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R3 TECHNICAL BULLETIN

Information issued by the General Technical Committee of the Association of Business Recovery Professionals to members, associates and new professionals

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Association of Business Recovery Professionals R3 Rescue Recovery Renewal

119.1

LEGAL ADVICE PRIVILEGE - JOHN LOUIS BULLOUGH; AND GEORGINA DOROTHEA MARY BULLOUGH V RBS [2019] CSOH 24 SCOTLAND

This decision of Lord Docherty in an action raised in the Commercial Court to reduce a personal guarantee summarises and confirms the law on waiver of legal advice privilege. It is a useful case to refer to when considering legal advice privilege.

The defenders, RBS, were granted commission and diligence to recover certain documents and the pursuers had produced documents in sealed confidential envelopes claiming legal advice privilege. In particular, the pursuers had lodged a redacted version of an attendance note prepared by their solicitor and RBS wanted to see the unredacted version.

RBS argued there had been an implied waiver of legal advice privilege in relation to the advice received. The pursuers had disclosed that legal advice had been received and the solicitor had explained the personal guarantee. There was therefore an implied waiver of legal advice privilege in relation to the legal advice given. It would be unfair to RBS if they were unable to put before the court the whole circumstances including the legal advice which the pursuers had received. The attendance note dealt with the circumstances in which the personal guarantee was signed. Reliance on and production of the redacted attendance note was partial disclosure of what had taken place at the meeting. The pursuers should not be able to pick and choose what to disclose. That would be cherry picking which would be misleading and unfair to the defenders.

The pursuers argued there was no implied waiver of the privilege either as a result of their averments or the lodging of the redacted attendance note. The pursuers had only confirmed that legal advice had been given and had not disclosed the content of that legal advice. The attendance note dealt with two matters which were clearly severable. First, what was said at the meeting attended by all parties which was not protected by privilege and second, the legal advice given by the solicitor privately to his clients which was protected by legal advice privilege. There was no question of partial or misleading disclosure.

Lord Docherty referred to the “clear and helpful” summaries of the law relating to waiver of legal advice privilege by the Inner House in **Scottish Lion Insurance Co Ltd v Goodrich Corporation and Others 2011 SC 534** and **Belhaj and Boudchar v DPP and Others [2018] EWHC 514** making the following points

- Waiver connotes the abandonment or giving up of a right;
- The abandonment may be expressed or inferred from the facts and circumstances
- Privilege is the right to resist compulsory disclosure of information and it exists to maintain the confidentiality of the information in question;
- Waiver will arise where it can be inferred that the person entitled to the benefit of privilege has given up his right to resist disclosure of the information in question. This will arise where the person’s conduct has been inconsistent with his retention of the right to maintenance of confidentiality that privilege is intended to protect;
- Waiver will arise where it can be inferred that the person entitled to the benefit of privilege has given up his right to resist disclosure of the information in question. This will arise where the person’s conduct has been inconsistent with his retention of the right to maintenance of confidentiality that privilege is intended to protect;
- Privilege can be waived for a limited purpose without being waived generally;
- Considerations of fairness may bear on an assessment of whether a person’s conduct has been inconsistent with the maintenance of confidentiality;
- Cherry picking concerns a policy or a strategy to use legal advice selectively to obtain a forensic advantage or an approach which might risk such arising;
- If a party waives privilege by deliberately deploying material in court proceedings that party also loses the right to assert privilege to material relating to the same subject matter. The underlying principle is one of fairness to prevent “cherry picking”;
- Privilege only protects information that is confidential and once information ceases to be confidential privilege cannot be claimed.

The question in this case was whether the pursuers' averment that legal advice had been obtained and the production of the redacted attendance note meant the pursuers had impliedly waived their right to insist on legal advice privilege in relation to the advice given and so must produce an unredacted version of the attendance note. The court found in favour of the pursuers.

The court confirmed that whether conduct gives rise to implied waiver is to be determined objectively. The pursuers' averments that they were not waiving privilege was not determinative of the issue although the subjective intention of the party whose conduct is being examined is relevant as part of the whole circumstances which have to be considered.

The court considered that the attendance note contained three different subject matters;

1. a record of what was said at the meeting attended by all parties,
2. a note of the fact that confidential legal advice was given and pursuers
3. notes recording the legal advice given.

Matters 1 and 2 were clearly not privileged but the court held that the subject matter in point 3 was privileged and was also "distinct and severable" from the parts of the note which had been disclosed.

The court held that there was no clear indication in the pleadings or witness summaries that the pursuers intended to rely on or otherwise deploy the content of the privileged legal advice. Neither the making of the averment nor the production of the redacted note involved the pursuers in relying on or otherwise deploying any part of the legal advice given. There had been no partial disclosure or cherry picking of the contents of the legal advice. There was nothing to indicate the pursuers were employing a strategy of using legal advice selectively to obtain a forensic advantage. The pursuers' insistence on legal advice privilege was not unfair.

In all the circumstances the pursuers had not impliedly waived their right to insist on legal advice privilege in respect of the documents RBS were seeking to recover. The court was not satisfied that the conduct from which RBS sought to infer waiver was inconsistent with the pursuers continuing to assert privilege. Nor was the court persuaded that the combination of that conduct and the assertion of privilege was likely to result in unfairness to RBS or mislead them or the court.

The Court did however comment that although at this stage the pursuers were not seeking to rely on the content of the advice given to them by their solicitor, that position may change and if that happened the position may require to be revisited

It seems that the pursuer may have won the battle but not necessarily the war.

CREDITORS' AND LIQUIDATION COMMITTEES PART 17, INSOLVENCY (ENGLAND AND WALES) RULES 2016 (IR16)

Committee-members' representatives

In accordance with **r17.17 IR16 (Rule)**, member of the committee (Member) may, in relation to the business of the committee, be represented by another person duly authorised by the Member for that purpose. At paragraph (5) of the Rule, there are a number of persons listed who cannot act as a representative, one of which is

'(b) a person who is at the same time representing another committee member'

However, the Rule fails address what action an Insolvency Practitioner (IP) is to take when, for example he/she receives, nominations for membership of a committee which name the same person as a representative of two or more of the proposed members.

Following discussions between R3 and the Insolvency Service, if a situation was to arise similar to the above it is recommended that the IP take a pragmatic approach by contacting each proposed or existing Member and the nominated representative to explain the Rule and the need for a new representative to be authorised by each Member. The original nominated representative is still able act but only for one creditor.

Scotland

The above approach will also apply to representatives of committee members under Scottish insolvency legislation, namely: –

Rule 3.84 'Committee-members' representatives' of the Insolvency (Scotland) (Company Voluntary Arrangements and Administrations) Rules 2018

Rule 10.17 'Committee-members' representatives' of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018

119.3

DATE AND TIME OF APPOINTMENT OF ADMINISTRATORS OUT OF COURT BY THE COMPANY OR DIRECTORS (R3.24(1)(J) OF IR16)

This rule sets out the information that a Notice of Appointment ('NOA') must contain, including *(j) the date and time of appointment of an administrator*, notwithstanding that, in accordance with Paragraph 31 of Schedule B1, the appointment can only be effective once the relevant statutory requirements have been met (i.e. the notice of appointment is filed in Court).

It is this provision that has caused uncertainty as when the appointment of an administrator takes effect and has resulted in three cases being brought in England. Summary below:-

NJM Clothing (HHJ Klein, Newcastle), March 2018

- Implied that the company or directors must have effectively appointed the administrator, before filing NOA at the Court;
- The time of filing could not, therefore, be simultaneous with the time of the appointment and that it was incorrect for the notice to state that the time of appointment is when filed at the Court;
- This judgment created ambiguity around how a NOA should be drafted to avoid being defective.

Towcester Racecouse (HHJ Matthews, Bristol), 2 October 2018

- NOA would not be defective if the date and time is stated the same as when filed at the Court;
- Comments by the Court were based on an assumption and the judgment was not binding.

Re Spaces London Bridge Limited (HHJ Nugee, High Court – London), 18 October 2018

- Two acts (1) the company/director's act of appointing an administrator and (2) filing of the NOA;
- Act 1 did not operate to appoint administrators as an appointment is only effective when Act 2 is actioned in accordance with paragraph 31 of SchB1 of IA86;
- The time of the appointment is a 'matter of supreme irrelevance' because it is not effective until the NOA is filed at Court;
- Accordingly, the requirement to state the date and time of the appointment was fulfilled by the Court inserting the date and time of filing on the NOA as happened in the old form-based system.

Conclusion

Most practitioners are adopting the approach of stating that the date and time of the appointment is the date and time of filing the NOA at Court. In the Spaces London Bridge Limited case the Judge included some suggested wording for inclusion in the NOA – "This appointment will take effect at the date and time specified below as the date and time the notice is filed." However, this approach requires the swearing of a statutory declaration which contains reference to an unascertainable date and time in the future.

The Insolvency Service has confirmed that practitioners should NOT insert the date and time of the appointment and leave this section blank. We understand a Dear IP is being drafted confirming this position and will be released in due course.

In the meantime, R3 will continue to promote the need for the provision to be removed from legislation to prevent future misunderstandings.

119.4

DEAL OR NO-DEAL BREXIT: IMPACT ON CROSS-BORDER CORPORATE RECOVERY AND INSOLVENCY

As members are aware, current EU regulations allow automatic recognition of UK insolvency procedures across the EU, and vice versa, and form a vital part of the UK's insolvency and restructuring environment.

Cross-border insolvency and restructuring within the EU are supported by the Recast Insolvency Regulation (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)). The Recast Insolvency Regulation contains, amongst other things, rules for the determination of a debtor's centre of main interests (COMI). COMI is a fundamental concept that determines whether the Recast Insolvency Regulation applies to a debtor and determines the jurisdiction for the opening of main insolvency proceedings.

Excluding Denmark, all EU member states are subject to the Recast Insolvency Regulation, requiring that, without any formality, each member state recognises insolvency proceedings commenced in another member state. This mechanism ultimately aids the realisation and distribution of assets of insolvent estates across Europe.

If the UK leaves the EU in a No-Deal scenario, UK insolvency proceedings would no longer be recognised automatically by the remaining EU member states. UK insolvency office holders would instead need to apply to the courts of each member state in which relevant assets may be located for recognition of their appointment and to seek the appropriate assistance in recovering or realising those assets. The consequences of seeking recognition would be additional time, costs and complexity to the realisation process. In addition, recognition will be dependent

A No-Deal scenario

In this scenario, the UK will lose its automatic recognition and EU member states would similarly lose automatic recognition in the UK. Therefore, it begs the question 'what is available for insolvency professionals?'

With regard to 'incoming' recognition requests from the EU (and other states) to the UK courts, the procedure will usually be covered by the **Cross-Border Insolvency Regulations 2006** (CBIR) which incorporate the **UNCITRAL Model Law** (Model Law). However, recognition via the CBIR still adds time, cost and complexity to the recognition process, as a court application is required. Recognition of insolvency proceedings is not automatic under the CBIR as it is under the Recast Insolvency Regulation. The aim of the CBIR is to give assistance in the UK where it is sought by a foreign court or foreign representative in connection with a foreign insolvency proceeding.

To equal effect, 'outgoing' recognition and assistance may be sought by UK insolvency office holders from the courts of a foreign state in relation to a UK insolvency proceeding where that foreign state has adopted the Model Law. UK insolvency office holders would need to apply to the courts of each member state in which relevant assets are located for recognition of their appointment and to seek assistance in recovering or realising those assets.

It was recently suggested at first instance in *Bakhshiyeva v Sberbank* of Russia [2018] EWHC 59 (Ch) that the objective of the Model Law is to assist in the development of 'universalism' and that the ultimate objective of 'universalism' is to provide a single forum applying a single regime to all aspects of a debtor's affairs on a worldwide basis. However, it was pointed out that the Model Law is only concerned with procedural matters and respects the differences between national procedural laws and does not attempt a substantive unification of insolvency law.

Legislation based on the Model Law has been adopted in a number of countries, including Singapore, Chile, Philippines, Greece, Canada, Australia, New Zealand, BVI, Poland, Romania, Japan, Slovenia, South Africa, as well as USA and the UK.

The Model Law has not been adopted by the UK's main EU trading partners and so will not be available to UK office holders when asking courts in those non-adopting states for recognition and assistance.

119.5

E-FILING, ADMINISTRATION – NOTICE OF APPOINTMENT

Members have queried as to when a Notice of Appointment, filed via E-Filing by the company or directors, outside the normal court hours takes effect as e-filing is available 24 hours a day.

The Electronic Working Pilot Scheme ('EWP') Practice Direction came into effect in 2015, initially in the London region. It now applies in all Business and Property Courts in England and Wales from 30 April 2019.

Electronic Working ('E-Filing') enables parties to issue proceedings and file documents online **24 hours a day** every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays.

E-Filing is a permitted means of electronic delivery of documents to the court for the purposes of **r1.46 of IR16.**

Rule 1.46 — Electronic delivery of documents to the court –

> (1) A document may not be delivered to a court by electronic means unless this is expressly permitted by the CPR, a Practice Direction, or these Rules.
>
> (2) A document delivered by electronic means is to be treated as delivered to the court at the time it is recorded by the court as having been received or otherwise as the CPR, a Practice Direction or these Rules provide.

Practice Directions

Practice Direction – Insolvency Proceedings ('PDIP')
Part Two: Company Insolvency

8. Administrations

8.1 *Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O -The Electronic Working Pilot Scheme, or to any subsequent Electronic Practice Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-paragraph (c) to notices of appointment made by qualifying floating charge holders, paragraph 2.1 of the Electronic Practice Direction 51O* ***shall not apply to any filing of a notice of appointment*** *of an administrator outside Court opening hours, and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply.*

8.2 *Paragraph 5.4 of the Electronic Practice Direction 510 provides that 'the date and time of payment' will be the filing date and time and 'it will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working'.*

Practice Direction 51O – The Electronic Working Pilot Scheme

Usage and operation of Electronic Working

2.1 *Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays, except—*

(a) where there is planned "down-time": as with all electronic systems, there will be some planned periods for system maintenance and upgrades when Electronic Working will not be available;

(b) where there is unplanned "down-time": periods during which Electronic Working will not be available due, for example, to a system failure or power outage, or some other unplanned circumstance; and

*(c) where the filing is of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the IR 2016 and the court is closed, in which case the filing must be in accordance with **r3.20 of IR16.***

2.2 *Electronic Working applies to and may be used to start and/or continue CPR Part 7, Part 8 and Part 20 claims, pre-action applications including applications under r31.16, insolvency proceedings, and arbitration claims in the Rolls Building Jurisdictions and in the Central Office of the Queen's Bench Division*

In the Rolls Building Jurisdictions from 1 October 2017—

(a) for a party who is legally represented, Electronic Working must be used by that party to start and/or continue any relevant claims or applications; and

(b) for a party who is not legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications.

Conclusion

Although E-Filing is available 24 hours a day, some have interpreted paragraph 8.1 of the PDIP to mean that E-Filing cannot be used to make any out of hours appointments. The General Technical Committee inclines to this view but it should be noted that others read it to mean that the restriction only applies to qualifying floating charge holders and, as such, directors can file a notice of appointment outside of court hours.

In the case Wright v HMV Ecommerce Limited [2019] EWHC 903 (Ch) the court was asked to confirm whether administrators were validly appointed following the directors filing a notice of appointment after the court office was closed. Whilst the Judge concluded that there is no question here of the administration appointment or any act of the administrators being nullified or automatically rendered a nullity or invalid; he did not confirm definitively that directors can make an out of hours appointment, but neither did he say that they can not.

In view of the perceived ambiguity we suggest the director's legal representatives file within the Court opening hours. However, directors who find they have to appoint an administrator outside of court hours should make an urgent application to have the appointment and any steps taken by the administrator ratified by the court at the earliest opportunity.

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119.6

NEW INSOLVENCY REGIME FOR FURTHER EDUCATION BODIES

A new insolvency regime for further education bodies in England and Wales came into force on 31 January 2019. It provides legal clarity as to how a further education or sixth form college would be managed should they become insolvent, and includes a special administration regime with an objective to protect student provision for existing students at an insolvent college.

The regime:

- applies aspects of existing insolvency law to further education bodies which are further education or sixth form college corporations in England or Wales so that they may become subject to a voluntary arrangement, administration, creditors' voluntary winding up, or winding up by the court

- also establishes a special administration regime for such further education bodies, known as education administration. This has a special objective to "avoid or minimise disruption to the studies of the existing students of the further education body as a whole" in the unlikely event that a college becomes insolvent and is initiated by a court application by the Secretary of State or Welsh Ministers

- creates a regime for the disqualification of college governors (or those acting as governors but not formally appointed) by modifying the Company Directors Disqualification Act 1986 to apply to further education bodies.

The provisions for the insolvency regime are set out in the **Technical and Further Education Act 2017,** the **Further Education Bodies (Insolvency) Regulations 2019** and the **Education Administration Rules 2018.** The Department for Education has published **guidance** that provides more information on the new regime.

Special administration regimes such as this provide modified procedures for sectors where the application of the normal rules of insolvency are not considered to be in the interests of public policy, for example where companies run key public infrastructure. They focus the duties of insolvency office holders on objectives set by Parliament, overriding the normal duty to act in the interests of creditors – usually this means ensuring continuation of service until transfer to another supplier. Examples of sectors covered by special administration regimes include energy transmission and energy supply companies, water and sewerage companies, banks and building societies, the railway industry, and postal services.

119.7

OFFICIAL RECEIVER'S GENERAL FEE – IS IT PAYABLE WHEN THIRD PARTY FUNDS ARE USED TO SETTLE THE BANKRUPTCY ESTATE?

The introduction of the Insolvency Proceedings (Fees) Order 2016[1] ('the Order') in July 2016 resulted in various changes to the structure of bankruptcy fees.

The Order provides that both the **administration fee** and the new **general fee** should be charged in all cases following the making of the bankruptcy or winding up orders.

Bankruptcy – official receiver's administration fee following creditor's petition

On the making of a bankruptcy order on a creditor's petition, for the performance of the official receiver's duties as official receiver the fee of —**£2,775**

Official receiver's general fee

On the making of a bankruptcy order or the making of a winding up order by the court for the costs not recovered out of the official receiver's administration fee of administering—

(a) bankruptcy orders,
(b) winding up orders made by the court

the fee of— **£6,000**

Following the reading of **paragraph 2 of the Order**[2], in particular the 'chargeable receipts' element, a member questioned whether the Official in particular the 'chargeable receipts' element, a member questioned whether the Official Receiver's general fee of £6,000 was payable in a situation whereby third party funds are used to settle the bankruptcy estate to effect an annulment, which results in no chargeable receipts in the estate.

The 'chargeable receipts' element of the Order only applies to the 'official receiver's administration fee' and therefore the Official Receiver's general fee is payable.

The Insolvency Service confirmed that the fee is payable and referred to **Dear IP No. 77** Chapter 15, Article 58 'Fees charged on Annulment of a Bankruptcy order', for further guidance. .

[1] Insolvency Proceedings (Fees) Order 2016

[2] *"official receiver's administration fee" means the fee payable to the official receiver on the making of a bankruptcy or winding up order out of the chargeable receipts of the estate of the bankrupt or, as the case may be, the assets of the insolvent company for the performance of the official receiver's functions under the Act.*

RELATIONSHIP BETWEEN INSOLVENCY PRACTITIONER AND AGENT

The case Brewer & Anor (as joint liquidators of ARY Digital UK Ltd) v Iqbal [2019] EWHC 182 (Ch) highlighted the relationship between an Insolvency Practitioner ('IP') and an agent, in particular the role of agent when providing expert valuation advice.

A requirement of SIP16 'Pre-packaged sales in administrations' in relation to the valuation of business and assets is as follows –

Valuation of the business and assets

The names and professional qualifications of any valuers and /or advisors and confirmation that they have confirmed their independence and that they carry adequate professional indemnity insurance. In the unlikely event that valuers and /or advisors who do not meet these criteria have been employed, the reasons for doing so should be explained.

The valuations obtained for the business or its underlying assets. Where goodwill has been valued, an explanation and basis for the value given.

A summary of the basis of valuation adopted by the administrator or the valuers and/or advisors.

The rationale for the basis of the valuations obtained and an explanation of the value achieved of the assets compared to those valuations.

If no valuation has been obtained, the reason for not having done so and how the administrator was satisfied as to the value of the assets.

Although the above highlights the requirement for confirmation of names, qualifications, independence and PI insurance, it does not address the need for an agent to confirm to the instructing IP the level of experience or relevant expertise in respect of the type of asset to be valued. This would provide the IP reassurance that the valuation is being provided by the appropriate agent.

IPs may wish to consider, when instructing an agent, to obtain their express confirmation that they have the relevant experience and/or expertise in the industry in which the company operates, and in the assets used in that industry and that they are qualified to undertake a valuation of those businesses and assets.

CASE LAW SUMMARIES

Global Corporate Limited v Hale [2018] EWCA Civ 2616 Court of Appeal

This Court of Appeal case overturned an unusual judgment in the High Court in relation to the payment of unlawful dividends.

In this case, the Director signed dividend certificates purporting to pay himself as shareholder by way of dividends. There were however no accounts showing distributable reserves against which those dividend payments could be made. The Court of Appeal held that the Director cannot then seek to assert that the payments had only been declared as dividends provisionally, or not at all, conditional on distributable reserves being available. The payments were expressly declared by the directors as interim dividends and taxed accordingly. The Court of Appeal concluded they were clearly distributions within the meaning of s830 Companies Act 2006 when they were made and that is the time when their legality must be tested. The Director/Shareholder also asserted that a counterclaim or set off could be advanced for quantum meruit payments in relation to unpaid remuneration. The Court of Appeal held that at best such a claim, if it could be made out, would be an unsecured claim in the Liquidation.

Practitioners will be aware that in unlawful dividend cases directors, shareholders, and their advisers often seek to assert defences of this nature. The Court of Appeal makes it clear that, unless the payments themselves can be re-characterised as payments for services lawfully made by the company prior to the liquidation (which in this case was not possible on the evidence) such defences are without merit.

Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd [2019] EWCA Civ 27

This Court of Appeal decision is likely to have a significant impact on companies in the construction industry in insolvent liquidation as unless there are exceptional circumtances they will not be allowed to use adjudication proceedings to pursue financial claims where there are claims and cross claim between the respective parties.

In this case, Bresco appealed to set aside an order of the High Court granting an injunction which prevented the continuation of an adjudication in which Bresco (in liquidation) and Lonsdale sought sums from each other in claims and cross-claims. The High Court determined that the basis for the injunction was Bresco's insolvency and Lonsdale's cross-claim.

The Court of Appeal upheld the decision of the High Court in granting the injunction, although on slightly different grounds. The High Court had held that the injunction was justified; firstly, as an adjudicator did not have the necessary jurisdiction to deal with a claim advanced by a company in insolvent liquidation and, secondly, as the decision of the adjudicator would be incapable of enforcement. The Court of Appeal held that technically an adjudicator would have jurisdiction to deal with a claim advanced by a company in insolvent liquidation but there would be no utility in allowing an adjudication and it would be futile for a number of reasons to refer claims by contractors in insolvent liquidation to adjudication where there is a cross-claim.

The Court of Appeal considered that there is a basic incompatibility between adjudication and insolvency. Upon Bresco entering into liquidation, the effect of r4.90 of IR86 (now replaced by **r14.25 of IR16**) was that the claims and cross claims between the parties were no longer capable of separate enforcement. They were replaced with a claim to a net balance following the taking of an account under the Insolvency Rules and that account could not be taken in adjudication proceedings.

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

The Court of Appeal has ruled that floating charges created within 12 months of a company's insolvency can only relate to the actual value of goods or services provided at the same time as or after the creation of the charge and not to any previously agreed fixed fee.

At the onset the liquidators claimed that a floating charge granted in respect of legal fees incurred by Candey was invalid under **s245(2)(a) of IA86**, which provides that when a floating charge is created within 12 months of a company's insolvency, it is invalid except to the extent of the value of any goods or services supplied at the same time as or after the creation of the charge.

The liquidators said that any such goods or services were to be valued by reference to the amount of money which could reasonably have been expected to be obtained for their supply in the ordinary course of business, in accordance with s245(6) of IA86. The High Court agreed with this approach; however, it ruled the value was the entire fixed fee amount of £3.8 million and not the amount valued by the liquidators (circa £1.2 million).

The liquidators appealed to the Court of Appeal who ruled that the floating charge was invalid except for the value of the services actually carried out after the creation of the charge. The valuation test to be applied is an objective one, considering the value of the actual goods and services provided. The Court of Appeal has remitted the exercise of valuing the services actually provided to the High Court, holding that the concept of provision of services in return for a fixed fee had to be disregarded because such a concept is incompatible with the valuation exercise under s245(6): a fixed fee is forward-looking (setting a fee in advance), whereas the valuation required under s245(6) is retrospective in that it requires an assessment of the work that has actually been done with the benefit of hindsight.

The underlying debt of the full fixed fee was unaffected, however. Candey could therefore make a claim as an unsecured creditor in respect of the amount of the fixed fee in excess of the value of the services as assessed by the High Court.

Devon Commercial Property Ltd v Barnett and another [2019] EWHC 700 (Ch)

The High Court has clarified the relationship between a mortgage borrower, lender and receiver, and the duties owed by receiver and lender to the borrower.

A lender has no duty to exercise his powers to sell, take possession or appoint a receiver, but when exercising their power of sale has a duty to the mortgagor to take reasonable care of the property and to obtain a proper price. A receiver also has a duty to the mortgagor to take reasonable care to obtain a proper price and may not remain passive if to do so would damage the interests of the mortgagor, but that does not require the receiver to await or effect any increase in the value in the property. When exercising the powers of sale and management, a receiver must act in good faith for a proper purpose (in this context, obtaining repayment of the debt).

Whereas a conflict of interest may arise where a lender sells to an associate unless it can prove the sale was in good faith and reasonable care was taken to obtain a proper price, a receiver does not have a conflict of interest or act in breach of any duties owed to the borrower merely by selling to a company linked to the lender.

It was also determined that to establish a breach of the duty of good faith, the burden of proof was on the borrower to show that the receivers had acted in bad faith or with improper motive.

NEW CONTACT DETAILS – HMRC (INDIVIDUAL VOLUNTARY ARRANGEMENTS ('IVAS') ONLY)

New contact details

Members should be aware that correspondence for IVA's should now be sent to:

HMRC
Elgin House
20 Haymarket Yards
Edinburgh
EH12 5WN

Phone Number – 0300 322 7838 – Helpline Times 09:00 to 15:00
Email address – vas@hmrc.gov.uk

Correspondence

Correspondence HMRC have asked that insolvency practitioners send correspondence either electronically or by post but not both. Their preferred method of receiving correspondence is electronically through the VAS email inbox.

If the same correspondence is submitted to the IVA team in more than one format i.e. post, email, fax, or a copy for each tax duty, then this duplication has a negative impact on their response time. In order that they can deal with all correspondence as quickly as possible, HMRC ask that you please send only one copy of your request to the team.

TECHNICAL ALERTS REMINDER

The R3 Technical Team have released the following alerts to members in 2019 –

- Tax Technical Alert – a number of important tax updates and messages from HMRC (20 March 2019) **Link**
- Disguised Remuneration Loan Charge – details on the loan charge, which came into effect on 5 April 2019 (2 April 2019) **Link**
- Modernised Insolvency Rules (Scotland) – the new Scottish Insolvency Rules came into effect on 6 April 2019 (5 April 2019) **Link**
- Disguised Remuneration Loan Charge – Part II – Guidance issued by HMRC on 18 April 2019 (24 April 2019) **Link**
- Insolvency Service - Redundancy Payments Service - Contact issues (10 July 2019) **Link**
- The Return of Crown Preference - Draft legislation for Finance Bill 2019-2020 (12 July 2019) **Link**

Caroline Sumner, Technical Director
Tel: 020 7566 4207
Email: caroline.sumner@r3.org.uk

Ben Luxford, Technical Manager
Tel: 020 7566 4218
Email: ben.luxford@r3.org.uk