insolvency profession considers that the abolition of the insolvency exemption from LAPSO is still an issue, or whether the growth in third party funding has bridged the gap.

Administrators not liable for selling a business free of obligations owed to a creditor

The High Court held that the administrators did not breach any duty and were not liable for procuring a breach of contract by effecting a sale of a business of a company in administration that left behind certain contractual obligations (relevant obligations) with the insolvent company. Applying established principles of construction, the court found that the relevant obligations had not been protected by express or implied terms that they were to be transferred to any purchaser of the company's business. While not containing any 'new law' the case provides a helpful examination of why the perceived injustice of an administrator's sale of the company's assets without transferring its obligations is unlikely to give rise to successful action against the administrator.

Fraser Turner Ltd v Pricewaterhousecoopers LLP and others [2018] EWHC 1743 (Ch) (12 July 2018)

PPF issues guidance on company voluntary arrangements

New guidance on CVAs, published by the Pension Protection Fund (PPF), sets out the issues that it expects to be considered. The guidance is relevant to companies who are considering a CVA which could affect a DB pension scheme, and to advisers working with those companies or with pension scheme trustees.

Where there is a DB pension scheme, a CVA proposal can include the compromise of pensions liabilities with a view to the scheme entering the PPF. Alternatively, it can focus on other issues, with the intention that the pension scheme continues without being compromised or entering the PPF. In each case, the PPF is a key stakeholder. In many cases, the CVA proposal will trigger a PPF assessment period, with the result that the PPF (rather than the pension scheme trustees) will have the right to vote on the proposal. In its guidance, the PPF explains that its approach will depend on what the CVA is trying to achieve. The guidance also confirms that the PPF will usually exercise its right to vote in favour of or against a proposal, rather than abstaining.

Commercial Property and CVA best practice

The British Property Federation (BPF) has produced a document to codify CVA best practice with a view to giving guidance to insolvency practitioners on key items landlords will look for in a CVA proposal. A copy of the BPF's guidance can be obtain from its website at

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www.bpf.org.uk/sites/default/files/resources/CVA%20best%20practice.pdf

Settlement of claims against directors did not prevent liquidators recovering void payments

The High Court allowed a company's liquidators to recover payments received by 16 respondents after the presentation of a winding up petition, on the basis that they were void under section 127 of the Insolvency Act 1986, which provides that any disposition of the company's property made after the commencement of the winding up is void, unless the court orders otherwise.

The court considered that the liquidators' subsequent recovery of funds from the directors in mediation did not bar their recovery of void payments from the respondents: the company's losses had not been recouped in full, so the rule against double recovery was not engaged. The court also considered that section 127 did not preclude the operation of other defences which may have been asserted by the respondents (including, as appropriate, estoppel, good faith for value and change of position) albeit, they did not apply in this case.

Officeserve Technologies Ltd and another v Annabel's (Berkeley Square) Ltd and others [2018] EWHC 2168 (Ch) (15 August 2018)

Principles applying to administrators' decisions whether to assign a claim

On appeal to the High Court a claim, that administrators of a company had unfairly harmed the interests of a creditor by refusing to assign a claim to the creditor, was dismissed. The Court found that there were fundamental flaws in the creditor's appeal (i.e. it hadn't appealed the original finding that it had not suffered unfair harm) meaning it had to be dismissed. The court did however consider the approach and procedure that should apply:

A) When an administrator is considering whether to assign a claim by the company in administration against a third party.

B) In applications under paragraph 74 of Schedule B1 where the issues concern the merits of an action against a third party who wishes to be heard on the paragraph 74 application.

LF2 Ltd v Supperstone and another (Administrators of Pennyfeathers Ltd) [2018] EWHC 1776 (Ch).

Bankruptcy order set aside for serving no useful purpose

The High Court considered the court's power to dismiss a bankruptcy petition where bankruptcy would serve no useful purpose and set aside a bankruptcy order based on a petition presented in respect of unpaid council tax on the basis that the debtor had no assets to satisfy her liability in bankruptcy and no investigation of her affairs would bring anything to light and so there was no benefit in making her bankrupt. The appeal was successful and the case demonstrates that local authorities must show a benefit to making someone bankrupt where petitions are based on unpaid council tax.

Lock v Aylesbury Vale District Council [2018] EWHC 2015 (Ch) (9 July 2018)

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Dismissing a bankruptcy petition

The High Court considered the meaning of the words "an appeal is pending" in rule 10.24(2) of the Insolvency (England and Wales) Rules 2016 (*SI 2016/1024*) (IR 2016), which allows for the dismissal of a bankruptcy petition (brought on a judgment debt or a court order for payment) on grounds that include that an appeal is pending from that judgment or order.

The court made a bankruptcy order in this case on the basis that there was no jurisdiction to dismiss the bankruptcy petition or stay the proceedings under rule 10.24(2) unless there was a pending appeal. The words in rule 10.24(2) are predicated on the basis that there is an appeal and where there is merely an application for "permission" to appeal, there is no appeal no "appeal pending" within the meaning of rule 10.24(2).

Barker v Baxendale-Walker [2018] EWHC 1681 (Ch) (10 July 2018)

Regulator successful in anti-avoidance case against Box Clever

TV rental business, Box Clever, was created as a joint venture between Granada (now ITV) and Thorn (now Carmelite). The Box Clever business was later sold, and administrative receivers were subsequently appointed over Box Clever companies. In the first anti-avoidance case by the Regulator to be heard in full by the Upper Tribunal, the Upper Tribunal concluded that it was reasonable for the Regulator to issue a financial support direction (FSD) to the target companies in the Box Clever anti-avoidance case. The Tribunal also found that the Regulator had jurisdiction to issue the FSD since the appointment of administrative receivers to the joint venture in this case had not broken the chain of control.

Whilst mainly of interest to pension lawyers, the Tribunal's interpretation of provisions in a debenture (relating to exercise of voting rights in shares subject to security created by the debenture) is of wider significance. The Tribunal found that the chargee did not automatically become entitled to exercise voting rights after the facility agent declared a default and stated that the debenture was enforceable. The debenture provisions also required the chargee to serve notice on the security providers assuming the share voting rights, whether the shares were legally mortgaged or equitably charged. Generally, for lenders it is important to ensure that assumption of voting rights is not automatic on the occurrence, or declaration, of an event of default because there may be unintended consequences.

Anti-suit injunctions and arbitrating insolvency-related claims

In early June of this year the Commercial Court gave its judgment in Nori Holdings Ltd v Bank Otkritie Financial Corp and provided guidance on three key issues:

1. The Court clarified that West Tankers1 remains good law insofar as parties will not be granted anti-suit injunctions by the English Court to restrain proceedings commenced in other Member States in breach of an agreement to arbitrate.

2. The Court confirmed that parties are entitled to seek anti-suit relief from the Court, rather than being obliged to apply to the arbitral tribunal.

3. The Court held that the arbitrability of claims arising in an insolvency situation (which generally do not fall within the scope of arbitration because tribunals cannot make orders that bind non-consenting third parties (such as other creditors)) should be considered by reference to the nature of the relief sought in the particular case in question, rather than by the fact that the claim arises in an insolvency situation e.g. a tribunal may not be entitled to grant an order for the winding up of a company (given the lack of consent to arbitration), but is able to determine whether a particular transaction constituted a fraud and whether that entitles a party to relief arising from that fraud.

Nori Holdings Ltd v Bank Otkritie Financial Corp [2018] EWHC 1343

Environmental law v insolvency

Issues arise between environmental law, and the status of environmental obligations of companies once they fall into insolvency as the "polluter pays" principle, which underpins much of the environmental law in the UK, is difficult to reconcile with insolvency principles.

Whilst the case continues, and a number of issues remain to be determined, this recent Court of Sessions (Edinburgh) judgment, ruling that obligations to carry out works required by the Environment Agency (for England & Wales) under a form of enforcement notice following contamination of land, constitute contingent liabilities of a company is likely to have important implications for insolvency practitioners on both sides of the border.

Dawson International Public Limited Company & Dawson International Trading Limited [2018] CSOH 52

ECJ confirms minimum guarantee of 50% compensation for members on employer insolvency

The ECJ has confirmed that members are entitled to an "individual minimum guarantee" of 50% of the value of their entitlement to old-age benefits, under Article 8 of the EU Insolvency Directive (Directive 2008/94/EC), rather than an average level of pension protection.

The benefits of the member who originated the claim had been reduced by 67% due to his retirement before normal pension age resulting in the application of the PPF compensation cap and the restriction on the application of indexation to his benefits. The case now returns the Court of Appeal who will consider how the ECJ's judgment will apply. In the meantime, the PPF has issued a statement confirming that it is working with the DWP to understand what action it can take prior to any change to the law and before the UK proceedings are concluded.

Grenville Hampshire v Board of the Pension Protection Fund (C-17/17) EU:C:2018:674 (6 September 2018).

Questioning the decision in Global -v- Hale

On appeal, Liquidators sought to overturn two adverse decisions, in three related claims, regarding substantial sums, stated to have been unlawfully paid by a company, to the Directors when there was; insufficient distributable profits, a lack of formal employment contracts and/or formal resolutions authorising the payments. The Directors cross appealed the decision upon which the liquidators had been successful relying on the recent decision in *Global v Hale, arguing that* the payments made to the Directors were not in fact dividends but remuneration.

The appeal judge rejected the Directors arguments, adopting instead the approach of *Guinness v Saunders,* which effectively established the principle that a director may not make an unauthorised profit out of his position and that this would override any unjust enrichment claim the directors might have against the Company.

This is the second recent case to consider the decision in Global v Hale (which is itself subject to an appeal listed in October) and further to which it appears the principle established in *Guinness v Saunders (*in reaching decisions on unlawful dividends and misfeasance claims) remains good law regardless of the decision in *Global.* This case will also be useful authority in establishing where courts should, when considering the burden of proof, give the "*benefit of the doubt*" to Liquidators rather than directors when there is a lack of evidence.

Toone v Robbins [2018] EWHC 569

Reasonable repayment terms

In this recent case the court of appeal considered the reasonableness (or otherwise) of a judgment debtor's application under CPR rules 40.9A to vary the costs' order against her to allow for monthly repayments be made.

This order was granted at first instance, on the basis that it was 'reasonable and proportionate' to grant the order in light of the appellant's financial circumstances but overturned on appeal (subsequently endorsed by the Court of Appeal) due to the Judgment debtor having no realistic prospect of discharging any significant amount of her costs' liability in the near future.

As many readers will be aware, it has long been the habit of lower courts to make orders for the payment of judgment debts by instalments as low as £1 per month, thus interfering with the rights of judgment creditors to use various enforcement methods that require a debt to be due and owing. This is an important decision by the Court of Appeal as it construes that, where a judgment debtor applies to pay a judgment debt by instalments, they must put forward a realistic payment schedule for the outstanding debt and a reasonable time frame. If this test is not met a court should refuse the judgment debtor's application. In circumstances, whereby an Instalment Order would prevent a judgment creditor from enforcing its judgment this decision, if followed by District Judges, is likely to allow the judgment creditors to enforce their judgment debt as they may choose through other enforcement methods such as Charging Orders or Bankruptcy.

Diana Loson v (1) Brett Stack (2) Newlyn PLC [2018] EWCA Civ 803

Conflicts of interest in Administration

Joint administrators were appointed in respect of three connected companies, TPS, ABC and CP. A creditor sought the removal of the administrators pursuant to para 88, Sched B1 IA 1986 on the basis that, as regards a TUV claim, there was an actual conflict of interest between their duties as administrators of TPS (the potential claimant) and their duties as administrators of ABC and CP

(the potential defendants).

The removal application was dismissed, the court finding that (in the context of large group insolvencies) the appointment of a common office-holder is prima facie likely to be in the interests of the general body of creditors for it will be more efficient and less costly

(*SISU Capital Fund Limited & Ors v Tucker & Ors* [2005] EWHC 2170 (Ch) applied).

The approach to a conflict will depend upon the particular circumstances, including: (a) the nature and extent of the conflict (from situations where the investigation is still at an early stage to those where litigation is already in prospect); (b) the point at which the question is being considered (either before or during appointment); (c) whether and if so how the conflict can properly be managed at that time and – insofar as can be known – at a future stage; (d) the consequences for and against removal both in terms of time and cost and more generally.

Mark Grahame Tailby and Tyrone Shuan Courtman v Hutchinson Telecom FZCO [2018] EWHC 360 (Ch

Liquidator loses protection of a freezing order following serious failings at earlier ex parte hearing

In Banca Turco Romana S.A. (in liquidation) v Cortuk and Others, the Commercial Court in London has underlined the need for applicants to give full and frank disclosure when seeking relief at ex parte (without notice) hearings, in this case arising further to a liquidator's application for recognition and registration for enforcement of an overseas (Romanian) judgment. The liquidator also sought (and obtained) a freezing order against non-party defendants, said to have assisted in the concealment of assets.

At a subsequent hearing the non-party defendants applied (and were successful) in setting aside the orders on the basis that the liquidator had failed to exhibit material documents. The freezing orders were subsequently lifted with the court observing that it was not necessary to determine whether the continuation of the orders or some part of them would have been justified if the liquidators had complied with their obligations to the court. The very fact that it had failed to do so was sufficiently serious to merit the orders being lifted and discontinued in full. The decision underlines the risk in failing to present ex parte applications fairly. In cases where the duty to the court is overlooked, applicants run the risk of losing the benefit of the orders they have obtained, whatever the underlying merit.

Banca Turco Romana S.A. (in liquidation) v Cortuk and Others

Remedy for a void disposition under s284 IA 1986

This application concerned (i) the transfer of shares in various companies by Eaitisham Ahmed (EA) to KA, a family member and the first appellant and (ii) certain shares transferred through KA to other family members, the second to fourth appellants. The shares were transferred in the period between presentation of the bankruptcy petition

against EA and the bankruptcy order. KA and the other appellants resisted all attempts to restore the transferred shares, but before trial, they were restored to the TiBs. The trial therefore concerned the TiBs' monetary claims by which they sought to restore to the bankruptcy estate the fair value of the shares.

The remedy in respect of a disposition which is void under s284 IA 1986 derives from the general law and is restitutionary in nature. The effect of ss278, 283, 284 and 306 IA 1986 was that the shares which were transferred here were held on trust contingently for the bankrupt in the event of a bankruptcy order, but if no such order was made, for the transferee as absolute owner. Following a bankruptcy order and on the appointment of the first TiB there would be a breach of trust if the shares were not restored. The claim by a TiB could include equitable compensation but such compensation had to reflect actual loss.

Re Eaitisham Ahmed [2018] EWCA Civ 519

Duties of an Administrator

In the case Dunbar Assets plc v Davey [2018] EWHC 766 (Ch) the court was asked to consider the duty of care of administrators, the process by which administrators appoint agents, the permissible extent to which they consult the appointor QFCH, and the impact of not justifying the choice of administration objective in the administration proposals. The sole asset of the company was a piece of land subject to a fixed charge. The court held that the administrators had acted appropriately in respect of all the issues raised and held that the actions of the administrators were still valid despite not stating explicitly *why* objectives 3a and 3b could not be achieved.

Dunbar Assets plc v Davey [2018] EWHC 766 (Ch)

Insolvency: Secretary of State fees avoided on 'payment in full' bankruptcy annulment

Mr Safier applied for annulment on the grounds of 'payment in full', payment of his creditors being financed from funds provided by a third party. The application was not contentious but referred to the High Court for determination concerning a dispute over whether or not the Secretary of State fees were payable on the third-party funds provided to the trustees and paid into the Insolvency Services Account ("ISA").

Although accepting that third party funds did not form part of the bankrupt's estate, the Official Receiver submitted that they were received by the trustees in the course of carrying out their functions. Further, had they not been provided to the trustees, the trustees would have realised assets within the bankrupt's estate to meet the debts and expenses of the bankrupt. Therefore when (it previously having been agreed that the Secretary of State fees would not be charged in 'no asset' cases where third-party funds had been paid into the ISA to discharge the debts because of the benefit to the estate) third-party funds provide no additional benefit to the estate, the Secretary of State fees should still be payable. Ultimately the court found against the Secretary of State agreed with the trustees' submissions that the receipt of third-party funds is not part of the trustee's function and the moneys are not payable into the ISA. It follows that no fee is payable in respect of them.

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This decision is of most relevance to bankruptcies in respect of which the petition was presented before 21 July 2016, on which date the previous fee regime was abolished by the Insolvency Proceedings (Fees) Order 2016. However, the court made the point that under the new fee regime, some fees appear to be payable from 'chargeable receipts' paid into the ISA while some are payable without reference to chargeable receipts.

Mohammed Safier and (1) Wendy Jane Wardell & David John Standish (Joint Trustees in Bankruptcy of Mohammed Safier) (2) The Official Receiver

Government response to "Insolvency and Corporate Governance" reforms.

The Department of Business, Energy & Industrial Strategy (BEIS) published, on 26 August 2018, the Government's response to its March 2018 consultation outlining the approach it proposes to take to: strengthen corporate governance in pre-insolvency situations and to improve the insolvency framework in the cases of major failure.

Changes to corporate governance are expected to include: options to require groups to provide explanations of their corporate and subsidiary structures, strengthen shareholder stewardship, dividend reform, access training and guidance for directors and protection of suppliers. Modifications to the insolvency regime are expected to include: measures that regulate disposals of companies in distress within groups, enhance existing recovery powers of IP's in relation to value extraction schemes, new powers to investigate the conduct of the former directors of dissolved companies

Companies with a defined benefit pension scheme should also be aware of proposed reforms put forward by the Department for Work and Pensions, which include the introduction of a civil penalty of up to £1 million for breaches of pension rules, and new criminal offences aimed at directors and others.

A full copy of the response can be found on the BEIS section of GOV.UK: https://www.gov.uk/beis

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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 the above then please do not hesitate to contact us.