AMB LAW

INSOLVENCY UPDATE

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Welcome to the 40th Edition of **AMB Law's *Insolvency Update***. First, we apologise for the lack of *Insolvency Updates* in the past 12 months but we promise to do better in 2025. 2024 was certainly a busy year for the insolvency profession in the mid-market with IPs and lawyers all busy. We have seen a large increase in the number of administration sales and pre-packs acting for both the administrators and on the buyer's side. In addition, Alistair Bacon has now completed in excess of 140 Qualifying Reports which is an indication of the level of activity across the market. We have every confidence that these work levels will continue well in to 2025.

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*.

Hollie Leckie Joins AMB Law as a Partner

We are delighted to announce that on 6 January 2025, we were joined by Hollie Leckie as a partner specialising in commercial property and development work. Hollie was until recently a director at a leading City firm and has worked on a wide range of commercial and residential developments including housing estates, retail parks and industrial estates. Hollie also has a wide experience of general commercial property work and will take over all the firm's existing property and LPA receivership matters as well as continuing her own practice.

Hollie will work from both our City and Suffolk offices.
Her contacts are: *hleckie@amblaw.co.uk 020 3651 5704 or 01473 276181*

MISCELLANEOUS

Fixed or Floating Charge

Re UKCloud Limited

The debate over whether a particular charge is fixed or floating continues. The asset in this case was a horde of IP addresses held by a cloud service company over which it had granted a security. On liquidation, the chargee claimed that the IP addresses were subject to its fixed charge.

The court considered the usual factors in determining whether the security bit as a fixed charge or whether it was merely a floating charge (which, obviously, made a huge difference in terms of the pecking order).

On the facts, the court found that the chargee had not exercised sufficient control over the asset for its fixed charge security to bite – the chargee could only rank as a floating charge holder. The court found that the control provisions in the debenture were 'sham' terms as per *Re Ashanti* and also followed Lord Hoffman's 'all or nothing' test in *Re Coslett (Contractors) Limited* (ie that a particular clause creates a fixed charge over all the assets or none of them).

High Court Listing in London

Pilot Practice Note (revised): Listing and Criteria for Transfer of Work (2024)

The proposed changes to how insolvency matters in London will be split between the High Court and the County Court at Central London have been postponed until 1 April 2025 and will take effect as a twelve month pilot.

Many applications required to be issued in the High Court will automatically be transferred to the County Court to be dealt with (or not) as is currently the case with applications for restoration and extension of admins. This procedure has been in place for about ten years and has never really worked. In the days of paper files, there was obviously precious little expectation of a file sent from the Rolls Building actually arriving at the Thomas More Building and, somehow, the situation is not much better with electronic files. We will have to wait and see how the pilot scheme pans out, but it is unlikely to end well!

For more details of the proposed pilot scheme, click here.

Unknown Creditors and s.423
Malik v Messalti

This was not actually an insolvency case but one transferred on appeal from the King's Bench. Mr Malik (a vexatious litigant) had put his share of the family home in trust for his children. Messalti had obtained a charging order in respect of an unpaid costs order and a dispute arose as to whether the trust should be set aside under s.423. Malik argued that s.423 could only relate to creditors known to him at the time of the trust settlement and could not extend to future creditors, especially ones that he had not even envisaged at the time.

Richards J rejected Malik's argument. Although s.423 is all about purpose not about effect, it would make no sense for its effect to be limited to known or envisaged creditors. If the purpose of a transaction was to 'protect' an asset from creditors then that would include future creditors whose existence could not have been envisaged at the time.

Definition of Insolvent
SBP 2 S.À.R.L v 2 Southbank Tenant Limited

This is not the first time that this identical point has come before the court. A lease had a forfeiture clause based on the tenant's being insolvent "*within the meaning of section 123 …*". Everyone knows about the so-called commercial test and the balance sheet test – BUT what people forget is that both ss.123(1)(e) and 123(2) require the matter to be '*proved to the satisfaction of the court*'.

In this case it was held that it was a prerequisite of the right of forfeiture's arising that there has been a determination by the court that the tenant was insolvent. The point to note is that non-contentious lawyers cannot use the phrase "*within the meaning of s.123*" as shorthand for 'insolvent' without dealing with the issue of the court's satisfaction.

No Arbitration Stay If Debt Not Disputed
Sian Participation Corp v Halimeda International Ltd

The debtor company, against which a petition had been presented, sought a stay of the petition and a referral to arbitration as it did not admit the debt.

As the debt was not genuinely disputed, the Privy Council held that the creditors were entitled to have the debtor wound up and that there was no useful purpose in referring the matter to arbitration. The Privy Council expressly overruled the decision in *Re Salford Estates (No 2) Ltd* (that referral to arbitration should be automatic save in exceptional circumstances) and held that it was wrongly decided. Sensible decision.

Disclosure of Confidential s.236 Information
Re Solstice (SW) Limited

Where a liquidator has obtained confidential information using powers contained in s.236, it would not be improper for him to provide copies of those documents to a litigation funder to whom the claims had been assigned.

The court held that there was no automatic right for the assignee to receive the documents which remained subject to confidentiality and that each case would remain fact-specific. However, upon the liquidator's application the court approved the information's being disclosed to enable the potential litigation to proceed for the benefit of the creditors generally.

Holder of Unregistered Shares is a Contributory
Re Hat & Mitre plc

A party to whom 0.002% of the company's shares had been transferred was, nonetheless, a 'contributory', even though he had not been registered in the company's register of members. The upshot was that the party in question was *prima facie* entitled, *qua* contributory to apply for a stay of the liquidation and replacement of the liquidators.

The High Court, however, upheld the ICJ's decision to dismiss the appellant's claim. Even though the contributory had *locus standi*, he had no material 'skin in the game' and accordingly no interest *qua* contributory in his application to stay and replace the liquidators.

Official Receiver's Fees
The Insolvency Proceedings (Fees) (Amendments) Order 2024

Readers will no doubt be aware that the OR's fees have increased by an inflation-busting 20% from **9 January 2025**.

The General Fee (for all cases) will rise to £7,200 with the case fee for each matter being £3,300 in bankruptcy and £6,000 in liquidation.

ADMINISTRATION

Parties Not Owed Money Aren't Creditors
Toogood International Transport and Agricultural Services Ltd

The dispute was about whether an administration had been validly extended given that the consent of a former secured creditor who had been repaid in full had not been sought.

Obviously, the court held that a creditor is someone who is owed money (as opposed to someone who was once in the past owed moeny). Accordingly, the High Court held that the former creditor's consent was not required and that the purported extension was perfectly valid.

Astonishing that this ever got to court; surely no-one sensible could have drawn any other conclusion.

Officeholders' Remuneration
Re MTA Personal Injury Solicitors LLP

Not exactly new law but a rare application of rule 12.59.

Administrators applied to court to reassess remuneration awarded to their predecessors. The court did not actually rescind the former officeholder's remuneration but ordered that he produce documentary records to justify it. Given that the former officeholder had already had his costs reduced because of shonky record-keeping, one can anticipate that he may find himself repaying a chunk of it.

Filing Defects in NOAs
Re QM Systems Limited

As we all know, the Rules still require three copies of an NOA to be filed. However, as we also all know, filing is done electronically through CE-Filing so there's no possibility of uploading three copies. Since the advent of CE-Filing we

have all just ignored this provision – why would you want to upload the same PDF three times?! The court waived the technical defect and held that this, along with other equally irrelevant matters, was a defect that could be remedied.

That this case came to court is ludicrous. With respect, I think that the court took the wrong approach inasmuch as it is the Rules that are defective not the actions of the solicitors. There are many instances where the Rules simply fail to reflect the realities of legal practice – for example, where an original copy of an order is required to be served. There's no such thing as an '*original*' order – orders are simply PDFs onto which the court has electronically stamped a picture of its seal.

No Jurisdiction to Challenge Fixed Charge Costs
Re Orthios Eco Parks (Anglesey) Limited

The holder fixed charge security agreed a fee for the administrators' disposing of the fixed charge assets. Following a change of personnel, the fixed charge holder sought to challenge the agreed fee as excessive.

The court held that the charge holder did not have jurisdiction to challenge fees under rule 18.34 as that dealt only with administration expenses. The administrators' fees here were not administration expenses but were fees agreed outside the scope of the admin and the charge holder was contractually bound to its agreement.

LIQUIDATION

Petition Not 'Proceedings' for Limitation
Re A Company

A petition, which had been presented based upon a 2010 judgment given in a Lebanese court, was challenged on the basis that it was outside the relevant limitation period.

The court first found that the judgment in question was outside the scope of all the usual legislation relating to the registration and enforcement of foreign judgments.

Secondly, the court found that a winding up petition did not constitute an '*action on a judgment*' within the meaning of s.24 of the Limitation Act 1980 and, on that basis, the act simply did not apply. Accordingly, the Lebanese court order was not subject to any limitation period.

Payment of OR's Deposit and 'Presentation'
Re A Company (CR-2024-BHM-000012)

The Court of Appeal has held that a winding up petition is not to be treated as having been presented until the OR's deposit has been paid. The date of presentation is obviously relevant to issues such as s.127. We now have a completely bonkers system by which the court fee is paid automatically upon CE-Filing the petition but the OR's deposit has to be paid separately by credit card over the 'phone (in the unlikely event that one can get through).

Tax Avoidance Not Liable to s.423
Re Ethos Solutions Limited

The case involved an umbrella company scheme set up so that its employees would not become liable to pay PAYE or NIC. The employees would be paid through loans from offshore companies (no doubt to be written off). The scheme was held to be unlawful and the liquidator sought to use s.423 to make the individuals personally liable for PAYE and NIC on the basis that the scheme had been set up to put the assets beyond the reach of a creditor, viz HMRC.

The court held that, since the purpose of the scheme was to ensure that no PAYE or NIC arose, HMRC could not be a person '*who may at some time make a claim*' and so s.423(3) was not satisfied. The court also held that it was necessary to distinguish between the purpose of the scheme and its consequences and the purpose was clearly to prevent a liability's arising rather preventing a creditor's recovering.

DIRECTORS

Disqualification for BBLS Misuse
Re Paranoid Expedition Engineering Ltd

There is little actual new law in this decision but it is an interesting example of the courts' taking a dim view of directors who flagrantly misused the various Covid bailout schemes.

The company had taken two Covid loans totalling £110,000 which were expressly to be used for the company's working capital. The director caused the loans to be transferred to an associated company shortly before the company went into administration.

The misuse of the BBL and the CBIL were clearly in breach of the director's duties to the company and its creditors and she was disqualified for a period of seven years.

Actually, seven years seems on the lenient side for what is flagrant dishonesty. The judgment does not record that any compensation was sought so presumably it wasn't. Why not?

CVAs/RESTRUCTURING PLANS

Security For Costs of Opposing Creditor
Re Consort Healthcare (Tameside) plc

An unusual case. The debtor company, which had entered into a PFI deal with an NHS trust, applied for sanction of a restructuring plan which was opposed by the Trust. The Trust applied to the court for security at 70% of its estimated costs of opposing the plan.

The court held that there was no reason in principle why the usual litigation rules relating to security for costs could not apply in an application under pt 26A. Given that the company's costs were being funded by various investment funds that owned it, there was no reason why those funds could not also put up security for the NHS trusts opposition and security was ordered at 50% of the estimated costs.

Alistair Bacon
20 January 2025

Directors' Duties Following *BHS*

Re BHS Ltd (in liquidation) [2024] EWHC 1417
Wright v Chappell [2024] EWHC 2166 (Ch)

A great deal has been written about the so-called landmark decision in *Re British Home Stores* handed down in June 2024 in which the directors, including Dominic Chappell, were held to be personally liable for over £18 million of losses to the creditors. Whilst I do not think that the decision was particularly a *"landmark"* case, it was significant in its magnitude and its novel characterisation of the directors' decision to trade being treated as misfeasance as an alternative to wrongful trading. The decision highlighted the responsibilities of directors of a company facing financial distress and the potential consequences of failing to act in the creditors' best interests.

Following BHS' acquisition by Retail Acquisitions Ltd and the subsequent attempts to restructure and refinance the business, BHS ultimately failed to secure adequate funding, leading to its collapse. The court found that, had the directors taken steps to enter administration much earlier, the creditors' losses would have been much less and thus the liquidators' claims for wrongful trading were made out.

The slightly controversial issue of the case relates to the issue of so-called *misfeasant trading* and a great deal has been written about this apparently novel cause of action. In fact, the only thing that is controversial is the term which should probably be avoided. It was a novel application of the statutory provisions to base a claim *both* on wrongful trading under s.214 *and* breach of duty under s.212. In the end, the directors were found liable for wrongful trading *and* to be in breach of their statutory duties to the company by allowing the company to continue to trade contrary to the best interests of the creditors. The key difference of a claim based on misfeasance is that it was found not to be necessary to wait for insolvency to become inevitable for the duty to kick in – and in this case, the trigger date for misfeasance under s.212 was several months earlier than that for wrongful trading under s.214. When it came to assessing damages for misfeasance, the court held that the directors would be liable for the entire increase in net deficiency of the company's asset position as a result of the misfeasance – in this case it came to £110 million.

Apart from the central issues of wrongful trading, there were a couple of important points to take away from the judgment. The first of these was the importance of the directors' seeking professional advice when a company is in financial difficulty – this has often, in the past, been called the *Twilight Zone*. It is not enough that advice is taken; the directors must ensure that they give clear and complete instructions to their advisers and carefully consider at board level the advice received. In BHS, the directors were failed to avoid personal liability for their actions simply on the basis that they had relied upon professional advice.

A second takeaway was the issue of influence at board level. The knowledge of each individual director, not just the board as a whole, will be relevant when considering claims for wrongful trading against that director – this is on all four with the general law relating to the standard of care to be expected of an individual director. Directors therefore have a duty to avoid allowing certain individuals or small groups to dominate board decisions, especially in times of financial distress. This may, of course, prove to be much more difficult in practice than in theory.

The BHS case is a very real reminder of the potential for personal liability of directors for their actions. The court imposed a significant financial penalty on the directors, demonstrating that directors will be held accountable for their decisions and actions during insolvency. We always advise directors in these situations, to act as though their every step will be closely examined in the future by a partial officeholder with the benefit of 20:20 hindsight. This case serves as a reminder to directors of their duties and the importance of acting in the best interests of the company and its creditors.

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