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INSOLVENCY LAW FIRM

UPDATE

December 2016

Welcome to the CRI Insolvency Law Update, a summary of recent judgments and insolvency related reports and news items which we hope you will find of interest

The Insolvency (England and Wales) Rules 2016

The new Rules have finally arrived and will come into force on the 6th April 2017.

The Rules are a restructured take on the 1986 Rules which have been amended 28 times since they initially came into force.

The new Rules replace the old in their entirety. The key changes relate to electronic communication, use of websites, changes to creditors meetings, opting out of correspondence, dividends and small debts, the appointment of the Official Receiver as Trustee in Bankruptcy automatically on the making of an order and the replacement of prescribed forms with specified content for notices and documents.

Assessment of wrongful trading claim

At first instance the directors were held liable to pay £35,000 for wrongful trading. Both the directors and the Liquidators appealed the decision on various grounds.

The directors were successful on appeal on the basis that the process by which the Registrar at first instance had calculated the compensation was unfair. The Liquidators had failed to create a properly articulated case that there had been any increase in the net deficiency of the company during the

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period of wrongful trading. The Court found that there had been no such increase and the Registrar should not have voided any payment by the directors.

Brooks & Another (Joint Liquidators of Robin Hood Centre Plc in Liquidation) v Armstrong and Another (2016) EWHC 2893(CH)

Statutory interest and tax

The High Court has confirmed that statutory interest payable on insolvency is not “yearly interest” for UK tax purposes. The Administrators in this case had no obligation to account for income tax on the interest payments made. Additionally the court was critical of HMRC’s contradictory guidance on the issue.

The case is also interesting as it discloses that the surplus in the Lehman Brothers International (Europe) administration, which had been ongoing for 8 years, was substantial even after payment of debts of in the region of £6/7billion. The surplus was to be used to pay statutory interest to creditors. The potential tax sum involved was significant and was estimated to be in the region of £1.2Billion.

Lomas v HMRC [2016] EWHC 2492

IVA material irregularity

At first instance the court had refused to revoke the approval of an IVA proposed by Mr Bishop.

On appeal it was argued that Mr Bishop’s failure to disclose proceedings against him before the solicitors disciplinary tribunal was a material irregularity.

At the appeal it was determined that the test of materiality is an objective one. The question

should be whether if the truth had been told it was likely to have made a material difference to the way the creditors would have considered and assessed the terms of the proposal and in fact would have been likely to change the outcome of the vote. Applying that test it was found that the creditors would have considered the proposal differently. It was a material irregularity. Whilst it was found that there was a material irregularity, the Judge did not have sufficient material to decide upon the appropriate remedy which was adjourned to a further hearing.

Goldstein v Bishop and Barnett (2016) EWHC 2187 (Ch)

Compensation orders

The Compensation Orders (Disqualified Directors) Proceedings (England and Wales) Rules 2016 came into force on 1st October 2016. These Rules govern the procedure for applications by the Secretary of State for a compensation order against a disqualified director under Section 15A Company Directors Disqualification Act 1986 (as amended) as well as applications by disqualified directors to vary or revoke compensation undertakings.

Validity of out of Court appointment

A challenge to the validity of the appointment of administrators was rejected by the court in a situation where a sole director had made the decision to appoint administrators and effected it in an out of court filing. The company’s articles provided that the quorum for any board meeting was two.

The other director was in fact disqualified and there had been no form of special resolution to amend the articles for a sole director to

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exercise all the directors' powers. Nevertheless the court held that applying the Duomatic principle, the course of conduct of the directors had had the effect of formally varying the articles to enable the sole director to act accordingly. The acting director was also the beneficial owner of 75% of shares in the company.

Re BW Estates Limited (2016) EWHC 2156 (CH)

Security for costs application

PWC and Lloyds Bank applied to the Court for security for costs against Premier Motor Auctions Limited, a company in liquidation that had brought proceedings against them.

The High Court refused the application because the company had ATE insurance in place and there was no reason to believe the insurance would not respond when necessary. The concern of PWC and Lloyds was that the insurance cover of £5M would be insufficient to cover costs estimated to be in excess of £7M.

The High Court acknowledged that this judgment was policy driven in permitting ATE insurance on appropriate terms to provide access to justice for insolvent companies.

Premier Motor Auctions Leeds Limited (in Liquidation) v PWC LLP, Lloyds Bank Plc (2016) EWHC 2610 (CH)

Review

An appeal against a Bankruptcy Order was fixed to be heard at the High Court but the parties reached an agreement before the hearing and the High Court Judge made an order discharging the Bankruptcy Order with the parties' consent.

The Trustee in Bankruptcy applied to the County Court to rescind the Order. The County Court transferred the application to the High Court but the Judge refused the application determining that although the High Court had power to rescind any order under Section 375 (1) of The Insolvency Act 1986, the order must be made "by it" and in this case the order had been made on appeal.

On appeal it was determined that the Judge was wrong to hold that he had no power to review, rescind or vary an order which he had previously made on appeal.

Sands v Layne & Another (2016) EWCA CIV1159

Bankruptcy and ulterior objective

The Chancery Division allowed a debtors' appeal against a Bankruptcy Order on the basis that the Registrar had not taken the correct approach to the petition as a matter of law. The Registrar had correctly focussed on whether the court could be satisfied that the petitioner had an ulterior objective in presenting the Petition but had omitted a critical stage in the exercise of his discretion.

The debtor had an ulterior purpose in presenting the Petition and the Bankruptcy Order should be set aside with a view to there being a further hearing on the Petition to involve a consideration of the various objectives of the creditors and the nature and interests of the opposing creditors.

Maud v Aabar Block Sarl & Another (2016) EWHC 2175 (CH)

Technical and Further Education Bill

The first reading of the Technical and Further

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Education Bill took place on 27th October 2016.

The bill applies normal insolvency proceedings to further education and sixth form corporations in England and Wales and sets out provisions as to how the administration of insolvent educational establishments will operate.

More details will be forthcoming over future months which will be of particular relevance to governors concerned about the application of fraudulent and wrongful trading provisions.

Disputed debt and administration application

A firm of solicitors acted for a client in successful litigation on a CFA Agreement including an arbitration clause. The client had a funding agreement with the third party which funded the solicitors costs in part. The solicitors entered into an agreement giving priority over recoveries to the funder.

Recoveries were insufficient to repay the funder in full meaning the solicitors fees and uplift were left unpaid.

The solicitors applied for an Administration Order over the client. The court determined that where a debt is disputed and that dispute is subject to arbitration the Court should not save in wholly exceptional circumstances wind up a company. The Judge held that the same principle should apply to an application for an Administration Order.

Field Fisher LLP v Penny Feathers Limited (2016) EWHC 566 (CH)

Exceptional circumstances

The Claimants as Trustees in Bankruptcy of Mr Baker applied for an Order for sale of the matrimonial home owned jointly with his wife.

Their 30 year old daughter had a mental age of 8 or 9 and was incapable of independent living. At first instance the court granted the order for sale but considered sufficiently exceptional circumstances existed to postpone the order until the adult daughter no longer resided at the property. The daughter's life expectancy was not impaired.

The Trustee appealed and the High Court allowed the appeal and determined that an indefinite suspension of the order for sale was incompatible with the underlying purpose of the bankruptcy legislation being to realise assets and distribute the net proceeds amongst the unsecured creditors.

Grant and Another v Baker (2016) EWHC 1782 (CH)

Liquidators personal liability

Where costs are sought against a Liquidator personally, in respect of an action brought by the Liquidator in the name of the company, the applicant has to show impropriety on the part of the Liquidator in order to succeed. Unreasonableness is not sufficient. In respect of a third party funder who is interested in the outcome of the litigation, impropriety need not be shown and costs would generally be awarded.

Although the case relates to proceedings brought in Hong Kong it provides guidelines as to when an order may be made against a Liquidator in circumstances where a Liquidator has brought legal proceedings in the name of the company.

Super Speed Limited (in Liquidation) v Anr v Bank of Baroda HCCW 237/2012 High Court of Hong Kong

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Remedies for void dispositions (1)

Subsequent to a Bankruptcy Petition being presented the debtor made payments from two accounts held in the name of the debtor's father but which were bankruptcy assets. These included money paid to purchase a property. The claim was based on Section 284 Insolvency Act 1986. The property was held until 21st December 2015 in the name of the debtor's wife when it was transferred to a trust in favour of the debtor's children. There was also a claim in relation to shares in a company transferred to the debtor's wife shortly prior to the Bankruptcy Order.

Chief Registrar Baister determined that the Trustees were entitled to all the relief they sought including payments from the accounts as well as the property which had been purchased with payments from the accounts. The share transaction was a sham on the evidence but even if that was wrong it was a transaction at an undervalue.

The Court did consider the remedy provided by Section 284 IA 1986. The debtor's wife was on notice of the bankruptcy and did not receive any of the payments to her in good faith.

D'Eye - Registrar Baister 22nd April 2016 (unreported)

Remedies for void dispositions (2)

In this case the debtor transferred shares in various companies to a family member and also through that family member to other family members in the period between presentation of the Petition and the Bankruptcy Order. On the eve of trial all the Respondents restored the shares and the Trustees sought recovery of the difference in value between the date of transfer and the date of restoration. It was determined that the court

needed to restore the fund preserving its value for the benefit of creditors as it was at transfer. The Judge had expressed a preference for the Trustees' expert evidence as to value in the sum of £2,216,000 and the recovery would be net of the value of the shares at the date they were returned.

Re Eatisham Ahmed (2016) EWHC 1536(CH)

European Commission proposals

On the 22nd November 2016 the European Commission published its legislative proposal for harmonising restructuring law across Europe. The proposal, which includes a draft directive on preventative restructuring frameworks, "second change" and measures to increase the efficiency of restructuring, insolvency and discharge procedures, needs to be agreed by the European Parliament and Council. Once the text is finalised, member states will have up to two years to implement the measures.

The relevance of the above is obviously subject to the consequences of Brexit and the inclusion of the same within this briefing is for information purposes only!

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The contents of this Update provide only a brief overview of the more important cases and reports. If you should require any detailed advice concerning these changes then please do not hesitate to contact us.