AMB LAW

INSOLVENCY UPDATE

No. 24 • December 2018

Welcome to the 24th Edition of **AMB Law's** ***Insolvency Update*** which is timeously available in plenty of time for your Christmas holiday. Brexit looms ever closer – or does it? There has been a plethora of secondary legislation published to deal with the transition after Exit Day to ensure the continuity of court proceedings and insolvency practice generally. We anticipate that we will all be inundated with Know-How notes on umpteen statutory instruments in the new year.

If you would like to be removed from our circulation list please email *office@amblaw.co.uk*.

MISCELLANEOUS

Indemnity Costs for Abandoned Proceedings

Hosking v Apax Partners LLP
Re Hellas Telecommunications

Liquidators aggressively pursued high-risk litigation in the High Court having already failed in multiple other jurisdictions. The liquidators discontinued their actions a matter of days before trial which tended to imply that the proceedings had been brought only in order to put pressure on the defendants. In the circumstances, the court ordered indemnity costs against the claimant liquidators. An unusual case, but a pretty stark warning to litigants as to what the courts are for.

Reflective Loss and *Pari Passu*

Garcia v Marex Financial Ltd

It is a principle of company law that a shareholder cannot claim in respect of losses that are actually losses of the company.

Here Marex was a secured creditor of two BVI companies which Garcia had stripped clean of all assets prior to their liquidation. Marex sued Garcia.

Marex's claim was dismissed as being essentially reflective loss. Any wrongdoing by Marex was essentially a wrong against the company which was the proper plaintiff. To allow Marex to continue would offend the principle of *pari passu* as it was for the liquidator to bring any such claim on behalf of all Marex's creditors.

Privilege Survives Dissolution

Addlesee v Dentons Europe LLP

Where a company has been dissolved correspondence with its solicitors and other such documents would continue to attract legal privilege until the theoretical time limit for its being restored to the register had passed. The rationale was one of public policy that privilege would only lapse once there was no prospect whatsoever of its ever being enforced.

Restoration By Insurer

The Third Parties (Rights Against Insurers) Act 2010 (Consequential Amendment of Companies Act 2006) Regulations 2018

These snappily entitled new regulations came into force on **23 November 2018** and merely enable insurance companies to apply for the restoration of a company in order to bring proceedings in that company's name.

Monies Paid Into Court

Re Peak Hotels & Resorts Ltd

Where money is paid into court to bolster a cross-undertaking in damages, the money continues to belong to that party albeit subject to a charge in favour of the beneficiary party.

The case turned on somewhat technical arguments as to who was entitled to the money in court. The important point to remember is that the money belongs to the payer – the court is neither a trustee nor a beneficial owner.

Brexit Regs for Insolvency

Insolvency (Amendment) (EU Exit) Regulations 2018

The government has published draft regulations intended to deal with the immediate aftermath of Brexit. Essentially these will co-opt the Recast Insolvency Reg into English law with effect from Brexit day. If you *really* want to look at these regs, click here.

Bank Not Required to Act Rationally

UBS AG v Rose Capital Ventures Ltd

In deciding whether to exercise its discretion to call in a loan, a bank did not owe a so-called *Braganza* duty to its customer not to act arbitrarily or capriciously. Such a duty would only be implied into contracts such as employment contracts where there was manifest inequality of bargaining power. In this case, the bank's facility gave it an absolute discretion in relation to calling in the loan and it could do so at will.

ADMINISTRATION

Admin or Liquidation?

Re Baltic House Developmts Ltd

The company was an SPV set up to develop a site in Liverpool. 70% of the purchase price (£12 million) was provided by Singaporean investors

but (surprise, surprise) the company became insolvent before the property could be bought. Two investors presented a petition and the Company countered with an admin application which was opposed by several creditors.

The court was required to consider whether the proposed admin could achieve its purpose. The judge held that this was a pretty low evidential hurdle but that, on the facts, the company failed because of the lateness of its application and the lack of detail on funding.

This case is of interest to us as we have successfully recovered sums for a number of Singaporean clients who have invested not insubstantial sums in similar development scams in which properties were bought off plan but failed ever to materialise.

FE Colleges' Admins

Education Administration Rules 2018 (SI 2018/1135)

The Technical and Further Education Act 2017 introduced a new admin régime under which the primary administration purpose is minimising of disruption to students. The rules will come into force on **31 January 2019** and set out the detailed provisions required for obtaining an order for and conduct of an Education Admin.

Derivative Action On Behalf of Company In Admin

Montgold Capital v Ilska

The claimant here was a 50% shareholder who alleged that a pre-pack entered into by the company was essentially a scam perpetrated to prevent the shareholders' buying the business. The shareholder brought a derivative action (ie on behalf of the company against its own officers – and others).

The court decided that the claim had reasonable prospects and should be allowed to continue.

The point of wider interest here is a reminder that actions by a company may survive insolvency. This is something that should be borne in mind by directors in the *Twilight Zone* who tend only to consider possible misfeasance actions that could be brought against them by a future officeholder. They should also look closer to home and ensure that the act equitably towards the shareholders too.

Appointment Date & Time

1) Re NJM Clothing Limited

Rule 3.24 states that a Notice of Appointment must state the date and time of the appointment. In a case where this statement was not expressed in the body of the Notice of Appointment, the court held that the statement of time of filing at court (being the time at which the appointment took effect) was insufficient. The judge held that by definition the appointment must have taken place *before* the notice was filed at court and the appointment of administrators was therefore defective as rule 3.24(1)(j) was not complied with. The court however invoked rule 12.64 to preserve the appointment on the basis that no injustice had been incurred. A pretty pointless bit of litigation!

2) Re The Towcester Racecourse Company Ltd

Normality appears to have been restored to the asylum. In this case the only reference to the date and time of appointment on the Notice of Appointment was reference to the date and time that it was filed at court (as, it would seem, it pretty common).

HHJ Matthews held that the Appointment was not defective – effectively, the court filing details satisfied rule 3.24(1)(j). He also held that there was no reason why the appointment should have to take place before the Appointment was filed.

3) Re Spaces London Bridge Ltd

This was a third case on the same subject. Nugee J partly agreed with HHJ Klein in *Re NJM* but held that the distinction between the time of appointment and the time of filing was of "*supreme irrelevance"* given that the appointment could not take effect until the Notice of Appointment was filed.

The issues seems to have been settled now. This is the level to which law appears to have been reduced – little more than a nit-picking exercise to exploit tiny, technical defects of supreme irrelevance. No purpose appears to have been served by this litigation – one wonders what the combined costs were! In any event, the insolvency legislation is so appallingly badly written it simply cannot withstand this level of close scrutiny.

LIQUIDATION

Liability For Waste Removal

Re Doonin Plant Limited

The Outer House of the Court of Session held that a company's statutory liability under a waste removal notice (under s.56(1) EPA 1990) should be discharged as a an expense of the liquidation.

This is largely a matter of expediency to give air to the '*polluter pays'* principle. Although this might put liquidators' remuneration at risk, the judge said that he thought that any court would allow an application by a liquidator for his remuneration to be paid ahead of this particular expense.

BANKRUPTCY

Income Payments Order Not Provable Debt

Re Azuonye

A discharged bankrupt was made bankrupt for a second time while an IPO made in the first bankrupt remained 'live'. The High Court held that the bankrupt's IPO obligation was not a debt provable in his second bankruptcy and he was not, accordingly, relieved from his obligation to continue payments under the IPO.

Vesting of Post-Discharge Asset

Doneen v Mond

A Scottish bankruptcy trustee administered the bankrupt's estatesin the usual away, paid a final dividend,

closed the case and obtained his discharge. Unbeknownst to the trustee, the bankrupt had been missold PPI and he later (after discharge) appointed a collections agent to seek compensation for which he was awarded £56,000. The trustee claimed that the right to receive PPI compensation had vested in him and, accordingly, the compensation should be a bankruptcy asset.

The Supreme Court accepted that the right to bring a claim had vested in the trustee but he was not entitled to receive the compensation payment as he had already declared a 'final' dividend. The decision appears to have turned largely on public policy as it would be unsatisfactory to have all insolvencies effectively open-ended *ad infinitum.* Unfortunately, argument about the trustee's dividend having been based on a mistake of fact was not put before the court.

Committal of Judgment Debtor
Deutsche Bank AG v Sebastian Holdings Inc

The bank had a judgment against a company whose Monégasque director had failed to submit to the court or comply with various orders. The Court of Appeal confirmed that the High Court was able to make an order under CPR71.8 for the director's committal incidental to the existing orders and that the applicant bank was not required to issue a fresh application specifically for the purposes of committal.

Stat Demand: Wrong Remedy
Re Doherty

D had applied for £2 million shares in Fannigan Holdings but failed to pay the monies so FHL did not transfer the shares to him. FHL served a stat demand on D for the £2 million which D applied to set aside.

The Court of Appeal found that the obligation on D to pay the £2 million and the obligation on FHL to transfer the shares were interdependent. As FHL had not completed its side of the bargain, D's obligation was not for a liquidated sum and the stat demand was set aside.

As it turned out, FHL should have issued a claim either for damages for breach of contract or for specific performance. At best, a subtle difference!

CROSS-BORDER

Exclusive Jurisdiction Under EC Insolvency Regulation
Wiemer & Trachte GmbH v Tadzher

The ECJ has held, on a preliminary ruling, that the jurisdiction of the court with the Main Proceedings is exclusive. In other words, the liquidator in a German liquidation was prevented from bringing proceedings against a debtor in the Bulgarian courts as the latter ceded jurisdiction to the German court.

This is a bit odd but note that the position different under the Recast Insolvency Regulation which expressly provides for proceedings to be brought in a debtor's member state if that is more appropriate.

EMPLOYMENT

Termination Notice
Heywood v Newcastle NHS Trust

An implied term needs to be read into employment contracts that a notice served on an employee "only when it has actually been received by the employee and the employee has either read or had a reasonable opportunity [to] read it".

In this case the employee was on holiday when a redundancy notice was delivered by recorded delivery; she *actually* read the letter a week later when she got back. The Supreme Court upheld the Court of Appeal and the EAT in siding with Mrs Heywood. The difference of a week meant that the employee was entitled to massively enhanced pension benefits that she would have lost had she not been on holiday and had read the notice the week before.

Payments in Lieu Taxable

Prior to the current fiscal year, *ex gratia* payments in lieu of notice were not subject to tax or NIC. The distinction between contractual and extra-contractual rights to PILONs has not been removed so that all payments in lieu are taxable. It is anticipated that further legislation will be introduced so that the £30,000 limit will be removed in relation to NIC which will also be payable on all PILONs.

Alistair Bacon
7 December 2018

Solicitors Regulation Authority

The SRA Transparency Rules came into effect on 6 December 2018. AMB Law is compliant – click here to check our various published policies.

R3 Eastern Conference 2019

By way of a shameless plug, places are now available for the R3 Eastern Conference 2018 which will be held at Madingley Hall, Cambridge on **28 March 2019**. Tickets will be reasonably priced and there is also the option to stay overnight.

For more information contact: events@r3.org.uk or https://bit.ly/2RGSB8x

HMRC To Quash Turnarounds?

There were two small but highly significant announcements in the Chancellor's 2018 Budget delivered in November.

First, is a reinstatement of HMRC's preferential status in respect of taxes collected by businesses on its behalf (eg VAT, PAYE, CIS). The detail of this proposal has not yet been published but HMRC's new status is described as a '*secondary'* preferential status so it will presumably rank behind the current preferential creditors being the employees and, oh, HMRC in respect of certain other duties.

It is difficult to rail too much against HMRC's preferential status in principle given that it is an involuntary creditor whose debts are collected by businesses and then simply not paid over. In respect of any other creditor in such a position one might be seeking to construe a constructive trust argument with which to attack the directors for misfeasance so it is hard to say that it is unfair to elevate HRMC's ranking. As far as unsecured creditors are concerned it is unlikely to make much difference in many cases as, typically, any monies that will go to HMRC would have been caught by the bank's floating charge anyway. There will be a difference in relation to the diminution of the prescribed part which could actually benefit officeholders if more cases fall below the level at which they are required to bother administering it.

We are therefore fairly neutral on this proposed legislative change.

The second limb of Mr Hammond's announcement is, perhaps, of greater concern. The 2019-20 Finance Bill will contain provisions enabling HMRC to decree that any director guilty of tax evasion or phoenixism by a company is to be personally jointly and severally liable for the company's debts. In other words, if HMRC decides that a company has deliberately entered insolvency with a view to ditching its tax liabilities, it can make the directors personally liable for the outstanding tax. There does not appear to be any appeal mechanism in respect of HMRC's decision.

Given our experience of their decision-making processes, we have no confidence in HMRC's ability to view such matters in a sensible, commercial manner. It is likely that any company that instigates an insolvency process by its own initiative will be at risk if the officeholder subsequently sells the business to a new company. How many directors will be prepared to consider using admin as a turnaround mechanism if the business will be carried on by a different company in the future and the insolvent company has a substantial VAT or PAYE liability?

Our concern about this is twofold: first, is the apparent underlying inference that all pre-packs or sales of businesses out of insolvency are a scam and a Bad Thing. We all know that that is not the case. Secondly, to which we have already alluded above, that assumption combined with HMRC's uncommercial and blinkered view of business could make the rescue of many insolvent businesses too risky for directors to contemplate. Even if some form of safety net were put in place (eg something akin to the Pre-Pack Pool or a sanction from HMRC) it would make many rescues too clunky and too slow to proceed and would also make HMRC the final arbiter on business rescue.

In a similar vein to the rules relating to the leaving open of domestic wheelie bin lids*, this smacks of very poorly thought-through legislation to be implemented in a heavy-handed and Draconian manner. Whilst we don't know *how* it will be implemented, it will be no good saying to clients '*Oh don't worry – it's not designed to catch a small business likes yours'* as is the current advice with GDPR; if the legislation says the directors can be personally liable for the company's tax, they have to take it at face value. This could definitely be another nail in the coffin of many corporate rescues.

** - for which the maximum fine is £2,500 (£20,000 for businesses).*

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