AMB LAW

INSOLVENCY UPDATE

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Welcome to the 28th Edition of **AMB Law's *Insolvency Update***. We apologise for the tardiness of this edition which should have been published in October but we were somewhat distracted by work in the lead up to Christmas. Things have now quietened down so feel free to instruct us.

Much has happened since the 27th Edition and we now at last have a government with a majority. For better or worse, the prolonged farrago surrounding Brexit/Bremain/Brevaricate appears to have been put to bed although Bozza's plan to *Get Brexit Done* by the end of the year is looking a tad optimistic. Any hope that the inevitable mayhem that will ensue may be offset by an uplift in inward investment and a revitalisation of the property market is probably being scotched by the media-driven mass hysteria surrounding Covid-19. Probably the only winners in all this will be the makers of hand sanitiser and the insolvency and restructuring profession. Let's hope …

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MISCELLANEOUS

Stat Demand NOT Demand Under Guarantee

Martin v McLaren Construction

Where a guarantee is stated to become enforceable upon a written demand being served, it was not good enough for the creditor just to serve a stat demand as his demand. A stat demand states that the sums demanded are '*payable immediately*' but the guarantee liability is only triggered upon service of a demand – so, at the moment of service of the stat demand, the guarantee liability would not yet be due.

It will, therefore, be necessary for a creditor first to make formal demand under the guarantee before serving a follow up stat demand [*although, in that circumstance, why would one bother with a stat demand at all when one could just present a petition? Ed*].

Security NOT a 'Transaction'

Re Burnden Holdings (UK) Ltd

The dictum of Millet J in *Re MC Bacon (No 2)*, that the granting of security could never constitute a transaction at an undervalue because it was not a '*transaction*' has oft been criticised. In *Hill v Spread Trustees*, the judge made clear that she would not have followed *Re MC Bacon* and there followed a good deal of commentary that it was just a matter of time before Millet's judgment would be overturned.

The issue has again come before the court in the *Burnden Holdings* case which was one under s.423 of the Act. Zacaroli J preferred the reasoning of *Re MC Bacon* and held that the granting of security could never be a transaction defrauding creditors under s.423 because there was no diminution of the company's net assets and therefore no transaction.

This was a wide-ranging judgment that looked at a number of relevant issues, viz: the *Duomatic* principle, the application of the s.1157 defence and limitation under s.423 claims and is therefore well worth a read.

We suspect, *pace* this judgment, that *Re MC Bacon's* life expectancy is nonetheless limited but for now it survives with judicial support.

Revised Chancery Guide

Click Here

The Chancery Guide 2016 has been revised again and is available by clicking the above link.

The revised guide has new contact details for Judge's clerks and Court Users Committee, new rules relating to Disclosure Pilot Scheme, the Insolvency PD and so much more.

New Code of Ethics for IPs

Insolvency Code of Ethics

The ICAEW has published a new code of ethics that will come into effect on **1 May 2020** and will apply to all IPs regardless of their RPB. Click here for a copy.

Prescribed Part Cap Increase

Insolvency Act 1986 (Prescribed Part) (Amendment) Order 2020

The cap on the maximum prescribed part will increase from £600,000 to £800,000 wef **6 April 2020**.

Directors' Compensation Order

Re Noble Vintners Limited

ICCJ Prentis has made the first compensation order under the amended CDDA 1986.

The company had been a wine broker and went into liquidation owing large sums to customers in respect of orders that were paid for but not placed or customers whose wines had been sold but not accounted for. In addition, the director had paid around £560K to another company owned by him.

Unsurprisingly, the director was disqualified for 15 years. As this was the first decision in which a compensation order had been made the judge took pains to go through the provisions in detail as follows:

1. The is a free-standing régime – unlike other provisions of the Act there is no need to establish a loss suffered by the company;

2. In terms of causation, the judge held that the test was the *But For* test – but for the director's conduct the creditors would not have suffered the loss;

3. As regards quantum, the court would have to take care to ensure the director did not suffer a double liability;

4. The court would be motivated to try to effect a distribution to creditors based on the information before it and the court would have a wide discretion as to the manner of order that it made.

In this case, the director was ordered to pay £560K (mirroring the amount that he had squirrelled away to his other company). Of that amount, the court ordered that £460K should be paid to 28 specific creditors whom the OR had identified as being those whose wine had been sold or who had paid in advance for orders that had not been placed. Those creditors were recognised as being the most easily identifiable as having suffered a direct loss.

Arkin Cap Revisited

Chapelgate Credit Opportunity Master Fund Ltd v Money

Diligent punters may remember that Snowden J held at first instance that the so-called *Arkin Cap* was not a hard and fast rule that the court was obliged to follow. He accordingly ordered litigation funders to pay indemnity costs far in excess of the sums that they had advanced to the claimant.

The Court of Appeal has upheld the judge's approach – the court is not compelled to adopt the *Arkin Cap*. Newey LJ added that the funder should have protected itself by ensuring that ATE insurance was in place rather than simply relying on the *Arkin Cap*.

Assignment of Debt

Nicoll v Promontoria (RAM2) Ltd

The Co-Op lent £10 million to Nicoll which he failed to repay. The Co-Op then assigned the debt to Promontoria and joint notice of assignment was given to Nicoll. Nicoll challenged the notice of assignment as it cross-referred to definitions in the assignment itself and accordingly the date on which the assignment became effective was not disclosed.

The court dismissed Nicoll's challenge. The judge's grounds were that (i) the notice stated that the assignment was effective, (ii) Nicoll had made payments to the assignee and (iii) Nicoll has not challenged security registered in the assignee's name. He held that Nicoll had no real interest in the validity of the assignment – apart from knowing whom he should pay, this was a matter between the assignor and the assignee both of whom treated the assignment as valid and complete.

Withdrawal of Admission

Re Charlotte St Properties Ltd

The director had sold various properties to a company but the legal titles had not actually be transferred in order to avoid stamp duty. The company had then sold the properties on to an offshore trust, CSPL, but, again, no transfer of title had been effected to avoid stamp duty.

The administrators of CSPL (who were also liquidators of the first company) sought an order under s.234 compelling the director to transfer the legal titles. In evidence the director admitted that he held the properties on trust for CSPL but claimed to have reached an agreement with CSPL that he would buy the properties.

Subsequently in the litigation, the director sought to change tack on the basis the original company had never acquired title so the properties could not be owned by CSPL. In effect, the director sought to resile from his admission that he held the properties on trust.

The court found that it would be unconscionable to allow him to change his tune in this way; he had deliberately arranged matters for his own benefit and must now suffer the consequences.

Common Law Defences to Antecedent Transaction Claims

SEB v Conway

This was a Privy Council case on appeal from the Cayman Islands and so refers to Caymanian law. The claim related to a preference claim and the respondent failed in the usual defences surrounding insolvency and the company's desire to prefer.

The respondent then claimed that the claim was essentially a claim for restitution and, as such, the common law defence of unjust enrichment should apply. The rationale was that, if the preference claim was made out, the respondent would have been unjustly enriched but it would have changed its position by paying the monies on to third parties.

Probably unhelpfully, the Privy agreed that the defence of change of position would be available but it also held that the defence was not made out in this case. Whilst the defence was available, the respondent was not able to avail itself of it since that would be incompatible with the *pari passu* principle.

Privilege Survives Disclaimer

Addlesee v Dentons Europe

Legal advice privilege that attached to documents would not be lost even where the company whose documents they were was dissolved. Even if the documents passed *bona vacantia* to the Crown which disclaimed any interest in them, the privilege would survive.

This is slightly odd given that there is no party in existence to claim the privilege but it does affirm the absolute permanence of legal privilege which is a Good Thing.

Directors' Duties Survive Liquidation

Re Systems Building Services Group Ltd

ICCJ Barber has held that the directors' statutory duties set out in ss.171-177 Companies Act 2006 will continue to apply even after the company's entry into liquidation or administration. They will subsist in parallel to any duties owed by the directors to the office holder under the Insolvency Act 1986.

The judge also confirmed, *obiter,* that the burden of proof was on the misfeasant director to justify certain unaccounted for payments to him from the insolvent company.

Bank's Failure to Prevent Fraud

Re Singularis

The so-called *Quincecare* duty (see *Barclays Bank v Quincecare (1992))* requires a bank to exercise reasonable skill and care in carrying out its customers' instructions. Here the customer company had been set up to manage the personal assets of a Saudi businessman who was a director, sole shareholder, chairman, president and treasurer. There were five other directors.

The director instructed the bank to pay $200 million to two other companies owned by him and then put the company into liquidation.

In ensuing negligence proceedings, the bank argued that the mind of the controlling director was to be taken to be the controlling mind of the company and thus there was no fraud as the bank was simply carrying out the company's instructions.

This was rejected by the Supreme Court. The bank's *Quincecare* duty was to protect the company itself from the actions of one rogue director. A pretty high bar on banks in dealing with such one-man bands (although the judge was keen to stress that this was *not* a one-man company).

ADMINISTRATION

Rent Deposit Top Up

Re London Bridge Ents Partners Ltd

Following the tenant's administration the landlord used the rent deposit to offset rent falling due during the admin period. With the administrators' consent, the landlord then forfeited the lease. A balance of rent relating to the admin period remained outstanding even after the application of the deposit and the landlord claimed that the tenant's requirement to top up the rent deposit fell to be dealt with as an administration expense.

The court was persuaded that the obligation to top up the deposit was a provable debt but not that it was an admin expense – it was therefore dealt with as an unsecured claim.

Had the landlord not been so hasty, it could probably have claimed the full rent (or at least the full post-deposit balance) as an admin expense.

Admin Application By Sole Director

Re Brickvest Ltd

Admin applications were made in respect of a number of group companies. A problem arose in respect of the parent company as the applicant was a sole director and under the articles the minimum quorum was three directors.

Marcus Smith J held that, had the appointment been affected out of court, the appointment would have been invalid. However. In a court-led process, the court has the discretion to disregard any such defect.

Out of Hours CE-Filing

Re Skeggs Beef Ltd
Re S J Henderson & Co Ltd and
Re Triumph Furniture Ltd
Re Keyworker Homes (NW) Ltd
Re All Star Leisure (Group) Ltd
Re Symm & Co Limited

Here we go again – this ludicrous farrago does nothing but heap dishonour and shame on the legal profession. In the days of administration petitions, it was standard for an admin order to include orders dispensing with service and truncating all time limits – precisely so as to avoid this sort of nonsense.

It is not clear to us why the rules relating to an online filing system are pegged to the opening hours of a court office which basically no longer exists!

It is difficult to glean from the plethora of recent cases precisely what is the state of play with regard to out-of-hours filing.

These involved Notices of Appointment that were CE-Filed at court at a time when the court office was closed.

In *Skeggs Beef*, the NOA had been CE-Filed at 5:03pm by the QFC holder. Marcus Smith J held that this was an improper use of the system and that the QFCH should have used the out-of-hours appointment system in rule 3.20 and the appointment was therefore defective.

The judge found that no injustice had been caused by the QFCH's having used the wrong filing process and, accordingly, he waived the error under rule 12.64.

In *S J Henderson,* the directors CE-Filed a NOA at 6:03am and in *Triumph* the NOA was CE-Filed at 9:29am – both before the court's "opening" time of 10:00.

ICCJ Burton found that the two NOAs had been improperly filed but that they would take effect from 10:00, the time at which the court office next opened.

In ***Keyworker Homes***, HHJ Hodge, sitting in the High Court, found as follows:

1. NOI can be CE-Filed at any time and takes effect from the time of CE-Filing;
2. The 10 clear business days for the purposes of para 28(2) commence on the next following day on which the Court office is open;
3. Directors can CE-File a NOA at any time and, again, the NOA takes effect from the time of CE-Filing.

In ***Re All Star Leisure (Group) Ltd***, a QFCH filed a NOA at 4:18pm (the Birmingham DR closes at 4:00pm). The High Court held that the appointment was effective. The fact that a QFCH has an additional process available to it under rule 3.20 IR16 does not preclude it from using the general provisions of CE-Filing.

In **Re Symm & Co Ltd**, Zaccaroli J found that a directors' NOA filed at 5:36pm was technically defective but that no damage was done and the defect could be waived under r.12.64 and the NOA would take effect when the Court office next opened.

By contrast, had the NOA been CE-Filed by a QFCH, it would take effect from the time of CE-Filing.

Current Position:

1. CE-File between 10:00 and 4:00 if you possibly can;

2. Between 4:00 and 4:30 don't mention a district registry on the NOA.

3. If CE-Filer is a director, the NOA will take effect at 10:00 next following;

4. If the CE-Filer is a QFCH, the NOA will take effect from the time of CE-Filing;

5. Unless a different judge rules differently in which case anything could happen.

LIQUIDATION

Stay of Criminal Proceedings

Cooper v Natural Resource Body for Wales

After the company went into a CVL, criminal proceedings were commenced against it and its directors in respect of environmental contamination. The moratorium against proceedings contained in s.130 of the Act applies in compulsory liquidation but not in a CVL.

The court held that it could rely on the power to give directions contained in s.112 of the Act to import its power in s.126(1)(b) to restrain proceedings in another court. Accordingly, drawing a distinction between *staying* proceedings and *restraining* them, the court held that it did not have the power to stay the criminal proceedings in another court. The judge went on to say that, even if he had had that power, he would not have stayed the criminal action as there was a clear public interest in having the directors' conduct scrutinised.

Interest on Misfeasance Claim

Re DCL Hire Ltd

A director had caused the company, shortly before its liquidation, to buy a number of vehicles which were then distributed to an associated company.

The liquidators succeeded in a shoo-in misfeasance application but the court abated the companies claim by 25% (allowing the director's plea under s.1157 CA06) and awarded interest only from the date of liquidation.

On appeal, the court held that there was no reason why the director should not be liable for 100% of the company's claim and that interest would flow from the time at which the company was divested of the property not from the later date of liquidation.

Rescission of Winding Up Order

Re Diamond Hanger Ltd

Six days after a winding up order was made, the company applied to rescind the winding up order under r.12.59.

The company's solicitors held sufficient funds to pay all liabilities and provide £1.5m in working capital.

A creditor opposed rescission of the winding up order as the company was badly run by a disqualified person; it had no UK director and was insolvent without the support of its overseas parent. This was also the sixth winding up petition in two years.

Rescission is in the court's discretion. The court rescinded the winding up on undertakings from the Company and its shareholder that all creditors would be paid in full and the above shortcomings would be remedied within three months.

RECEIVERSHIP

Receiver Can Sue in Own Name

Menon v Pask

LPA receivers sought a possession order against defaulting borrowers who refused to give vacant possession. The receivers amended the proceedings so as to be claimants

in their own names notwithstanding that they acted as agents of the borrowers under the terms of the charge.

The borrowers challenged the validity of the proceedings. The court held that the receivers could bring the proceedings in their own names – to rule otherwise would mean that the receivers would be causing the borrowers to sue themselves in their own names to obtain vacant possession against themselves.

BANKRUPTCY

First-Tier Tribunal Jurisdiction
Wolloff v Patel

The Upper Tribunal has held that the First-Tier Tribunal had jurisdiction to determine whether a bankrupt had an interest in property prior to his bankruptcy. The FTT's jurisdiction was not overridden by the general supervisory powers of the High Court in bankruptcy.

Setting Aside IPA Following Change in The Law
Re Elston

The bankrupt had entered into an IPA with his trustee pursuant to which funds would be paid directly to the estate by the bankrupt's pension provider. Following the decision in *Re Henry,* the pension would have been outside the estate and untouchable. The Bankrupt sought to set aside the IPA on the basis of there having been a change in the law. His application was refused on the basis that it would always be in the reasonable contemplation of the parties that there could be a change in the law following the agreement.

Insolvency Proceedings Not Invalidated by Late Service
Re Ide

Rule 12.9(3) requires an application be served at least 14 days before the date of the hearing. HHJ Paul Matthews has confirmed that, in insolvency proceedings, this means the date on which the application is actually heard.

Furthermore, unlike general litigation, claims in insolvency proceedings would not be invalid if they were served out of time. Any defects in service were capable of being cured by the court. However, a claim that might be susceptible to a limitation defence would not necessarily survive that defence just because the court had extended time for service.

Creditors Entitled to Bankruptcy Order
Re Titilayo Orebanwo

The County Court adjourned a bankruptcy petition to allow the debtor to pay the £5,700 petition debt at the rate of £150pcm (ie over 3½ years).

The High Court overturned the decision and reminded us that the starting point on a petition is that, if the statutory requirements are met, the creditors are entitled as of right to the making of a bankruptcy order.

CROSS-BORDER

s.263 is Extra-Jurisdictional
Re Carna Meats (UK) Limited)

The company's Irish bookkeeper tried to obtain leverage for payment of his historic fees from the fact that he held or had access to the company's books and records which the liquidator sought.

The Court found that the power to require delivery up under s.263(3) was a standalone power separate to that under s.263(2) (ie to compel attendance).

Whilst s.263(2) might be limited to England & Wales, the Court was clear that the power to order delivery up under s.263(3) have extra-territorial effect provided that the target person has sufficient nexus with the jurisdiction. A person who takes on the rôle of bookkeeper to an English company could hardly complain if he was asked to deliver up his clients books.

This decision is at odds with that in *Re MF Global UK Limited* and the matter therefore still requires settling by the Court of Appeal.

Admin Order Over Gibraltarian Company
Re Nektan (Gibraltar) Ltd

Falk J has held that the English High Court has jurisdiction to make an admin order in respect of a Gibraltarian company even though its COMI is in Gibraltar.

Under the Recast Insolvency Reg, Gibraltar is a 'territory' of the UK but it is not an EEA State for the purposes of s.436 of the Insolvency Act 1986.

The judge found that a company with its COMI in Gibraltar would fulfil the requirements of para 111(1A) as it was incorporated in an EEA state (ie Gibraltar being part of the UK) with its COMI in member state other than Denmark.

Pushing the bounds of reasoning somewhat! This was, in fact, all *obiter* because the company in question actually had its COMI in England.

Alistair Bacon
12 March 2020

Covid-19 Coronavirus

At present all at AMB Law are alive and well and working as normal. It is currently intended that all our scheduled events will proceed as planned.

In the event that the situation should deteriorate, all are staff are fully set up for home working with full IT access to all office systems.

The **R3 Eastern Conference** is currently planned to proceed as scheduled on **26 March 2020**. Should that change presenters and punters will be notified by R3.

When Do Administrators 'Occupy' the Premises?

Let's start with a quick recap as the courts have flip-flopped a bit over the past few years. The so-called *Salvage Principle*, emanates from a number of C19th cases involving distress over liquidated companies – most famously *Re Lundy Granite Ltd.* Currently the position on the interpretation of the *Salvage Principle* is as follows:

- **Rent**: Rent is payable as an expense of the administration at a daily rate for the full period during which the office holders cause the company actually to occupy; ie *Re Game Retail Ltd* applies. *Goldacre v Nortel Networks* has been overruled so it is not the full contractual rent that falls due as an expense on the quarter day – nor is there a rent-free period prior to the quarter day.
- **Rates**: the company in admin will be exempt unless the administrator causes the company to 'occupy' the premises. See *Reg 4(l) Non-Domestic Rating (Unoccupied Property)(England) Regulations 2008* and *Exeter City Council v Bairstow*.

So, clearly, the $64,000 question is as to what constitutes *'occupation'* by the company in administration. If one imagines a sliding scale, the two extreme ends are obvious: if the administrator continues actively to trade the business from the company's premises which remain open to the public as before, then he will certainly be occupying the premises and liable to pay both rent and rates as an admin expense.

If, on the other hand, the premises remain empty following the administrator's appointment, and he takes not steps in respect of them at all and consents to the landlord's forfeiture then he will certainly not be liable to pay any post-appointment rent or rates. The difficult bit is, of course, in respect of all those situations which fall in between the two extremes and, as is so often the case with these knotty little issues, there is very little useful caselaw on the issue.

'Occupation' for these purposes means occupation of the premises (i) for the benefit of the insolvency process and (ii) to the exclusion of the landlord. In other words, if the administrators keep the landlord out of the property they will run the risk of having to pay rent and rates.

There is authority that simply failing to vacate or refusing to surrender premises does not amount *per se* to occupation: in *Re Oak Pits Colliery (1882)* it was held that liquidators were not in occupation simply because the company had P&M on site.

In a similar vein, we are often asked whether having the company's books and records on site would constitute 'occupation'. Our view is that it probably would not but it is difficult to set any hard and fast rule and it will depend on the circumstances of each case. If the landlord requests the administrator's consent to re-enter the property (and thereby forfeit the lease), the administrator will have either to consent (in which case he risks the landlord's disposing of the books and records) or refusing in which case he risks being held to be in occupation.

In cases in which we have been involved, administrators have avoided all liability for occupation by allowing landlords to re-enter. Where the administrators have been unable to clear essential assets or records from the property within a reasonable time, they have had no option but to agree to pay rent at a daily rate as an admin expense.

The same broad principles will apply where the tenant is in liquidation as opposed to being in administration but there is, of course, no moratorium so the liquidator may need to decide straight away what he intends to do with the property and will not be able to prevent a landlord's re-entry. As ever, this is an area in which office holders would be well advised to take specific legal advice – preferably from AMB Law.

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