AMB LAW

INSOLVENCY UPDATE

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Welcome to the 25th Edition of **AMB Law's *Insolvency Update***. Brexit is looming (only 36 sleeps until B-Day) but we still have absolutely no idea what that is going to mean for the profession. Or the country! Clearly there is likely to be some element of disruption in the early days but our suspicion is that predictions of dystopia and eternal damnation will prove to be exaggerated. We will see – largely it will come down to how vindictive the interested parties want to be. Just to be clear, AMB Law has no plans to decamp to Brussels following Brexit.

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MISCELLANEOUS

Brexit is Merely Hypothetical
Alcohol Countermeasure Systems (International) Inc v EU

Proceedings before the ECJ (or whatever it's now called) involving British litigants would not be stayed pending 29 March simply on the basis that the outcome could be affected by the UK's withdrawal from the EU.

That position may change!

Insolvency Clauses
Re Spark Energy Supply Ltd

An insolvency provision relied upon the company's being insolvent *'under section 123(1)(e) or (2)'* of the Act. This requires its being proved to the satisfaction of the court that the company is unable to pay its debts.

In this case, the company was clearly insolvent but the contractual provisions did not kick in because there had been no finding by the court (as required by the section above).

This is a natty little point for draughtsmen who trot out *'within the meaning of section 123'* as a definition for insolvency. They will need to negate the need for a court finding for the definition to have any meaning.

Snowden J unlocked the stalemate by finding that the court could make a declaration of insolvency as to do so was in the public interest (normally the court can only make a declaration if there is a dispute).

Prohibitions on Debt Assignment
Business Contract Terms (Assignment of Receivables) Regs 2018

These regulations came into force on **31 December 2018** and provide that contractual provisions prohibiting or restricting the assignment of debts will be of no effect. This will include any indirect restrictions (such as confidentiality clauses preventing an assignee getting information about the contract).

The purpose of the regulations is to free up a person's ability to seek finance for his business. There are, however, numerous exceptions to the rule with which practitioners would be advised to familiarise themselves - click here for the text of the regulation.

PG Demand for Wrong Amount
Barclays Bank plc v Price

The bank demanded £55,500 under a PG that was limited to £55,000 and the debtor accordingly challenged the demand as being flawed. JIEB graduates remembering *Bank of Baroda v Panessar* will not be surprised to know that the court found in favour of the bank. Although the interpretation of a demand will turn on the facts of the case, the court found that the bank's demand was clearly intended to be a demand under the PG and would have been construed as such.

In any event, the PG contained a primary obligor clause, so no demand was required to trigger the obligation anyway.

Compare also:

Stat Demand Against Guarantor
Pearce v HMRC

The debtor had given a PG to HMRC for £600,000 of his firm's unpaid tax. The PG barred HMRC from enforcing the debt by way of bankruptcy proceedings. The firm defaulted and HMRC obtained summary judgment against the guarantor for the guaranteed amount plus costs and statutory interest.

The High Court subsequently held that HMRC was free to pursue its judgment debt by way of a stat demand because (1) the judgment debt was a different debt to the contractual debt and (2), in any event, the PG would not have prevented HMRC's serving a stat demand for the costs and interest element of their judgment.

Directors' Dividends
Global Corporate v Hale

A director generally received £1,383 a month from the company in addition to his salary. He would decide, at the end of the year, whether these

payments would be classed as dividends or otherwise.

When the company went into liquidation, the liquidator challenged these payments as gratuitous alienations and the company's claim was sold to a litigation company.

The Court of Appeal overturned the High Court and agreed that the payments were unlawful distributions. At the time that the payments were made they were unlawful and that could not be subsequently changed by a re-classification of the payments.

This is a thorny issue that has arisen in numerous insolvencies – especially in respect of smaller, owner-managed businesses. Recently, the courts have flip-flopped to and fro in their treatment of such claims but we think that this is the right decision. We are also pleased to see some derision poured on the quantum meruit argument arising out of *Guinness v Saunders* and which we consider to be utter nonsense.

Witness Evidence Not Same As Submissions

Re Guardian Care Homes (West) Limited

This case is a salutary reminder of the status and purpose of witness statements in litigation. The Chancery Guide expressly states that a witness statement should be confined to the facts which the witness can give and should not "*… provide a commentary on the documents in the trial bundle, nor … set out quotations from such documents, nor … engage in matters of argument, expressions of opinion or submissions about the issues, nor … make observations about the evidence of other witnesses.*"

In this case, the judge found that the applicant liquidators' evidence breached the above guideline and she therefore excluded it from evidence. The liquidators were therefore left with no evidence in support of their application which therefore failed.

CVAs

Rent Concession Dependant on CVA's Survival

Re SHB Realisation Ltd

This case concerned some detailed wording in the text of the CVA proposals – the company, BHS, had gone into administration and a CVA at the same time. The CVA compelled the various BHS landlords to accept reduced rents whilst the CVA was in force. Following the termination of the CVA, however, the original rent would be reinstated. Upon the company's liquidation at least one landlord submitted a proof of debt based upon its original entitlement under its lease and this was challenged by the liquidators on the basis that the clause constituted a penalty and amounted to an attempt to contract out of *pari passu*.

The court found (i) that the law relating to penalties did not apply to CVAs, (ii) the *pari passu* principle was not infringed and (iii) the rent accruing during the period of administration was payable as an expense of the administration *at the full rate*.

This is a victory for corporate landlords who have, by and large, been shafted over recent years by the exploitation of CVAs by large retail companies.

LIQUIDATION

Extent of Director's Indemnity

Re Moorcourt Holdings Ltd

As part of an *in specie* distribution out of an MVL, the shareholders of the company provided the liquidators with an indemnity in respect of the company's 'Liability to Tax'. The question then arose as to whether that could include an APN served on the company in respect of tax that HMRC claimed under a failed EBT scheme. The court found that it was and that the shareholders were liable to indemnify the liquidators in respect of sums due under the APN.

Adjudication and Insolvency

Re Bresco Electrical Services Ltd

This case involved another of those thorny issues that seem to have been around for years and the perceived wisdom in respect of which seems to change each time.

The Court of Appeal has now held that adjudication is not readily available to a company in liquidation (by extension that must apply to other insolvency processes too). Whilst the company's underlying claims continue to exist and the theoretical adjudication jurisdiction therefore survives, it would be inappropriate for that jurisdiction to be invoked.

Given that that Housing Act adjudication scheme is essentially based on the premise of *pay now, argue later,* it would be massively inequitable for any party to be ordered to pay monies to an insolvent company which may not be able to repay or offset the monies in the future should the case be decided in the payor's favour.

BANKRUPTCY

Trustee cannot Seek Vesting Order Post-Disclaimer

Sleight v Crown Estate

A trustee in bankruptcy disclaimed two freehold properties. The properties were subsequently sold by their mortgagees and there was a surplus on each – the trustee applied for a vesting order under section 320(2) of the Act seeking to recover the surpluses.

The court found that, having disclaimed, the trustee had no interest in the property for the purposes of s.320(2)(a) and, accordingly, no *locus standi* to apply for a vesting order.

Whilst that might seem fairly obvious, the situation is far from satisfactory as the party properly entitled would be the Crown but, as it is the Crown's policy not to apply for vesting orders, the funds would languish in court indefinitely. Had the trustee not disclaimed, he would have picked up

the surpluses as part of the mortgagees' possession actions.

Multiple Petitions Should be Heard Chronologically
Re Stanford

In a case involving multiple bankruptcy petitions presented in different courts, the court held that it should hear and dispose of the first-presented petition before hearing subsequent ones.

The principle is important as the timing of presentation will have an effect on other timetables – eg in respect of antecedent transaction applications.

Stay of Proceedings Against Bankrupt
Re Bayliss

The High Court has found that the mandatory stay of proceedings in s.285(3) only applies in respect of debt actions against the bankrupt. This is hardly surprising given that the section expressly relates to an action for "*a debt provable in the bankruptcy".*

In this case, the bankrupt was the subject of committal proceedings in respect of litigation that he had been pursuing in the name of his dead mother whom he had represented to the court as being alive. He sought to rely on s.285(3) to seek a stay of those proceedings but his application was roundly rejected.

Trustee's Entitlement to Documents
Re Baxendale-Walker

Trustees sought the delivery up of documents and papers from various solicitors employed by the bankrupt. The bankrupt challenged the requests on the ground that they were perverse as he asserted legal privilege over the documents which were in the hands of third parties. He also alleged that the trustees were not entitled to private papers which did not form part of his bankruptcy estate.

The High Court rejected the bankrupt's complaints as he had failed to demonstrate that the request was perverse – ie that no trustee acting on proper advice could reasonably have made the same request.

Failure to Serve Documents Where No Address Given
Brouwer v Anstey

Although this case was in the context of an unfair prejudice petition, the point of law might be of universal application.

A respondent litigant in person had failed to provide an address for service following the sacking of his solicitors (presumably because he did not know that he had to). The petitioner served the respondent with an unless order and a judgment application by email and by post to his last-known address – in reliance on CPR 6.9.

The court held that CPR 6.9 (which provides for service at a last-known residential address) applied only to claim forms and not to other documents. Accordingly, the subsequently obtained judgment could not stand as the respondent had not consented to email service and CPR 6.9 did not apply.

Clearly, the petitioner should have made an application for alternative service. This of course misses the point that such 'quickie' applications for leave might be rendered all but impossible in the context of the current collapse into chaos of the court system.

CROSS-BORDER

The Rule in Gibbs
Bakhshiyeva v Sberbank

Since 1890, the *Rule in Gibbs* has held that an English law debt cannot be discharged by foreign insolvency proceedings. The instant case involved the court sanctioned reorganisation of an Azerbaijani bank which resulted in the respondent bank's English law debts being cancelled and replaced with other rights under the scheme.

The scheme administrator applied for an indefinite stay of the English debts which would give permanent effect to the Azerbaijani scheme. The Court of Appeal felt bound to follow *Gibbs* and held that the Cross Border Insolvency Regs 2019 (and, by extension, the UNCITRAL model law) remained subject to the *rule in Gibbs*.

We understand that the smart money is on this decision and the *rule in Gibbs* being overturned should this case reach the Supreme Court.

s.366 Operates Extra-Territorially
Re Shlosberg

The High Court has acceded to a request for an order for the disclosure of information made against a Latvian bank. It held that s.366 fell within the ambit of the EC Insolvency Regulation and, as such, an order under s.366 to provide information to a trustee in bankruptcy could be made against any party registered in a member state.

Alistair Bacon
22 February 2019

R3 Eastern Conference 2019

There are still a few, limited places available for the R3 Eastern Conference 2019 which will be held at Madingley Hall, Cambridge on **28 March 2019**.

Tickets are very reasonably priced and include a formal dinner in the evening. There is also the option to stay overnight.

For more information contact: events@r3.org.uk or Click Here

Initial Disclosure in Insolvency Proceedings

Guidance from ICCJ Briggs, 20 February 2019

The Disclosure Pilot Scheme under CPR PD 51U (DPS) came into force with effect from **1 January 2019**. The DPS introduces *Initial Disclosure* which requires litigants to be made aware of their disclosure obligations and, in most cases, for disclosure to be given at the same time that statements of case are served.

Guidance issued by ICCJ Briggs confirms that the DPS does apply to cases in the Insolvency and Companies List.

The following guidance is subject to the court's jurisdiction to exercise its case management powers to order disclosure in proceedings howsoever commenced – even if by CPR Part 8 claim, petition or application. This may be either of the court's own motion or on the application of a party. The DPS has effectively replaced CPR 31 for BPC cases and disclosure will now be in accordance with the provisions of the DPS.

Ordinarily, the DPS WILL APPLY to:

(i) any proceedings commenced under CPR Part 7 which incorporate statements of case or,

(ii) expressly, petitions presented pursuant to ss 994-996 Companies Act 2006 or petitions for winding up on just and equitable grounds, since these are analogous to Part 7 proceedings with statements of case.

The DPS WILL NOT APPLY to:

(i) CPR Part 7 claims without particulars of claim,

(ii) CPR Part 8 claims,

(iii) Insolvency Express Trials (under CPR PD 51P) being proceedings within "*a fixed costs regime or a capped costs regime*" (para 1.4 of CPR PD 51U);

(iv) originating process such as petitions and insolvency applications are not "statements of case" for the purpose of the DPS.

By and large, most insolvency applications in the ICC will be unaffected by the DPS but practitioners will need to be familiar with the provisions of the DPS to know whether any particular case will be exempt or not. Remember too that the court can order disclosure under the DPS in any matter whenever the case is up for directions or at any CMC. Litigators should also bear in mind the ability to exploit the DPS to their client's own advantage by seeking disclosure under the DPS at any time.

It would also be sensible for would-be litigators to proceed as if the DPS does apply even where it doesn't so that if any order for disclosure is it can easily be dealt with. This firm will act on that basis so that the issue of disclosure and preservation of documentary evidence is highlighted at the outset of a case. As with most time or costs saving schemes recently introduced, the DPS will lead to an increase in legal costs which in many cases will be completely unnecessary.

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