Issue 128

Technical Bulletin

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128.1 An overview of digital assets

A Guide to Digital Assets for insolvency and restructuring professionals

The digital universe is vast and ever-changing in this modern world. This overview of 'Digital Assets' intends to provide members with an understanding of the meaning of this, often complex, type of asset, and how an officeholder may wish to approach this asset in an insolvency scenario.

The guidance can be found here.

128.2 PPF R&I Guidance

The PPF Restructuring & Insolvency team has refreshed its existing guidance and issued new guidance on several topics, including details on different claims the pension scheme may have, the PPF approach to scheme rescues & how the PPF believes trustees should act where the employer is in distress following the recent Biwater case.

The guidance on PPF drift has been updated to include help for actuaries when they are calculating drift with the aim of achieving a consistent approach.

The PPF insolvency rate card has been revised in respect of costs which have been incurred after 30 November 2023.

Details on the four new guidance notes are:

- **Guidance note 10:** Potential claims as a result of employer insolvency – which explains the PPF's approach to certain claims that can arise following the insolvency of an employer of a defined benefit pension scheme.
- **Guidance note 11:** Scheme rescue notices and the PPF's approach – this covers the PPF approach and in particular how we address conditional rescues and protect the PPF position
- **Guidance note 12:** Completing forms for claims on the Redundancy Payments Service – providing help in completing these forms to ensure prompt processing produced with help from the RPS
- **Guidance note 13:** Guidance for trustees on their approach on PPF consideration in distressed employer situations – covering the tests & issues that the PPF believes are key for trustees deciding whether a scheme should be allowed to continue with a distressed employer.

The guidance can be found below -

[Insolvency guidance and support | Pension Protection Fund (ppf.co.uk)]

128.3 HMRC - Cessation of tax clearance in Members' Voluntary Liquidation.

On 6 December 2023 HMRC published a bulletin about its decision to cease providing tax clearance in a **Members' Voluntary Liquidation**. The bulletin can be found here.

In response to this action by HMRC, the R3 Tax Working Group has produced this note for members. (It should be noted that this is guidance only, it is not a substitute for taking specific advice on the facts of the specific case.)

The note to members can be found here.

128.4 Scotland - Fee approval in Administration and the timing of Administrator's progress reports.

We are aware of some of the potential pitfalls and perceived difficulties of fee approvals in Scottish administrations, specifically adhering to the timescales set out in the Rules in relation to accounting periods.

The Rules and their requirements in relation to the submission of a request for remuneration and the interaction of the progress report with the period of approval are set out below. Members who know in advance that the timescales cannot be achieved may seek the advance permission of the court to vary the deadlines. Members should not expect to rely on the courts taking a flexible approach to their interpretation of the Rules or that any breach will be remedied retrospectively.

The Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 set out the requirements for the approval of the office holder's remuneration in Scottish Administration procedures.

R3.95 (1) requires the request for approval of remuneration to be submitted to the approving party within two weeks after the end of the relevant accounting period. The six-week period referenced in R3.96 (1) is the period within which approval of the fee must be made and is the equivalent six-week period in which the Administrator's progress report must be issued, as set out in R3.93.

Administrators who make their fee request in conjunction with issuing the progress report within two weeks of the end of the accounting period are therefore acting within the Rules. However, if the Administrator issues their fee request after the two week period, albeit with the progress report and within the six weeks period, their progress report meets the statutory deadline but not the fee request, and they are in breach of the Rules.

The progress report therefore has two functions:

It can support the request for fees made in the two-week period – in which case, a separate notice of the fee approved and any rights of appeal must be issued once fees have been approved.

OR

The fee request is made in the two-week period (providing the information required under R3.95), and the progress report is then issued with notice of the fees approved and any rights of appeal within the six-week period.

128.5 Consultation - Digital Assets and English Insolvency Law - R3 response.

The UK Jurisdiction Taskforce ('UKJT') understands that such practitioners would welcome guidance and certainty as to how various aspects of the English insolvency law regime apply to issues involving digital assets.

Further, the UKJT has been advised that greater certainty, in that respect, would potentially assist investors when choosing English law as the governing law for e.g. debt instruments, or selecting England as a forum for pre-insolvency restructuring or a formal insolvency (and, if a formal insolvency, selecting which type of procedure to use).

The purpose of the proposed Legal Statement is accordingly to offer such guidance and promote certainty, by seeking to answer questions relating to the application of English insolvency law principles to digital assets. A draft set of such questions is set out in the Annex to this consultation paper. The purpose of this consultation is to seek input from key stakeholders on this list of questions.

R3's response can be found here.

128.6 Consultation (Scotland) - Definition of insolvency - Moveable Transactions (Scotland) Act 2023 - R3 response.

The Scottish Technical Committee ("Committee") responded to the recent consultation seeking views on the definition of insolvency for the Moveable Transactions (Scotland) Act 2023 ("the Act").

Broadly speaking, the Act modernises the law of Scotland in relation to transactions covering moveable property and introduces a new statutory scheme for moveable transactions law in relation to both: the assignation of claims over moveable property; and security over corporeal and certain non-corporeal moveable property.

In their Report, the Scottish Law Commission recognised that "(t)he law of rights in security is closely linked to insolvency law" but as the project was not about insolvency law and to include it would have made the project too large and unwieldy, the policies of insolvency law are left substantially unaffected. We note that the subject matter of insolvency is, to a large extent, reserved."

The consultation referenced a summary of the amendments that had been made to the insolvency definitions at Stage 2 of the legislative process which were essentially reversed at Stage 3 focussing on the issues that have been raised by those amendments.

The consultation also sought general views on the definitions and the more conceptual issue of what insolvency should be intended to capture for the purposes of the Act.

It has been recognised that this matter is a complex area of law where opinions are divided. Indeed, this was reflected during the length and breadth of the discussions the Committee had on the consultation.

In collaboration with the Committee, R3 submitted a response which can be accessed below. The response highlights the policy choices which would determine whether a narrow or more expansive definition of insolvency is needed and the possible technical considerations thereon rather than expressing a view on which policy should be adopted. We thank the Committee for its significant input in this response.

R3's response can be found here.

128.7 Case Law - Brake and another v The Chedington Court Estate Ltd [2023] 1 WLR 3035 On appeal from: [2020] EWCA Civ 1491, Supreme Court, 10 August 2023

Brake and another (Respondents) v The Chedington Court Estate Ltd (Appellant) 2023] UKSC 29, [2023] 1 WLR 3035 On appeal from: [2020] EWCA Civ 1491

Headline – This Supreme Court decision re-enforces the basic principle that a party without an economic interest in an insolvency will face a high hurdle before they may establish standing to challenge an officeholder's conduct. From a practical perspective, officeholders will be allowed to get on with administering their estate, in most circumstances, without the fear of challenge from an out-of-the-money party.

Introduction

This appeal concerns the standing of a bankrupt to challenge the acts, omissions or decisions of the trustee of the bankrupt's estate under section 303(1) of the Insolvency Act 1986 ('IA86'). More particularly, it concerns the standing of two bankrupts to challenge steps taken by their trustee to facilitate their eviction from a property which was in their possession (but was not occupied by them).

Section 303(1) of IA 1986 provides:

"If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."

Background

The facts of the appeal are not straightforward, and complex. However, in summary –

The appeal arises from an application to strike out an application made under section 303(1) by Mr and Mrs Brake, on the grounds that they lacked the standing to make it.

- Mr and Mrs Brake ran a partnership – Patley Wood Farm LLP, which operated an accommodation business from West Axnoller Farm, which Mr and Mrs Brake lived on.
- The farm included a cottage known as West Axnoller Cottage; registered in the names of Mr and Mrs Brake and Mrs Brehme. It was held a partnership property.
- Receivers were appointed over the Farm in 2014. However, this did not include the cottage. The Farm was sold to Chedington Court Estate Ltd in 2015.
- Mr and Mrs Brake failed to comply with a costs order that arose from arbitration proceedings concerning the partnership and as a result were made bankrupt in 2015. The partnership entered into liquidation in 2017.
- The Liquidators eventually sold the cottage to Chedington Court Estate Ltd. Mr and Mrs Brake were invited to bid for the cottage. The Trustee in bankruptcy for Mr and Mrs Brakes entered into various transactions with the liquidators and purchaser that ultimately led to the purchaser acquiring the rights to the cottage. Mr and Mrs Brake were formally evicted from the cottage following completion.

- Mr and Mrs Brake were aggrieved with the transactions entered into by their trustee in bankruptcy and as a result issued two applications to unwind those transactions –

  (1) an application pursuant to section 303(1) of IA86 to set aside the transactions entered into by the Trustee to sell the Cottage to Chedington.

  (2) an application pursuant to section 168(5) of IA86 to set aside the sale of the Cottage by the liquidators.

- Prior court decisions

(1) The two applications mentioned above were struck out on the application of Chedington Court Estate Ltd in early 2020.

(2) Mr and Mrs Brake appealed the strike out in 2020 at the Court of Appeal. The appeal in respect of the liquidation application was dismissed, however, the other appeal in the bankruptcy application was granted on the basis that the test for standing should be whether the bankrupt has a substantial interest which has been affected by the conduct complained of and a direct interest in the relief sought to give them standing under section 303(1) of IA86 in their personal capacities as bankrupts. The Court of Appeal held that Mr and Mrs Brake **did** have such an interest.

Supreme Court Decision

The appeal of Chedington Court Estate Ltd succeeded and the decision of the first instance judge to strike out the bankruptcy application was reinstated. Mr and Mrs Bake did not fall within any of the principles underlying the standing of applicants under section 303(1) of IA86 and therefore did not have standing to make the bankruptcy application insofar as it deals with the trustee's dealings with the cottage in December 2018 and January 2019.

The principles mentioned by the Supreme Court underlying the standing of applicants under section 303(1) of IA86 were as follows –

1. *"Creditors have standing where their application concerns their interests as creditors, because the bankrupt's estate or the assets of the company in liquidation are administered under the terms of the statutory trust for their benefit as creditors."*

2. *"where there is or there is likely to be a surplus, the bankrupt or contributories are also persons for whose benefit the estate or assets are being administered and they have standing in respect of their interests in the surplus."*

3. *"there is a limited class of cases where creditors, the bankrupt, contributories or others will have standing, but only in respect of matters directly affecting their rights or interests and arising from powers conferred on trustees or liquidators which are peculiar to the statutory bankruptcy or liquidation regime."*

The Supreme Court also confirmed that the above principles are equally applicable to the equivalent section 168(5) of IA86 relating to the standing of creditors and others to challenge a decision of the liquidators in a compulsory winding-up.

Section 168(5) of IA86 provides -

"If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just."

This decision represents a clear restatement of the longstanding general principle that, subject to very limited exceptions, a party will require a tangible economic interest in an insolvent estate before they will have standing to be heard in relation to the conduct of that estate. For obvious reasons, bankrupts will seldom have such an interest, by reason of the estate being insolvent with no surplus for the bankrupt.

The judgment is available here.

128.8 Case Law - Denaxe Ltd v Cooper & Anor [2023] EWCA Civ 752, Court of Appeal, 30 June 2023

Denaxe Ltd v Cooper & Anor [2023] EWCA Civ 752

30 June 2023

Lady Justice Asplin

"169. It seems to me to be quite clear that the protection afforded to officers of the court or trustees seeking directions and the approval of the court for their proposed conduct, must depend on the nature of the approval sought, the issues which the court is required to consider in order to reach its decision and the parties which were before the court. If an issue has been decided as part of the process of giving approval, a party to the approval application or one of their privies, cannot seek to re-litigate the issue in subsequent proceedings against the trustees or office-holders."

Introduction

The appeal concerned the extent of immunity from subsequent claims which may be enjoyed by receivers appointed by the court by way of equitable execution who obtain the approval of the court for a sale of assets over which they have been appointed.

The Court of Appeal upheld the decision of Mr Justice Fancourt, who struck out a claim against the court-appointed receivers in respect of a sale of assets.

It emerges from the judgment that there is no doctrine in English business or property law strictly called 'immunity'.

Background

In summary, the appeal concerned the assets of Blackpool Football Club. The court-appointed receivers sold the majority shareholding in the football club along with the club's stadium and training ground for c£8.2m. The package also included the sale of the minority shareholding of the judgment creditor. Prior to completing the sale, the receivers made an application to the court seeking approval of the proposed sale, which was given. The court will not normally be asked to approve a commercial decision of a receiver, but in this case, application was necessary in order to obtain a variation of the previous order that the minority shareholder be bought out by the majority shareholder. The sale of these shares to the third party purchaser was a key part of the package.

Following the sale, a claim was issued by Denaxe Limited formerly Blackpool Football Club (Properties) Limited alleging that the football club and other assets had been sold at an undervalue, despite them being notified of the receivers' application to the court with regard to the proposed sale. No objections or concerns were raised at this hearing, beyond a purported reservation of a right subsequently to challenge the marketing and valuation in relation to the proposed sale.

The receivers successfully applied to strike out the claim on the basis that sanctioning of the sale of the club and other assets provided them with 'immunity' from such claims.

Denaxe Limited appealed the decision to strike out.

Decision of the Court of Appeal

The appeal was dismissed. However, Snowden LJ did not wholly agree with the reasoning of the first instance decision, in particular the part concerning 'immunity'.

As noted above, immunity does not exist as a concept in business law. The term is best understood as a shorthand for a bar on subsequent proceedings by reason of issue estoppel or abuse of process.

The Court of Appeal found that the claim by Denaxe Limited was based on matters which could and should have been raised at the approval hearing. Snowden LJ did not decide whether an issue estoppel arose in this case, but he was clear that the attempt to bring claims now against the receivers, when the opportunity to question the basis of the sale at the approval hearing had been missed, was an abuse of process and that the claims should therefore be struck out.

For officeholders it is important to note that a decision by the court to approve a particular action does not confer blanket immunity against subsequent claims. Notifying relevant parties of an intention to seek the court's approval of a decision will be an important factor in obtaining protection.

Asplin LJ's brief judgment concurring with the detailed judgment of Snowden LJ is a neat summary:

Lady Justice Asplin

"169. It seems to me to be quite clear that the protection afforded to officers of the court or trustees seeking directions and the approval of the court for their proposed conduct, must depend on the nature of the approval sought, the issues which the court is required to consider in order to reach its decision and the parties which were before the court. If an issue has been decided as part of the process of giving approval, a party to the approval application or one of their privies, cannot seek to re-litigate the issue in subsequent proceedings against the trustees or office-holders."

"170. When considering the extent of any protection afforded, it is important, therefore, not only to take into account the issues which were decided on the approval application but also the identity or interest of the parties who were before the court. A party to the approval proceedings will not be allowed to raise the same issues in subsequent proceedings. It is for this reason that it is usual for trustees or office-holders to seek to join all interested parties or to seek representation orders so that all interests are before the court on the hearing of the approval application."

"171. As Snowden LJ points out, one size does not fit all. There is a wide spectrum of applications which may be made by trustees or office-holders and the nature of the approval they seek will vary. Inevitably, the factual background of each application will be different. It follows that the nature of any immunity which may arise is highly fact sensitive and must be considered with some care. There is no single answer to the question of whether subsequent proceedings will be barred."

The judgment is available [here](#).

128.9 Case Law - Supreme Court decision in R (on the application of Palmer) v Northern Derbyshire Magistrates Court and another (1 November 2023)

Supreme Court decision in R (on the application of Palmer) v Northern Derbyshire Magistrates Court and another (1 November 2023)

On 14 January 2022 the R3 Technical Team issued a technical alert to members titled 'The importance of filing a HR1 Form'. The alert was based on the decision in 'R v North Derbyshire Magistrates Courts and others [2021] EWHC 3013 (Admin)', which in essence held that Insolvency Practitioners ('IPs') can be criminally liable for not notifying the Secretary of State ('SoS') about proposed collective redundancies.

The technical alert, which provided a summary of the background to the case, can be found here.

Whilst the tension between insolvency law and employment law remains, the decision of the Supreme Court in this case will at least provide some comfort to IPs, being that an administrator of a company appointed under the Insolvency Act 1986 ('IA86') is not an 'officer' of the company within the meaning of section 194(3) of the Trade Union and Labour Relations (Consolidation) Act 1992 ('**TULRCA'**).

TULRCA

Section 188 of TULRCA deals with the employer duty to consult - requirements to consult beginning at least 30 days before the first of the dismissals takes effect if 20 or more employees are proposed to be made redundant at one establishment, increasing to 45 days if the number of proposed employees to be made redundant is 100 or more.

Section 193 of TULRCA creates an obligation on the part of the employer to notify the SoS of proposed redundancies with the same timings as set out in section 188 of TULRCA and before notice of the dismissals is actually given to the employees concerned.

Section 194 of TULRCA makes failure to notify the SoS of the intended redundancies a criminal offence. If a corporate body has committed an offence "(3)...with the consent or connivance of, or to be attributable to neglect on the part of, any director, manager, secretary or other similar *officer* of the body corporate, or any person purporting to act in such a capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly".

Decision of the Supreme Court

The appellant, Mr Palmer, who was one of three joint administrators of West Coast Capital USC Ltd, appealed the original decision to the Supreme Court, who had to consider whether an administrator was an 'officer' within the meaning of s.194(3) of TULRCA.

The Supreme Court made it clear that an administrator of a company appointed under the IA86 is not an 'officer' of the company within the meaning of section 194(3) of TULRCA.

The Supreme Court relied on the references to "officers" in the Insolvency Act itself, which are clearly distinct from the role of administrator, the decision of the Court of Appeal in re B Johnson Builders Ltd (1955) 1 Ch 634 that a receiver and manager (now an administrative receiver) is not an officer, and the wording chosen by Parliament for s194 TULCRA itself. Previous decisions in the Chancery Division that had allowed administrators and liquidators to look to the Companies Act as officers to seek relief from potential civil liability (now s1157 CA 2006) were wrongly decided.

As a consequence, an administrator cannot be held criminally liable where an employer commits the offence of failing to notify the SoS of large scale proposed redundancies within the specified time limits (or at all).

HOWEVER, whilst the decision provides some comfort to IPs, it does not mean administrators can choose to ignore the requirements under TULRCA in respect of notifications (ie the HR1 Form) whilst the company is in administration. The employer still has an obligation to notify, but the administrators will not be at personal risk of criminal liability under s194 of TULRCA.

Whilst a prospective administrator has no standing to submit Form HR1 on behalf of a company until appointed, at any pre-appointment stage of the IP's involvement, it is advisable to enquire of the directors whether they have considered the possible need to submit an HR1 and to point them towards legal advice as appropriate.

Following appointment an IP/administrator should assess whether redundancies are likely to occur. Form HR1 should be submitted immediately where 20 or more employees are proposed to be made redundant at one establishment. If the directors had already submitted Form HR1, IPs should check the information on the form remains correct and submit a further form if necessary.

Supreme Court judgment – Link.

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