AMB LAW

INSOLVENCY UPDATE

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Welcome to the 17th Edition of **AMB Law's *Insolvency Update***. A lot has happened in the world since our last missive: Donald Trump is set to be US president, (Lord?) Farage is gearing up to be our man in Washington and Andy Murray is king of the pile. You couldn't make this stuff up – if you had, however, put a fiver accumulator on all three of Trumpton, Brexit and Leicester winning the premiership, you'd now be very wealthy – PaddyPower would have given you 3,000,000:1 odds!

Perhaps most incredibly of all, the new **Insolvency Rules 2016** have actually been published. There will be a great deal written about the new rules before they come into force next April. Some of the new concepts are good (alignment of rules on meetings, recognition of IT etc) but much of the problem with the Rules will derive from their being so appallingly badly written in so-called 'clear' English.

In the real world, we are pleased to announce that we will be extending our service offering in the new year by the addition to the team of an associate partner being a senior lawyer specialising in commercial litigation with a particular emphasis on construction disputes. We are very excited at this new departure which will enable us not only to expand into different areas of legal practice but will also offer a massive boost to our existing contentious insolvency work.

As ever, if you would like not to receive future updates or if you or your colleagues would like more stuff, please tell us by email to: *office@amblaw.co.uk*.

MISCELLANEOUS

New SIP 13 – Disposal of Assets to Connected Parties

R3: Statement of Insolvency Practice 13 (England and Wales)

A new SIP 13 will come into effect on **1 December 2016**.

Currently, SIP 13 applies only where the assets of an insolvent company are sold to the directors. The new SIP 13 will apply to disposals to any connected party via any corporate or personal insolvency process although it will not apply to MVLs.

The SIP is concerned to protect against disposals on terms less favourable than might be obtained by or offered to a third party – not just price. Office holders will be required to justify a sale to a connected party in the next report to creditors after its conclusion.

To read the SIP in full visit the R3 website or click here.

Bank's Duty of Care

O'Hare v Coutts & Co

The defendant bank had not breached its duty (in contract or in tort) to exercise reasonable skill and care when advising investors about the risks of certain investments.

The judge focused on what the claimant, as a sophisticated investor, would expect to be told and not on whether the bank had complied with certain standards of professional practice.

An informed investor, much like a medical patient, is entitled to decide the level of risk that he is prepared to take and for that he must accept responsibility.

Offer & Acceptance By Email

Gibbs v Lakeside Developments Ltd

Not in any way and insolvency case but quite an interesting area of law and one that is bound to develop.

Party A had offered to settle upon the payment to it by Party B of a sum of money by a certain date. Party B's email response began *'[We] accept your offer'* but attached to the email was a draft consent order with a different payment date to that proposed by Party A.

Party B contended that it had unequivocally accepted Party A's offer and that the date in the order was just detail – had there been no draft consent order at all, there would have been no argument.

The court held that it had to look at the correspondence as a whole and that it was clear that there was not

agreement between the parties. Party B's email had varied the terms of the Party A's offer and was, accordingly, a counter offer so the parties were not *ad idem.*

ATE Policies as Security for Costs

Re Premier Motorauctions Ltd

The company's liquidators had sued PwC and Lloyds bank for losses suffered by the company prior to its insolvency which they alleged to be as a result of PwC's and the bank's breaches of duty. PwC had been advisors and subsequently administrators.

PwC applied for security and the liquidators provided ATE policies for which an interim premium of £350K had become payable. PwC alleged that the ATE policies were insufficient security as they could be rescinded by the insurers and that two of the insurers were Gibraltar-based.

Snowden J dismissed PwC's application. The fact that the company was insolvent did not automatically mean that it would not be able to pay the ATE premiums as those would rank as expenses ahead of other creditors. There was also no evidence that the insurers would 'fight tooth and nail' to avoid the policies which had been taken out following professional advice. As regards the jurisdictional point, the judge found that one insurer had a good track record in the UK; the other had no such track record and the judge disregarded £½ million top-up payment from that insurer.

The important bit is that the judge also found that it was public policy to take account of ATE policies in considering liability to pay security for costs.

ADMINISTRATION

Officeholder May Seek Admin Order

Re a Company CR 2016

An administrator had carelessly allowed the admin appointment to expire and had unwittingly continued to act as administrator.

Realising his error the administrator then applied to the court for a further admin order.

The High Court held that the applicant did not have *locus standi* to apply for an administration order as a former administrator but he *did* have *locus* to apply as a creditor of the company in respect of his unpaid fees.

On this basis, the High Court made an administration order as the company was plainly insolvent and making an administration order was likely to achieve the purpose of administration and appointing a liquidator would be worse for creditors.

This strikes us as slightly peculiar and yet more manipulating of common language by the courts in order to achieve a perceived desired outcome. Is an officeholder *really* a *creditor* of a company over which he is appointed? A rhetorical question, but we think not. In the old days the court would merely have retroactively extended the term of the previous order and then made a further extension going forwards.

Court's Power to Wind Up Company

Re Graico Property Company Ltd

The High Court has held that, on an application to end an administration pursuant to para 79 of Sch B1, it has the power to make a winding up order instead despite there being no winding up petition presented. Furthermore, the court has held that it has the power to appoint the incumbent administrators as liquidators. The latter part is not controversial as that is set out in section140 (albeit in the context of a petition having been presented). Whilst this is not exactly ground breaking, it is the first reported example of the court exercising its discretion to make a winding up order under para 79.

Concurrent Administrators

Re BHS Ltd

Everyone knows from the news that, with the encouragement of the PPF, the BHS administrators applied to the court for the appointment of concurrent administrators. A protocol was established between the two sets of administrators by which the original ones would continue to trade the business with a view to achieving the statutory purpose and the incoming administrators would be responsible for investigating potential claims against the former directors.

The appointment was stated to be in the best interests of the creditors and would not lead to a duplication of cost as the administrators had agreed to share information and were carrying out separate tasks. The application therefore ticked all the boxes required by para 103 of Sch B1 and the court exercised is discretion to effect the appointment.

LIQUIDATION

Contribution For Wrongful Trading

Re Robin Hood Centre plc

You may recall this case from October 2015 (Click Here for ***Insolvency Update #11***). It involved a partly-successful wrongful trading action against directors on whom the burden of proof fell to show that they had taken every step to minimise the loss to creditors etc.

Whilst the finding of wrongful trading stands, on appeal the directors have had the order that they contribute to the company's assets set aside. This is largely factual due to the liquidators' case having been so shabbily pleaded but the court reiterated the principle that the quantum of any order would be based upon the overall effect on the company's assets as a whole not on the loss to any particular creditor.

Application to Rescind Winder

Re Cre8atsea Limited

Under rule 7.47(4), an application to rescind a winding up order must be made within 5 business days of the order. An application to extend that time limit must be strictly justified and only allowed in exceptional circumstances.

The judge's comments are *obiter* as he found that the applicant was, in fact, not a creditor at all and had no

standing to make the application. Whilst he does not suggest what sort of time extension the court might entertain, the inference was that it should be measurable in weeks rather than months.

Assessing Validity of Claim Requisitioning Meeting
Re J&R Builders (Norwich) Ltd

Given that there was no appeal mechanism, there would be a low threshold to be applied by a liquidator in assessing whether a person was a 'creditor' for the purposes of requisitioning a meeting of creditors. In this case, the claimant's locus as a creditor was challenged by the director and was unsupported by any documentation or evidence in hate company's records. After an extensive investigation, the liquidator concluded that the claim was not genuine and rejected the claimant's right to call a meeting.

The High Court has held, even though the claimant's evidence was weak and uncorroborated, there was no evidence that the claim was *mala fides* and accordingly the liquidator should have allowed the creditor to vote.

BANKRUPTCY

Objective Test for *'Material Irregularity'* in IVA
Re Bishop

The debtor's former business partner (they were solicitors) had a substantial (£122K) claim for unpaid profit share which was admitted to vote for £1. Secondly, the debtor's proposals failed to disclose certain disciplinary proceedings to which he was subject (and which ultimately led to his being struck off).

The court struck out the complaint in relation to voting rights on the basis that the claim was unliquidated and unascertained.

In relation to the non-disclosure of the proceedings, the court held the test of materiality was objective. Had the creditors known of the proceedings they would have viewed the overall proposals differently and the non-disclosure was therefore material.

Pension Income in Bankruptcy
Horton v Henry

The Court of Appeal has rejected the trustee's claim and held that pension income NOT is available to a trustee in bankruptcy unless bankrupt has already elected to take payment. In this case, although the bankrupt had reached the age at which he was entitled to draw down his pension he had not yet done so. The trustee could not compel him to make that election.

Bankrupt's Committal for Contempt
Re Ellison

This case is somewhat dependent upon its own facts but it is worth reading for interest and for an idea how the court's patience may be tested. The Bankrupt was a dentist subject to two bankruptcies petitioned for by HMRC – one on 2000 and one in 2013. The trustee had, for some time, sought unsuccessfully to negotiate an IPO with the Bankrupt but, ultimately, proceedings for the disclosure of the Bankrupt's financial information had been issued. There was a string of cumulative orders made by various bankruptcy registrars which required the provision of information regarding the Bankrupt's assets and means. The trustee had not been satisfied with the information provided and had obtained a freezing injunction with a penal notice. At the final hearing the court was asked to consider whether the Bankrupt had complied with earlier orders and whether the application could be proceeded with in the Bankrupt's absence, as he had failed to attend.

The court was happy to proceed with the application as it was clear that the Bankrupt had had notice of the hearing and it had been his decision not to attend. IN his evidence, the Bankrupt had made mention of an offshore trust but provided no details of it; it was beyond doubt that the Bankrupt had failed to comply with an order made by Registrar Derrett requiring him to provide information regarding all his assets whether he was beneficially entitled or not. He had also failed to comply with at least two other orders and the court was satisfied, to a criminal standard, that the Bankrupt was in contempt and would, accordingly, be committed although sentencing was adjourned.

Electronic Working Scheme

With effect from **1 November 2016** bankruptcy proceedings in multiple lists (ie petitions) will be dealt with in accordance with the electronic working pilot scheme set out in Practice Direction 510 of the CPR.

In our view, this will just result in duplication of work of the part of lawyers who will now have to produce hearing bundles as the court will not have files available for the registrar.

For a copy of CPR PD510 Click Here.

Cross-Border

Validity of QFC in Foreign Jurisdiction
Hooley Ltd v The Victoria Jute Company Ltd

It is not necessary to test the validity or enforceability of a floating charge in a foreign jurisdiction where the company's assets were located in order for the QFCH to exercise its rights of appointment under paragraphs 14 and 16 of Schedule B1.

In this case the Scottish company was already in liquidation in India. The Outer House of the Court of Session held that the Indian proceedings were ancillary to Scottish proceedings, not *vice versa*, and so dismissed arguments by Indian creditors that the Scottish administrators' powers were subject to Indian legal constraints.

Alistair Bacon
23 November 2016

The Modern Law of Validation Orders

Express Electrical Distributors Limited v Beavis [2016] EWCA Civ 765

Ever since the oft-cited 1980 decision in *Re Gray's Inn Construction Ltd*, there has built up a belief that all that is required for a validation order under s.127 (and, by extension, s.284) is (i) that the payments made should be in the ordinary course of business and (ii) that the recipient should be ignorant of the existence of the petition. Faith in this approach has continued unabated notwithstanding para 11.8 of the Practice Direction on Insolvency 2014 which clearly states that, on a validation, the court must be satisfied (i) that the debtor is solvent *or* (ii) that the payments required to be validated are in the best interests of the creditors as a whole.

In *Express Electrical* the court was asked to validate a post-petition payment of £30,000 that had been made by the company to a supplier. On the facts, it appeared that part of the payment was in respect of £13,000 of new goods. The balance related to previous supplies which had not all fallen due for payment. Prior to the petition the company had been in the habit of effecting payment for supplies at the very last minute permitted by the supplier's terms.

The High Court expressly disapproved the *Gray's Inn Construction* formula which it stated should not be regarded as a legal test. The starting point in any validation application will always be that the court will seek to enforce the *pari passu* principle and will go behind that only if there are special circumstances that warrant it. This will be exactly the same regardless of whether the application is retrospective or prospective although the court stated that, in a retrospective application, the court should be able to view the circumstances with the benefit of hindsight.

On the evidence in *Express Electrical* it was clear that the supplier knew nothing of the petition. It could not, however, be said that the payment was in the ordinary course of business as paying ahead of time was not the company's *modus operandi*. Neither could it be said that the payment was in the best interests of the unsecured creditors generally as the supplies were not essential to the company's completing its contract which was not particularly profitable anyway.

This decision is an important one for practitioners asked to advise in respect of validation orders. Everything that has gone before emanating from *Re Gray's Inn Construction* needs to be forgotten. The starting point is that the court will not validate post-petition dispositions. It will only go behind that if there are special circumstances that warrant its doing so and, even then, it will be necessary to show that the validation will benefit the creditors generally – for example, by enabling the debtor to complete a contract and realise its WIP for the benefit of creditors.

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