AMB LAW

INSOLVENCY UPDATE

No. 34 • January 2022

Welcome to the 34th Edition of **AMB Law's *Insolvency Update***. People are now back in the swing of things following their Christmas breaks (which seem a long time ago). *Pace* the hiccough caused by the Omicron variant (*why is it not the Epsilon variant?*), things seem to be slowly starting to return to normal. We have seen work picking up on all fronts with more transactional cases in the past eight weeks than we saw in the whole of the rest of 2021. The big issues going forward will be the effect of Omicron on a very bruised leisure and hospitality industry for which the recent restrictions could not have come at a worse time and also the extent to which IPs and HMRC are able to recover the billions of pounds of stolen BIBLs and CIBLS. The worst thing about that farrago is the inevitability that the money would mostly be nicked.

If you would like others to receive this Update as an early Christmas present or if you would prefer not to receive it at all, please email us at: *office@amblaw.co.uk*.

Legislation

The Payment and Electronic Money Institution Insolvency (England and Wales) Rules 2021

These rules came into effect on **12 November 2021** and provide rules to support the special administration procedure in respect of payment institutions or electronic money institutions.

Rating (Coronavirus) and Directors Disqual (Dissolved Companies) Act 2021

This act received Royal assent on 16 December and enables the Secretary of State to bring CDDA proceedings even where the subject company has already been dissolved.

The Land Registration Fee Order 2021

Wef **31 January (*sic*) 2022** land registry fees will be introduced. Interestingly, the percentage increase in fees is lower than the percentage decrease by which the level of service has collapsed. Scale 1 and Scale 2 fees have been increased by about £5 at each level (click the title above for details).

Increased Fees in the Civil and Family Courts

New ICC fees came in on **1 October 2021**:

Winders/Bankruptcy petitions	£302
Insolvency application	£280
Application in insolvency proceedings	£99
Consent notice	£26
Bankruptcy discharge certificate	£75

MISCELLANEOUS

Meaning of "Deliberate" in Personal Liability Notice

Osman v HMRC

HMRC had issued a PLN against the director of a company on the ground that he had deliberately submitted inaccurate VAT figures. Whilst the court accepted that the director may not have been dishonest *per se*, it stated that the director was under an obligation to understand the requirements of VAT and to understand the business's tax obligations. In this case, the director had taken no steps to try to understand the requirements of VAT and cannot have believed that his VAT returns were accurate – their inaccuracy was therefore '*deliberate*' and the PLN was properly issued.

Challenging Officeholder's Assignment

Re Edengate Homes (Butley Hall) Limited

This case involved a family company in respect of which the liquidators had assigned to Manolete various antecedent transaction claims against the director's parents. The director then sought, *qua* creditor, to challenge the assignment under s.168(5) (person aggrieved by an act of the liquidator).

The court dismissed the director/creditor's application:

First, notwithstanding that she was properly a creditor, the applicant had no *locus standi* as a creditor to bring the application because she had no legitimate interest in the outcome. It was clear to the court that the applicant's beef was not with the assignment itself but with the underlying litigation against her parents which she wanted to block –

The contents of this *Insolvency Update* are believed to be correct as at the date of publication. This bulletin is provided for information only and is not intended to constitute legal advice. No liability can be accepted by AMB Law for any errors contained herein.

© AMB Law Limited 2022

the application was not therefore brought in the interest of the creditors as a whole.

Secondly, the liquidators' decision to assign the claims was perfectly proper and there was no evidence that the director had shown any interest in buying the claims herself (which she now claimed). In order for the assignment to have been set aside, the applicant would have had to show that the liquidators' decision was so absurd as to be perverse.

This was a case that largely turned on its own facts but it is nonetheless a good read and no doubt very welcome for the plethora of litigation funders with which we are now blessed.

ADMINISTRATION

Administrators' PERSONAL Liability Under TULRCA

R v North Derbys Mags (ex p Palmer)

Administrators gave notice of redundancy to employees on the day following their appointment. Notice in Form HR1 was not sent to the OR for a further 21 days following an enquiry from the OR. Criminal proceedings were commenced against the administrators for their failure to give 30 days' notice of redundancies to the OR which failure is actionable against "… *any director, manager, secretary or other similar officer*". The administrators sought judicial review of the decision to prosecute them on the basis that this definition did not include insolvency officeholders.

The court found against the administrators on the basis that the legislation was designed to protect employees. It was noted that this could, on occasion, leave officeholders in the invidious position of having to choose their duty to creditors and committing an offence. Even after 35 years, the courts still have not managed to square the circle relating to administrators' obligations under TULCRA but this case seems to have taken a step in the wrong direction – *cf* the decision in *Re Carillion* in relation to 'exceptional circumstances' in *Insolvency Update #33.*

Court Cannot Order Dissolution

Re Tre Ciccio Altrincham Limited

For reasons that are not entirely clear from the judgment, administrators sought an order that they be discharged from office and the companies be immediately discharged by order of the court. This was contrary to the normal course by which administrators would, once the purpose of the administration was complete, seek to move the company to dissolution under para 84.

HHJ Hodge held that the court did not have the jurisdiction to make such an order. He instead ordered that the administrators apply para 84 in the usual way and that the administrators be discharged after 28 days.

Apparently, the judge felt compelled to hand down a full, reported judgment as an earlier court had previously made the requested order in relation to a connected company.

LIQUIDATION

Deferral of Dissolution Post-Liquidation

Re Border Control Solutions Ltd

The OR had deferred dissolution of a company following its liquidation to the detriment of the applicant director. The question arose as to whether the director had *locus* to bring an appeal.

Whilst s.205 of the Act was silent as to who could bring and appeal, the court held that, as a person with a legitimate interest in the outcome of the appeal, the director had *locus*. In the event the court also held that the deferral of dissolution had gone on for a disproportionately long time and served no useful purpose.

Stay of Proceedings Does Not Cover FCA Notices

Re Carillion plc

The section 130(2) stay of proceedings in compulsory liquidation did not apply to notices relating to market abuse served by the FCA under FSMA as such notices were not 'proceedings'.

cf the old cases relating to the administration moratorium (*Re Paramount Airways* and the *Air Ecosse* case).

DIRECTORS

Ultra Vires Distributions to Directors

Re TMG Brokers Ltd

An interesting recap of directors' duties. Two directors had misappropriated substantial amounts of cash from the company for their own purposes and for payment to another company owned by them – these were clearly *ultra vires* distributions. One director, who actually effected all the payments, also had an ATM card which the other director knew nothing about.

ICCJ Burton found that the payments were clearly unlawful distributions of capital and, as such, a breach of the directors' duties. The dormant director could not plead ignorance as it was his duty under the CA06 to act with the care and skill of a reasonable director.

The directors could not rely on s.1157 CA06 as the statutory defence could not be invoked by malfeasant directors in respect of funds that they had received.

Directors' Remuneration

Re Bronia Buchanan Associates Ltd

Another overdrawn director's loan account case! The director in this case had an overdrawn DLA of around £286K. When the sum was demanded, the director's defence was that the sums should be reallocated as 'drawings' and that they should be allowable as a *de facto* salary given that her actual salary was only around £6K pa.

First, the judge found that the burden of proof was on the director, as a fiduciary, to justify the payments to her.

The judge then found that it was not open to the director to rewrite the history of the matter: she had no entitlement to receive the monies as either salary or dividends and, as such, the only inference was that the monies were loans.

In our view this is quite right; a person can only receive monies from a company to which he is lawfully entitled by way of salary or dividends. Any money taken as 'drawings' or otherwise are merely loans and probably unlawful ones at that.

Secret Profits By Directors

CPS v Aquila

It is well-established that, where directors have acted in breach of their duties, they cannot keep any profits accruing to them as a result of those breaches but must deliver up all profits to the company. Furthermore, even where directors are the controlling mind of the company, they cannot ascribe their fraudulent acts to the company to defeat a claim against them by the company itself.

CVAs/RESTRUCTURING PLANS

CVA Challenges – Dos and Don'ts

Re Dealmaster

A local authority sought to challenge the chairman's decision relating to a CVA on the grounds of unfair prejudice and material irregularity. The decision in question related to the admission to vote of certain historic intercompany debts which the local authority refused to accept as genuine despite its having no evidence to the contrary.

HHJ Davis-White noted that, in looking at an appeal of a chairman's decision, the court would make its decision based on the evidence available to the chairman at the time and that it would not conduct a full examination of all evidence subsequently adduced. Although the local authority might have been marginally worse off under a CVA than under a liquidation, the estimated outcome statements showed that, overall, the CVA produced a better outcome for creditors as a whole and there was, accordingly, no unfair prejudice or material irregularity.

The judge had no sympathy for the local authority which has acted vindictively throughout and refused to accept any evidence of the intercompany debts. It was not open to a creditor simply to allege wrongdoing and expect to put others to proof to prove their debts.

BANKRUPTCY

Costs Against The Bankruptcy Adjudicator

Bankruptcy Adjudicator v Shaw

This case was a delayed appeal from the 2017 decision in *Re Budniok* in which the court overturned the Adjudicator's decision *not* to make a bankruptcy order as the debtor had failed to satisfy the adjudicator that he was unable to access his pension in time for it to be taken into account in assessing his solvency.

The court held that the adjudicator has been right not to make an order. It therefore discharged the third party costs order that had, at first instance, been made against the adjudicator and went further stating that it was utterly wrong in principle for any costs order to be made against the bankruptcy adjudicator.

Change of Position Defence

Re Fowlds

The bankrupt in this case had sold a property pre-bankruptcy and used part of the proceeds to part-pay a debt to his daughter-in-law for accountancy services provided. Upon his bankruptcy, the bankrupt's debts were paid in full except for debts owed to his relatives (including the balance owed to the daughter-in-law). The trustee issued an application under s. 340 for the return of the monies paid to the daughter-in-law as a preference.

The daughter-in-law raised a defence based (i) the debt's being commercial and bona fide (ii) her having changed position and the disproportionate affect that it would have on her to repay it. The defence succeeded at first instance.

On appeal, Trower J held that the court should only give any weight to a change of position defence in exceptional circumstances and, even then, it would only be one of the many factors to consider. The judge held that the first instance judge had over-egged the pudding and placed too much reliance on the respondent's position. Nonetheless, the judge held that this was an exceptional case because (i) all non-connected creditors had been paid and (ii) the undue hardship that would be caused to the respondent who would have to sell her home and, accordingly, the balance of convenience fell in the respondent's favour.

Trustee's Possession of Jointly Owned Property

Re Hussain

This was another case on what seems to be becoming the topic *du jour* – viz, whether certain claims should be brought as insolvency applications or as part 7 claims. This issue is of course just another confusion largely created by poor statutory drafting and pointless point-scoring by litigants. At first instance the trustee's application for possession and sale of the bankrupt's jointly owned property had been dismissed on the ground that it should have been brought by way of part 7 claim.

The court found that previous judges had always proceeded on the basis that such applications should have been brought by way of insolvency application and that they cannot have been wrong. In any event, even if the claim had been brought in the wrong form, the court could correct any such procedural errors under its powers in the CPR.

Although the application was made more than a year after the first vesting of the property, so that the creditors' interests outweighed all others but the court nonetheless suspended enforcement of the order for three months to allow the bankrupt's children to finish school. Whilst the issue of the children was not an exceptional circumstance, the court allowed a short delay as a matter of common humanity.

Alistair Bacon
19 January 2022

The Future of Insolvency Regulation

Insolvency Service Consultation Paper, 21 December 2021

The topic of IP regulation has been floating around for at least twenty years and certainly since long before the notion of a single regulator was officially floated in the Enterprise Act 2015 which afforded the Secretary of State the power to create a single regulator at any time before 30 September 2022. In anticipation of this date running out, the Insolvency Service published a consultation paper just before Christmas in which it set out its plans for a single regulator.

The Insolvency Service's proposals for future regulation may be summed up as follows:

- A new government regulator to replace the regulatory role of the RPBs;
- Regulation of firms rather than of individual IPs;
- A new public register of insolvency firms;
- A statutory compensation in respect of IPs' negligence or wrongdoing;
- Reforms to the bonding regime which will be replaced by the new compensation system.

We cannot think of a any single justification for multiple regulators. Each regulator will have its own priorities and its own interpretation of the rules to be enforced – how can that lead to anything other than varying levels of regulation and the application of different standards? For many years IPs have been choosing which RPB to be regulated by based, perhaps amongst other things, on each RPBs' perceived regulatory policies. Overall, therefore, we think that a single regulator is a *Good Thing* for consistency and fairness across the profession although IPs that we have spoken to are unhappy at the prospect of a government-run body.

In our view, however, current regulation of IPs has become too prescriptive and over-stringent. IP regulation tends to focus on the minutiae of case management, whilst ignoring the commerciality or the bigger picture. IP regulation also appears to proceed on the misconceived assumption that there is always a 'right' way of doing something when very often there isn't. The main problem is that the tail wags the dog and the agenda is set by advisory professionals with a vested interest in making the issue as complicated as possible. For many years we have noted how individual IPs' decision-making is often set not by their decades' experience of insolvency but by their recent experience of what their regulator would want them to do in a given situation. IPs are, in our experience, now looking over their shoulders because they know that their decisions are susceptible to being second-guessed by a regulator with 20:20 hindsight.

In our view, the regulation of firms rather than individual IPs is also sensible. Currently, some firms with numerous IPs feel as though they are being perpetually monitored by their RPBs. To focus on the actual firm would be less disruptive to the IPs' business, more commercially realistic and in line with other professions.

It is not clear how extensive the proposed compensation scheme is intended to be but there is a refence in the document to the current scheme by which complainants can claim £250 compensation in respect of poor service from the OR. We see little point in this proposal which is likely to lead to a multitude of small, spurious claims from disaffected creditors each of which will have to be fully dealt with by IPs. Presumably, if the bonding scheme is to be replaced by a statutory compensation scheme, the Insolvency Service is envisaging something more rigorous that the current scheme.

Overall, we think IP regulation is overdue and that a single regulator is sensible. We will need to await the outcome of the consultation exercise to see which way this goes

AMB Law Limited
46 New Broad Street
London
EC2M 1JH

T: +44 (0)20 3651 5646

office@amblaw.co.uk

AMB Law Limited
Epsilon House
West Road
Ipswich
IP3 9FJ

T: +44 (0)1473 276103

Alistair Bacon
Principal

T : 020 3651 5647
M: 07881 554062
abacon@amblaw.co.uk

Matthew Rice
Paralegal

T : 020 3651 5704
01473 276181
mrice@amblaw.co.uk

Stephen Carter
Consultant

T : 020 7329 4242
scarter@amblaw.co.uk