AMB LAW

INSOLVENCY UPDATE

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Welcome to the 19th Edition of **AMB Law's *Insolvency Update***. The growth of work levels that we experienced at the beginning of 2107 seems to have continued and the insolvency market generally seems to be much busier than last year. In other spheres, commercial property also seems to be booming as is M&A work.

Closer to home, our litigation practice under Nick Bowman is busy with plenty of enquiries relating to general litigation and construction disputes coming in. Despite all the Brexit rhetoric and the fears over *The Donald*, the market appears to have steadied itself quite satisfactorily.

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MISCELLANEOUS

New SIP6 – Decision Making

It is unlikely to have escaped your notice that the new Insolvency Rules 2016 will come into force on **6 April 2017**. There is also a new SIP6 relating to the new decision making processes which is available here or on R3's website. It is fairly unremarkable and notes such obvious things as information being presented consistently and fairly to all creditors.

SIPs 8, 10 and 12 will be replaced by this new SIP.

Power to Vest Disclaimed Property

Re Cadmus Management Ltd

Following the dissolution of the landlord of a 999 lease, the applicant underlessees applied for an order under section 181 for the head lease to be vested in them.

Notwithstanding that this would give the tenants a massive windfall in the form of an extended lease, the Court held that its discretion was unfettered and it could vest property on such terms as it deemed fit. The court, however, declined to make a vesting order because the applicants had not demonstrated that vesting would not cause injustice to anyone else with a proprietary interest.

ATE Fails to Pay Out Following Insured's Breach

Denso Manufacturing UK Ltd v Great Lakes Reinsurance

ATE insurers were held to be entitled not to pay out to a third party claimant following a breach of the provisions of the policy by the policy holder.

The policy holder had been ordered to pay some of the claimant's costs but went into liquidation without doing so. The claimant brought proceedings against the ATE insurer under the Third Party Rights Act 1930 (which was the act in force at the time). The insurers denied liability because of the policy holder's various breaches in relation to assisting with claims and providing info.

Interestingly, were the case brought now, the claimant might fare better under the Third Party Rights Act 2010 pursuant to which an insurer cannot rely upon the insured's failures if they are completed by the claimant instead.

Disclaimer of Liability

Taberna Europe CDO II plc v Selskabet af

Whilst this is not an insolvency case, it is relevant given the preponderance of such disclaimers in insolvency practice.

The claimant had bought €27 million of loan notes issued by a Danish bank, Roskilde Bank A/S. Eight months later the bank went bankrupt and the claimant brought proceedings against the defendant broker claiming misrepresentation in its presentation to investors which had massively understated the bank's non-performing loans (K57 million as opposed to K3.5 billion).

The Court of Appeal analysed the provisions of section 2 of the Unfair Contract Terms Act 1977 and found that there was no reason why a person could not exclude liability for statements made to the world at large. There was therefore no reason why the defendant could not rely upon such a disclaimer in its presentation to exclude liability for the erroneous bad debt figures given.

Compliance with On-Demand Guarantee

MUR Joint Ventures BV v Compagnie Monegasque De Banque

The Commercial Court has upheld a demand under an on-demand guarantee despite finding that the making of the demand did not comply with its own provisions in that (i) it had been signed by one director rather than the stipulated two, (ii) it was sent by ordinary post not registered and (iii) it was not properly notarised.

The court acknowledged that a bank could refuse to pay out under a letter of credit for such apparently trivial grounds but that an on-demand guarantee would not be interpreted so strictly. One does rather wonder what is the point of negotiating contractual terms if they can simply be replaced

by a judge's imposing his own interpretation at some future date.

Compare also our article on the strict service requirements of contractual notices : Here

Limitation Periods Where Company Dissolved

Pickering v Davy

Prior to this case, the test for the court to make an order freezing the running of time for purposes of limitation had depended upon the applicant's being able to show a connection between the striking off and the failure to bring proceedings. The judge at first instance held that it was sufficient that there had been a small window of opportunity in which the claimant could have issued proceedings had the company not been dissolved.

The Court of Appeal reversed this decision as setting the bar too low. To succeed, the claimant would need to show a clear causal link between its now having issued proceedings and the company's having been dissolved. In this case, it was mere speculation to show that the applicant *would have* issued proceedings but for the dissolution.

Agent's Authority Revocable

Bailey v Angove Pty Ltd

This long-running saga has now reached the Supreme Court. The issue arose in relation to a company, D&D, that had acted as selling agent for Angove. Upon the administration of D&D, Angove served a notice terminating D&D's agency. An issue arose as to whether the agency had been irrevocable and so whether D&D could continue to collect customer payments on Angove's behalf. Angove also claimed a constructive trust over the proceeds collected by D&D from the customers.

Angove was successful on its agency point in all lower courts but attention turned to the monies that had been collected.

The Supreme Court held that an agency agreement could always be revoked even if it was expressed to be irrevocable (unless the agency granted the agent a proprietary interest). Accordingly, Angove's notice had acted as an immediate termination of D&D's agency and consequently D&D had no authority to collect outstanding invoices (or, thus, to be paid commission for so doing).

On a point of general interest only (because it did not arise in this case), the Supreme Court rejected Angove's constructive trust claim. Even if D&D had had authority to collect the outstanding invoices, the monies collected would not be held on constructive trust for Angove but subject to the terms of the agency agreement.

ADMINISTRATION

Adjudication Awards and Administration

South Coast Construction v Ivorson Road

The High Court gave permission for a claimant contractor to continue proceedings to obtain judgment in respect of an adjudication award, notwithstanding that the company was subject to a para 43 moratorium.

This is a sensible decision – it crystallises an award into an enforceable judgment providing clarity and certainty to the creditor and the administrator alike with no detriment to other unsecured creditors and no undue advantage to the claimant. It also enabled the claimant to secure an order in respect of its costs.

For a more detailed review of this case, click here.

Retrospective Admin Order

Re Elgin Legal Ltd

The court was asked to make a retrospective admin order in a case where, through an oversight, there had not been an application to extend an admin as part of a block transfer application.

Snowden J in the High Court stated that he doubted very strongly where the wording of para 13(2) of schedule B1 to the Insolvency Act 1986 was sufficient to allow a court to *back*date an order.

In the present case, Snowden J felt that a backdated order would be inappropriate anyway as (i) it could have an unfair effect on creditors' claims and (ii) no debtor claims would be lost by not backdating the order.

Whilst it may have been convenient or expedient in many cases in the past, we simply cannot see how an administration order can ever be backdated – it is a nonsense.

Improper Motive in Administration

Re Frogmore Real Estate Partners GP1 Limited

The applicant in this case alleged that the QFCH bank had appointed administrators to stifle litigation that the company might otherwise have brought against the bank. Paragraph 81 enables the court to terminate an administration that was begun for an *'improper motive'* but, unfortunately, does not give any clue as to what constitutes an improper motive.

The court held that the test was not akin to that for an abuse of process but required a purpose that was not in keeping with the statutory regime relating to administration. Whatever the bank's real motivation, the provision would be unlikely to be invoked if the administration were able to proceed in accordance with the regime in Schedule B1 and the statutory purposes achieved. The court held, in any event, that there had been no improper motive and, even if there had, the statutory purposes would still be achieved so para 81 would not be invoked.

This case also dealt with a COMI issue – see below in relation to Cross-Border.

DIRECTORS

Authority to Bind the Company

Re NAL Realisations (Staffordshire) Ltd

The managing director had entered into various transactions with his

company including a sale to him of a freehold property, the purchase of his shares and the sale of a subsidiary.

The court found that the sale of the freehold to the director had not been properly authorised by the company nor had it been subsequently ratified. As a consequence, the director held the property on a resulting trust for the company.

The purchase by the company of its own shares from the director had not been carried out in accordance with the provisions of section 691(2) of the CA2006 and, specifically, the purchase price had not been paid but instead left outstanding and recorded in the director's loan account. More importantly for general application, the court found that a share purchase scheme *could* constitute a 'transaction' for the purposes of section 423 of the Act.

The sale by the company to the director of its own subsidiary failed for a number of reasons: (i) the director did not have authority to action it, (ii) the sale was not in accordance with the CA2006 provisions on substantial property transactions and (iii) it was at an undervalue for the purposes of section 423.

The MD and two co-directors were found to have breached their duties to the company. Interestingly, a claim that the directors had breached the duty to act in the best interests of *creditors* failed and the court found that the directors had not been under a duty to give priority to the creditors' interests on the basis that the transactions could lead to the company's insolvency.

LIQUIDATION

Quantifying Loss in Wrongful Trading

Re Robin Hood Centre plc

The directors who had been found liable for wrongful trading and ordered to pay £35,000 to the company's coffers appealed the quantum of that order [see *Update #11*].

The High Court found that the Registrar had been placed in an impossible position because the liquidators' case had been so badly formulated and had not shown any net deficit to the company. Accordingly, the Registrar had had to draw his own conclusions form the evidence before him. On this basis, the High Court found that the directors had not had an opportunity to make representations and so their appeal *had* to succeed.

It is important to note when considering a wrongful trading action against directors that the liquidator will need to establish not only the facts of wrongful trading but also a direct causal link between the directors' actions and the overall increase in net deficiency to the creditors as a whole (not a single creditor or group of creditors).

Given the quantum of the original order, one does slightly wonder what the directors' irrecoverable costs were in this matter and whether the litigation was even remotely economic.

Test of Assessing Creditor's Claim For Voting

Re J&R Builders (Norwich) Ltd

In a CVL a former director required the liquidator to convene a creditors' meeting under section 171(2) to consider his removal. The liquidator refused on as the request to convene the meeting was not supported by 25% in value of the creditors. To reach this conclusion the liquidator has subjected one claim to extensive scrutiny and put the claimant to strict proof.

The Court held that, for voting purposes, a creditor's claim should be accepted unless it is was connected party, manifestly wrong or *mala fide*.

EMPLOYMENT

Tribunal Limits to Rise

Employment Rights (Increase of Limits) Order 2017

With effect from **6 April 2017** the maximum compensatory award payable in the Employment Tribunal will rise to **£80,541** (from £78,962) an a *'Week's pay'* will rise to **£489** (from 479).

Nation Minimum Wage

National Minimum Wage (Amendment) Regulations 2017

With effect from **1 April 2017**, the national minimum wage levels will be as follows:

Aged 25+	£7.50
Aged 21–24	£7.05
Aged 18–20	5.60
Aged < 18	£4.05
Apprentices	£3.50

Direct Consultation Prohibited

Dunkley v Kostal UK Ltd

Where a company had reached an impasse in a collective bargaining process with its trades unions, it was not permitted to write directly to the employees restating its offer.

Although this case was outside the insolvency context it is an important reminder of the need to follow the rules strictly or - in an insolvency situation – as closely as possible. The court found that it was inherently improbable that the company had not tried unlawfully to induce the employees to sign up to its terms and that any result was a prohibited result under TULRCA.

BANKRUPTCY

Abuse of Process Repeatedly to Challenge Debt

Harvey v Dunbar Assets plc

It was an abuse of process for the debtor to keep challenging the validity of the debt pursuant to which he had been made bankrupt, when the arguments had all been dealt with already in earlier proceedings. Applying the so-called *Tuner Principle,* the Court of Appeal upheld the High Court's having dismissed the bankrupt's application on the basis that the applicant's arguments had previously been dealt with and it was a waste of public time and money for them to be rehearsed again.

ISA Fees on Annulment Monies

Safier v Wardell

No Secretary of State's fee would be payable in respect of third party monies paid into the Insolvency Services Account in order to settle bankruptcy debts and costs in order to achieve annulment.

HP Agreement Vests in Trustee

Re Mikki

The bankrupt had had the use for his business of a vehicle that was purchased on an HP agreement. The bankrupt sought to purchase the vehicle from the HP company claiming that, as the vehicle was a tool of his trade, it had not vested in his trustee.

On appeal to the High Court, Mann J held that the benefit of the HP agreement was an ordinary *chose in action* which fell within the wide definition of 'property' in section 431. Accordingly, pursuant to section 283(1)(a), the rights under the HP agreement vested in the trustee upon his appointment.

Completion of an IVA

Re Wright

The debtor was in an IVA under the R3 Standard Conditions. The supervisor had issued a notice of completion stating that the terms had been complied with. Subsequently the debtor become entitled to two sums relating to damages for PPI misselling claims and the former supervisor sought directions as to whether the monies should be paid to the debtor or caught by the IVA trust clause.

The lower courts had found in favour of the debtor; the certificate of compliance under clause 9(2) of the standard terms was conclusive and the IVA trust had been brought to an end.

The Court of Appeal differed and allowed the appeal so that the monies fell to be dealt with under the terms of the completed IVA. On a strict analysis the court held that, although the IVA contained terms bringing an end to any trust following termination of the IVA, the IVA had not actually *terminated* but had *completed*. This simply operated to release the debtor and his assets from any claims covered by the IVA but it did not bring the IVA trust to an end. The right to receive compensation from the banks remained subject to the IVA trust notwithstanding the debtor's release from any liability to the IVA creditors.

A harsh result for the debtor but one that is difficult to criticise for that is was the terms said. In any event, there is no reason why the debtor should receive a windfall merely through the serendipity of timing when his creditors had, no doubt, suffered a huge shortfall on what they had been owed.

Successive Suspensions of Discharge

Harris v Official Receiver

The High Court held that the provisions of section 279 are sufficiently wide to allow the court to make successive orders suspending the discharge of a non-cooperating bankrupt. Here, a suspension of 12 months had been made and on that basis the bankrupt challenged a further application for an indefinite suspension. By virtue of the suspension, the OR continued to have jurisdiction over the estate. As the bankrupt had continued to fail to cooperate it was perfectly in order for the OR to seek to extend the suspension indefinitely. The purpose behind the regime was to give the bankrupt an incentive to cooperate.

CROSS-BORDER

Modified Universalism Displaced By Statute

Re Caledonian Bank Limited

The case concerned the Caymanian winding up of Caledonian, a company registered in the Cayman Islands. The liquidators applied to the Bahamian court for recognition of the liquidation in order that assets situated in the Bahamas could be pursued by the liquidators.

The Bahamian *Companies Winding-Up Amendment Act 2011* has introduced a statutory scheme for the recognition of foreign insolvency proceedings in designated 'relevant foreign countries'. Unfortunately, at the time, no countries at all had been so designated. Accordingly, the Bahamian Supreme Court held that there was no mechanism in existence for the mutual recognition of foreign insolvencies as the common law principle of modified universalism had been replaced by a statutory procedure which contained no transitional provisions.

We understand that the Bahamian Liquidation Rules Committee has now designated 142 countries including the USA and many Commonwealth countries.

Rebutting COMI Presumption

Re Frogmore Real Estate Partners GP1 Limited

We dealt above with paragraph 81 of schedule B1 to the Insolvency Act 1986 and the improper motive issue. The judgment also dealt with the presumption that COMI followed the registered office.

The companies (there were three connected companies involved) were all registered in Jersey for tax reasons. Each had two professional directors based in Jersey and a third, executive director based in England. The companies dealt with commercial property in England and all their day-to-day operations were conducted from London. The court applied the established tests for COMI and held that the COMI was in the place from which the company conducted the general administration of its business as could be ascertained by a third party. In this case, the day-to-day business was conducted in London and the companies' documentation was stated to be subject to English law. The only connection with Jersey (apart from the registered office and the two non-active directors) was that board meetings took place there – but that would not have been known to a third party. Consequently, the COMI was in England.

Alistair Bacon
17 March 2017

All Change at the Courts

Even the average ostrich will have picked up that the Insolvency Rules 2016 are about to come in force. There are, however, a number of other impending changes that will shortly come into play that will have an equally dramatic effect on the conduct of insolvency litigation.

CE-Filing : The New Regime Works!

With effect from **25 April 2017**, the various courts operating out of The Rolls Building will, for a two year trial period, close down their public counters for the purposes of filing documents, issuing applications or presenting petitions. The courts involved include the Technology & Construction Court, the Admiralty and Commercial Courts and the Chancery Division which, of course, includes our own Companies Court and the High Court in Bankruptcy.

All court filing, issuing and presenting will now be down via the CE-File portal. AMB Law has recently completed through to final order its first application via CE-File portal and we can report that all went well! The process will take some getting used to but it will be much more convenient overall.

The only contentious issue is in relation to time-critical filings (such as Notices of Appointment or winders) where the Court service has said that it will try to issue "*within three hours*". In many cases that will be fine, but in many others it will be hopeless and the court service it going to have to find a way immediately to process time-critical filings or allow paper filings in cases where the timing can be certified as being critical.

HMCTS to Produce Standard Court Forms

The Insolvency Rules 2016 repeal all the forms previously prescribed by the Insolvency Rules 1986 which is absolutely barking! The Companies Court has stated, however, that it will publish its own suite of standard court forms to be used in Insolvency proceedings – which, we hope, should closely resemble those currently in use.

The court has stated that it intends to publish these forms by the end of March 2017.

Business and Property Courts

With effect from **June 2017**, the specialist civil courts (including the Companies Court, the Financial List, the Commercial Court and the Technology and Construction Court) will be known as the "Business and Property Courts of England and Wales". The idea is to allowing a more flexible cross-deployment of suitable expert judges to sit on appropriate business and property cases. It is anticipated that the changes will enhance the UK's reputation for international dispute resolution, and assist in ensuring that the UK continues to provide the best international court-based dispute resolution service for businesses.

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