AMB LAW

INSOLVENCY UPDATE

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Welcome to the 36th Edition of **AMB Law's *Insolvency Update***. AMB Law was nine years old in May which means that we'd better start planning our tenth anniversary party for next year! Funny old time to have been in insolvency really – lot's of ups and downs in the market but we are mostly still waiting for the next round really to kick off. All the skittles are in place: Brexit-car crash, incompetent government on the brink of collapse, double-digit inflation, war in Europe, the pandemic, OPEC-driven fuel crisis, rail strikes etc. Makes the *Winter of Discontent* look like a walk in the park - all we need now is someone to release the Devil to topple the tailors and we'll all be busy!

MISCELLANEOUS

Officeholder's Assignment of Cause of Action
Re Edengate Homes (Butely Hall) Ltd

The Court of Appeal has upheld the first instance decision and rejected the appellant's challenge to the liquidator's assignment of certain causes of action to Manolete.

Mrs Lock, the appellant director, *was* a creditor but in seeking to challenge the assignment was held not to be acting in the best interests of creditors and so was not properly a '*person aggrieved*' under s.168(5).

Furthermore, the liquidator's decision to assign would not be classified as 'perverse' simply on the basis that he had not first offered to assign the claims to the appellant. As such, the court would not interfere with the liquidator's exercise of his discretion.

It is clear that challenges to such assignments to litigation companies are going to have to do better than merely complain about the fact of the assignment itself if they are to succeed.

BBLs Fraudster Jailed
R v Zagroba

There has been much recent clamour surrounding the first jailing arising out of a fraudulent BBLs claim. In this case, the director had sought a £20,000 BBLs some weeks *after* he had applied to the Registrar for his non-trading company to be dissolved. As with the majority of BBLs claimants, the director used the money to buy a car and sent the balance abroad. The director was jailed for 2 years and disqualified for 7 years.

Whilst this is barely the tip of the iceberg, it is the first successful prosecution that we know of and it is very welcome. On the other hand, how is it possible that the disqualification period for blatant fraud could be only 7 years?!

ADMINISTRATION

Failure to Secure 1st Admin Extension
Re E Realisations 2020 Limited

In this case, the administrators were in the habit of seeking the secured creditors' consent to an extension when they sent out their proposals! Clearly, given that they were not at that time *really* considering an extension, they were unable to comply with r.3.54 which requires reasons for the extension request to be given.

Nonetheless, Deputy ICCJ Curl found that the administrators' procedural failure was not one to render the appointment invalid *per se* and was capable of being cured by the court under r.12.64.

LIQUIDATION

Liquidators' Power to Trade
Re Baglan Limited

The liquidator of the company decided that, upon a strict interpretation of his powers under s.167 and Sch 4, he did not have the power to continue to trade the company as such power was only provided "…*so far as may be necessary for its beneficial winding up*". The business in question was a power station and the liquidator was the OR appointed compulsorily. The liquidator therefore viewed the purpose of the liquidation to be the closure of the plant and that the provision of electricity to customers was not *necessary* for the winding up.

The court disagreed and held that the liquidator *did* have the power to trade the company's business. An application had been brought under s.168 by various substantial customers, including Welsh Water, seeking a reversal of the liquidator's decision on the basis that Welsh Water needed electricity to manage certain environmental risks and that was necessary as part of the factory closure process.

For IPs, the slightly worrying aspect of this case is not about the slightly wide interpretation of the liquidator's powers but more about the court's apparent preparedness to step in and second guess his decision-making which is rather unusual.

Change of Position and Section 127
Re Changetel Solutions UK Limited

The respondent here was the recipient of various payments made by the company *after* presentation of a winding up petition against it. Upon the liquidators' application under s.127, the respondent sought validation of the payments made to it on the basis that payment was received pre-advertisement and the payee had effectively changed its position by providing services to the company (which were of no benefit to the creditors generally).

Barber ICCJ rejected the payee's argument. For one thing, if it sought validation, it ought to have issued its own application and paid a court fee. Nonetheless, the judge held that the test for change of position would reflect that for a validation order; there was no benefit to the creditors generally and accordingly the liquidators were entitled to an order under s.127.

Misfeasance Claim Against Liquidators
Re Core VCT plc

A VC company was restored to the register and liquidators appointed with a view to bringing s.212 proceedings against its former MVL liquidators. It was alleged that the former liquidators had been negligent in the sale of certain stocks owned by the company which sale had been orchestrated by its managers and the sale had been to an associated entity (which fact had been withheld from the company's members). The liquidators had dismissed concerns raised by a number of shareholders.

The new liquidators had not covered themselves in glory (they had issued proceedings without notice to the respondents and had failed to comply with any of the court's previous directions) but the court held that the bar for granting leave under s.212(4) was not high. The applicant had simply to show that there was a reasonably meritorious case and that it would result in a benefit to the liquidation estate.

Despite a number of misgivings, the court held that the test was made out and leave was granted to bring s.212 proceedings against the former liquidators.

DIRECTORS

De Facto Directors
Re Umbrella Care Ltd

This case does not really set out any new law *per se*, but it does provide a very good summary of the position to be adopted in deciding whether a person is a *de facto* director.

The court was keen emphasise that there are no hard and fast rules and that each case will be decided on its own merits. That said, the judge endorsed the well known dictum of Millet J in *Re Hydrodan (Corby) Ltd* in which he said that those who act like directors must accept the responsibilities of directors.

The upshot seems to be a common sense stance – if a person is a 'nerve centre'[1] from which the activities of the company emanate or if he is the controlling mind of the company, he is likely to be a *de facto* director.

In this case the factors were that the *de jure* director was the respondent's wife who was a housewife that did not speak English and knew nothing of the companies' affairs. It was clear that all activities of the companies were orchestrated by the respondent who was also the sole point of contact for the companies' bankers and other outsiders.

[1] *Arden J's phrase in Re Mumtaz Properties*

Proceedings Brought By Single Director
Rushbrooke UK Ltd v 4 Designs Concept Ltd

We will all no doubt be all too familiar with the problematic scenario where one of two *de jure* directors wishes to instigate proceedings to protect the company – does he have the necessary authority if he cannot pass a board resolution?

The short answer is 'no' unless the articles of association specifically delegate such powers to an MD or CEO. This is a problem that faces restructuring lawyers time and again – especially if one of the directors has gone rogue or off the rails. There is usually a way to deal with this *impasse* if creative thinking is applied!

CVAs/RESTRUCTURING PLANS

Creditors With No Economic Interest
Smile Telecoms Holdings Limited

Classes of creditors with no 'skin in the game' (to borrow Snowden LJ's phrase) need not even be invited to meetings to consider its restructuring plan.

Whether or not the class had an economic interest should be decided by reference to the alternative to the plan's being accepted. In this case, only one class (comprised of a single creditor) had an economic interest and only it was required to vote on the restructuring plan.

Creditor's Right to Vote on an IVA
Re Rossi

There was confusion about the time of a virtual creditors meeting as an email sent after the notice of the meeting had been given, gave the wrong time (based on the wrong time zone). Once the creditor in question realised this, he sought to email details of his claim to the convener but supporting documents became log-jammed in his outbox and were not sent. If the creditor had been allowed to vote in full, the IVA would have been accepted.

The court noted that the creditor was required only to establish a *prima facie* claim and that the court had to balance the creditor's claim against the debtor's objections. In this case, the creditor had failed to provide the information to the chairman in advance of the meeting but, even if he had, the documents shown to the court were insufficient to prove a liquidated claim. Had he received the documents before the meeting, the chairman would only have been able to agree a minimum £1 value for voting purposes and so it would have made no difference to the outcome.

BANKRUPTCY

Challenges Already Disposed Of

Re Preston

This case is really about its own facts but it is an example of a robust decision from the court. The bankrupt had appealed against the making of a bankruptcy order following a contested application.

The High Court held that it had been open to the lower court to conclude at a directions hearing that directions were not needed before the final hearing. It was also open to the judge not to hear arguments against the petition where the same arguments had already been dismissed on a previous application to set aside a stat demand.

Interim Charging Order is 'Security' for Stat Demand

Utip v McLelland

A judgment creditor obtained a charging order against the debtor and subsequently also served a stat demand when no payment was made. The debtor applied to have the stat demand set aside on the basis that the creditor had had security in the form of the interim charging order.

The court held that the interim charging order was, indeed, 'security' within the meaning od s.383. However, it was clear that the debtor had misled the court in relation to payments that he claimed to have made. The court held that the stat demand was defeasible since it would become void if a bankruptcy order was made before a final charging order was made. The court was not satisfied that the value of the charging order exceeded the sum owed and accordingly the stat demand was not set aside.

Failure to Serve Suspension Application

Re Mittal

A trustee in bankruptcy wished to apply for the suspension of a bankrupt's discharge but failed to leave sufficient time following issue of the application within which to serve the application. The bankrupt's automatic discharge therefore took effect before the trustee's previously issued application was served.

The trustee could not rely on electronic service as this had not been agreed in advance in accordance with CPR PD6A. The trustee's application was therefore out of time and, absent exceptional circumstances, the court would not interfere with the bankrupt's right to raise a limitation defence and, accordingly, his automatic discharge was effective.

The legislation is now littered with time limits under which one is required to count back from a given date by an indeterminate number of days. This has always struck us as deeply unsatisfactory – time limits *must* be finite.

Right to Challenge a Stat Demand is Personal

Addison v London European Securities Ltd

The court held that the right to challenge a stat demand was a personal right of the bankrupt and not one that vested in his trustee in bankruptcy. The principle of *Heath v Tang* was not limited just to rights relating to '*body, mind or character*' but would cover any rights that were fundamental to the bankrupt's status. The court was also persuaded by a common sense approach; if the right to challenge a state demand was vested in a trustee in bankruptcy it would become illusory for a trustee would hardly be motivated to challenge the very order under which he had been appointed.

Ironically, having upheld the bankrupt's right to challenge the stat demand, it then rejected his challenge and the bankruptcy continued.

Test for 'Residence'

Re HRH Prince Hussam Bin Saud etc

Unlike the Insolvency Practice Direction 2014, the 2020 version of the IPD expressly subjugates bankruptcy proceedings to the CPR in relation to service issues both within and without the jurisdiction. The test is contained in s.264(2)(b) and relies upon the debtor's, within the past three years, having been ordinarily resident or having a place of residence in the jurisdiction. If you recall *Re Su Hsin Chi*, you will know that this is different to the previous test which relied on the debtor's physical presence on the date of presentation.

This case involved a stat demand served in respect of a costs order for £640K. The debtor was a Saudi national who lived in Saudi Arabia. He had not visited England during the relevant period (at least in part due to a pending arrest warrant for contempt of court) and he did not own a property. He did, however, have access to various properties owned by his mother.

The court refused the debtor's strike out application. It was not in dispute that the debtor had not been *'ordinarily resident'* in the jurisdiction but he *did* have a place of residence. It not necessary for the debtor to own a property or even have *de facto* control of it – it was sufficient that the property was available to him.

Section 366 Order Against Third Parties

Re Ferster

Not really new law *per*, but an interesting read and a good resumé of the court's powers in relation to suspension of discharge and to compelling co-operation from the bankrupt. In this case, there was clearly a history of lack of co-operation from the bankrupt whose discharge had been suspended numerous times. The court made an order further suspending discharge to the fifth anniversary of the bankruptcy order and also, under s.366(1)(c), requiring the bankrupt's partner to provide witness statement evidence and supporting documentation as to his income and expenditure and assets.

Security for Costs Against Trustee in Bankruptcy

Kireeva v Bedzhamov

A Russian bankruptcy trustee had applied for recognition of the bankruptcy in the High Court and the bankrupt sought security for costs. The court accepted that it had jurisdiction to make such an order but could only do so in exceptional circumstances.

In this case, the trustee had no presence and no assets in England and Russia was not party to the Hague Convention and any enforcement difficulties could be exacerbated following the Ukrainian invasion. Further the trustee had failed to disclose any details of the litigation funder involved in the case. All of this amounted to exceptional circumstances and security for costs was ordered.

Alistair Bacon
6th July 2022

Limitation Periods in Insolvency Revisited

Missing a limitation period must be every litigator's ultimate nightmare. Where they are missed in insolvency matters, it is usually due to a misunderstanding of the rules rather than an inability to read a calendar.

For limitation purposes we need to divide a company's claims into two classes: those that are the property of the company and those that arise by virtue of the liquidation or administration. The first category consists of claims that the company could have brought pre-insolvency – eg claims in contract or in tort. The second category consists of statutory claims that arise on insolvency and vest in the office holder – eg wrongful/fraudulent trading, misfeasance or antecedent transaction claims.

Company's Claims

This category of claims is not really affected by the company's insolvency – the limitation will continue subject to the usual rules. In the majority of simple contract cases, the limitation period will be six years from the date of the breach and time will continue to run regardless of the intervening admin or liquidation. Most claims arising out of a deed will be subject to a twelve year limitation period. In all cases, you should check the relevant contract for 'quirks' – eg many shipping contracts tend to be subject to much shorter limitation periods (as little as three months in some cases).

Claims in negligence will usually be subject to a six year limitation. If you are looking at a tortious claim, you would be well advised to take immediate advice on limitation.

Officeholder Claims

Officeholder claims are more complicated and the limitation period may be dictated by the nature of the claim. Under the Limitation Act 1980, an antecedent transaction claim to recover money will be subject to six year limitation period but, if the object of the claim is to recover *property*, the period might be extended to 12 years.

Generally, the limitation period will start to run at the commencement of he liquidation or administration – in other words an officeholder will probably have six years from commencement within which to bring a preference or undervalue transaction claim to recover money. If the transaction being challenged arose out of the respondent's fraud, the limitation period might not start to run until the officeholder could have reasonably discovered it.

Wrongful and fraudulent trading claims must also generally be brought within six years of the commencement of the insolvency.

Readers may remember the *Burnden Holdings* case a few years ago. In that case, liquidators sought to recover the company's property from its directors who had misappropriated it. The directors were deemed to be holding the property on trust for the company and a quirk of a claim for fraudulent breach of trust is that there is no limitation period *at all*!

Preserving Limitation

It used to be fairly common practice to issue a protective writ and then sit on it for a while without serving it – especially if negotiations were afoot. Nowadays, it may be more difficult as claimants will need to ensure compliance with pre-action protocols notwithstanding the need to issue. It may be that a claim needs to be issued and then the claim immediately seek directions in order to deal with the pre-action protocols.

Limitation is not something that can be ignored or forgotten. Officeholders should ensure that their lawyers have always considered litigation issues in any instruction and where officeholders think there might be an issue, specific, specialist advice should be sought.

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