AMB LAW

INSOLVENCY UPDATE

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Welcome to the 33rd Edition of **AMB Law's** ***Insolvency Update***. At long last, the prohibition on winders has been knocked on the head and creditors have not been slow in getting back in the saddle. This long overdue move signals the beginning of a return to normality although, given the new three week grace period, we are not yet clear on the numbers of petitions being prepared. Next we will have to wait to see what the government intends to do about CBILs and BBLs most of which seem to have been converted into luxury cars or BTL investment properties. We anticipate that life will slowly start to emerge from its hibernation although the Tsunami will not hit the shore until around Q2/2022. And even then it will only be a medium-sized wave consisting largely of CVLs with precious few assets other than misfeasance claims against directors with no funds. If you would like to be removed from our database, please email *office@amblaw.co.uk*.

MISCELLANEOUS

Test of Risk For Freezing Injunction

Les Ambassadeurs Club Ltd v Yu

This was not an insolvency case but an application for a freezing injunction following judgment – or, rather, an appeal against the lower court's refusal to grant such an injunction.

The claimant had obtained a summary money judgment against the defendant for a sum in excess of £6½ million. The claimant was of the view that the defendant would seek to dissipate his assets and sought a freezing injunction which a *puisne* judge had refused as the claimant had insufficient evidence of the risk that Mr Yu might misbehave – the claimant had nothing more than a suspicion or fear but no actual evidence.

The Court of Appeal upheld the first instance decision. A freezing injunction could not be granted simply because a judgment debtor was avoiding paying. An injunction would only be granted against a defendant who would take every step to dissipate his estate so as to frustrate a creditor.

Singh LJ held that an applicant for an injunction had to provide cogent evidence that the defendant fell into this category and that there was a 'real risk' of dissipation – that meant that the risk had to be more than theoretical or fanciful. It was relevant in this case that Mr Yu had had plenty of opportunity to dissipate his assets but had not done so.

Submitting to the Jurisdiction

Re Rufus

Trustees in bankruptcy issued an antecedent transactions application against a number of parties but they failed to serve a sealed copy of the application prior to the first directions hearing. The limitation period had expired shortly after issue but the respondents did not take the point for a further six months during which time the parties had been conducting the litigation.

The respondents applied to the court for the application to be struck for want of having been properly served within the limitation period.

The court refused the respondents' strike out application on the basis that, by taking part in the litigation, they had effectively waived their right to seek to take a point on limitation at a later date.

The trustee's solicitors no doubt heaved a sigh of relief!

ADMINISTRATION

RECEIVERSHIP

Receivers' Duty of Care

Re Serene Construction Limited

This old chestnut has arisen again - the mortgagor company alleged that LPA receivers had failed to take steps to achieve

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the best possible market value for a property. The receivers actually sold the property for a price in excess of their agent's best estimate but it was less than the company's expert's estimation of the value.

The court held that a sale price below an expert's estimate did not *ipso facto* mean that the price was an undervalue. The receivers were entitled to instruct and rely upon the advice of local selling agents and they were not required to incur the cost of an enhanced planning application.

LIQUIDATION

Winders Are Back

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Amendment of Schedule 10) Regulations 2021

Apologies if you have already seen our bulletin on the subject. Whilst the return of winders has been well-fêted in the industry press and on social media, there are a couple of points worth making:

1. The 21 notice seeking proposals must be served afresh – reliance cannot be placed on past discussions between the parties …
2. … but evidence of such discussions might be relied on by the court in an application to waive the 21 day notice.
3. It is not clear how the court will judge whether a creditor has acted reasonably in not accepting a settlement offer but we would suggest that the courts approach might reflect the test in s.271(3) for bankruptcy. In this regard see *Re Howell*, below.

Overall, these regulations are pointless and do nothing to give any real succour to debtors whilst simply delaying petitions by three weeks and paving the way for a raft of pointless litigation. The £10,000 minimum is presumably intended to prevent the ICC and the OR being swamped but that is going to happen anyway.

Indirect Effect of Covid for CIGA Protection

Re PGH Investments Limited

This case is really just a reminder that a company seeking to invoke the protection of CIGA to see off a winder does not have to show that Covid has had a direct effect on its finances; an indirect effect will suffice.

The company was required to satisfy the court that its financial position had worsened as a result of Covid. The company's liability arose as a result of a guarantee that it had given. The company argued that the guaranteed party's financial position had been adversely affected by Covid to such an extent that the company's guarantee obligation was triggered when, but for Covid, they most likely would not have been.

The court accepted the contention in principle but held that it did not apply in this case because the company had not produced any evidence to demonstrate how the third party had been affected by Covid.

Interesting to note exactly how wide the court is prepared to take the definition *'financial effect'* in CIGA.

Adjudication Revisited

Re John Doyle Construction Limited

Readers will remember Lord Briggs' judgment in *Bresco v Londsdale* in which he held that it was not inappropriate in principle for an insolvent company to seek enforcement of an adjudication award by way of summary judgment.

In this case, the Court of Appeal upheld a first instance decision of Fraser J in which the judge dismissed a summary judgment application on the basis that the security offered by the insolvent applicant was inadequate – it needed to have been *'clear, evidenced and unequivocal'*.

The interesting part of the judgment however is not the decision itself but the *obiter* discussion that followed. Coulson and Lewison LLJ both concluded that an adjudication is necessarily a provisional measure if there remain any crossclaims against the award. It therefore follows that such an adjudication cannot provide the final 'net balance' between the parties and cannot therefore found the basis of a summary judgment.

DIRECTORS

All Members of LLP Liable to CDDA

Re Bell Pottinger Private Limited

Disqualification proceedings were brought against the various members of an LLP who sought to have the proceedings struck out on the ground that they had not been members of the management team and so had not demonstrated themselves unfit to be directors or involved in the management of a company.

The court held that all company directors (and, by extension, LLP members) were, by definition, involved in the management of business regardless of what their specific roles and duties might have been. This is a further reminder to company directors that they cannot absolve themselves of liability simply by not getting involved in the management.

Extent of Director's Liability Under s.216

Re Discovery Yachts Limited

The director of the company also became a director of its parent company which was in contravention of s.216 (the parent being called *Discovery Yachts Group Limited*). The claimant had obtained a judgment against the company's parent in respect of a defective yacht built by the company. The parent company also went into liquidation and the claimant sought to enforce the judgment directly against the director under s.217(2) (*ie, joint and several liability for debts).* The question arose as to whether the claimant could proceed directly against the director or whether he first needed to issue proceedings against the director and get a judgment against him personally.

The High Court held that where a director is in default of s.216, he is automatically liable for all the relevant dates of company – it is not necessary for a claimant to establish a separate, direct liability.

Burden of Proof in Breach of Duty Claims

Re CSB 123 Limited (sub nom Reynolds v Stanbury)

It has generally been understood that where a claim against a director relates to the misappropriation of company funds, it is tantamount to a claim for breach of fiduciary and, as such, the burden of proof is on the director to justify the transfer of funds.

In an astonishingly long judgment on the subject, ICCJ Barber has introduced a refinement to this shifting of the burden of proof. The applicant must first show that the transfer of the property actually took place and that the property belonged to the company. Only once those two elements are proven must the respondent justify the transfer of assets as proper.

BANKRUPTCY

No Disclosure in Bankruptcy Proceedings

Re Hoffgen

In bankruptcy proceedings brought by his employer, the debtor sought an order for disclosure of his company laptop (which was in police custody) in order to build a schedule of work that he claimed to have carried out.

Although disclosure was available in bankruptcy cases (see rule 12.27), it was not usual and was not appropriate in this case as the debtor could simply ask the petitioning company to produce the documents sought and an adverse inference could be drawn from its failure so to do.

No Indemnity Costs on Failed Stat Demand

Re Luttman-Johnson

This case involved PGs given by two directors to a finance company.

First, note that the directors' argument that they had been assured that the PGs were a mere formality was (rightly) dismissed. *[Oldest one in the book, Ed]*

The real point of the appeal, however, related to the issue of costs as the first instance judge had awarded indemnity costs against the creditor when the stat demands were dismissed.

Mellor J pointed out that there was no rule that a failed stat demand would automatically lead to indemnity costs in the debtor's favour. The court below had wrongly relied upon the authority of *Re Kirkman-Moeller* but that dealt with a petition presented with no clear evidence of a debt.

Petitioner's Refusal of Security

Re Howell

Readers will be aware that, unlike winders, bankruptcy petitions offer the court the discretion *not* to make an order if the petitioner has unreasonably refused a settlement offer or security for the petition debt – see s.271(3). Although there have been several decisions on this section, it has never really been quite clear when it might be reasonable for a petitioner to turn down an offer of security or instalment payments.

In this case, the debtor had offered to settle part of the debt from a legacy that he was expecting. The Court of Appeal held that, whilst a legatee had no proprietary interest in a deceased's estate, his hope of an inheritance *did* amount to an interest that was capable of being charged and could therefore be taken into account under s.271(3).

However, in this case, the debtor's uncorroborated evidence massively exaggerated his potential legacy, only dealt with half of the debt and provided no date for payment (being dependent on the sale of a property). The Court of Appeal accordingly dismissed the debtor's appeal and made the following observations:

- An offer under s.271(3) must be concrete and capable of acceptance;
- The offer must be a present offer and not dependent on some future event;
- It is not the petitioner's job to negotiate a settlement which should be produced by the debtor in a form capable of acceptance.

EMPLOYMENT

Liquidation Not 'Exceptional Circs' for TULRCA

Re Carillion plc

We will all remember from JIEB days that, in addition to the need to inform and consult employees under TUPE, employers must carry out a consultation process under TULRCA if they intend to make 20 or more employees redundant within 90 days. There is an exception where *'exceptional circumstances'* make such a consultation process impossible but, even then, the employer is required to give it his best shot.

Right up to the point of liquidation (14 January 2018) the board of Carillion had genuinely believed that the government and other stakeholders would find a solution to its financial difficulties and that it would continue to trade solvently. The EAT accepted that the government's refusal to provide funding had come as a bolt out of the blue but neither that nor the fact that liquidation was inevitable counted as '*exceptional circumstances'* even though the EAT accepted that the company could not have consulted employees.

It is almost impossible, based on this judgment, to think of any circumstance that might be exceptional and we should work on the basis that large employers will always be susceptible to protective awards if they suddenly enter an insolvency process.

Alistair Bacon

20 October 2021

R3 Eastern Back-to-Business Lunch 2021

Thursday 18 November, 12:30-16:30

The R3 Eastern Committee would like to invite you to join them at the Back-to-Business Lunch (formerly known as the *Ladies' Lunch*). This will be our first flagship face-to-face event since 2019, so we hope you are able to attend.

Sponsored by **Gatehouse Chambers,** this year's event will once again take place in **Norwich** in the stunning Grade I-listed Georgian venue, The Assembly House.***Click the picture above to purchase your ticket***

Phoenixism Revisited

The case of *Re Discovery Yachts Limited* referred to above has prompted us to re-examine the whole issue of sections 216 and 217 and the re-use of company names by directors. This has long been an issue in the context of advising on pre-packs and advising the directors of the implications of section 217 must be on every lawyer's checklist. We have seen a distinct rise over the past 18 months or so of cases actually being brought against offending directors and we know of at least two ambulance-chasing organisations that sniff out such claims and buy them from individual creditors. Whilst such behaviour might be unsavoury it is not unlawful and the director in question will have to deal with the claim against him.

Put simply, where the director of a company in liquidation becomes, within five years, a director of another company with a similar name, he will be in breach of the provisions in s.216 unless one of the exceptions applies. The exceptions are:

(1) that the second company has already actually traded using the offending name for at least twelve months, or
(2) that the business and assets were bought via a pre-pack and notice was given to all the creditors of the liquidated company, or
(3) that court sanction is obtained.

What is a Confusing Name? The test here is all about whether the public will be confused – or, rather, whether they will assume that there is a connection between the old and new companies. It is therefore a matter of common sense as to whether the names would fall foul – clearly *Discovery Yachts Group Ltd* is similar to *Discovery Yachts Ltd* and, accordingly, fell within s.216(2). If any director is faced with this dilemma, he should always err on the side of caution and assume that the provision will apply if there is any doubt. He should take legal advice at an early stage.

What are the Penalties for Failing to Comply There are two: by s.216(4) a defaulting director will commit a criminal offence and be subject to imprisonment or a fine (and a daily fine) or both. Under s.217(2) the defaulting director will be personally jointly and severally liable for all the debts of the new company incurred whilst he was a director. Such claims could be huge – the claim against the director in *Discovery Yachts* was over £1 million.

What is frustrating about these claims is that, in the case of an insolvency sale, it is usually so easy to avoid any liability at all by following the steps set in rule 22. As a firm we have dealt with dozens of such cases and for a relatively small fee can arrange the physical giving of notice to creditors and advertisement in the *Gazette*. The downside to not taking the simple step above could calamitous as the director of Discovery Yachts Ltd, Mr Langdon, discovered.

It is also possible to make an application to the court effectively to be exempted from s.216 but there is only a seven day window following the liquidation of the first company within which to make the application. The application will have to be supported by evidence from the director who will need to demonstrate that he was not culpable for the insolvency of the first company. The court will have a wide discretion as to the order that it can make and, whilst it is not like an application under the CDDA, the court might make conditions such as that an accountant sits on the board. Note too that the order cannot be retrospective and so cannot assist a director who has already breached s.216 – even inadvertently.

Any director looking to engage in a pre-pack or insolvency sale would be well advised to seek specific advice on s.216 and would, in our view, be mad not to try to rely in the giving of notice – *aka* the rule 22.4 exception - AMB would be happy to assist.

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