AMB LAW

INSOLVENCY UPDATE

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Happy New Year and welcome to the 18th Edition of **AMB Law's *Insolvency Update***; the first of 2017. Christmas and its excesses are but a distant memory as we enter the season of hair shirts and abstinence full of hope for a bumper year in the world of ~~insolvency~~ corporate recovery.

It is our very great pleasure to introduce **Nick Bowman** who has joined the firm as an associate partner. Nick qualified in 1998 and has 20 years' experience of litigation and dispute resolution. Nick has a particular specialism in property and construction litigation and also business and financial disputes. Hopefully we will be able to introduce Nick to our friends and clients as soon as possible.

Nick will primarily be based in our Ipswich office but will also operate from our City office. Nick's contact details are :

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If you would like to be removed from our list of recipients of this august publication or if you have chums and colleagues who would like to be added, please email: *office@amblaw.co.uk*.

MISCELLANEOUS

Restrictions on Re-Use of Partnership Names

Re Newton's Coaches Ltd

The prohibition in s. 216 relating to the re-use of company names does not apply to partnerships that are being wound up. Although s. 216(8) extends the relevant provisions to unregistered companies, the court held that that did not include a partnership.

No Indemnity For Salaried Partner

Wood v Priestley

The claimant was an IP and salaried partner with P&A. He was the subject of various claims for misfeasance and breach of duty in relation to an appointment as liquidator of a company. He claimed that his firm was bound to indemnify him against any award and also against any costs incurred by him in fending off the Secretary of State and his RPB who were also investigating his conduct.

The court reviewed the partnership indemnity and found that he was only entitled to an indemnity against claims brought against the partnership for which he might have become liable as a result of being held out as a partner. The court also held, *obiter*, that it was possible for an officeholder to hold fees earned from that office on trust for his employer but that that would not automatically given the individual a right of indemnity.

If you are a salaried partner in a firm, it might be an idea to check the working of the indemnity that you have from your firm to be sure of its extent. We would be happy to do this for you.

Transactions Defrauding Creditors

JSC BTA Bank v Ablyazov

The defendant had given £1.1 million to his minor son to invest – the investments matured five years later. The claimant claimed that the sums should be held on trust for the defendant or, in the alternative, that the original gift should be set aside under s.423.

The court found on the facts that the gift to the son was genuine and that the investment monies would not be held on trust. However, the question remained as to whether the transaction had been effected '*for the purpose of putting assets beyond the reach of creditors*' pursuant to s.423. The court held that it would be sufficient for the gift to be substantially motivated by this desire – ie it must be *an* intention even if not *the* intention. It has always been said in relation to s.423 that a man cannot be taken to have desired all the consequences of his actions, but this seems to be a slightly wider test than previous authorities.

ADMINISTRATION

Administrators' Costs Indemnity

Re HEC Enterprsises Ltd

The case concerned the insolvency of various companies comprised within the organisation surrounding *Deep*

Purple. In 2005 HEC had entered into an agreement with the various band members to deal with certain IPR. HEC was in breach of that agreement when it subsequently went into administration. The claimants sought to enforce HEC's obligations against the company in administration.

The administrators refused consent to the claimants to continue the litigation and also sought an indemnity in respect of their costs on *Berkeley Applegate* principles.

The court held that it had jurisdiction to determine who should bear the administrators' costs of dealing with the litigation as part of the application and that this was not something to be dealt with separately in a *Berkeley Applegate* application simply because there was a trust involved.

The court then found that the administrators should have granted consent for the litigation to continue and that they should not be allowed to claim for any costs above those incurred in dealing with the actual litigation.

LIQUIDATION

Costs of Complying with Overturned Order

Re Saad Investments Co Ltd (No2)

The Bermuda liquidators of two Caymanian companies sought orders against PwC requiring the latter to give disclosure of their files relating to the two companies. PwC successfully challenged the orders which were overturned but not before PwC had incurred substantial time costs in preparing to comply with the disclosure orders. PwC sought reimbursement of those costs from the liquidators.

The Privy Council held that there was no jurisdiction to make such an award against the liquidators and there had been no requirement on the liquidators to give a cross-undertaking to pay PwC's costs even though the orders had been obtained *ex parte*. Had PwC sought a stay of the orders they could have applied for provision to deal with their costs at that stage.

This is a harsh result for PwC and, although the judgment follows earlier precedent, leaves a result that could be easily abused by IPs able to obtain orders against innocent parties without a thought to the costs incurred by them.

EMPLOYMENT

The Ongoing Risk of TUPE

Project Viva Ltd

The claimants had been made redundant but they claimed that the redundancies were a sham and that they had been unfairly dismissed. In the meantime, the employer had gone into administration and the business then sold to another company owned by the same director and shareholder as the employer.

The claimants were given leave to bring their claim against newco notwithstanding that it was a different company entirely. The Employment Tribunal held that, given that there was a commonality of direction and ownership between the two companies, newco must have been aware of the employees' complaints. Accordingly, it was held that TUPE applied and that the employees' claims could be brought against newco.

BANKRUPTCY

Mental Capacity to Enter IVA

Re Fehily

The debtor and her husband had been made bankrupt following the failure of their IVAs. They challenged the bankruptcies on the ground that they did not have the mental capacity to enter into the IVAs and should not have been made bankrupt. They lost at first instance – the husband abandoned his case but the wife appealed.

On appeal, the High Court dismissed the debtor's case. The law relating to contract applied analogously to IVAs and there was clear authority that the test was as to whether a person, with advice, would be capable of understanding the nature of the transaction in question. As there had been no medical evidence at the time of the IVAs, the debtor could not establish that she lacked the requisite mental capacity at that time. Even if evidence had been raised, the IVA would not have been automatically void. Mrs Fehily had failed to demonstrate that she lacked capacity and her appeal failed.

Ancillary Relief Claims Not 'Property'

Re Elichaoff

This extraordinary litigation has been before the courts again and the trustee's application for leave to appeal the striking out of his case has again been refused.

In short, the trustee in bankruptcy sought to continue a claim for ancillary relief (ie financial settlement) against the bankrupt's ex-wife, even after the bankrupt's death. In the face of overwhelming authority to the contrary, the trustee contended that the right to ancillary relief was 'property' that had vested in him upon his appointment.

The court held that no claim for ancillary relief was possible following the death of the bankrupt. Furthermore, there was clear authority that the right to claim ancillary relief was not 'property' but a statutory right to ask for relief.

Court's Power to Rescind Order

Re Layne

The Court of Appeal had held that the wording of s. 375 is sufficiently wide to allow an appeal court to review, rescind or vary an order made by the court below. Here the Court of Appeal reviewed an order of the High Court by which a trustee in bankruptcy's application to overturn a discharge had been refused. The discharge had not provided for payment of the trustees costs and expenses and so the trustee's application was remitted to the High Court for that issue to be dealt with.

Alistair Bacon
January 2017

A Bankrupt's Pension Entitlement

Horton v Henry [2016] EWCA Civ 989

The long-running saga of *Horton v Henry* has now reached its next stage with the Court of Appeal having given judgment in dismissing the trustee in bankruptcy's appeal.

The question to be decided was as to whether a trustee in bankruptcy could require a bankrupt, who had reached the age at which he was contractually entitled to draw down his pension (but had not done so), to elect to do so. Obviously, the incentive for the trustee would be that he could then apply for an income payments order under section 310 in relation to the funds drawn down.

As a matter of pure construction of section 310 of the Act, the court held that a bankrupt's contractual right to draw down or crystallise his pension did not come within the definition of "*income of the bankrupt*" within section 310(7) and an attempt to impose such a construction onto the section was wholly unrealistic. A contractual right to *elect* to receive a lump sum or income payment out of a pension pot was very different in character from an *actual* payment once the relevant election had been made.

Section 310(7) defines income as comprising "*every payment in the nature of income which was from time to time made to him or which he from time to time becomes entitled*". This, the court held, was not sufficient to include the right to call for such an entitlement.

The court also noted that there would "normally" not be any right to receive an actual income until long after the relevant election had been made especially if the fund comprised assets which were not readily marketable. That point is fact specific and may or may not be true but the point is that section 310 is concerned with payments and monies to which the bankrupt is actually entitled and it cannot be extended to include a *chose in action* which might, if exercised, give rise to a monies being paid.

In the circumstances of this case, it is difficult to see how one could say that the bankrupt was "entitled" to a "payment" until he had made the necessary election and it is difficult to see how the right to make an election could be included in the language of section 310(7). On the other hand, this does create something of a serendipitous situation where bankrupts of pensionable age who have not started to draw down their pensions may be able to preserve them in their entirety whereas those who have had to start to draw an income may be susceptible to an income payments order. No doubt clarifying legislation will follow soon.

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