AMB LAW

INSOLVENCY UPDATE

No. 10 • June 2015

Welcome to the 10th Edition of **AMB Law's *Insolvency Update***. We cannot quite believe that we have made it to ten editions but last month was AMB Law's 2nd anniversary (which, along with Rasher's wedding anniversary in the same month, we forgot!). Still, it was something of a milestone and year 2 was very good for the firm with increased turnover and profit. Let's hope that that will continue into year 3 (although early signs are not encouraging!).

Some change is afoot and we will be moving our Suffolk offices into new premises on the Masterlord Business park in July. This will bring us much closer to Ipswich and leave us ideally located to service our clients' needs.

As ever, if you have any comments or would rather not receive future Insolvency Updates, please email *office@amblaw.co.uk*.

MISCELLANEOUS

Bank Saved from Inadvertent Mortgage Discharge

NRAM v Evans

The bank sought to rely upon a mortgage deed entered into in 2004 even though it had mistakenly cancelled the registered charge by way of a DS1. The borrowers argued that the charge only applied to an initial loan advanced in 2004, which had subsequently been redeemed, and not to a further loan taken out on 2005 - so the DS1 had been correctly filed.

The loan were both under a single mortgage account with the bank. When the borrowers' solicitors asked for the mortgage to be discharged as the 1004 loan had been repaid, the bank mistakenly acceded to their request. When the bank realised its mistake, it sought rectification of the register.

The court held that the 2005 loan was clearly intended to be secured by the charge – it was clearly stated.

Whilst the bank's mistake was based on its own carelessness, it had been induced by solicitors' letter which had referred to a single account number and stated that the loan had been repaid. The consequences for the bank would have been serious and the borrowers would have gained an undeserved windfall so it would be unconscionable to leave the mistake uncorrected. Accordingly, the court ordered rectification of the charges register to reinstate the charge.

Football Insolvency Rule Changes

The Football League, Football League clubs focus on the future (5/06/2015)

With effect from **8 August 2015**, the regulations that apply to insolvent football clubs will be amended.

A core asset of a company that trades as a football club is the club's share in the Football League (FL share). Only a company holding an FL share may field a team in a League competition. The League regulations prescribe the consequences of a company's owning a club going into administration and the conditions under which the League will allow the transfer of an FL share from an insolvent company to a purchaser (thus allowing the club to continue to participate in the League under new ownership).

The revised regulations provide that:

- Any administrator proposing a sale of the club must liaise with the club's supporters' trust and allow it the opportunity to bid for the club. The club must be marketed for at least 21 days.
- The penalty for a club's going into administration will be increased to 12 points (currently 10 points).
- There will be a further 15 points deduction unless the purchaser of the club agrees to pay unsecured creditors either:
  - a minimum of 25p/£ immediately; or
  - a minimum of 35p/£ within three years.
- A football club will no longer be required to exit administration by way of a CVA.

The "football creditor rule" will be preserved, making the transfer of the FL share conditional on the purchaser's repaying in full all football debts.

Client Monies Held on Trust For Clients

Bellis v Challinor
Gore v Mishcon de Reya

In two entirely unconnected cases, the High Court and the Court of Appeal have held that monies held in a solicitor's client account were held on bare trust for the solicitor's client and not on a Quistclose trust for the provider of the monies. The distinction is important because a Quistclose trust needs clear intention on the part of the transferor and transferee and will fail where the monies have been advanced by way of a loan.

In *Bellis* funds were paid to solicitors in response to an invitation to invest in a property development scheme. The scheme was never set up and the company went into administration. The Court of Appeal held that there was no resulting or Quistclose trust in favour of the individual investors as the monies were advanced by way of a loan.

In *Gore* monies were again procured by way of property investment and they were paid to Mishcons to be used to purchase a bank guarantee to fund the investment. The investor fraudulently kept the money for himself and the investors sued Mishcons as being vicariously liable for the actions of the individual solicitor whom they claimed had conspired with the fraudster.

The court found that there was no evidence of a conspiracy and so Mishcons cannot have been liable. In order for there to have been a resulting trust, the claimants would have had to show that monies were paid to Mishcons were not intended to be for the free use of their client and that they knew that. They could not and the claim to a trust failed.

It is clear from these cases that the courts will not easily be persuaded to find that funds paid to a solicitor's client account are subject to a Quistclose trust. If no proprietary interest can be established, the trust claim will be almost bound to fail and the claimant will merely be an unsecured creditor of the person to whom the funds were paid.

Restoration of Company To Allow Proceedings To Be Issued

Re Heather Moor & Edgecomb Limited

The applicant had various negligence claims against the company which had sold its business and assets and been struck off before he had been able to bring them. The application applied for the company to be restored so that he could sue it.

In restoring the company to the register, the court also ordered that:

(1) the period between striking off and restoration was not to count for the purposes of the Limitation Act 1980, and

(2) if a winding-up petition was made within fourteen days of the restoration, it would be deemed to have been presented on the date of striking off so as to bring the claim within the two year limitation period required by the relevant anti-avoidance provisions.

An interesting example of the court being practical and helpful to a potential litigation faced with possible substantial prejudice.

Pension Protection Fund to Adjudicate IPs' Fees

The PPF has issued a guidance note to IPs in relation to their remuneration in insolvencies in which the company has a Defined Benefit Pension Scheme.

Where an officeholder seeks a fee resolution from creditors, the PPF will vote on behalf of the pension scheme. The PPF requires to be engaged early in the process and will not be bound by any prior agreement between the company and the scheme trustees.

In CVLs, the PPF will require the proposed liquidator to liaise with them *before* the section 98 meeting – ie before there is an assessment period and before there is even an insolvency process at all.

The PPF's guidance note reminds IPs that they will need to:

- Consult early with the PPF in relation to fees – both on the basis of charging and on quantum. This is especially the case if a pre-pack is envisaged;
- Provide the PPF with a full SIP 9 compliant report – more than just a table of hours and tasks to be completed;
- Explain how the IPs' work will provide value to creditors;
- Liaise with the PPF in respect of any security held by the scheme;
- Discuss with the PPF the need for a creditors' committee – generally the PPF will object.

This is another case of a quango flexing its muscles because it can. It is wrapped in the sacred cow of protecting creditors' interests by curbing IPs' excesses but it is difficult to see how, overall, this plan is going to benefit creditors. This, combined with the fees estimates requirement that will come in in October 2015, will only lead to an increase in costs because of the extra level of reporting that is being demanded and delays and uncertainty will be more common.

Liability For Capital Loan in Insolvent Firm

Barclays Bank plc v McMillan

The defendant was a partner in a US law firm that had filed for bankruptcy. The claimant had lent him US$540,000 by way of a loan for his partners' capital contribution which sum was paid directly to the firm (as is common practice).

The bank's total exposure to various partners in the firm was US$56m. Perhaps unsurprisingly, the bank issued proceedings against the defendant for repayment of the loan.

The defendant's defence was (i) that the loan was to the firm and not to him *or* that, if he was liable, it was as guarantor only and the bank had waived his liability; (ii) that the loan agreement was a sham; (iii) that he had never received the loan proceeds; (iv) that the bank had falsely represented by implication that there had been no event of default;

and (v) that the loan agreement had given rise to an unfair debtor-creditor relationship and should not be enforced pursuant to s.140B of the Consumer Credit Act 1974. He also counterclaimed against the bank based upon its apparent negligence in failing to advise him about the loan.

The court found that it was absolutely clear that the loan was to the defendant who was personally liable for its repayment. The defendant's case on a sham depended upon an assertion that he had neither intended nor needed the agreement to be for the provision of loan capital and failed because it was clear that the defendant understood the purpose of the loan. The argument on non-receipt failed because draw down was expressly by payment to the firm and the firm had been the defendant's agent for the purposes of drawing the loan. There had been no implied representation and there had been no event of default as alleged. Accordingly, the bank had shown that the relationship had not been unfair and the bank had not owed any relevant duty of care to advise the defendant so the CCA defence and the counterclaim also failed.

The bank was therefore entitled to judgment in respect of the principal sum of US$540,000.

Nice try Mate, but you need just to cough up like the rest of us!

Independent Legal Advice for Mortgagees

HSBC Bank plc v Brown

In September 2002, Mrs Brown granted HSBC an all monies charge over her property to secure the liabilities of her son to the bank. Prior to completion HSBC received a standard confirmation from Mrs Brown's solicitor that he had explained the nature of the charge and that he had witnessed her signature.

HSBC subsequently sought to enforce its charge and had to show that the *Etridge (No2)* requirements had been complied with as there appeared to be a potential undue influence in that Mrs Brown had granted security that was of no financial benefit to her.

HSBC contended that it had followed its standard procedure and had relied upon the solicitor's certificate.

Mrs Brown denied having had any contact either with the bank or the solicitor.

The court found that whilst there was no undue influence, the bank was on notice that there could have been [*no – honestly, it's true. Ed*].

Even though the evidence was that Ms Brown had always regarded the property as belonging to her son, the charge was unenforceable and the court dismissed HSBC's claim for possession. Unfortunately, the bank could not adduce any evidence that it had ever written to Mrs Brown or that it had given the solicitor sufficient information about the loan for him to have advised properly

It appeared that the solicitor had fraudulently give the relevant certificate when he had not, in fact, met Mrs Brown.

This appears to be a very legalistic approach by the court; it is a very harsh judgment against the bank which had followed its usual procedures but was largely duped by its customer and his dodgy solicitor.

Banks absolutely must ensure that all the box ticking (which they normally love) is complied with so that there is a clear paper trail to show compliance with *Etridge (no 2).*

Failure to Comply With Court Sanctions in Litigation

Re Burling

A trustee in bankruptcy sought possession and sale of two properties owned by the bankrupt and his spouse. In relation to the first, the trustee claimed a 100% interest and, in relation to the second, 5/6 of the equity.

The Registrar gave directions for the exchange of evidence with which the respondent wife failed to comply. Subsequently a Deputy Registrar made an unless order (that unless the respondent filed her evidence by a given date she be barred from adducing any evidence at trial); the respondent failed to comply with that too. The respondent then applied for relief from the registrar's sanction on the ground either that she did not remember receiving the order or, if she did, she didn't understand it! Relief was refused.

The respondent appealed on the basis that the Deputy Registrar has misapplied the legal test for deciding whether to forgive her relief.

The court held that the important issue was to ensure that litigation should be conducted efficiently and proportionately and to enforce compliance with the rules and orders of the court.

On the facts, the court found that the Deputy Registrar had erred in relation to the second property but that this would not have made any difference and the respondent had not sought to conduct her case efficiently. Accordingly, the court dismissed the appeal and the original order barring the respondent from adducing any evidence stood.

This would seem to be one of those cases in which the party was being obstructive and deliberately dragging her heals. In times of yore such cases might have dragged on interminably; not any more. Litigants need to be very careful nowadays and to ensure that they comply with the rules or they might find themselves struck out.

ADMINISTRATION

CFAs in Special Administrations

Re Hartmann Capital Ltd

The insolvency exception to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 does not apply to special administrations – meaning that the administrators could not claim the CFA uplift or ATE insurance premia against a defendant in the event that they were successful in litigation. Although this was almost certainly due to a drafting cock up and

there was no reason why the administrators of an investment bank should be treated differently to other administrators, the court held that it was not open to it to adopt a purposive approach when the wording of the legislation was perfectly clear.

RECEIVERSHIP

'Acting by the Receivers'
TBAC Investments Ltd v Valmar Works Ltd

The High Court considered the validity of a notice to complete a property sale agreement, including who was the proper party to the sale agreement who could give such a notice, in circumstances where receivers were appointed over the property in question.

Receivers were appointed over the claimant's property by its bank following a default on certain loans. The receivers had contracted to sell the charged properties to the defendant but completion did not take place on the appropriate date and the claimant's solicitors served a notice to complete. The defendant still failed to complete so the seller rescinded the contract and sold the property at auction.

The defendant subsequently contended that the notice was invalid as the contracting party was the seller 'acting by the receivers' not the seller itself.

This argument was roundly rejected by the High Court which confirmed that the receivers acted as agents of the seller. It also rejected the notion that, as the receivers were individually named in the contract, only those individuals could serve a notice to complete. The expression 'receivers' included their assigns or successors in title.

Completely extraordinary that this case should ever have come to court, in our humble view!

LIQUIDATION

Good Faith In Validation Orders
Re SMC Properties Ltd

A company was forced to sell a property in order to satisfy a mortgage debt where the mortgagee was threatening enforcement proceedings. A winding up petition was presented before the sale completed and the seller company subsequently went into liquidation. The liquidator sought to overturn the sale of the property under section 127 and the buyer was forced to apply for a validation order.

The case turned on whether the sale had been concluded in good faith which the liquidator challenged on the ground that the sale was at an undervalue.

The court found that the buyer did not know about the petition and that, *even* if the sale had been at an undervalue, there was no loss to the unsecured creditors. On this basis the court was prepared to validate the sale.

Petition Not Abuse of Process
Re Astra Resources plc

The company sought an injunction to restrain the petitioning creditor in the prosecution of its winding up petition on the ground that the petitioner was motivated by an ulterior motive in seeking the winding up.

It appeared that the petitioner's ulterior motive was to put in place a restructuring process in relation to the company. The court found that all the statutory requirements for the presentation of a petition had been complied with and that this did not constitute an abuse of process.

Rebutting the Presumption in Preference Actions
Re Al Fayhaa Mass Media Limited

The director of this company was its sole director and shareholder. The director purchased a property in his own name with the funds being provided by the company on the basis that the monies constituted the repayment of loans to him.

The liquidator brought proceedings against the director claiming:

- that company owned the property;
- that repayment of the loans was a preference and in breach of the director's duties.

The court found that the property was recorded to in the accounts in the directors' loan account and it was not recorded as an asset of the company. Accordingly, the director was the legal and beneficial owner.

In relation to the preference claim, the court found that the director had been preferred and that the company had been insolvent at the relevant time. However, the test for determining the director's state of mind was a subjective one and the court accepted the director's evidence that he had not taken seriously an employee's claim against the company (its main liability) and therefore had no reason to seek to prefer himself.

In terms of the breach of duty claim, the test was objective as to whether it was reasonable for the director not to take account of the creditor's claim in causing the company to repay the his loan. The court found that it was not unreasonable for the director to have concluded that the company would continue the cycle of borrowing money form him and repaying it.

This case was an interesting example of a director managing to rebut the presumptions against him relying solely upon his own evidence.

HMRC Petition on Disputed Assessment
HMRC v Changtel Solutions UK Limited

This issue has bounced back on forth in the courts and when this case came before the High Court (see update #9: http://bit.ly/1RoNKB9) we all thought that, at last, a sensible decision had been made. It would seem that we cheered too soon.

The reader may recall that the High Court had dismissed a petition based upon a VAT assessment that was subject to an appeal and which the First Tier Tax Tribunal had said had legs.

The Court of Appeal has held that the first instance judge was wrong to defer to the First Tier Tax Tribunal on matters of tax and has reinstated the petition.

This is, we believe, a serious issue given the massive injustice caused to a wronged taxpayer. This is even more so given the massive levels of ineptitude and incompetence generally displayed by HMRC. Interestingly, see the following case …

HMRC Liable on Cross-Undertaking in Damages

Re Abbey Forwarding Limited (in liquidation)

HMRC decided that the company simply must have been involved in fraud and raised VAT assessments for £6m. Although these were not actually served, two days later HMRC presented a winding up petition and obtained the provisional appointment of liquidators who closed down the entire business. HMRC had given the usual cross-undertaking in damages.

Subsequent misfeasance claims were dismissed, the judge finding that there had been no evasion of duty and the directors were awarded damages in the face of harsh criticism of HMRC by the court.

Notwithstanding this, HMRC did not withdraw the assessments to VAT and excise duty until a few days before an appeal was due to be heard by the First Tier Tribunal.

The directors sought damages against HMRC pursuant to its undertaking given on the application for the appointment of the provisional liquidator. The judge ordered an enquiry into damages, on the basis that the company had not been wound up on HMRC's petition thereby entitling the company to recover the value of its business as a going concern.

HMRC argued that its cross-undertaking in damages came to an end when the winding up order was made and the appointment of liquidators ceased to be provisional; this was rejected. The court was swayed by the fact that HMRC had completely withdrawn the VAT assessments, thereby abandoning its only basis for the provisional liquidation.

HMRC also argued that since *Financial Service Authority v Sinaloa Gold plc* it had not been the court's practice to require an undertaking in damages from HMRC on the appointment of provisional liquidators and that there was a public interest against the enforcement of the undertaking. The judge rejected this too; HMRC had readily given an undertaking to the court and it was in the public interest that that undertaking should be capable of being relied upon.

Whilst it is now not 'generally' the court's practice to require a cross-undertaking in damages from HMRC on a provisional liquidation application, it strikes us as wholly unconscionable that HMRC should be able to instigate proceedings of such gravity as provisional liquidation with a totally crass disregard to justice. If they get it wrong (which they frequently do) they must pay compensation to those affected.

Arbitration Clause Survives Liquidation

Re WGL Realisations 2010 Ltd

A company in a CVL was embroiled in a construction dispute the French Lycée in South Ken and there was a maelstrom of claims and counterclaims. The school put in a proof of debt upon which the liquidators had yet to adjudicate. The liquidators wanted to settle the dispute by way of a summary application under rule 4.90 for an account of who owed what to whom.

The school contended that, notwithstanding the company's being in liquidation, the arbitration clause in the construction contract continued to be binding and that any application to the court would be stayed under s. 9(4) of the Arbitration Act.

The liquidators applied for directions contending that the court had power under r 4.90(3) to give directions as to the taking of an account of the balance due between the company and the school. The court agreed with the school that the arbitration clause trumped and that it was not void by virtue of the liquidation.

In many such cases, the creditor would be content for claims to be settled by the liquidators so as to avoid the costs of litigation. It is worth noting, however, that, in cases where they are not, an arbitration clause will continue to bind the company notwithstanding its liquation.

Costs of Complying with Section 236 Applications

Re Harvest Finance Ltd

A firm of solicitors was the object of a s. 236 order by which it was required to deliver up to the liquidator certain files contained on its computer system. The court had to consider the costs implications of complying and whether they should be borne by the liquidation estate.

The court followed *Re Aveling Barford* and decided that it did have jurisdiction to award costs. It found, however, that that compliance with an officeholder under section 236 of the Act was effectively a public duty so as to assist the liquidator in the fulfilment of his statutory duties for the benefit of the company's creditors which was deemed generally a *Good Thing*.

Whilst the solicitors were allowed their costs of responding to the liquidators' application and representation at the hearing, the court would not allow recovery of the costs of in complying with the subsequent court order. Whilst this is a liquidation case, presumably the same principles will apply in administration and also in bankruptcy under section 336.

The Company's Knowledge in Fraudulent Trading

Re Bilta (UK) Limited

The *ex turpi causa* doctrine is long established in English law – a person will never be permitted to benefit from his own wrongdoing. In this case,

which involved a £38 million MTIC fraud, the defendant directors argued that the company, acting by its liquidator, could not bring a wrongful trading action against them as the company would be fixed with the directors' knowledge and was therefore effectively part of the fraud. The Supreme Court held that where a company suffers a loss due to the dishonest acts of its directors, it would never be fixed with the director's knowledge. Conversely, where such loss was suffered by a third party dealing with the company, the company would always be fixed with the knowledge of the directors.

There was a previous decision (*Stone & Rolls Ltd v Moore Stephens)* in which the opposite conclusion was reached and directors had managed to defeat a fraudulent trading claim on the basis of the claimant company's being fixed with their knowledge. In *Bilta* the Supreme Court strongly criticised this decision which it said had no legal *ratio* and should not be followed.

We would suggest that although it was a clever line of argument in *Bilta,* it was not one which should ever be allowed to succeed!

BANKRUPTCY

Trustee's Costs On Annulment
Re Mowbray

Where the annulment was on the ground that all debts have been paid, there should not be a problem as the trustee's costs will be included in the sums paid. Where the annulment is on the basis that the order ought not to have been made, the trustee's costs will be in the discretion of the court.

In the *Mowbray* case, the bankruptcy order was overturned on appeal. The trustee's costs were ordered to be paid by the bankrupt up to the point of her appeal and by the petitioning creditor thereafter.

Although the trustee's costs (a very reasonable £82,000!) were paid in this case, the court was keen to stress that trustees should not always assume that they will recover their costs in full.

Completion of IVA Releases All Obligations to IVA Creditors
Green v Wright

Successful completion of an IVA incorporating R3's standard conditions released the debtor from any further liability to the IVA creditors.

After the conclusion of the IVA, the debtor received compensation for missold PPI. The court held that, even though the debtor's claim for compensation was one of the assets included in the IVA, it was the debtor, rather than the IVA creditors, who was entitled to the benefit of the compensation payment. The effect of the completion of the IVA was to release the debtor from any further liability to the IVA creditors and to terminate any trust over the IVA assets for their benefit.

Service of Petition on Agent
Gate Gourmet Luxembourg IV Sarl v Morby

Handing a bankruptcy petition to the debtor's agent, at his request and in his presence at a meeting that had been convened for the purpose of service was held, on the facts, to constitute good service of the petition under rule 6.14(1).

The meeting had been arranged at the airport so that the debtor could be served with the petition whilst in transit *en route* to sunnier climes. The debtor then refused to accept the petition and instructed the creditor to hand it to his agent. Upon examination, the agent declared the petition to be defective (as the debtor's addressed was misspelled) and put the petition in the bin.

The court held (1) that the petition had nonetheless been personally served, and (2) that the debtor was aware of the nature of the petition and what was contained within it.

The procedure surrounding the service of petitions has always been a lot more complicated in practice than the legislature can ever have intended. This is a sensible decision in respect of a debtor clearly attempting to avoid service of a petition.

Test For Annulling Bankruptcy Order
Woolsey v Payne

A bankrupt seeking annulment need only show that there is a substantial dispute of the petition debt and cannot be expected to prove on an annulment application that the debt was not due at all.

The court has provided some long-needed clarity on this issue settling previously conflicting authorities.

Statutory Demand Should Stand Even If The Debt <£750
Howell v Lerwick Commercial Mortgage Corporation Ltd

The High Court has held that a stat demand should not necessarily be set aside on the ground that the debt was less than £750, if there were other debts owed by the debtor.

In this case the debtor was subject to a costs order but had a cross-claim. Although the cross claim was less than the claim, it reduced the debt to below £750 once interest on the cross-claim was taken into account. The debtor's appeal was however dismissed. The fact that taking interest on the appellant's cross-claim into account reduced the debt to below £750, did not mean that the statutory demand should be set aside if other debts were taken into account.

The aggregate amount of a petition debt needs to be at least £750; but there was no requirement for each debt on its own to be a minimum of £750.

Cross-Border

Meaning of 'Establishment' – Requires Business Activity
Re Olympic Airlines SA

Olympic Airlines was Greek and based in Greece but had operated flights into England where it had business premises at which 27

members of the company's English pension scheme were employed.

Olympic went into liquidation in Greece. The PPF had sought to commence secondary proceedings in England as the Greek liquidation was not a triggering event for the assessment period for the purposes of the Pensions Act 2004. The Court of Appeal overturned the first instance judgment and held that Olympic had not had an 'establishment' with an "*external economic function"* within the jurisdiction.

The Supreme Court has now upheld the Court of Appeal. Lord Sumption held that one had to look at the overall picture to decide whether there was an establishment and that activities had to be carried on between human agents of the debtor and third parties which were not pure acts of internal administration. Activities associated with finalising the winding down of the English operations of Olympic were not sufficient those were pure acts of internal administration.

Payment of Debts Contrary to International Sanctions

Maud v Libyan Investment Authority

Mr Maud guaranteed the indebtedness of his company, Propinvest Group Ltd, to the Libyan Investment Authority. Propinvest defaulted and the LIA served a statutory demand on Mr Maud in the sum of about £17.5m which was followed by the presentation of a bankruptcy petition.

Mr Maud applied to set aside the stat demand: although he did not dispute the guarantee of Propinvest's default, he contended that any payment to the LIA would be in breach of the sanctions régime which had been imposed on Colonel Gaddafi. Mr Maud therefore sought to have the statutory demand set aside under either rule 6.5(4)(b) (the debt was disputed on substantial grounds) or rule 6.5(4)(d) (other grounds on which the demand ought to be set aside).

Mr Maud was allowed an extension of time in respect of his application which he made out of time. The balance of convenience in terms of the prejudice to be suffered was clearly in his favour as was the public interest.

Rose J also found that it would be unjust to allow a creditor to present a bankruptcy petition where any payment by the debtor would have been illegal. She further also found that it did not matter whether Mr Maud had had the wherewithal to settle the demand.

In relation to *'other circumstances'* the judge found that any payment made by Mr Maud to the LIA would have be caught by the sanctions régime and that to make any such payment would expose Mr Maud to criminal penalties.

Accordingly, the statutory demand was set aside on the above bases.

Unfortunately for Mr Maud, although he was successful in his case against the LIA, he was not so successful in a parallel case determined by Rose J at the same time that concerned his application to set aside a statutory demand served by another creditor in the sum of about £40m (see *Maud v Aabar Block SARL*) – a proper pyrrhic victory!

Submitting to an Overseas Insolvency Jurisdiction

Erste Group Bank AG v JSC VMZ Red October

Erste Group Bank AG had submitted a proof of debt and participated in Russian insolvency proceedings, thereby submitting to the jurisdiction of the Russian court. The English court therefore refused to allow service out of the jurisdiction in respect of English proceedings based on the tort of conspiracy and s. 423 IA 1986.

The main issue for the court was whether there was a '*real issue'* that it was reasonable to expect the English court to try. This in turn depended upon whether the English creditor had taken any steps in the Russian liquidation thereby submitting to the foreign process. Erste claimed that, as it had not received a dividend, it has not submitted to the Russian jurisdiction but this was rejected by the court which followed the recent Privy Council decision in *Stichting Shell Pensioenfonds v Krys* and found that a foreign creditor submits to the jurisdiction of the court supervising the insolvency by proving in that insolvency.

The important, wider issue for those advising creditors on whether to submit a proof in foreign insolvency proceedings is it will result in submission to the jurisdiction in respect of <u>all</u> claims against the debtor or its assets.

Alistair Bacon
25 June 2015

Deregulation Act 2015 and Small Business Enterprise and Employment Act 2015 *The Bits in Force*

The following provisions of DRA and SBEEA have been in force since **26 May 2015**:

Administration

- Creditors can now extend the admin by one year (previously only 6 months). This will not apply if there has already been an extension.
- Court consent not required to distribute the prescribed part BUT cannot move to CVL if only purpose is to distribute the prescribed part.
- Winder will not prevent appointment of administrators by directors or QFCH *if* it was presented *after* the Notice of Intention.
- The SoS may introduce regulations prohibiting or curtailing the disposal of the company's assets to any person connected with the company (but he hasn't as yet).
- The prohibition on the appointment of administrators by the company or its directors when there is a winding up petition pending is removed (unless the winder is a public interest petition).

Liquidation/Bankruptcy

- Powers under sch 4 or sch 5 will no longer require the OR's sanction.
- Challenges to IVAs must be brought within 28 days; Fast Track IVAs are abolished.
- In CVLs and MVLs a progress report must be issued to creditors if the liquidator changes in the first year.

Disqualification

- Overseas convictions in connection with the management of a company may now form basis of disqualification.
- Persons exercising influence over a 'main transgressor' who is found to be unfit may also themselves be disqualified.
- Schedule 1 (factors determining unfitness) will become much more generic looking to the harm suffered and the director's influence.
- D Reports must now look back three years and the OR has three years within which to bring proceedings.
- Compensation orders are also introduced against unfit directors to be paid either to specific creditors or into the general pot.

General

- The SoS is again empowered to introduce rules (but hasn't yet) whereby small creditors (<£1,000?) will no longer be required to prove their debts but their debt may be assumed from the figures contained in the statement of affairs.
- There is now a prohibition on the creation of bearer shares.
- Non-natural persons may not be directors (but *may* be liable as shadow or *de facto* directors).
- Duties of directors under CA06 have been expressly extended to shadow directors.

Overall, these are all quite positive moves and they largely do away with needless applications to the court or to the OR for purely procedural matters.

AMB Law
46 New Broad Street
London
EC2M 1JH

T: +44 (0)20 3651 5646
F: +44 (0)20 3651 5555

office@amblaw.co.uk

AMB Law
18 Epsilon House
West Road
Ipswich
IP3 9FJ

T: +44 (0)1473 276103

Alistair Bacon
Principal

T : 020 3651 5647
M: 07881 554062
abacon@amblaw.co.uk

Sutha Mohanadas
Traineee Solicitor

T : 020 3651 5704
M: 07973 222710
smohanadas@amblaw.co.uk

Stephen Carter
Consultant

T : 020 7329 4242
scarter@amblaw.co.uk