AMB LAW

INSOLVENCY UPDATE

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Welcome to the 15th Edition of **AMB Law's** ***Insolvency Update***. The papers have entirely been consumed by the recent Brexit vote about which so much rubbish has been written - we have not "*left Europe*" as Mr Gove has stated. Never can such a monumental decision have been taken for the wrong reasons based on so much myth and disinformation from both sides. The only real lesson to be gleaned from all this is that we must NEVER again have a referendum on any topic – it will be politicised and turned into a popularity contest fuelled by partisan and disingenuous press too prepared to manipulate a gullible populace.

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MISCELLANEOUS

Third Party Rights Against Insurers

Third Party Rights Against Insurers Act 2010

The new Third Party Rights Against Insurers Act 2010 will come into force on **1 August 2016** replacing the 1930 act.

Under the new act, a potential claimant will be able to issue proceedings directly against the insurers of an insolvent defendant without first restoring the defendant to the register. The claimant will also be able to get early disclosure of the insurance policy to assess the viability of proceedings. In addition, the claimant will no longer have to obtain an award against the defendant before it can sue the insurer.

Sanctions for Breach of CPR

McTear & Williams v Engelhard

This was another case involving sanctions against a party for failing to comply with the CPR and directions from the court. In this case, the defendant had been barred from adducing witness statement evidence that had been filed 50 minutes late or for adducing documents that he had only found two weeks before trial.

The Court of Appeal sharply criticised this decision as wrong and unjust. Clearly the judge's decision has been disproportionate and manifestly unfair.

Following the ridiculous decision in *Mitchell v News Group* in 2013 (no costs awarded to successful litigant whose costs budgets were filed a few days late), there has been a growing tendency towards a mendacious, nit-picking attitude to the application of the court rules which has, in our experience, generally led only to increased and wasted costs. Hopefully the *McTear* decision might reflect a growing backlash towards a more sensible approach.

Petition Costs Increase

Insolvency Proceedings (Fees) Order 2016 (SI 2016/692)

It has been well publicised that the OR's deposits have increased again. The costs payable on presentation of petitions are now as follows:

Petition	Fee	Deposit	Total
Winder	£280	£1,600	£1,880
Bnkrpcy (Cred's)	£280	£990	£1,270
Bnkrpcy (Dbtor's)	£130	£550	£680

In addition the basis of the OR's fees for administering cases will change and new fees are introduced for dealing with Income Payment Orders and dismissed petitions – for more details go to our website: http://bit.ly/29ntGRg.

Limitation Period on Loan Demand

Goldsmith v Chittell

When does the limitation period begin to run on a loan that has an open-ended repayment? Such a loan has traditionally been treated as being repayable on the date on which the loan was made – so the limitation period would run out six years from the loan date. Clearly, on that basis, any such loan more than six years old would be time barred.

However, section 6 of the Limitation Act 1980 provides that, where a loan neither has a repayment date nor makes repayment conditional upon demand being made, the limitation period will not start to run until demand is actually made.

De Facto Directors

Re Sports Management Group Ltd

It was a question of fact and degree for the court to determine whether an individual had been held out to be a director. The issue was whether that person had been part of the corporate governing structure of the company. Here the evidence suggested that the respondent had been held out as a director and that the sole *de jure*

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directors was used to taking instructions from him. By his assuming the role of a director, the law placed upon the respondent the same fiduciary and other duties that it placed on any other director.

Entire Agreement Clauses

Globe Motors v TRW Lucas Varity

Not an insolvency case but nonetheless an important issue of interest to IPs. In this case a contract declared that it was "*… the only agreement between the Parties … [and] … can only be amended by a written document …*". The Court of Appeal unanimously found that oral variations to the contract were binding – the judges placed more importance on not fettering the parties' commercial freedom than they did on the rigid certainty of sticking to the written contract. So, all those entire agreement clauses in every standard SPA are a waste of ink!

Director's Duty To Creditors

Re Cosy Seal Insulation Ltd

The case involved a number of preferences to and undervalue transactions with the director and a connected company in respect of which the administrators' claims were made out. They also sought orders against the director for breach of statutory duty to the creditors.

The court found as a matter of fact that the company had been insolvent at the relevant time and that the associated beneficiaries of the various payments had been unable to prove that there had not been an intention to prefer them (the burden of proof being reversed).

In relation to the director's duty, the court held that it was not necessary for the company to be absolutely provably insolvent in order to trigger the director's duty to consider the creditors. The principle was that the director should never put at risk the creditors' prospects of being paid. None of the preferential or undervalue payments had been in the creditors' interests and were clearly a breach of the director's duty to the creditors. The director was therefore jointly liable with the associated company to effect repayment of the sums claimed.

Lender Does Not Owe Duty to Explain Onerous Terms

Finch v Lloyds TSB Bank

The lender had failed to advise a borrower that it might become liable for significant hedging break costs if it repaid early. The borrower contended that the bank owed it a duty of care and had been negligent by not explaining these costs.

The court rejected this. The bank owed neither a contractual nor a tortious duty to the borrower which had been, in any event, advised both by a broker and by solicitors.

Bank's Liability For Reference

Playboy Club v Banca Nazionale del Lavoro

The bank had given a reference for one of its customers to Burlington acting as agent for the Claimant [the club used an agent so as to keep its member's affairs private]. A number of the customer's cheques bounced and the club sued the bank.

Even though the reference did not contain any disclaimer and even though the bank might well have given the same reference directly to the club, the Court of Appeal held that the bank could not be liable to an undisclosed principal of whom it was unaware especially where that principal had deliberately concealed itself.

Contractual Penalty Clauses

Edgeworth Capital (Luxembourg) v Ramblas Investments

This case did not involve car park fees but, rather, a default fee payable under an 'Upside Fee Agreement'. The Defendant objected to the payment of such a fee on the basis that it was a penalty and did not represent an estimate of the Claimant's loss following its breach of contract. The Court of Appeal upheld Hamblen J's decision that, on the facts, the fee was no a penalty but was part of the bank's charging structure for the provision of associated loans. The Court also held that the fee (which, by the way, was €105 million) was reasonable in the circumstances of a 'difficult' loan.

LIQUIDATION

Liquidators Cannot Challenge Prior Administrators' Legal Costs

Re Hellas Telecommunications (Luxembourg) II SCA

Administrators were able to agree and pay solicitors' fees incurred during the admin even where the final bill was agreed after the administrators had been discharged. Subsequently-appointed liquidators sought to challenge the solicitors' costs but the High Court (both at first instance and on appeal) and the Court of Appeal all found against them. It was perfectly within the administrators' remit to agree their solicitors' fees – if the liquidators wished to challenge that decision the proper course of action would have been a misfeasance action against the administrators.

Dismissal of Winding Up Petition

Re A Company [2016] EWHC 1046

Cases involving the challenge of winding up petitions are rarely of general interest because they tend to be wholly fact-specific.

In this case, the petitioning bank appeared to have a fairly 'nailed on' basis for its petition having called in 25 loans to the company none of which had been repaid. When challenged, the bank was prepared to allow most of its claims to be disputed but it stood by the remaining three (amounting to £100,000). The company claimed that it had never received any monies in relation to these three – an argument that had never previously been raised. The petitioner contended that the company's claims were simply not

credible and did not amount to a *bona fide* dispute.

The court dismissed the petition on the basis that the company had raised what appeared to be a *bona fide* dispute which the petitioner could not counter without providing additional evidence and even expert testimony. It would be disproportionate to require the company to continue with the petition hinging over its head. The mantra of a petition not being used as a debt collection tool was also cited. It is clear, however, that the court required a fairly high level of certainty in respect of the petition debt being due and owing. Petitioners must be aware that they should not proceed on a petition where there is the slightest, credible challenge to the debt's being owed – however flimsy the evidence might appear to them.

Arbitration Claim Stayed

Re Lemma Europe Insurance Co

The company was a Gibraltarian insurance company whose liquidation had been recognised by the English court. The claimant sought leave to lift the automatic stay on litigation so as to start an arbitration against the company as his claim had been rejected by the liquidator.

On the facts it was held that the claimant had failed to make out a genuinely arguable case and, in the absence of such, the need to preserve the estate for the benefit of creditors generally, outweighed the claimant's contractual right to have his claim determined by an English arbitration.

ADMINISTRATION

Administration Order Refused

Re Oak Property Partners Ltd

HHJ Purle sitting as a High Court Judge in the Birmingham District Registry refused to make admin orders in respect of two companies even though it was clear that they were insolvent and that admins would produce a better result than winding up and would therefore achieve the statutory purpose.

The judge refused to exercise his discretion to make admin orders preferring to impose independent commercial judgment – something which the courts generally do not do. The judge preferred to adopt a *'wait and see'* strategy and to give the companies an opportunity to turn round their businesses – even though he was deeply sceptical about the accounts and figures that the company had produced.

The judgment in this case is short – mostly one sentence paragraphs – so it is difficult fully to understand the background. It does, however, seem an unusual decision and could have ramifications for the company and its directors in the future – eg if the company were eventually wound up (there being no moratorium in place) would the directors face a charge of wrongful trading?

BANKRUPTCY

Pension Drawdown Election

Hinton v Wotherspoon

In assessing whether the bankrupt's pension fund was available to his trustee on an Income Payments Order application under s.307, the court had to have regard to that point at which the bankrupt would become entitled to an income.

The court found that if the bankrupt had elected to drawdown but had yet to elect as to how the drawdown would be effected (eg as income or a lump sum) he could not be said to have become "entitled" to an income and the pension pot would not be vulnerable to s.307.

In this case, however, it was all beside the point as the court found that the bankrupt had in fact elected to receive an income which would therefore be liable to an income payments order.

Bankrupt's Legal Privilege

Re Schlosberg

Arnold J held that certain documents which were privileged between the bankrupt and his former solicitor remained privileged and that the benefit of that privilege did not pass to his trustee in bankruptcy. Importantly, it was held that privilege did not constitute 'property' within the meaning of s.436. In the judgment, distinction was drawn between privilege that was solely the bankrupt's (and remained so) and privilege which was shared between the bankrupt and the company – that became shared, effectively, between the bankrupt and the liquidator.

Hitherto it has been common practice for trustees to demand delivery up of solicitors' files regardless of privilege. Lawyers receiving such demands from trustees will have to make sure that they are comfortable that the files are not subject to a privilege that is personal to the bankrupt before complying.

Remedies For Void Dispositions

Re D'Eye

Shortly prior to his bankruptcy (but *before* presentation of the petition), the bankrupt has transferred a substantial sum to his father which was used to purchase a property. The flat had been bought *after* presentation of the petition. The trustee sought an order that the transfer of funds was void under s.284. It is not, however, entirely clear from the wording of s.284 what the trustee's remedy should be.

The court held that the transfer of funds was void even though it took place *before* presentation of the petition – to hold otherwise would defeat the purpose of s.284. As the flat had been purchased with the proceeds of a void disposition it vested outright in the trustee as a matter of law.

Whilst this judgment produces a result that might be is ultimately *'fair'* for the creditors, it is interesting to note that this is <u>not</u> what the section says in terms of the relevant period

which begins with the day on which the petition was presented.

Quantum of Liability for Void Disposition

Re Ahmed

Another case under s.284 - prior to his bankruptcy, but *after* presentation of the petition, the bankrupt had transferred his shares in various companies to a family member who had then transferred them on to other family members. The trustees sought to have the shares or their value returned to him under s.284.

The respondents contended that the trustees were not entitled to such relief as they had not pleaded an actual loss. Much turned on the restitutionary nature of s.284 and whether that meant that the trustees were entitled to the return of the shares (which had diminished in value) or to be put back in the position that they would have been in had the shares not been transferred.

The court held that the first respondent had become trustee of the shares when they were transferred to him by the bankrupt. The trustees in bankruptcy would have been under a duty to sell the shares on their appointment and, accordingly, the amount payable to the estate by the respondents was a fair price as at the date of the transfer of the shares – not a market value. In this case, the respondents were jointly liable to pay £2.21 million being the value of the shares on the date of their transfer by the bankrupt.

EMPLOYMENT

Implied Employment Contracts

Re MF Global UK Ltd (In Special Administration)

Where employees were, subject to an intra-group arrangement, routinely seconded between group companies a dispute arose as to which company should be liable for which employees.

Although there was no express contract, the company had for many years reimbursed all the employment costs of the employing company. The court held that there was an implied contract that the company would be liable for the employees – given the large sums of money involved and given that such arrangements are common in large organisations, it would unthinkable that the company would not have considered itself liable.

Cross-Border

Implied Submission to Foreign Jurisdiction

Vizcaya Partners v Picard

The issue of submission to the jurisdiction of the court can become highly technical and this case was no exception. The issue turned on the question of whether V had impliedly submitted to the jurisdiction of the New York Bankruptcy Court whose judgment the US liquidation trustee sought to enforce against V in Gibraltar.

The debtor's consent to be bound by the jurisdiction of the court need not be a contractual submission but he must have expressed willingness to be subject to the court. This consent can be inferred from the circumstances but it must amount to an actual agreement to submit to that foreign jurisdiction.

In this case, the Privy Council held that the contracts in question did not contain a blanket submission to the NY court and the trustee could not show any aspect of NY law that extended the relevant jurisdiction provisions to include V.

Insolvency Moratorium Not EU-Wide

Marme Inversiones 2007 SL v Royal Bank of Scotland plc

The court refused a stay of English proceedings where there were pending Spanish insolvency proceedings. The claims arose out of alleged misselling of swap agreements but the court found that they were not "*related actions*" within the meaning of Article 28(3) of the 2001 Brussels Regulation. The court was also influenced by an exclusive jurisdiction clause in the swaps and the fact that the Spanish insolvency proceedings appeared to be languishing in the Spanish court.

Insolvency proceedings in one EU state do not prevent litigation in another EU state if the claims do not derive from or are not closely linked to the subject of the insolvency proceedings.

English Guarantee Liability In Overseas Insolvency

Edgeworth Capital (Luxembourg) v Maud

M was guarantor of debts of a Dutch company whose COMI was in Spain and which had entered voluntary insolvency (*Concurso*) in Spain. The PG was governed by English law. Under Spanish law PG liability would have been discharged as a 'specially related creditor'. The guarantee creditor sued M in England under the terms of the PG.

M argued that (i) under the EC Insolvency Regulation, the matter was an insolvency process subject to Spanish law and (ii) since the creditor had proved in the liquidation, it had submitted to the jurisdiction of the Spanish court (see *Rubin v Eurofinance*). According to M he could rely on Spanish law for a discharge of his liability.

Knowles J held that the relevant provision of Spanish law, not being part of the insolvency code, did not come within the EC Insolvency Regulation in any event. Even if proceedings had been brought in Spain, the Spanish courts would inevitably find that English law applied to the PG.

Alistair Bacon
15 July 2016

Brexit – A Perspective

So - 37.44% of the UK population has voted in favour of the UK's seceding from the EU which is, apparently, sufficient.

Leaving aside the press-stoked public hysteria and Machiavellian gamesmanship of certain politicians, nothing material has actually changed. The immediate impact of the Brexit vote is purely economic and political – the pound is at its lowest point for years, ½% interest rates are on the horizon, job vacancies are down, the housing market (especially in London) is falling and we have an entirely new Government and Prime Minister and an Opposition in disarray.

The UK executive is not, however, legally bound to serve notice under article 50 and the withdrawal process will not begin until it does. That said, as things stand, it will be politically difficult for the Government not to act upon the result of the referendum even though it is clear what the effect of the result is. So, for present purposes, let us assume that the UK does secede from the EU within the next couple of years or so – what will be the effect on the English Insolvency régime?

A lot of the so-called 'EU law' derives from EU directives and regulations that have been enacted into English legislation – not least in the realm of social and employment law. This latter class of legislation forms part of English law and will remain wholly unaffected by the UK's relationship with the EU.

On the other hand, there are a number of pieces of legislation that have direct effect in English and apply without further enactment. These include:

- EC Regulation on Insolvency (EC) 1346/2000 (plus recast version of the directive effective from 2017)
- Financial Collateral Directive 2002/47
- Various directives on winding up credit institutions, banks and insurance companies.

In respect of such directly effective measures, the Government would have to pass new legislation to ensure that the issues currently dealt with by the various EC directives would, where appropriate, continue to apply in English law. This would be mostly likely achieved by way of secondary legislation so all that would be required of Parliament would be an enabling provision in primary legislation allowing the secretary of state to make the changes needed.

There might be some shenanigans following Brexit in private law contracts. For example, in cross-border loan agreements where a UK bank is lending to an EU-based borrower, such a loan could become unlawful if there are no banking arrangements in place in substitution of current EU rules. That could render the loan repayable. The LMA is aware of this as will be the banks so it is inevitable that at fix will be worked out in advance. There has also been much written by many lawyers about the need to factor Brexit provisions into all cross-border trade agreements but our view is that contracting parties should not rush into anything until it is a bit clearer what measures the Government is going to introduce.

Whatever one's views on the rights of wrongs of Brexit are (personally, I'd quite pleased to be shot of the EU but cannot see how one could vote for Brexit without any indication at all as to what alternative was envisaged), it is absolutely apparent that the current vacuum is going to lead to short- to mid-term chaos. There will be further economic hardship in that period as the Government and other institutions are focused on trying to negotiate terms with the EU whilst simultaneously sweet-talking external trade partners and inward investors. One would hope that the sensationalist British press and the likes of Bozza can be curtailed to allow more sensible parties to get on with the job in hand but that is probably too optimistic.

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