AMB LAW

INSOLVENCY UPDATE

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Dee-dum. Dee-dum. Dee-dum-di-dum … Just when you thought it was safe to go back into the office …

Welcome to the long overdue 29th Edition of **AMB Law's *Insolvency Update*** which has been in draft form since about March and this intro has been written and re-written at least half a dozen times! Well … after several months' settling into a new version of normal with *Working From Home* becoming ubiquitous, many of us had a little flirtation with returning to the office. It didn't last and we seem to have been gated again. It is hard to imagine a time when the suit and tie will make a comeback - once we've all seen each other in shorts and tee shirts there does not seem much point in dressing up in the future.

At the top end of the market we have seen a number of large insolvencies with Carluccios, Debenhams, Casual Dining Group and many others crashing already. How many airlines, travel companies, leisure/retail businesses, suit makers etc are going to follow? It is being widely predicted that the surge in insolvency assignments is likely to start between Q4 of this year and Q2 of 2021. The industry is going to be in for a busy time and there is no question that the market is starting to pick up now.

COVID RELATED MEASURES

Have you lost track of where we have got to? Here's a handy update:

Striking Off of Companies

From **10 October 2020** Companies House will reinstate the compulsory striking off process in respect of companies thought not to be carrying on business. The process has been suspended since April 2020.

Stat Demands and Winders

Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020

The relevant period has now been extended to **31 December 2020** which means no stat demand served between 1 March and 31 December 2020 can ever be relied on.

No winding up orders will be made between 27 April and 31 December 2020 unless it can be shown that the debtor company would have been insolvent even without Covid-19.

There is no requirement for companies subject to a pending winder presented after 27 April 2020 to bother seeking a validation order under s.127.

Wrongful Trading

Corporate Insolvency and Governance Act 2020

One of the significant measures introduced in the Act can be found in section 12. The temporary suspension of wrongful trading was originally introduced in March 2020 and is due to end on **30 September 2020**, subject to any last-minute intervention.

The measure has provided some breathing space for company directors suspending their personal liability, however directors still need to be mindful of other considerations relating to their business – including provisions which prevent creditors from being defrauded under section 213 of the Insolvency Act 1986.

Overall, the temporary suspension never changed the attention directors should give when evaluating the financial position of the company. Their (in)action will remain subject to scrutiny and directors should remain cautious about continuing to trade when the company has no realistic change of avoiding insolvency.

Protection for Commercial Tenants

Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No 2) Regulations 2020

Section 82 of the Coronavirus Act 2020 provided that a right of re-entry or forfeiture for non-payment of rent could not be enforced in respect of business premises during the *relevant period*. The relevant period has now been extended to **31 December 2020**. All well and good but

for every non-paying tenant there is a landlord not getting paid.

Domestic Possession Proceedings

Coronavirus Act 2020 (Residential Tenancies: Protection from Eviction) (Amendment) (England) Regulations 2020

All possession proceedings and all applications for a warrant of possession remain suspended until **31 March 2020**. A minimum of six months' notice of termination must be given in respect of applications terminating an assured shorthold tenancy under the Housing Act 1988. This is not good news for any pensioners or others who rely on rent from rental properties for their income.

Directors' Appointments Temporary Practice Direction

In force wef 6 April 2020

CE-Filing Notices of Intention and Appointment

Directors' NOIs or NOAs and QFCH's NOAs shall be deemed delivered to the court at the time stated in the email receipt, except:

if a directors' NOI is CE-Filed outside court hours, it will be treated as having be CE-Filed at 10:00 on the day that the court is next open.

QFCH may not use CE-Filing out of hours but must use the procedure in r.3.20 *et seq*.

All ICCJ hearings will be conducted remotely. There are rules for listing urgent hearings before a Judge or an ICCJ – contact the clerks on: Rolls.ICL.Hearings1@justice.gov.uk.

Winders and bankruptcy petitions in London will be dealt with by remote hearings using either Skype for Business or BT MeetMe. Our experience is that the court clerks will contact the parties' solicitors and arrange a link with counsel – the system seems to work well.

EXTENSION OF TIME LIMITS

PRACTICE DIRECTION 51ZA – wef 2 April 2020

Parties may agree an extension up to 56 days without notifying the court (was 28 days) – longer extension needs to be agreed by the court.

A party seeking permission to listen to or view a recording of a hearing may do so by request to the court and does not need to make a formal application.

CENTRAL LONDON COUNTY COURT : 2nd PROTOCOL FOR INSOLVENCY WORK

A revised Protocol has been published by the CLCC which took effect from **7 September 2020** replacing the 1st Protocol published at the beginning of Lockdown in March.

Bankruptcy Petitions

All bankruptcy petitions will be heard via Skype and BT MeetMe. HMRC petitions will be heard in pairs; all other petitions will be listed for 30 minute slots.

Certificates of Compliance and of Continuing Debt must be sent to RCJBankCLCCDJHearings@justice.gov.uk.

Public Examinations

Public examinations will be listed for face-to-face hearings.

Company Applications

Applications for Restoration or late filing of charges will remain listed and dealt with on paper – there will be no attendances unless the court deems it necessary. Evidence of solvency may be sent to RCJCompGenCLCC@justice.gov.uk

Insolvency Applications

Insolvency applications will be considered on paper and standard directions given.

All parties will be required to file paginated, searchable PDF bundles.

MISCELLANEOUS

HMRC's Preferential Status

The Insolvency Act 1986 (HMRC Debts: Priority on Insolvency) Regulations 2020

The controversial reinstatement of HMRC's preferential status is now set to take effect in respect of insolvencies commencing on or after **1 December 2020**. The new provision will not operate as it did previously – HMRC will have a secondary preferential status only inasmuch as they will not rank pari passu with the existing prefs (ie employees) but will rank behind them but ahead of floating charge realisations.

HMRC's secondary preferential status will apply to:

- PAYE income tax;
- Construction Industry Scheme deductions;
- Employee National Insurance contributions;
- Student loan repayments.

Criminal Fine Provable Debt

Re Paperback Collection and Recycling Ltd

The court relied upon the old Bankruptcy Act to find that criminal fines relating to pre-insolvency activities *were* provable debts in a company's liquidation or administration. Ironically, by dint of rule 14.2, criminal fines are no longer provable in bankruptcy.

Late Filing of Witness Statements

Re Wolf Rock (Cornwall) Ltd

Where directions provided a timetable for the filing of witness statements, a party wishing to rely upon evidence that had been filed late was required to apply for relief from sanctions under CPR 3.9. In this case, the district judge had refused to admit evidence that had been filed late by the debtor company and had proceeded to make a winding up order. Paul Matthews

J found that, whilst sanctions were not set out expressly in the directions order, it was implicit that the sanction for failing to comply would be that the party in question would not be allowed to rely on evidence filed late.

Delivery Up and Legal Privilege
Barrowfen Propertie v Patel

The Defendant was a former director of the Claimant. The Claimant sought delivery up of documents and legal advice given to the Defendant and another company. The Defendant claimed legal professional privilege and refused to hand over the documents.

It is a well-established principle that privilege cannot be asserted over documents that were created for a fraudulent purpose or for criminal intent (called the '*Iniquity Exception*').

In this case, the High Court went further and found that it was not necessary tor the application for delivery up to prove actual fraud. Tom Leech QC found that it would be sufficient that the Claimant alleged a breach of the directors' duties under the Companies Act and that the allegations amounted to dishonesty, bad faith or sharp practice or that the director had preferred his own interests over those of the company.

Although this was not strictly an insolvency case, the same principles will apply to cases where directors and others seek to hide behind legal privilege to fend off s.236 applications.

ADMINISTRATION

Exercise of Administrators' Powers
Re Lehman Bros

The administrators wished to distribute surplus funds in the administration to the company's shareholders but were concerned that such a distribution would be inconsistent with achieving the statutory objective (which, in this case, was the survival of the company as a going concern).

On an application for directions, the court held that the administrators were not required only to exercise their powers in furtherance of the statutory objective which would be unworkable. The proper test was that the administrators should exercise their powers consistently with, and with the overall objective of achieving, the relevant statutory objective.

Insolvent Estate as Appointor
Re Secure Mortgage Corporation Ltd

The case involved an attempted appointment of administrators that was so littered with mistakes that it somewhat detracts from its usefulness as a precedent. One minor but good point does come from it however: a deceased's estate is not a 'person' so cannot file an NOA – it needed to have been filed by the PRs acting on behalf of the estate. That would apply to apply such applications or appointments, not just an NOA.

FCA Consent Cannot Be Retrospective
Re ARg Mansfield Ltd

Section 362A of FSMA 2000 requires the FCA consent to an admin appointment before the NOI is filed. In this case the directors did not realise that the company was FCA regulated. The court held that such leave could not be obtained retrospectively and, accordingly, the purported appointment of administrators without the FCA's prior consent was ineffective and this was not a procedural irregularity that could be waived or cured by the court.

The requirement for FCA consent does not apply to a court appointment. In this case therefore, Judge Davis-White QC remedied the situation by appointing administrators and backdating the date of appointment to the date of filing of the NOA.

Director's Residual Powers
Re ASA Resource Group plc

The company was destined to be handed back to the directors having been rescued as a going concern. The court found that the administrators had not acted unfairly in refusing to allow the director to exercise residual powers in anticipation of the handing back. The director had wanted to exercise his powers *qua* director in order to appoint other directors, amend the company's records and open a bank account which the court felt could put a disproportionate burden on the administration. Part of the problem here seems to have been a poorly prepared application.

LIQUIDATION

Directors and Shareholders have no *locus standi*
Re Saint Benedict's Land Trust Ltd

The right to challenge the presentation of a winding up petition is the company's right not to be subjected unfairly to the winding up process which vests in the company not in any director or individual shareholder.

Bank's Knowledge for Fraud Claim
Re Bilta (UK) Limited

The liquidators brought fraud claims against two RBS subsidiaries on the basis that some of their employees must have had sufficient knowledge of the company's VAT Fraud to constitute participation and that they had turned a blind eye. The court found that the bank was accordingly liable and it was ordered to pay compensation to the company equal to the amount of VAT lost by HMRC from the dated on which the bank was deemed to have had the knowledge.

Liquidation Stay of Proceedings
Re Carilliion plc

The FCA wanted to issue a Warning Notice against the company in respect of various alleged breaches of the

Listing Rules. The question of the s.130(2) stay arose and the FCA sought directions from the court.

ICCJ Jones held that the issuing of a Warning Notice constituted a, '*action or proceeding*' for the purposes of s.130(2) and, accordingly, could not be issued without the leave of the court.

Putative Liquidators Do Not Have Locus to Restore
Re BCB Environmental Management Limited

Putative liquidators of a company do not have locus standi to bring a claim for restoration to the register under s.1029(2) CA06 even if they have identified serious issues that warranted investigation by a liquidator. That and the support of HMRC as a creditor did not give the IPs a voice as they were not in the list of potential applications set out in the statute.

VOLUNTARY ARRANGEMENTS

Are VAs 'Contracts'?
Re Rhino Enterprises Properties Limited

That voluntary arrangements are a form of *statutorily-controlled contract* is a mantra that is often trotted out but those seeking to explain how they work.

Baker J has held in the High Court that it is at least arguable that VAs are not contracts for the purposes of the Contract (Rights of Third Parties) Act 1999. In favour of this argument is the fact that (i) validity of a VA is not dependent on the parties' consent but adherence to the statutory rules; (ii) the Insolvency Act 1986 does not refer to VAs being contracts and (iii) none of the established rules relating to the formation of contracts applies to the creation of VAs.

An interesting point on the narrow issue as to whether a third part can rely on provisions of a VA.

PERSONAL INSOLVENCY

Re-Vesting of Bankrupt's Dwelling House
Re Brake

The High Court (Matthews HHJ) conducted a thorough analysis of section 283A Insolvency Act 1986 in this matter. The court held that the term "belonging" in section 385(1) of the Act when referring to separate structures referred only to buildings that served a useful purpose to the dwelling land. Accordingly, the court held that parcels of land adjoining a dwelling house did not belong to it as they did not form a coherent whole and could not revest in the Bankrupt.

The case also serves as a useful reminder that the Bankrupt's principle address should be determined by an objective test. In this case the Bankrupt attempted to show that he had changed his principle residence by the date of bankruptcy, which was rejected by the court.

Costs Second Petition Not Pre-Preferential
Re Glenn Maud

Unusually two petitioners had simultaneously pursued two petitions against the same debtor. Whilst it was clear that each petitioner was entitled to his costs against the debtor, Snowden J held that the provisions in the Rules relating to payment of the petitioner's costs as pre-preferential related only to the costs of the petition on which the bankruptcy was founded. The costs of the second petitioner were not therefore included and they ranked only as an unsecured

creditor.

CROSS BORDER

COMI For Non-Business People
MH and NI v OJ and Novo Banco SA

The debtors in this case were Portuguese nationals living in the UK but their only property was in Portugal. The debtors sought to start insolvency proceedings in Portugal and the Portuguese court referred the matter to the ECJ for a ruling as to whether the presumption that the debtors' usual place of residence would be their COMI was rebutted by their only owning property in a third state.

The ECJ held that the presumption would not be rebutted and that the court needed to consider all relevant factors as to where the debtors conducted the administration of their economic interests and where they earned their income and where their assets were. In this case, that we was clearly England.

Retrospective Leave to Serve Out
Re Lau Yu

Hong Kong trustees has issued proceedings in the English High Court which they then served on the debtor in HK. The debtor argued that the proceedings were invalidated by the trustees' failure to obtain leave to serve outside the jurisdiction. The court however held that, under CPR 6.15, it could validate steps already taken to effect service.

Alistair Bacon
30 September 2020