AMB LAW

INSOLVENCY UPDATE

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Welcome to the 39th Edition of **AMB Law's *Insolvency Update***. This comes at a time when many practitioners are reporting being extremely busy. We have seen a marked increase in insolvencies and restructurings in a number of sectors including online services, restaurants, high-end fashion and law firms (which seem to be going down like ninepins). The latter is hardly surprising given the totally ludicrous decision some years ago to allow ABS firms – what did anyone think was going to happen if law firms were commoditised to be bought and sold without any checks?!

As ever, if you would prefer not to receive these Updates or have colleagues who would like to be added to our circulation, please email *office@amblaw.co.uk*.

MISCELLANEOUS

Directors Hold Property on Constructive Trust
Re Sherwood Oak Homes Limited

This case raised a number of procedural issues as well as legal ones. ICCJ Greenwood found that it was in order for him to determine questions of title to property within the context of a directions application under para 63 of Sch B1.

The nub of the case was as to ownership of a ransom strip that the company's directors has purchased in their own names with the purchase price having been provided by the company. The company owned a large development site and the ransom strip was a small piece of land that connected the site to the public highway and therefore had a value beyond the pure land value.

The court accepted the directors' case that it had been intended that they would own the strip of land personally and that they would sell it to the company in due course. Even though the company had provided the cash, it had not done so '*in the character of a purchaser*'.

The court found however that, in purchasing the land for themselves, the directors had acted in breach of their duties to the company and placed themselves in a position of conflict. On that basis therefore, the directors were said to hold the ransom strip on constructive trust for the company.

Compare this decision with Re Stunt below (under Bankruptcy) in which the court also held that the person providing the cash to purchase an asset did not get title.

The Right to Trial By Jury in Civil Cases
Re Ryle

This case was an ordinary application by a trustee for the usual declarations and orders in relation to the former matrimonial home which was (surprise, surprise) registered in the sole name of the bankrupt's ex-wife. The bankrupt himself was a convicted fraudster having been guilty of a

simple missing trader VAT fraud. The bankrupt applied for the trustee's application to be heard by a jury on the basis that he could not receive a fair trial in front of a judge as the trustee had disclosed his fraud conviction in the pleadings thereby besmirching his name.

HHJ Matthews in the Bristol County Court gave a fascinating judgment in relation to the right to trial by jury under s. 66 County Courts Act 1984 (which, bizarrely, neither side had referred to). In short, the position is that all county court civil trials should be without a jury unless the trial falls into one of three categories which includes a charge of fraud.

Because the trustee's pleadings [unnecessarily] referred to the bankrupt's fraud conviction, the judge found that the proceedings *did* amount to an action for fraud and accordingly the right to a jury trial was *prima facie* made out. There is, however, an exemption within s.66 CCA which is where it would not be convenient for a matter to be tried by a jury due to the requirement of a prolonged examination of documents. As the trial would involve the examination of bank statements and other finance documents, the judge found that it would not be convenient for the matter to be tried by a jury and dismissed the bankrupt's application.

ADMINISTRATION

Appointment Under Unenforceable QFC Invalid
Re The Sustainable Bathroom Company Limited

The company supplied products to a supermarket chain and was supported financially by a trade finance agreement pursuant to which all payments of its invoices were to be made to a designated bank account controlled by the financier. The trade finance facility was supported by a debenture. The financier provided an incorrect IBAN to the supermarket customer as a result of which payments were made not to the designated account but to another account in the name of the company much of which the director used for other purposes.

The financier, on discovering this breach, made demand under its debenture and then appointed administrators from Opus Business Advisory. The director of the company challenged the appointment on a number of grounds including (i) that there had been no breach of the facility and (ii) that the financier's demand had not been served in accordance with the requirements in the debenture and, accordingly, the debenture had not become enforceable. The director also complained of numerous defects in the poorly drafted Notice of Appointment.

The director failed at first instance and Deputy ICCJ Baister held that an enforceability provision could be implied into the debenture and he was not moved by the fact that the financier's demand failed to comply with the service requirements.

On appeal to the High Court, Michael Green J also dismissed the *'trivial'* defects in the Appointment [no para 100(2) statement, company wrongly stated to be an art 1.2 undertaking and not sworn in person] as they were capable of remedy under r.12.64. The judge however found that the questions relating to the enforceability of the debenture depended on questions of fact and that it was not appropriate for these to be disposed of summarily within a directions application. The director's application was upheld and the administrators' appointment was held to defective.

Interesting note: NOIs and NOAs may no longer be sworn virtually although they mostly still are!

Permission under Paragraph 43
CargoLogicAir Ltd v WWTAI AirOpCo 1 Bermuda Ltd

This case involved a squabble in the Commercial Court over an aircraft lease with each side blaming the other for being in breach of contract. The defendant served a counterclaim *after* the claimant had gone into administration apparently oblivious to the requirements of paragraph 42 of Sch B1.

The court found that it was old hat that no consent/ permission was required if the sole purpose of a counter-claim was to enable the defendant to raise set-off as a defence. In this case, however, that was not the *sole* purpose of the pleaded counterclaim as it potentially exceeded the level of the claim.

There were clearly important issues regarding the ownership of the aircraft and delivery up of documents which the administrators would need to resolve prior to effecting any distribution to creditors. The most expedient way for this to be dealt with would be by the court's granting retrospective permission to the defendant to bring its counterclaim although that permission came with certain conditions about the defendant's not enforcing any judgment without the court's further permission.

LIQUIDATION

Limitation in Unfair Prejudice Petitions
THG plc z Zedra Trust Company (Jersey) Ltd

Since the dawn of time, perceived wisdom has had it that there is no limitation period applicable to petitions for unfair prejudice (now under s.994 of the Companies Act 2006). This perceived wisdom appears to have been based upon footnotes or comments in every major company law text – those footnotes themselves do not appear to have been based upon anything in particular.

The Court of Appeal has now chucked a grenade into the ring by finding that s.994 petitions *are* subject to limitation because they are '*actions'* and therefore subject to s.8 of the Limitation Act 1980. As things now stand (and we don't know if this will be appealed), s.994 petitions *will* be subject to a twelve year limitation – unless the relief sought is purely monetary, in which case it will be six years. In reality, the impact of this decision may be limited given that not many disgruntled members will wait that long before going to law.

Shareholder Cannot Petition under s.122(1)(g)
Re Turnbull, Petitioner

The petitioner was a minority shareholder who issued a petition for just & equitable winding up under s.122(1)(g).

The Court of Session dismissed the petition on the basis that the company was clearly insolvent which precluded a shareholder's obtaining a J&E winding up. In short, the shareholder has no skin in the game so the winding up cannot be said to be for his benefit.

BANKRUPTCY

Determining Disputed Ownership
Re Stunt

This case involves the infamous case of a van Dyck old master whose ownership was disputed. The trustees claimed it as part of the bankruptcy estate but the bankrupt claimed that the painting was owned by his father who had paid for it.

Whilst the case is not really about law but turns on its own facts, it is a useful treatise on the way in which a court will approach and deal with conflicting evidence and competing claims to ownership. In this case, the turning point seems to have been that all the written evidence (such as it was) supported the trustees. This was preferred by the court to the oral evidence of the bankrupt and his father and the simple fact that the father had paid for the painting.

Annulment is a Matter of Discretion
Re Sriram

There had been some shenanigans in serving a stat demand and the petition largely due to the bankrupt's failure to engage with HMRC or tell them at which of her addresses she resided. A bankruptcy order was eventually made and the bankrupt sought annulment under s.282(1)(a) – she averred that the order should never have been made as she was undergoing treatment for psychiatric illness and lacked the mental capacity to deal with the bankruptcy.

The court held that HMRC had done all that was reasonably possible to bring the stat demand to the debtor's attention and that is was, accordingly, served. The court was also, however, prepared to accept that, due to her schizoid illness, the bankrupt lacked the capacity to understand or deal with the bankruptcy proceedings.

Annulment was a matter of the court's discretion. In this case, the bankrupt has deliberately obfuscated and sought to mislead HMRC as to her whereabouts and about the extent of her assets. The potential for detriment to the bankrupt's creditors outweighed any mitigating factors and the court refused to annul the bankruptcy.

Court's Jurisdiction to Annul Bankruptcy
Re Mohammed Razi Khan

A bankruptcy order had been made based upon a petition that turned out to be disputed and factually inaccurate and the bankrupt applied for his bankruptcy to be annulled. The county court, upheld on appeal by both the High Court and the Court of Appeal, found that, whilst the petition was defective, the bankrupt was patently insolvent and there was little point in acceding to the bankrupt's annulment application. The fact that the petition was factually in dispute did not go to the question of the court's jurisdiction and the question of annulment therefore remained within its discretion.

Court Should Not Look Behind Judgment Debt
Re Brooker and Brooker

The bankrupts had appealed against their bankruptcy orders even though they had not challenged the stat demands on which the petitions had been founded. Those appeals were rejected by the High Court.

The bankrupts then sought, under r.14.8(3), to reverse the trustee's admission of the petitioner's proofs. The ICCJ held that it should examine the evidence behind the bankruptcy order and partly granted that application holding that the burden of proof was on the creditor to prove its debt.

On appeal, Roth J held that the court would not look behind every judgment and consider the validity of every debt. In this case, there was *prima facie* evidence of the debt and the bankrupts should not be able to re-argue points that they had already lost. Under rule 14.8 the burden of proof was on the applicants and, in this case, they had failed to discharge that burden.

Twelve Year BRO
Re Armstrong

The bankrupt owned a very substantial property portfolio with the majority of the properties being held in his wife's name due to his previous and current bankruptcies.

In the period following the presentation of the current petition against him, the bankrupt persuaded four individuals to lend him a total of £273,000 for property investments that never actually came to pass. The bankrupt obviously forgot to mention the petition to the investors and did not use the funds for their stated purpose.

The OR applied for a 12 year BRO which was, unsurprisingly, granted. There is no new law in this case but the issue of interest is *why only 12 years?* In a case where the bankrupt had fraudulently obtained substantial loans which he had squandered on his own lifestyle one wonders why not the full 15 years. As with directors' disqualification, duration of orders for inadvertent, honest transgressions (eg failure to pay VAT for a couple of quarters) seem to be disproportionately harsh when compared to orders handed down to out-and-out wrong 'uns. Just an observation …

EMPLOYMENT

National Minimum Wage Increases
National Minimum Wage (Amendment) (No 2) Regulations 2024 (SI 2024/432)

With effect from **1 April 2024**, national minimum wage rates have increased as follows:

Apprentice:	£6.40
16-17 years:	£6.40
18-20 years:	£8.60
21+ years:	£11.44

From **6 April 2024**, a week's pay for redundancy is capped at **£643** with the maximum statutory redundancy payment being £19,290.

Alistair Bacon
9th May 2024

Section 216 Revisited

This is intended just as a reminder of the key issues of *'Phoenixing'* and re-using a company name post-liquidation. Applications under ss.216 and 217 have been more prevalent in the past few years, with serial claimants actually seeking out and buying such claims from liquidators.

Under s.216 any person who has, within the past 12 months, been a director or shadow director of a company in liquidation will be prohibited from being a director of or otherwise involved with another company with a prohibited name unless he has leave of the court or one of the statutory exemptions applies.

A name will be prohibited if it is confusingly similar or suggests a connection between the new company and the one in liquidation. The confusing aspects of the name will apply both to the company's registered name or its trading style.

There are, essentially, two possible sanctions that may be meted out upon directors who act in contravention of s.216. First, it is a criminal offence under s.216(4) which is punishable by two years' imprisonment or a fine or both and there is a daily default fine. Secondly, any director acting in breach of s.216 will, pursuant to s.217, be *personally liable* for all the debts of the new company (ie the one through which he is currently trading). That liability will be joint and several with the company and any other misfeasant directors – this could have a catastrophic impact on the director if the new company gets into financial difficulty or goes into liquidation.

There are four exemptions to ss.216/217 which can easily be invoked in order to avoid criminal and personal liability. Three of these are contained in r.22.4 of the Rules.

The first exemption, applies where the new company has purchased the business and assets of the old company out of an insolvency process and has, within 28 days of completion, given notice to all Oldco's creditors and published a notice in the *London Gazette.* Note that this procedure may be relied upon even where the director has already been acting as a director of the new company – the problem caused by *Churchill v First Independent Factors* has long since been overruled.

The second exemption involves the applicant's making an application to the court for permission to be a director of the new company notwithstanding the prohibited name. Where the application is made within 7 days of Oldco's liquidation, the director will have six weeks' grace within which to obtain permission without being liable criminally or civilly. The problem with this is that 7 days is too short a period and this provision is rarely invoked in time.

The third exemption applies where the new company buying the business has already traded using the prohibited name for at least 12 months prior to the old company's liquidation. Note that it will not suffice if the new company has been dormant – it must have actively traded.

If none of the above exemptions applies (usually because the directors have done a pre-pack and no-one remembered to advise them about s.216), the directors can, at any time, apply to the court for permission under s.216 itself. The technical difficulty is that the directors will continue to commit an offence and continue to be liable for newco's debts right up to the point that a court order giving permission is secured – which might be several months after the application was made. The effect of this could be to make a bad situation even worse if permission is not ultimately obtained.

Given the potential severity of failing to comply with ss.216.217 and given the ludicrous ease with which it can be avoided, it is astonishing that not all directors give notice to creditors as part of a pre-pack process. We would always advocate the giving of notice even if the company is in administration – you never know, it might subsequently go into liquidation which, quite unnecessarily, opens the directors up to a whole heap of grief that could so easily have been avoided for a few hundred quid.

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