AMB LAW

INSOLVENCY UPDATE

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Welcome to the 14th Edition of **AMB Law's *Insolvency Update***. At the top end of the profession, it's been a busy period culminating in another couple of major retail insolvencies – *BHS* and *Austin Reed* (the latter being considerably more significant to this firm for reasons of sartorial habit). At the bottom end, work levels continue to be low in a difficult market – especially now that the MVL extravaganza is over. Obviously the next major events on the horizon will be the Brexit vote and the possible accession to the US throne of King Donald, *rex imperator*, each of which would have a significant effect on the economy.

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MISCELLANEOUS

Disapplication of the Prescribed Part

Re Castlebridge Plant Limited

Scottish administrators applied to court to disapply s. 176A on the basis that the dividends payable to unsecureds would be in the region of 0.001p and 0.005p in the £. Unfortunately, the administrator's had relied on a typo throughout their calculations and the actual dividends, whilst still small, were in fact between 0.083p and 0.051p in the £. This error did not endear the administrators to the court which was extremely critical.

Given the sums involved, the court said that it would be reasonable for the administrators to adopt a more rough and ready approach than they might otherwise do in adjudicating claims, but Parliament's intention had be to benefit unsecured creditors even if the returns were modest. The court therefore ordered that dividends be calculated and paid.

Valuation of Solicitors' Costs in Insolvency

Rowbury v Official Receiver

Two firms of solicitors, acting under CFAs, sought to vote at an IVA meeting of creditors. The value of their claims was material to the outcome of the meeting and was subsequently challenged.

Registrar Briggs held that the chairman needed to have placed a minimum value on the solicitors' claims which would therefore be valued at £1.

The legal position in this area has always been confused and is, in our view, a nonsense. Where a claim is unascertained the chairman should be required to place a minimum, *realistic* value on such a claim. That cannot be £1 in the context of legal costs claimed at many thousands. Perhaps a better solution would be to discount such costs by 1/3 being the rule of thumb discount usually applied on assessment.

Charge Registration Fees Increase

Companies House news, 22/02/16

Companies House has proposed that, with effect from **6 April 2016**, fees for the registration of charges should increase as follows:

- **£23** for a paper registration (currently £13),
- **£15** for an electronic registration (currently £10).

To be fair to the good burghers of CoHo, this fee has remained static for years and most fees have actually gone down not up.

Liquidator Not Personally Liable For Legal Costs

Stevensdrake v Hunt

Rarely has a case caused so much interest in the insolvency profession! As this has been commented upon to death in the legal press, we merely note that the decision has now been reversed in the IP's favour: the liquidator was held not to be personally liable under a CFA entered into by him *qua* liquidator.

This has to be the 'right' result although we are not convinced that the reasoning was correct. This is, after all, the basis on which insolvency lawyers have always been tacitly instructed whether the case is formally a CFA or not. This firm's standard CFA makes clear that officeholders will not be personally liable for costs which will only be payable from actual receipts.

ADMINISTRATION

Statutory Charge under para 99(3)

Re Sunnyside Holiday Park Ltd

SHP had been dissolved some years before its potential right to compensation for swaps misselling came to light. Its former administrators sought (i) an order that their unpaid remuneration be charged against such compensation by way of a charge under para 99(3) and (ii) an order that the compensation be paid directly to them by the bank.

The claim failed on both counts – albeit on its narrow facts. If there was a right to compensation that was a right of the company which vested in the Crown *bona vacantia* upon the company's dissolution. If the former administrators wanted to make claim to those monies, they would need to restore and liquidate the company. The court was also careful not to characterise the para 99(3) charge as a charge similar to a fixed or floating charge but merely as a proprietary interest that conferred no 'ownership'.

Extent of Moratorium

Cook v Mortgage Debenture Ltd

The applicant here was a former partner in KCJ solicitors who was supervising various claims against

the firm by MDL. He applied to be joined to an action between MDL and a former customer. At the time of his application, MDL had filed a Notice of Intention and its putative administrators objected to the application on the ground that it was in breach of the moratorium and neither consent or leave had been sought.

The argument was rejected at first instance and on subsequent appeals. In the underlying, substantive litigation, MDL was in fact the claimant. Cook/KCJ were merely trying to be joined to a claim brought by MDL – as this was hardly in the context of a claim *against the company* in administration it could hardly be covered by para 43 of schedule B1 to the Insolvency Act 1986.

LIQUIDATION

Damages for Wrongful Trading
Re 375 Limited

The company was clearly insolvent on both tests in s.123. Nonetheless the directors allowed the company to continue to trade long after it ought to have been apparent that insolvent liquidation was inevitable. In other words a *prima facie* case of wrongful trading was made out and the liquidators issued proceedings under s.214.

One of the liquidators' main complaints was that the directors' actions meant that a number of existing creditors were paid but new creditors were not.

The court found that the act required it to look at the position of the company's creditors as a whole. As the company has not suffered an overall loss as a result of the directors' actions, no contribution would be ordered against the directors.

This case substantially reduces the impact of s.214. A case of wrongful trading was found to have been made out but not contribution was ordered to be made. It would be interesting to see how the same court would have reacted to the same facts if the application had been under s.212.

Officeholders' Discretion to Litigate
Re Longmeade Ltd (In liquidation)

The company was a creditor of the Lehman's US insolvency. The Insolvency Service purported to file Longmeade's claim in the US plan and confirmed in writing to L that it had done so. In fact it had not and L irretrievably missed out on a dividend which would have been worth around US$26 million. L obtained funding to bring a claim in negligence against the Insolvency Service.

L's creditors amounted to some £93½ million of which HMRC was the largest single creditor. Having initially pledged support for litigation against DBIS, HMRC recanted on the basis that a claim would be too political. Litigation was also opposed by another creditor which was a Lehman company.

L's liquidators sought directions. Snowden J noted that, although weight should be given to the views of the creditors, the decision by liquidators as to whether or not to pursue litigation was largely a commercial one for them to take without the need from sanction from the OR or the court. In the instant case the liquidators had taken steps to ensure that the litigation would be pursued at no cost to the unsecured creditors. Whilst there were dissenting voices, they were clearly partial and pursuing their own agenda, and it was clearly within the liquidators' remit to exercise their discretion so as to issue proceedings against DBIS.

BANKRUPTCY

Challenging an IVA
Re Narandas-Girdhar

This was a fairly fact-specific challenge by the debtor against his IVA which had been accepted (he challenged because he was his IVA to be linked to his wife's but her was rejected). There were two issues.

First, a modification was proposed to the clause linking the two proposals. The modification was probably intended to amend the wording but was cited as replacing it (with the result that the two IVAs were not inter-dependent).

The second issue, related to HMRC's vote as they had filed a standard acceptance subject to the inclusion of a list of modifications. In the event, a further amendment had been introduced which HMRC had not seen so could not have agreed. The chairman nonetheless wrongly treated HMRC as being in favour of the IVA.

The Court of Appeal found in relation to the modifications that there was no ambiguity at all and accordingly there was nothing to suggest that the two IVAs should be linked.

In relation to HMRC's vote, the court found that HMRC had effectively ratified the vote as it had wilfully elected not to take any steps once it had come to light that its vote had wrongfully been recorded as being in favour.

Remedy for Void Dispositions
Re D'Eye

Section 284 of the Act provides that payments made after the presentation of a bankruptcy petition are void, but it does not specify what the redress should be.

The court here held that one needed to look to the general law and found that section284 created a statutory obligation to account to the trustee for monies received. This is consistent with the bankrupt's duty to deliver up his estate to the trustee – any rogue payments would have formed part of that estate had they not been made.

Trustee Treated As Shareholder
Re C.& M.B. Holdings Ltd

Trustees in bankruptcy did not need to be registered as the shareholders of shares formerly owned by the bankrupt which transferred to them on their appointment. The trustees, *qua* member, alleged unfair prejudice and presented a winding up petition – s. 124(2)(b) however requires the

shares to have been held by the petitioner for 6 months.

The court held, via a semantically tortuous route, that the trustees were 'a member' because of the definition in s. 250 and that 'a member' was registered in the register of members so s. 124(2)(b) was fulfilled.

Nonetheless, the decision does produce a sensible outcome helpful to trustees who can rely on receiving the bankrupt's accrued rights as a member of a company in which he owns shares without the need for any further registration process.

Debtors' Petitions Abolished IVA

The anachronistic and slightly bizarre process whereby a debtor needed to present a petition to the court for his bankruptcy has now been abolished. In its stead is a snappy, new, online application process.

The application is made to the newly created office of Bankruptcy Adjudicator and the court is (usually) bypassed altogether. The fee has been slightly reduced to £130 but the OR's deposit remains at £525.

Applications can be made at: www.gov.uk/apply-for-bankruptcy

Bankrupt 'Ordinarily Resident' In England

Re Khan

Although the bankrupt usually lived in Lahore, where he was a member of the Pakistani Senate, he also had substantial property, commercial and domestic interests in England. He owned of number of properties in London where his family lived and where his children were schooled. Whilst he may well have spent more time in Pakistan, the factors above all suggested a degree of permanence with England such as to satisfy the requirements of s. 265(1)(c) and, accordingly, a bankruptcy order was made.

EMPLOYMENT

Increase to ERA Limits

Employment Rights (Increase of Limits) Order 2016

The following changes to the ERA limits took effect from **6 April 2016**:

A week's pay	£479
Min Basic award	£5,853
Max Comp award	£78,962

Cross-Border

Extra-Territoriality of s. 236

Re Omni Trustees Ltd

The OR, as liquidator, sought an order under s. 236 that N produce a witness statement with supporting documents to explain the transfer of the company's assets to Hong Long shortly before its liquidation.

Following *Re British and Commonwealth Holdings plc,* the court accepted that, in principle, s. 236 had extra-territorial effect and that the test to be applied was (i) whether the documents were necessary to the liquidator's function and (ii) whether their production would impose an undue burden on N.

This decision was clearly at odds with *Re MF Global Overseas Ltd* in which David Richards J, following a decision based in the Bankruptcy Act 1914, held that s. 236 did *not* have extra-territorial effect. As to who is right, the matter will need to be settled by the Court of Appeal; we would not be inclined to put money on *MF Global*!

Director of English Company Subject to German Law

Re Kornhaas Montage und Dienstleistung Ltd

The company here was incorporated in England but also with a branch registered in Germany. Most of its work was in Germany which was also where its COMI lay. The company went into liquidation in Germany.

The MD was English and based in England. The law governing the directors became an issue as, under German law, there is a strict obligation on an MD to file for insolvency within three weeks of the company's becoming insolvent; in this case the company had traded on for over a year.

The ECJ ruled that, under art 4 of the EC Regulation, German law was applicable being the law of the member state in which the insolvency proceedings were opened and, secondly, that this law did not infringe the director's freedom of establishment. She is accordingly liable to an order that she repay €110,000 being the payments made by the company after it became insolvent.

It is hard to see how the ECJ could have come to any other decision but this is nonetheless a salutary reminder of the need for directors fully to understand the laws of the states within which they operate.

Court's Lack of Jurisdiction

Re Meyden

The debtor had petitioned for his own bankruptcy citing England as his COMI. On an application from Raiffeisenlandesbank Oberosterreich AG it became apparent that the debtor's COMI was *not* in England and, accordingly, the court had no jurisdiction to make a bankruptcy order.

On appeal, Nugee J held that, where the court had had no jurisdiction to make a bankruptcy order, there was no alternative but to annul the order. Initially, the registrar had sought to exercise the court's discretion so as to allow the bankruptcy order to stand – that cannot have been the correct decision so this is a useful authority in respect of the court's lack of discretion where it has no jurisdiction.

Alistair Bacon
4 May 2016

Insolvency Express Trials – Pilot Scheme

CPR 51P (PD) came into force on **1 April 2016** establishing Insolvency Express Trials. IETs are intended to provide a "*speedy, streamlined procedure*" to litigants in the Companies Court and High Court in Bankruptcy *[Funny – we thought that that's what the CPR was supposed to do. Ed*].

Subject to the court's right of veto, applicants can elect whether or not to invoke the IET procedure. The relevant criteria for admission are as follows:

- Simple applications before the Registrar;
- Time estimate for trial is two days or less;
- Limited directions and disclosure are required;
- Costs of each side will not exceed £75,000 (excl VAT and court fees but inc CFA uplift).

If an applicant wants to invoke the IET, he simply writes 'IET' on the application notice. The application notice cannot exceed 15 A4 pages (in 12-pt font at 1½ spacing). The application notice must contain:

- a description of the dispute and the relief sought;
- a summary of the issues likely to arise in the application;
- the applicant's contentions including particularised material facts;
- the legal grounds for the relief sought; and
- a statement confirming that (1) the application is suitable for IET and (2) the respondent can object to being subject to IET.

Evidence in support of the application must be filed at the same time that the application is issued and must exhibit all the documents relied upon but not *inter partes* correspondence (unless particularly pertinent to the claim).

Once issued, the IET will be listed for a 30 minute directions hearing. If the respondent wishes to object to the IET, he must file objections 14 days before the directions hearing which must be a maximum of 2 sides of A4. The claimant can file a reply 7 days before the hearing.

At the directions hearing, the Registrar will give the usual directions and set down for trial within three to six months. Once directions have been given, the trial cannot be vacated by consent and an adjournment will only be granted in exceptional circumstances.

Costs should be dealt with at the trial and judgment should be handed down within four weeks of the trial.

The IET pilot scheme is set to last for two years. Any procedure that simplifies and speeds up litigation is to be welcomed but we are somewhat non-plussed by the IET. Not that we don't think that it's a good idea – the point is that, surely, the court should deal with all litigation in this way. The introduction of the IET will be a *Good Thing* but it strikes us as an admission by the courts that the system is simply not working. Not that we're cynical but the IET doesn't actually introduce anything new. One assumes that the court will be anxious to ensure that the pilot works so applicants can scribble *'IET'* onto their application notices to ensure that the matter will be dealt with in manner in which it ought to be anyway.

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