AMB LAW

INSOLVENCY UPDATE

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Welcome to the 20th Edition of **AMB Law's *Insolvency Update***. This edition represents an exciting milestone as AMB Law was four years old this month – we opened our doors for business on 1 May 2013. Starting a new practice from scratch has been an interesting experience with plenty of highs and lows - a graph of our turnover in the past four years would resemble an architect's plan for a rollercoaster. We now operate from two offices – Ipswich and the City - and have extended our range of services to include all aspects of commercial litigation, construction contracts and disputes, and commercial property advice (particularly in respect of LPA receiverships) as well as our core insolvency practice.

According to the Insolvency Service's figures, the number of corporate insolvencies in Q1 of 2017 rose again for the third successive quarter (taking account of a spike in the Q4/2016 figures). 89% of corporate insolvencies are liquidations and only 11% other forms of insolvency. So much for the much heralded rescue culture – but that is not surprising in a world where all value has been stripped out of a business at an early stage so that most businesses do not actually own any assets, not even their P&M or their debtor books. The primary "asset" in many insolvencies has become claims against the former directors and often spurious litigation on technical points of law which are reflected in the reports..

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MISCELLANEOUS

Limitation And The Dissolved Company

Pickering v Davy

This issue has arisen numerous times in the past few years: when a dissolved company is restored to the register, what happens to the running of time, in the context of the limitation period? The Court of Appeal has now given some guidance on the application of s.1032(3) Companies Act 2006.

At first instance, the High Court had suspended time's running whilst the company had been dissolved and further ordered that the winding up petition would be deemed to have been presented on the date of dissolution.

The Court of Appeal has now held that, in order to stop the clock, there must be a causal link between the company's being dissolved and the failure to commence proceedings in time.

In this case, it was held that the claimant would have failed to issue proceedings in time even if the company had not been dissolved and so to extend the limitation period would unfairly give the claimant a windfall. The first instance decision was set aside on this ground alone but the court was also, *obiter*, critical of the order relating to the timing of the winder.

ADMINISTRATION

'Notice of Intention' Means Exactly That

Re Davis Haulage Ltd

This was one of those frequent cases in which the company desperately needed a bit of breathing space and so chose to file a Notice of Intention in order to gain the benefit of the moratorium in para 44 of schedule B1. In fact the company filed three consecutive Notices of Intention but no administration appointment was ever effected.

On challenge from the company's landlord, the Court of Appeal held that when filing a Notice of Intention the company or its directors must actually intend to appoint administrators. In this case, the primary intention had been to try for a CVA with admin seen only as a last resort. Accordingly, the Court of Appeal held that the Notices of Intention were infective as the director did not actually 'intend' to appoint.

We have often had to advise on the related issue of repeated filings of Notices of Intention and our advice

has always been consistent: provided that the directors *actually* intend to appoint administrators, there is nothing *per se* abusive about multiple filings. Of course, the directors' credibility will get weaker with each successive filing and there may come a point at which the court calls *'Enough*!'.

The more significant aspect of this judgment is the clear statement that a Notice of Intention cannot be filed if there is no person to whom notice need be given under paragraph 26(1). In other words, if there is no QFCH, there can be no interim moratorium. Practitioners need to be alive to this as it has become common practice to file a Notice of Intention even where there is no QFCH just to reap the benefit of the moratorium protection.

Test for Lifting the Moratorium

Re Algrave Limited

A dispute had arisen between the company or its administrators and a third party who claimed to have been contracted either by the company or the administrators personally to provide accountancy services to the group companies – as there were 727 companies, the contract wasn't worth nothing.

Registrar Briggs had to consider whether to give permission for the applicant to bring proceedings notwithstanding the moratorium in paragraph 43. The registrar identified two separate classes of case: those where the purpose of the admin had been achieved and those where it had yet to be achieved.

The current case fell into the former category – purpose achieved – and, accordingly, the registrar held that it was not therefore necessary to go on to conduct the *Re Atlantic Computers* balancing exercise weighing the interests of the applicant creditor against those of the general body of creditors as a whole. (He added, *obiter*, that, even if it had been, he would have sided with the applicant).

The second prong to the test for permission was simply as to whether the applicant had demonstrated that his claim had a 'reasonable prospect of success' - being the test used in summary judgment applications or to set aside a stat demand. Whilst there were some serious misgivings expressed about the applicant's claim (which would need to be amended in parts), it could not be said that it did not have a reasonable prospect of success and, accordingly, leave was granted.

LIQUIDATION

Cases involving the dismissal of winding up petitions are nearly always entirely subjective and fact-dependant. The following two case were no different but they come to diametric results and contain a useful summary of the essential requirements for the successful prosecution of a petition:

1) Petition Dismissed as Abuse of Process

Re Breyer Group plc

In short, the petitioner RBK Engineering, had presented a petition in respect of a debt of £258K and based upon an alleged admission. The company, Breyer, denied liability and produced evidence of its own solvency including a substantial cash balance and an unused £4 million overdraft facility. The judge found that the petitioner was not properly a creditor and that the company was not insolvent and, as such, the presentation of the petition was an abuse of process.

The judge set out the principles that the court will apply in assessing a disputed petition:

1. A petition can only be presented once the petitioner has established his *locus* as a creditor;

2. The company may challenge the petitioner's claim by a substantial dispute – which means a rational prospect of success;

3. But the petition will not be struck out merely because the company alleges a dispute;

4. The court will be prepared to interrogate and challenge the company's evidence to the same extent as though the application was one for summary judgment.

2) Purported Dispute Had No Rational Prospect of Success

Re Retail Acquisitions Ltd

In the infamous BHS saga, the administrators of BHS presented a petition in respect of *Retail Acquisitions Ltd* (Dominic Chappell's SPV) in respect of an unpaid loan instalment whose non-payment had in turn triggered the repayment of a £6 million loan.

RAL tried to claim set-off in respect of certain payments due to it under a managements services agreement ('MSA').

The court found, as a matter of fact, that any payments under the MSA were not due from BHS but from a third party. In any event, even if such payments had been due from BHS, the loan agreement contained a prohibition against set-off.

The court also looked at the application of the cash-flow and the balance sheet tests which had to be looked at side-by-side. It found that, in assessing insolvency, it was necessary to take account of all relevant circumstances including future cash-flow items. It found that RAL had no income and it could not class set-off rights as an asset – it was consequently insolvent on either or both bases.

Equitable Liens

Re Alpha Student (Notts) Ltd

This case involved what seems to be the modern-day ostrich farm – multi-ownership of student accommodation blocks. Freehold premises were purchased to be subdivided into student accommodation and individual suites sold to buyers as investments properties. Overseas buyers had speculatively paid £3.2 million being 50% of the purchase price but the premises were never actually built before the company went into liquidation. The liquidators managed to sell the property for £1.1 million and sought directions from the court as to how the investors' claims should be treated.

The court held that it was settled law that where a purchaser had handed over purchase monies, the vendor held the legal estate on trust for him and he became the owner in equity even thought there was no conveyance or transfer. This would apply even though the property had not been constructed.

In the instant case, the purchasers' interests would be tantamount to liens and ranked equally and would abate *pro rata* according to the amount of their contribution. It was immaterial that the building did not exist because there was an existing legal estate and there was a clearly identifiable plan as to the creation of a new estate from it.

AMB Law has been involved in several of these schemes on behalf of overseas clients and those that we have looked at appear to be little more than scams.

No Personal Liability for Liquidator in Rejecting Proof
Re Burnden Group Ltd

Applicants who had succeeded in overturning the liquidator's rejection of their proofs of debt, tried to get a costs order against the liquidator personally. The applicants' costs exceeded £290,000 and the company had no assets.

The court held that the liquidator had been justified in rejecting the applicants' initial proof which contained no details of the claims. The liquidator had to make a decision and his rejection had not been unreasonable. The applicant's costs would therefore rank as liquidation expenses.

DIRECTORS

Limitation Period Disapplied
First Subsea Ltd v Balltec Ltd

A director was analogous to a trustee in respect of his handling of company property and, accordingly, limitation was governed by s.21 of the Limitation Act 1980. By s.21(1) no limitation would apply to an action by a company against a director in respect of (a) fraud by him or (b) in respect of trust (ie the company's) property, or its proceeds, that the director had appropriated for his own use. In this case, the Court of Appeal held that there would be no limitation period in *any* claim of fraud against a director brought by the company.

BANKRUPTCY

Equity of Exoneration
Re Onyearu

The bankrupt and his wife owned a property that was in his sole name; he paid the mortgage interest whilst she paid all other household bills. The husband subsequently took a business loan secured by a second charge. Despite this the husband's business failed and he was made bankrupt.

The trustee's application for possession and sale was refused on the basis that the wife's claim to exoneration entirely exhausted the husband's beneficial half share of the property. The trustee appealed (twice) on the ground that credit had to be given by the wife for the fact that she would have been the indirect beneficiary of the husband's business as it provided family income.

The Court of Appeal held that the central issue was the intention of the parties. Whilst it was true that the wife stood indirectly to benefit from the second loan, any such benefit was wholly contingent on the husband's business surviving and producing sufficient profits for him to take drawings for their joint benefit of the wife. It was too remote to infer an intention that the wife would jointly share the burden of the second loan her claim to exoneration was upheld.

Order Suspending Discharge
Re Hilsdon

The district judge in this matter had made an order suspending the bankrupt's discharge until the trustee confirmed to the court that the bankrupt had complied with all her obligations to the trustee.

Nugee J set aside the district judge's order suspending discharge. He held that there was nothing wrong, in principle, with such an open-ended order but felt that, in this case, the order was flawed because there was no evidence that the district judge had considered alternative forms of order and had not considered anything less Draconian.

Whilst the judgment gives much spaces to pillorying the form of order as being effectively temporally infinite, it then goes on to state that such an order is fine in principle but then sets it aside in this case.

Order for Sale Creates an Equitable Interest
DW v CG

A consent order entitling a party to sell a number of properties in order to recover a lump sum payable gave that party an equitable interest in those properties. This was a divorce case so, you ask, why have we included it in an *Insolvency Update*?

Only because trustees in bankruptcy will need to carry out regular searches of the titles at the Land Registry to ensure that no protection of such an interest has been filed. Such a search may well be fruitless and not make any difference as the registers are generally not concerned with legal interests and so they may not appear anyway.

Vesting of Jointly Owned Property
Re Amin

The bankrupt jointly owned a leasehold property. The trustee disclaimed the lease which he claimed brought to an end the estate's entire liability to the landlord. The landlord, on the other hand, claimed that the obligation to pay rent continued and that he was entitled to prove as a creditor in respect of that rent.

Ostensibly therefore the case was about disclaimer. However, the High Court held that, as the property was jointly owned, the tenants held it on trust for themselves. This therefore brought the tenancy within the exception to the vesting rule in s. 283(3)(a) which excepts "*property held on trust for another*". On this basis, the tenancy remained vested

jointly in the bankrupt and the other tenant; it did not form part of the bankruptcy estate and thus could not have been disclaimed. Accordingly, the landlord continued to be entitled to claim rent against the bankruptcy estate.

It is a pity that the court did not have to answer the central question as to the effect of the disclaimer on the landlord's rights under the lease. All sorts of possibilities were mooted which included the lease vesting *bona vacantia* or that it remained vested in the landlord but without a tenant all of which seem to us to be equally ludicrous. Surely the answer would have been that the lease would have come to an end triggering the landlord's right to damages for breach of contract equal to the amount of unpaid rent.

Petition Based on Debt Subject to Appeal
Re Vieira

This case was another of those ones involving a stat demand from HMRC based on an assessment which was subject to an appeal.

The debtor was a minicab driver and there had been shenanigans relating to his tax affairs going on for many years. He had been given an assessment which he disputed and which was subject to an appeal to the First Tier Tribunal.

The court found that the para 13.3.3 of the Practice Direction on Insolvency was binding on it and that it was accordingly not open to the bankruptcy court to go behind HMRC's tax assessment which took effect as a binding debt. Accordingly, the court held that a stat demand based on a disputed assessment would only stand a chance of being set aside where the court felt it right to exercise its discretion and that would largely depend on the taxpayer's having acted promptly. In this case the taxpayer was out of time in his appeal to the FTT and there were no exceptional circumstances (such as evidence of fraud by HMRC) to warrant the stat demand's being set aside.

It was clear in this case that there were long delays and mistakes on both sides – HMRC had never served any papers at the taxpayer's actual address. Nonetheless, the taxpayer probably reaped that which he had sown by having taken so long actually to challenge the assessment.

We nonetheless consider this provision of the insolvency legislation utterly iniquitous. That HMRC should be able to proceed on a petition based upon a disputed assessment is just plain wrong – especially in light of the reported evidence of the utter Horlicks that HMRC is currently making of applying the current tax legislation (see, for example, a report in the FT on 7 April 2017 - http://on.ft.com/2pkEK98).

Application of *ex parte James*
Re Young

The facts of this case were rather odd and probably unique. Mrs Y was due 20% of a £1.3 million life assurance pay out in respect of her deceased husband. Mrs Y was indebted to the trustee in respect of an historic costs order and an agreement was reached by which Mrs Y would assign her share of the life assurance monies to the trustee in return for a cash payment of £15,000.

Mrs Y then challenged this agreement on the basis that there had been no binding contract (which was roundly dismissed by the registrar) and on the basis that, under the rule in *ex p James*, it would be unconscionable for the bankruptcy estate to receive a windfall.

It was stated in the judgment that the trustee had not established an entitlement to the life assurance monies (but it is not clear why they would not have vested). On this basis, the rule in *ex p James* applied to prevent an officer of the court enforcing his lawful rights if the result of that would be unfairly to disadvantage a third party. Even though there had been a valid and binding contract between the trustee and Mrs Y, the trustee would not be allowed to enforce his rights as that would lead to a windfall to the estate if it was indeed the case that there was no entitlement to the monies.

CROSS-BORDER

Security for Costs Application
Re Dalnyaya Step LLC

The company was in liquidation in Russia and the liquidator had obtained an order for recognition in the English court of the liquidation as a foreign main proceeding under the UNCITRAL Model Law/ Cross Border Insolvency Regulation 2006. Pursuant to section 236 of the Act the liquidator sought the production of documents by and the private examination of various UK-based former officers of the company. Conversely, the former officers sought to set aside the recognition order and also sought security for their costs in respect of the hearing of the liquidator's claim against them. A dispute arose as to which party was the claimant in respect of which action and whether the various applications each constituted a 'proceeding or claim' for the purposes of CPR 25.12. The liquidator claimed that as the application for security was neither a proceeding nor a claim, security could not be ordered.

The court held that it was required to look at the overall substance of the proceedings and not the form of each application. It was clear that the liquidator was the claimant in respect of the recognition application and his section 236 application and that the officers' application for security stemmed from that – regardless of the form or the timing of the individual applications.

The conditions of CPR 25.12 were satisfied as the liquidator was resident in a non-contracting state and that it would be difficult (at best) for the officers to enforce a costs order. As the liquidator had substantial assets but none in the jurisdiction the court thought it appropriate to order security for costs in the sum of £1 million – approximately half-way between the directors' and the liquidator's estimates of the likely costs.

Alistair Bacon
24 May 2017

The Uninvited Guest!

There has been significant publicity in the media recently concerning illegal settlements and, with the weather improving over the coming months, issues may escalate with the arrival of unauthorised campers, travelers and other uninvited guests.

Landowners can take practical steps and sensible precautions to protect their land and businesses and to discourage unknown persons from trespassing or entering onto their land.

For example:

- Chain or lock gates and review physical security;
- Install CCTV if practical;
- Be vigilant and communicate with neighbours;
- Construct bunds to prevent easy access of vehicles and caravans;
- Remove cattle grids but be careful not to create a hazard or a trap;
- Make land unattractive to potential uninvited guest by using a muck/farmyard manure/slurry spreader (honey wagon).

It is essential to note that no such action should ever put a potential trespasser at any risk. Precautions should be safe as landowners and occupiers can be liable for loss or injury sustained by a trespassers as a result of a hazard even if the that person's presence on the land is itself unlawful. If you have any doubt about steps that you intend to take, please contact us or make enquiries with your insurance provider.

Unfortunately prevention is not always successful and in the event of the arrival of uninvited guests caution should be taken in respect of approaching any trespassers. There are various options, actions and police powers which can be used to evict unknown persons or unauthorised campers such as:

- Section 61 & 62A evictions (Criminal Justice and Public Order Act 1994);
- Part 55 evictions under the Civil Procedure Rules;
- Common Law eviction.

Unauthorised campers are rarely novices and often know their rights so advice should be taken immediately to avoid the risk of inadvertently providing a defence or delay to proceedings. Action can be taken quickly and it is important to avoid such unfortunate delays.

In most circumstances the situation will be classed as a civil matter and the police will be unlikely to assist. In the event that trespassers arrive you should take immediate advice and avoid inflaming the situation.

Safety is paramount but if possible it is always helpful to obtain registration numbers of vehicles and obtain any information from any potential witnesses.

On receipt of instructions we will approach and talk to the trespassers to see if a leaving date can be agreed. During this period we will also prepare the necessary paperwork to secure and recovery of the land quickly.

For more information or for urgent assistance in relation to uninvited guests, please contact **Nick Bowman** in our Ipswich office on **01473 276154**.

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