AMB LAW

INSOLVENCY UPDATE

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DUDES (as our new PM would say) - welcome to the 27th Edition of AMB Law's *Insolvency Update* which is making us all at AMB Law incredibly ENERGISED. We are so pleased to hear that nice Mr BoJo is going to sort everything out and that the #*Brexit-thing* will soon be all settled. Brilliant.

Leaving aside investigation work, work levels in our industry seem to be at an all-time low which is, at least in part, a symptom of the economic and political climate. The markets are paralysed by uncertainty and fear of what Mr Johnson or, Heaven forbid, Mr Corbyn might do. Leave or remain, deal or no deal, the sooner that this nonsense is sorted out, the better.

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MISCELLANEOUS

Exclusion of Duty by Banks

Federal Republic of Nigeria v JP Morgan Chase Bank

When a bank is on notice of fraud it is under a duty not to carry out a payment instruction (*Quincecare* duty). The Commercial Court accepted the bank's contention that it was possible for a bank to contract out of this duty by its express terms. In this case, however, it held that the bank's terms were not sufficiently clear to exclude the Quincecare duty.

Injunction Application by Dissolved Company

Yuzu Hair and Beauty Ltd (Dissolved) v Selvathiraviam

On closer inspection, this case is not quite as radical as it first appears. The applicant company had in fact obtained a freezing injunction against its accountant prior to its being dissolved. The company therefore sought a continuation of the injunction.

Zaccaroli J ordered that the director of the company be added as a party to the application and likened his position, *vis-á-vis* the company, to that of the petitioning creditor on a winder. A petitioning creditor would clearly be able to seek an injunction against the target company and by analogy the court was able to grant the company an injunction over the rogue accountant's assets pending the company's restoration to the register.

Local Bank Manager and Ostensible Authority

Stavrinides v Bank of Cyprus plc

The bank was not bound by a letter signed by its local relationship manager purporting to write off a customer's debts.

The court held that the manager had no ostensible authority to bind the bank as

(1) the bank had never represented as such and, over 10 years, had required all significant decisions to be referred up the chain, and

(2) it would not have been reasonable for the customer to rely on any such representation had one been made as it was familiar with the bank's processes.

Execution of Deeds

Land Registry Practice Guide 8

The Land Registry has announced that it will no longer accept documents stated to be "*Signed as a deed*" – the wording must state "*Executed as a deed*". Whilst this firm has always preferred the latter wording, as it is more accurate, one has to conclude that this is a magnificent victory for form over substance. Has the Land Registry *really* got nothing better about which to trouble its pretty little head?

ADMINISTRATION

Directors' Out-of-Hours Appointment

Wright v HMV Ecommerce Limited

This is another example of poor drafting in the legislation. The rules relating to Out-of-Hours appointments were written long before the advent of CE-Filing and provided for a QFCH to effect an appointment of administrators even when the court office was closed.

Now, with CE-Filing, anyone can file any document at any time. In this case, directors filed a Notice of Appointment at 5:54pm on 28 December and an acknowledgement was automatically sent by return. The filing was accepted by the court at 8:23am on 31 December.

On an application for directions, the court confirmed that the appointment of administrators was valid and had been effected at the time of filing – 5:54pm on 28 December.

Moratoria and Co-Respondents

Ince Gordon Dadds LLP v Tunstall

Where a company in administration was one of a number of parties to litigation, the moratorium in respect of that company would not operate to stay the proceedings in respect of the other parties.

So held the EAT in allowing a claim against a number of parties including Ince Gordon Dadds LLP which had bought part of Ince LLP's business out of administration and which was alleged to be subject to TUPE.

Whilst this was an employment matter, the logic would apply to all litigation (albeit that EAT decisions are not binding on the courts). The EAT acknowledged there could be logistical difficulties in relation to matters such as disclosure but these could be settled by directions.

Stat Demand Could Not Be Used for PG to *'make good'*

Davies v Revelan Estates

The applicant had agreed to provide a PG to his company's landlord, under which he covenanted to make good any losses suffered by the landlord.

The tenant company defaulted and the landlord made demand under the PG using a formula contained in the lease which was followed up with a stat demand.

On appeal to the High Court, the judge held that the obligation to '*make good*' smacked of an indemnity and the obligation could not therefore be said to be a liquidated sum and therefore not suitable for a stat demand.

Landlords and lenders will need carefully to ensure that PGs that they take are worded so as to stand as PGs and not as indemnities.

Administrators not liable for one creditor's loss

Fraser Turner Ltd v Pricewaterhousecoopers LLP

Administrators sold the company's business but did not ensure that the buyer agreed to pay royalties to a third party on the same terms that the company had done pre-administration. That third party sought to make the administrators personally liable for its consequent loss of income.

The Court of Appeal dismissed the third party's appeal. The administrators were not under a duty to protect the third party from loss. In fact, the Court went further, *obiter,* in suggesting that it would positively have been wrong of the administrators so to do as favouring the third party would have had an effect on the price paid for the benefit of the unsecured creditors generally.

Directors

Director Personally Liable

Palmer Birch v Lloyd

Not strictly an insolvency case but one that is of interest to those advising directors. The defendants were brother and directors (one *de jure,* one shadow) of a building company set up simply to recover VAT on the brother's house which was being renovated by Palmer Birch. The shadow director stopped funding the company and sought to terminate the contract with Palmer Birch. The company then went into liquidation.

The High Court found that the brothers had deliberately induced a breach of contract to avoid paying Palmer Birch. The interesting thing about this case is that it is not a corporate veil case – the brother were found liable in tort for their own actions and, as such, liable in damages to Palmer Birch.

LIQUIDATION

s.127 and Change of Position

Re MKG Convenience Ltd

Bona fides or change of position are irrelevant in considering a s.127 validation application; the court must be satisfied that the transaction would benefit the creditors as a whole or that there were exceptional circumstances.

The applicant argued change of position as it had received various payments by direct debut, unaware of the winding up petition.

The court held that, whilst a defence of change of position might, in principle, be available, it was not in this case and could only be relied upon in exceptional circumstances. The court did not differentiate between payments made by direct debut and any other payments.

Restoration Does Not Reinstate Contracts

Bridgehouse (Bradford No 2) v BAE Systems plc

Following an administrative restoration to the register, the company is deemed never to have been struck off. In this case, the company was an SPV set up to buy a property from BAE and had contracted so to do.. The company was then struck off for failing to file accounts. BAE had served a notice terminating the agreement.

The court held that BAE's notice was the positive act of an innocent third party and, as such, could not be reversed upon the company's being restored to the register.

Appointment of Special Managers

Re British Steel plc

Whilst the context of this matter is very much in the public domain, the rationale behind the mode of the appointment is interesting if only because of the rarity of such applications.

It was self-evident that the company was insolvent and given a number of extrinsic factors (Brexit, the state of the car industry, rising commodity prices etc) it was all but inevitable that the company would enter an insolvency process at some stage.

Given the very high environmental risks including the apparent likelihood of explosion if the company's gas pipes were not kept pressurised, the court was satisfied that no IP would accept the appointment as administrator. Accordingly, the court made an immediate winding up order with the appointment of the OR as liquidator. As the OR lacked the necessary expertise or resources to conduct the liquidation, IPs from EY were appointed as special managers under s.177 Insolvency Act 1986.

Fraudulent Trading Knowledge
Re Pantiles Investments Ltd

The director was essentially a stooge for her bankrupt ex-employer, G. The company's property was sold at an undervalue to a party connected with G and G and his wife continued to live at the property before and after the sale.

W's defence to fraudulent trading and breach of duty was that she was inexperienced and had been duped by G. The court found that the director was or should have been aware of what was going on and could not simply turn a blind eye. In any event, her causing the company to transfer the sale proceeds to a third party had left the company insolvent which was a breach of her statutory duties.

Voluntary Arrangements

Adjudication Enforcement Refused in case of CVA
Indigo Projects v Razin

The *Technology & Construction Court* has refused to permit enforcement of an adjudication award against a company that had entered into a CVA. The rationale was that, whilst there was no blanket bar against enforcement, to allow it would cause complications for the Supervisors who would have to allow for the fact that the payment might have to be repaid.

The adjudicator had not carried out a detailed assessment of all the claims and cross-claims which would have to be done for the first time by the CVA supervisor.

BANKRUPTCY

Petition Adjourned Pending Debtor Receipts
Digby-Rogers v Speechly Bircham

The court must take account of the interests of a class of creditors as a whole. In this case, the debtor sought an adjournment to allow him to receive an anticipated £2.5 million fee from a Mongolian mining project. All creditors other than the petitioner (amounting to 87% of creditors), opposed the making of a bankruptcy order.

The court found that it had to take account of the views of the unsecured creditors generally and that the petitioner had failed to provide any evidence that the bankruptcy would benefit the creditors generally.

Settlement Agreement Not Regulated Credit Agreement
CFL Finance Ltd v Bass

The creditor had settled a PG claim against the debtor on terms that the debtor would settlement £2 million by instalments. The debtor failed so to do and the creditor petitioned. The debtor sought to claim that the instalment arrangement amounted to a regulated financial agreement under the CCA and, as the creditor had not followed certain steps, was unenforceable.

The court rejected the debtor's argument. A structured settlement providing for the payment of a debt over a period of time did not constitute a loan and could not therefore amount to credit or financial accommodation under the CCA.

Second IVA Proposals
CFL Finance Ltd v Bass

This was, in fact, the same case as above!

The debtor had previously had an IVA set aside by the court due to a lack of good faith. The debtor had proposed a second IVA and sought an adjournment of the petition.

The court ruled that the debtor was not barred from proposing a second IVA *per se* – he was only barred from seeking a second moratorium – and that the court would exercise its discretion as to whether to adjourn the petition.

Considering (1) the prospects of success of the second IVA proposals and (2) the proposed levels of return to creditors, the court declined to adjourn the bankruptcy petition.

CPR Applies to Trustee's Costs
Ardawa v Uppal

The High Court has confirmed that the general rules about costs in CPR44 also apply in insolvency proceedings. Accordingly, a court in giving judging could also make an order for summary costs or for assessment.

This is, in fact, expressly stated in r.12.41 of the Insolvency (England & Wales) Rules 2016 so is hardly new.

Security for Third Party Debts
Promontoria (Chestnut) Ltd v Bell

It is trite law that a stat demand needs to declare and deduct the value of any security that the creditor holds in respect of the debtor's debt. The court here held that credit also had to be given in respect of security provided to the creditor by the debtor in respect of a third party's debts.

In this case the debtors had provided security for a company's obligations to its bank although the debtors would not themselves be personally liable for the company's debt.

The court held that the stat demand was defective as it did not give credit for the security that the bank held over the debtors' property.

Second Application Abuse of Process
Lambert v Forest of Dean DC

The Bankrupt's annulment application had been struck out for his failure to comply with the court's directions. The Bankrupt simply issued a second application.

The High Court found that the second application amounted to an abuse of process as the issue had already been the subject of an application to the court. To allow the second application to continue would effectively be to allow the bankrupt simply to ignore and circumvent directors given and costs orders made. This was notwithstanding the fact that the court thought that the bankruptcy probably ought not to have been made and that the basis of

the annulment application was otherwise sound.

Second Bankruptcy Discharges Income Payments Order

Azuonye v Kent

Where a bankrupt is subject to an IPO (or, presumably, an IPA) the IPO obligation will itself be a provable debt in a subsequent bankruptcy. This would apply both to future IPO payments and also to any accrued arrears.

This means that, as regards, the first bankruptcy, the bankrupt is effectively relieved of any obligation to make further payments and the trustee will be obliged to submit a proof of debt in the subsequent bankruptcy for any arrears or further payments. It would also be open to the 2nd trustee to apply for a further IPO.

CROSS-BORDER

CBIR and Solvent Liquidation

Re Bailey

The UNCITRAL model law refers to insolvency proceedings which do not appear to include administrative proceedings designed to wind-up a solvent corporate entity. Falk J held that it was clear that the *Cross-Border Insolvency Regulations 2006* were intended to apply to foreign rules relating to all forms of liquidation regardless of whether the subject company was itself actually insolvent and that the court was not required to carry out an assessment of insolvency. This would include MVLs

Anti-Suit Injunction

UBS v Fairfield Sentry Ltd

This case arose out of the Bernie Madoff Ponzi scheme. Relying on voidable transaction provisions in the BVI Insolvency Act 2003, the liquidators had started litigation in the US against certain investors. Those investors had sought an anti-suit injunction to prevent proceedings being brought in the US – the application was refused and the matter wound its way up to the Privy Council from the BVI Court of Appeal.

The Privy Council held that it was common for the courts of one jurisdiction to apply the laws of another and insolvency did not generally confer exclusive jurisdiction. Accordingly, it was a matter for the US courts to decide how to exercise their discretion in applying BVI law in the US and the anti-suit injunction was therefore refused allowing the BVI liquidators to continue actions in the US against the US investors.

English Court Has Jurisdiction over Scottish Claim

Holgate v Addleshaw Goddard (Scotland) LLP

A claimant director sued AG, Scottish solicitors instructed by the administrators of D's company, for negligence, breach of contact and breach of fiduciary duty. The claimant subsequently issued a misfeasance application against the administrators as well. AG claimed that the English court had no jurisdiction on the basis that Sch 4 of the CJJA required the claim to be heard in Scotland.

The court held that the misfeasance claim was clearly subject to the insolvency exception in the Recast Brussels Regulation which required all insolvency matters to be heard in the court with jurisdiction over the insolvency matter. The misfeasance claim acted as an *anchor* claim to found jurisdiction of the whole case in the English court.

Asymmetric Jurisdiction Clauses

Re NN2 Newco Ltd

An asymmetric jurisdiction clause will confer obligations unevenly – requiring one party to submit to particular jurisdiction but not the other. The French Supreme Court has, in the past, held such clauses to be invalid under the Recast Brussels Regulation.

At least in the context of a scheme of arrangement, the High Court has upheld the validity of an asymmetric jurisdiction clause which required borrowers to bring proceedings in England whilst allowing the lender to bring proceedings wherever it chose. Effectively the clause gave exclusive jurisdiction to the English court over proceedings started by a borrower but non-exclusive jurisdiction if the claim was started by the lender to which the court had no objection.

Alistair Bacon
31 July 2019

Personal Guarantees – The Basics

We spend a great deal of time in advising directors and others in relation to personal guarantees that they have given in respect of their company's debts. Often, these PGs will have been glibly or even unwittingly given without a second thought and certainly without any expectation of their actually being called in. We therefore thought that it might be timely and useful to run over a few of the basics.

PGs tend to fall into one of two categories – the formal document entered into as a deed at the behest of a bank or a contracting party or the less formal declaration contained in the signature box of a credit agreement. In the case of the former, the guarantor will struggle to persuade anybody that he didn't realise that the document headed "Deed of Guarantee" was a PG. In the latter case, the director will often not have read the credit application and may genuinely have had no idea that he had given a PG.

A guarantee needs to be differentiated from an indemnity. A guarantee is a promise that a third party will fulfil its obligations or a promise to fulfil those obligations if the third party fails to. This stands as a secondary contract dependent on the primary one – ie it is only triggered if the primary obligor fails to do what he was supposed to do.

An indemnity is like a guarantee but it stands as a primary obligation and the indemnifier will be liable regardless of the position of the primary obligor.

Consideration A PG is a contract and there must therefore have been consideration given. Invariably, the consideration will be a funder's promise to fund or a supplier's promise to supply and there may not be much mileage in this as a defence to a demand. In any event, a decent PG will be by deed which counts as consideration.

Written Document Under the Statute of Frauds 1677, a guarantee must be in writing and signed to be enforceable – one that is not is a *thing writ in water.* An indemnity does not need to be in writing.

Variations A guarantee *may* also be invalidated by any variation to the underlying contract. Most written PGs will allow variations to the contract but this might be worth looking at - a guarantor cannot guarantee things he didn't know about. An indemnity is a primary obligation so will not be affected by any change to the underlying contract.

Knowledge In the case of the hidden guarantee unwittingly given (this is very common with credit agreements given to trade suppliers in the construction industry) the guarantor may genuinely not have realised that he has given a PG for the company's debts. The courts are not, however, sympathetic – if a director of a company has signed a PG he will be held to have done so deliberately and in full knowledge of what he is has signed.

I a director of a company receives a demand under a PG he should check all the above points carefully. We have succeeded in overturning PGs obtained by fraud and where the underlying obligations have been significantly extended but otherwise it will usually be difficult to avoid PG liability – that is, after all, the point of PGs.

Many people will refuse to give any PGs under any circumstances. Others, however, may take the view that once one PG has been given, it no longer matters how many he gives – but that is a whole different story.

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