Newsletter June 2019

CARRICK | READ
INSOLVENCY LAW FIRM

Update

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

PPI Deadline

A briefing note has been published by The STEP UK Practice Committee noting the risks to Trustees in Bankruptcy and Supervisors of IVAs if they fail to make PPI claims before the 28th August 2019 deadline. The note states that the Official Receiver has suggested it is reviewing closed cases as far back as 1st January 2000.

Court cannot cure defective service

In the recent Judgment of Ardawa v Uppal [2019] EWHC 456 (Ch) the court held on appeal that substituted service cannot be authorised by the court after the event.

It is clear under IR 2016 10.14 that the court "may order substituted service to be effected in such manner as it sees fit". As such the court cannot retrospectively grant permission for substituted service. In this case the court still concluded that it was not proportionate to annul the

Carrick Read Insolvency is a specialist insolvency law practice providing legal and technical advice to insolvency practitioners, debtors and creditors involved in the insolvency process.

Carrick Read Insolvency Solicitors
12 Park Place, Leeds LS1 2RU
T: 0113 246 7878
F: 0113 243 9822
E: enquiries@carrickread.com

bankruptcy petition made for this reason alone, however it is an important reminder that bankruptcy petitions must be correctly served.

Ardawa v Uppal [2019] EWHC 456 (Ch)

LPA Receivers and selling to connected companies

In a recent High Court decision, the court has held that LPA Receivers did not put themselves in a position of conflict when selling property to a company connected with the creditor.
In this case, LPA Receivers were tasked with selling a cider factory. The Receivers had received offers for the property ranging between £2 million and £4 million. The property was eventually marketed and sold for £2.75 million to a subsidiary of the company which had appointed the receivers.

The claimant in the case argued that the Receivers had failed to act in good faith by failing to achieve the best possible price and that they had placed themselves in a conflict of interest as they were influenced by the appointing company.
It was held that there was no conflict of interest. Where a creditor appoints a Receiver and the Receiver exercises the power of sale it cannot be considered to be self-dealing as the Receiver does not benefit from selling the asset at a lower price.
Further, the Judge could not find evidence that the Receivers had acted in bad faith. The Judge concluded the claim was over-optimistic and as such it was dismissed.

Devon Commercial Property Limited v Robert Adrian Barnett and Robert John Belcher [2019] EWHC 700 Ch

More change in the status of preferential creditors?

HMRC recently concluded a consultation, on 27th May 2019, to consider whether HMRC should be made a secondary preferential creditor for taxes paid by employees and customers. The rationale behind the consultation is that the taxes paid in good faith by businesses and employees during insolvency should be used for the primary purpose of those taxes, i.e. to fund public services.
This would result in HMRC being ranked after ordinary preferential creditors. If adopted the changes would apply to insolvencies commencing on or after 6th April 2020.

Tax grouping and the appointment of receivers

The Court of Appeal have recently denied a parent company control of a subsidiary in receivership and as such prohibited a claim for group tax relief. The decision focussed on the requirement for companies to be grouped for tax, namely that there must be

no arrangements such that at some time during or after the current period a person has or could obtain control of the first company and not the second. When considering the element of control, the Court held that when Receivers had been appointed the parent company no longer controlled the subsidiary, as the parent company could no longer run the company in accordance with its own wishes.

Farnborough Airport Properties Co and another v Revenue and Customs Commissioners [2019] EWCA Civ 118

Out of hours administration appointments

Pursuant to the Insolvency Rules 2016 only a qualifying floating charge holder has the ability to file an appointment of administrator with the court outside of court hours. However, The Electronic Working Pilot Scheme, now applies to all Business and Property Courts in England and Wales from 30 April 2019. The e-filing system allows users to file documents with the court all hours and all days of the week. As such the court was recently asked to consider whether the filing of appointment of administrators by directors outside of court hours was valid.
Re HMV Retail Limited [2019] EWHC 903 (Ch)

Can a CVA lead to the stay in the enforcement of an adjudicator's decision?

Earlier this year the Court of Appeal refused to stay the enforcement of an adjudication decision due to a CVA, more recently the same decision has come before the Technology and Construction Court, who ultimately granted the stay.
In the case of Cannon, the CVA had been entered into prior to the adjudication decision being enforced.

In the case of Indigo Projects London Limited v Razin and another the Claimant had issued enforcement proceedings, after commencing those proceedings the Claimant entered into a CVA and the Defendant requested a stay of the enforcement proceedings. The stay was granted.

So, what were the deciding factors in the cases?

The court drew two key distinctions between the cases. Firstly, the timing of the CVA and whether the CVA was proposed before or after the adjudication was enforced. In Indigo the debt had arisen prior to the CVA being entered into and if a stay was not granted it would be unfair to the Defendants. This is because claims arising prior to insolvency will be part of a netting off exercise between the parties. Thereafter once insolvency has arisen any successful claims will form part of the

insolvency funds and will be distributable to creditors. A further distinction drawn was that the monies in Cannon related to damages, whereas the sums in Indigo related to an amount due for a missed notice and in essence were an order for payment on account.

Indigo Projects London limited v Razin and another [2019] EWHC 1205 (TCC)
(1838) Cannon Corporate Limited v Primus Build Limited [2019] EWCA Civ 27

Administrators and the GDPR

This issue arose during the administration of Cambridge Analytica.

Administrators attempted to salvage Cambridge Analytica ("CA"). However they were unable to profitably realise the assets of the company as the Information Commissioner's Office had seized CA's servers and computer equipment, meaning it was unable to trade. The administrators ultimately placed CA into compulsory liquidation.

A Creditor objected to the administrators' appointment as liquidators for a number of reasons, one such reason being that the administrators had breached data protection legislation, as he had been refused a subject access request.

In making it's decision, the court considered earlier case law which established that a liquidator will not be considered to be a data controller in respect of personal data, this being because a liquidator takes decisions as a principal, rather than as an agent of a company.

In this matter the administrators had taken the decision not to search through some 700 terabits of data seized by the ICO. The court concluded this was a decision the administrators were able to take and that as agents of CA their statutory duty was limited and as such the interests of one creditor must be balanced against the group of creditors as a whole. Further the court confirmed that administrators are not required to investigate any breach of duty to a third party. Their duty is to investigate breaches of duty owed by a director(s) to the company or to creditors.

This is a welcome decision for administrators and liquidators confirming their limited obligations to third parties and data subjects.

Green v Group Ltd and others [2019] EWHC 954 (Ch)

Carrick Read Insolvency

Newsletter June 2019

S245 Value of Goods and Services Supplied

A solicitors firm, Candey Ltd, was instructed by Peak Hotels and Resorts in relation to ongoing litigation. The parties agreed to the payment of a fixed fee (some £3.8 million) upon conclusion of the case by judgment or settlement.

Candey had taken a fixed and floating charge over the business assets of Peak, although earlier proceedings had considered the charge to be floating and not fixed.

Peak entered liquidation less than 12 months later and the liquidators quickly settled the ongoing litigation. Candey then sought to be a creditor to the extent of £3.8 million despite the actual value of work undertaken being substantially less (approximately £1.2 million).

At first instance it was held that the fixed fee arrangements were part of the ordinary course of a solicitors business and as such Candey's security was valid in the full amount of £3.8 million.

This decision was appealed and the court later held that the question was not whether the sum was contractually due but rather the extent to which Candey could enforce its change by reference so s245(6).

It was held that s245(5) requires an objective view of the work actually undertaken which was incompatible with the calculation of Candey's fees under the fixed fee agreement, as this related to work which may or may not be undertaken.

Ultimately the court took the view that Candey's charge would only be valid in respect of the work undertaken and its claim to the remaining sums would rank alongside the other unsecured creditors in the liquidation.

Crumpler & another (liquidators of Peak Hotels and Resorts Limited) v Candey ltd [2019] EWCA Civ 345

Can a dissolved company apply for a freezing injunction?

In this case a dissolved hair and beauty business sought the continuation of a freezing order obtained against its former accountants. It was suspected that the accountants had defrauded the company of around £300,000. An application by the company's shareholder to restore the company to

the register was pending.

The initial judge had granted the freezing order as if the company was restored to the register it would be done retrospectively.

At the hearing to continue the freezing order the issue of whether a dissolved company (which in theory did not currently exist) could bring an action for a freezing injunction was considered. The Judge was concerned regarding this point although was not willing to make an order to restore the company to the register as the Treasury Solicitor had not yet been served with the application.

Ultimately the court found that the court's jurisdiction under s37 Senior Courts Act was wide enough to allow a petitioning creditor to obtain a freezing order against a third-party debtor of a company. The court considered the position of the company's shareholder to be akin to that of a petitioning creditor on winding-up.

A freezing order was granted pending the application to restore to the register.

Yuzu Hair and Beauty Ltd (Dissolved) v Selvathiraviam [2019] EWHC 772 (Ch)

Contact Details

For more information or to discuss how we may be able to assist your business, please contact

Andrew Laycock
T: 0113 3804313
F: 0113 2439822
E: ALaycock@carrickread.com

Hannah Dunn
T: 0113 3804318
F: 0113 2439822
E: HDunn@carrickread.com

Helen Mitchell
T: 0113 3804312
F: 0113 2439822
E: HMitchell@carrickread.com

Ali Renshaw
T: 0113 3804311
F: 0113 2439822
E: Arenshaw@carrickread.com

The contents of this Update provide only a brief overview of the more important cases and reports and those issues which have caught our interest. If you should require any detailed advice concerning these changes or the cases and authorities referred to then please do not hesitate to contact us.