CARRICK | READ
INSOLVENCY LAW FIRM

December 2015

Welcome to Jennie

We are pleased to announce that Jennie Blagg will be joining the firm from December 2015.

Jennie has extensive insolvency law experience accrued whilst with other Yorkshire-based law firms and many of you will already have met and worked with her. We hope to have the opportunity of introducing her to you in the near future as a new member of the team

Another Reported case

Carrick Read has been involved in another reported bankruptcy case, Woods v Lowe and ors. The case involves the consideration by the court of ownership of assets situated at the premises of the bankrupt in the context of limited relevant evidence.

The court also dealt with issues concerning the joining of the correct parties to the litigation

See Woods v Lowe and Ors
http://www.bailii.org/ew/cases/EWHC/Ch/2015/2634.html

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.

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Dissolution and Revesting

The High Court decided that a dissolved company which is subsequently restored to the register could have its freehold property re-vested in it, even though the property had passed to the Crown *bona vacantia* and the Crown had subsequently disclaimed it.

The application had been made by the company's bank who realised that a property belonging to the Company had value and applied for the company to be restored and placed into liquidation

See ***Re Fivestar Properties Ltd* [2015] EWHC 2782 (Ch)**

Reconsideration of *MF Global*

In our September newsletter we made reference to *MF Global* in which it was determined that section 236 of the Insolvency Act 1986 did not have extraterritorial effect.

However, the High Court in a recent case reconsidered the issue and concluded that the court could order examination outside the UK under section 237 if the appropriate procedural mechanisms were in place in that jurisdiction.

See *Official Receiver v Norriss [2015] EWHC 2697*,

Section 423 applications

The High Court has given guidance upon the issues to be taken into account when an application is made for relief under section 423 Insolvency Act 1986 to set aside a transaction on the basis that it was undertaken for the purpose of defrauding creditors

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The court should be satisfied that:

The transaction was entered into at an undervalue;

The real and substantial purpose of entering into the transaction was to put assets beyond the reach (or otherwise prejudice the interests) of someone who may be entitled to make a claim; and

It was appropriate in all the circumstances to grant the relief sought

See ***Swift Advances Plc v Ahmed and another [2015] EWHC 3265 (Ch***

No jurisdiction for creditors who have proved elsewhere

The Privy Council has held that where a company was being wound up in a jurisdiction where it was incorporated, and where a foreign creditor had submitted a proof of debt to the liquidators, that creditor had submitted to the jurisdiction of the administering court, and could not bring proceedings in its own jurisdiction with the aim of obtaining priority over other creditors.

***See Stichting Shell Pensioenfonds* v *Krys* [2014] UKPC 41**

The “illegality “defence

In a relatively rare case against an insolvency practitioner who paid away company funds in error, the Court of Appeal refused to permit her to rely on the defence of illegality to defeat the creditors’ claim against her for compensation for breach of duty

This was on the basis that the monies she wrongly paid away were not "criminal property" and given that there was not sufficient nexus between the alleged fraud and the claim brought against her. The fraud in question was merely "collateral" to the creditors' claim.

See ***(1) Top Brands Ltd (2) Lemione Services Ltd v (1) Gagen Dulari Sharma (2) Barry John Ward (as former liquidators of Mama Milla Ltd) (2015)***

Assignment and vacation

In a case decided in the courts in Northern Ireland it was determined that a proposal whereby a liquidator would assign proceedings then leave office, leaving the person to whom the proceedings had been assigned to make a distribution to creditors in the event the proceedings were successful, was contrary to the statutory scheme.

See *Cavanagh v Conway [2015] NIQB 69,*

Guidance on forfeiture

A recent High Court case has clarified that financial prejudice suffered by administrators may not necessarily be enough to prevent forfeiture and loss of rent is not the only prejudice landlords can suffer. It also is a reminder to administrators of the main principles under a pre-pack administration, this time in the context of the administration of Strada.

Guidance was also provided on

1. Financial prejudice that might be considered de minimis so that it would not impede the purpose of the administration;
2. How long administrators should have to resolve their proprietary interests;

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3. What loss landlords can suffer other than non-payment of rent; and
4. When landlords can refuse consent to assign

See ***Lazari Investments Limited v Saville & others [2015] EWHC 2590 (Ch)***

Misfeasance

In a case where the directors relied upon section 1157 of the Companies Act 2006 (that they had acted honestly and reasonably) in defending a claim for summary judgement for misfeasance where the directors had transferred assets after the onset of insolvency, the court determined that no director acting reasonably could have authorised the transactions which effectively gave away the company's assets for no consideration.

Summary judgement was given against the directors and an order made that the company be put back into the position it would have been in if the directors had not entered the transactions

See ***Power and others v Hodges and Others [2015] EWHC 2983 (Ch)***

The corporate veil

Trustees in bankruptcy obtained an interim order restraining a bankrupt from disposing of assets which had been sheltered in various front companies. The Trustees sought to claim that the assets were after-acquired property. In granting the order, the court held that there was a good arguable case that the corporate veil could be pierced so as to identify the activities and assets of the companies as those of the bankrupt.

See ***Wood v Baker [2015] EWHC 2536 (Ch)***

Wrongful trading

IA 1986, s 214 did not require proof of insolvency at the date of knowledge. However,it was determined that the directors did have to prove knowledge at some time before the commencement of the winding-up, rather than at a particular date. Knowledge should not be approached with hindsight and the fact that a decision proved to be wrong did not amount to failing to act as a reasonable director.

The Registrar found that once it had been established that a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, the onus was on the director to establish that he had taken every step to minimise the potential loss

See ***Brooks and another v Armstrong and another; Re Robin Hood Centre plc (in liquidation)*** **[2015] EWHC 2289 (Ch)**

Costs of a partly successful action

The case of Brooks is also the subject of another decision relating to the costs of a partly successful action.

The solicitors to the liquidator claimed costs in excess of £1 million on the basis of a CFA arrangement.

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The original claim by the liquidator was for a sum in excess of £700,000. The liquidator succeeded to the extent of £35,000. He sought an order for payment of his costs.

The Registrar determined that bearing in mind that the directors had been successful in defending a large part of the claim there should be no order as to costs. Bearing in mind the recent decision in the case of *Stevensdrake Ltd v Hunt* [2015] it would be interesting to know the nature of the discussion between the office holder and his solicitors concerning his liability for their costs

Refusal to adjourn bankruptcy hearing

A solicitor appealed to the Court of Appeal a case in which he had been made bankrupt when the judge on the hearing of the petition had refused to adjourn the hearing.

The solicitor had made various arguments which failed and then offered to make payment of the debt over time. The judge determined that there was no reason to delay the making of the bankruptcy order.

The Court of Appealheld that insolvency actions were class actions, not just debt collection proceedings, and delaying a petition could prejudice other creditors. An adjournment could be permitted, however, if there was a reasonable prospect that the debt would be paid in full within a reasonable time.
There had to be credible evidence to support such an application and delay in making an application was relevant. The debt was three years old in this case. There was a long-standing rule requiring evidence to show the debt could be paid and this applied equally to solicitor

debtors. He had produced no evidence to prove he could pay and had provided no timescale for payment.

See ***Sekhon v Edginton*, CA [2015] 1 WLR 443**

Duty of Trustee

A Trustee in Bankruptcy does not owe a common law duty of care to a bankrupt in addition to the statutory duties under IA 1986. As to loss for mental distress, there was no claim on the facts in this case but the sum claimed was in any event too much for non-pecuniary loss. The release under s299 IA 1986 releases the Trustee in Bankruptcy from everything except the matters provided for in s304 IA 1986. Given such release, only matters for the benefit of the estate could therefore be the subject of any action.

See ***Oraki and another v Bramston and another [2015] EWHC 2046***

Refusal of Administration

Based on the evidence presented to the court, the court in this case was not satisfied that the company was, or was likely to be, unable to pay its debts, or that any of the purposes of administration would be achieved, notwithstanding that the circumstances of the case suggested that some court intervention might be appropriate.

Additionally the company's major creditor opposed the Order. This case illustrates that it is critical, in making a creditor administration application based on evidence of general insolvency rather than a clearly evidenced unpaid debt, to have up-to-date information of the company's financial condition, together with evidence from the proposed administrators as to how the purpose of administration can be achieved. It is rare that an outside creditor (or, as in this case, an insider who has been excluded) will have sufficient financial evidence to satisfy the requirements of an administration order.

See ***Green v Gigi Brooks Limited [2015] EWHC 961***

Administrators proposals

In a local court decision by HHJ Behrens it was decided that where proposals by administrators are rejected there must be an application to the court for directions. It was open to the court to direct a liquidation – in this case a CVL - and in particular the date it took effect, so that the administrators could continue to realise assets in the interim. On the subject of remuneration a cap on the same could not be a set amount for the purpose of fixing remuneration under r2.106 IR 1986.

See *Re Pudsey Steel Services Limited*;

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Contact Details
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