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Tolley's Company Law and Insolvency

Bulletin Editor
Dr John Tribe
Kingston University

Dear Subscriber,

Welcome to the latest newsletter. First, I would like to wish a happy Christmas and a healthy and prosperous New Year to all the newsletter readers. Enjoy your festive break!

In this newsletter the analysis section contains five pieces. As the Serious Crime Bill winds its way through the legislative process, Laura Dunseath, senior associate, and Barry Vitou, partner and head of global corporate crime, at Pinsent Masons LLP consider the implications of the Bill and how it fits in with the Government's Serious and Organised Crime Strategy.

In the second analysis piece Patrick Bourke, member of the Lexis®PSL Commercial team considers what duties of confidence directors owe their companies after they have left office.

The court's decision in *Re Business Environment Fleet Street Ltd* highlights how important it is for administrators to properly analyse the circumstances they face to ensure the relief sought is appropriate and a relief the court has jurisdiction to give. In the third analysis piece Stephen Atherton QC of 20 Essex Street considers the issues.

What does the latest Comet Group case tell us about applications made by insolvency office-holders for information from third parties pursuant to the Insolvency Act 1986, s 236 (IA 1986)? Stephen Leslie, solicitor in the Lexis®PSL Restructuring and Insolvency team mulls on the issues in the fourth analysis piece.

In a series of guides highlighting areas of legislation that may not fall within the everyday work of insolvency practitioners, Mark Gleeson, partner, Rachel De Souza, associate, and Helen Kavanagh, professional support lawyer, of Squire Patton Boggs give guidance on key areas of data protection law that insolvency practitioners need to be aware of. This piece makes up the fifth and final analysis piece in this newsletter.

This newsletter contains two summary reports of case law apposite to the jurisdictions of insolvency law and company law.

Finally, the newsletter contains details on the new Small Business, Enterprise and Employment Bill and some new legislation coming into force in relation to Market Abuse.

I would be pleased to hear from subscribers who have any comments or suggestions regarding the content of this Newsletter, or any comments or queries on company law, insolvency law and practice and procedure in general in those areas. Letters which raise issues of interest may be published in the Newsletter. Please address letters to the editor of this newsletter: Dr John Tribe, Kingston Law School, Kingston University, Kingston Hill, Kingston upon Thames, Surrey, England, KT2 7LB, Email: j.tribe@kingston.ac.uk.

Dr John Tribe

Newsletter Editor

NEWS

(1) Insolvency Service publishes guidance on its complaints process

Guidance on its complaints procedure has been published by the Insolvency Service. The guidance set out the process for making complaints, what information should be included in complaints, what to do if you are not happy with the initial response to your complaint and what to do if your complaint remains unresolved.

You made be able to resolve the complaint by taking it up immediately with the person you have been dealing with, or their immediate manager. However, if you cannot resolve the problem there and then, you can write to:

- the local official receiver;
- the redundancy payments office manager;
- the deputy official receiver (for Long Term Asset Distribution and Debt Relief Order teams);
- the Companies Investigation (CI) supervisor; and
- the HQ section head.

Alternatively you can register a complaint online via the Insolvency Service website or phone the Insolvency Service. The following must be included in a complaint:

- your name and address;
- the name of the bankrupt or insolvent company, including the court reference if known;
- details of what has led to the complaint, if it is not about an insolvency case;
- copies of any correspondence or documents about your complaint;
- the name of the member of staff you first wrote or spoke to, and when, to help the Insolvency Service find the relevant information;
- details about what has gone wrong or has not been handled properly; and
- how you would like the Insolvency Service to resolve your complaint

The Insolvency Service will try to give a full written reply to your complaint within ten working days of receiving it. If this is not possible, it will send you a written acknowledgement within five working days, explaining why and telling you when you can expect a full reply.

If you are not satisfied with the initial response you should write to:

- the Senior Official Receiver responsible for the official receivers;
- the official receiver (for Long Term Asset Distribution and Debt Relief Order teams);
- the head of the Redundancy Payments Service;
- the director of Investigation and Enforcement Services; and
- the director of the HQ section involved.

If you remain dissatisfied with the response from the regional/corporate business services director, director of redundancy payments or inspector of companies, you may be able to ask the Adjudicator to look into your complaint. The Adjudicator is an unbiased referee who makes independent recommendations. You can contact the Adjudicator at:

- The Adjudicator's Office 8th Floor Euston Tower 286 Euston Road London, NW1 3US;
- Telephone: 0300 057 1111 or 020 7667 1832; or
- Fax: 0300 057 1212 or 020 7667 1830.

(2) Insolvency practitioner sanctions to be published in one place

In order to improve transparency in the regulatory regime for insolvency practitioners, all sanctions imposed on insolvency practitioners by regulatory bodies will be published in one location by the Insolvency Service. Responsibility for monitoring and discipline of insolvency practitioners rests with eight regulatory bodies. In addition, Common Sanctions Guidance has been published which aims to ensure that if findings against an insolvency practitioner are consistent, the outcome and sanction across regulatory bodies will be comparable.

Details of sanctions imposed on insolvency practitioners will be provided in an agreed format by the regulatory bodies. A summary of the misconduct, the details of the sanction and how the Common Sanctions Guidance has been applied will be provided in each case.

The information will be made available for 12 months and summarised as part of the Insolvency Service's Annual Review of Insolvency Practitioner Regulation.

The Common Sanctions Guidance gives details on:

- the various sanctions which can be imposed including both financial and non-financial sanctions;
- aggravating and mitigating factors – a sanction may need to be adjusted depending on the facts of particular cases. A disciplinary committee or tribunal will normally consider the number of aggravating and mitigating factors before it decides on the appropriate level of sanction;
- costs – disciplinary committees and tribunals have the power to order the insolvency practitioner to pay the costs incurred in investigating and considering a complaint;
- publicity – when a disciplinary committee or tribunal makes an adverse finding and order, the regulatory body will publish the record of decision in the manner it thinks fit. The insolvency practitioner will usually be named in that publicity. Disciplinary committees or tribunals will rarely order that there should be no publicity associated with an adverse finding.

(3) Insolvency Service changes Official Receiver process

From 1 December 2014 the Insolvency Service is changing the way the Official Receiver closes a case following completion of the case administration. The Official Receiver will no longer be applying for release as trustee or liquidator.

The closing notice letter including the notice of release and account summary will no longer be sent, ie the Official Receiver's notice of intention to apply for release (form NORAD) and account summary (form ACCSUM). The Service will also no longer send the Trustee Release, Letter to Bankrupt, stating it is applying for its release.

The changes are in line with the Service's commitment to simplify its processes as set out in the Insolvency Service annual plan 2014/2015, and is a result of feedback from stakeholders.

ANALYSIS

(1) The Serious Crime Bill – a corporate crime perspective

As the Serious Crime Bill winds its way through the legislative process, Laura Dunseath, senior associate, and Barry Vitou, partner and head of global corporate crime, at Pinsent Masons LLP consider the implications of the Bill and how it fits in with the Government's Serious and Organised Crime Strategy.

On 5 June 2014 the Serious Crime Bill was introduced to the House of Lords. This Bill is intended to give effect to a number of legislative proposals in the Serious and Organised Crime Strategy.

What are the most significant features of the Serious Crime Bill?

The government's Serious and Organised Crime Strategy included a number of statements about the causes, effects and methodology of organised crime including that:

'Criminals will seek to launder money through the financial sector, or use the services of lawyers or accountants to invest in property or set up front businesses. A small number of complicit or negligent professional enablers, such as bankers, lawyers and accountants can act as gatekeepers between organised criminals and the legitimate economy.' (para 5.20, Serious and Organised Crime Strategy)

This principle led to the most significant feature of the Serious Crime Bill from a corporate crime perspective, which is the 'participation offence' at clause 44 of the amended Bill. The offence is designed to target the professional and non-professional 'enablers' who facilitate the criminal enterprises of organised crime groups.

The Home Office has argued that the offence is required to pursue those in organised crime groups who 'ask no questions' and support organised crime at arm's length. The Home Office has stated that the offence is designed to supplement the existing conspiracy offence as the 'second tier' of an investigation, and contend that it is significantly different to the existing offences of encouraging and assisting crime contained in the Serious Crime Act 2007, ss 44–46.

What aspects of the Bill attracted most attention throughout the Bill's Reading?

When the Bill was first introduced, the wording of the proposed offence had the effect that a person would be guilty of the offence if they took part in activities knowingly, or with reasonable cause to suspect, that the activities were the criminal activities of an organised group, or would help an organised group to carry on criminal activities, with a view to directly or indirectly obtaining a gain or benefit.

The proposal received stinging criticism particularly and significantly from two of the most prominent professional associations in the UK, the Law Society and the Institute of Chartered Accountants in England and Wales (ICAEW), who each protested the Home Office's failure to consult with the professions in advance of the Bill being published.

The ICAEW went so far as to declare that the proposed legislation would not make it easier to convict 'crooked' professionals, and could in fact have a detrimental impact on the fight against organised crime by reducing the likelihood of professionals reporting suspicions. The ICAEW recommended that the clause was deleted from the Bill entirely.

The principle concern of both associations was the burden which would be imposed on businesses and professionals by the objective test of 'with reasonable cause to suspect' mental element. The concern was that this set a very low bar of which unwitting and naive professional advisors could fall foul.

How has the Bill changed throughout the Reading?

After a summer of successful lobbying by the Law Society and ICAEW, the clause was amended in October 2014 to the subjective test of 'reasonably suspects'.

What impact will this Bill have on criminal practice?

When enacted, this legislation will add another tool to the corporate crime prosecutor's toolkit. The scope of the offence in corporate crime terms goes beyond the professional advisors, and also targets the directors, senior officers and even third-party customers or suppliers who turn a deliberate 'blind eye' to the suspicious circumstances, e g a request to raise a dubious and unexpected invoice just before the year-end. It is currently difficult to prove these types of individuals are part of the conspiracy and so they often evade prosecution. The proposed offence would enable the prosecutor to target those individuals as well as the protagonists of the conspiracy.

The introduction of this offence will mean that everyone needs to be more vigilant and will have to ask more questions before acting upon suspicious requests. Professional advisors in particular will need to take even greater steps to know:

- who their client is;
- the purpose of the client's business; and
- the purpose of the activity which they have been instructed to perform.

For example, if the client is already under investigation in relation to previous business dealings, could the current and seemingly incidental advisory work actually be a furtherance of the criminal activities?

What should lawyers consider as this Bill proceeds towards Royal Assent?

In preparation for the enactment of this legislation, professional advisors should consider whether their existing client due diligence procedures are adequate and also develop an action plan to use should a reasonable suspicion arise.

(2) Directors and their obligations of confidence

Patrick Bourke, member of the Lexis®PSL Commercial team considers what duties of confidence directors owe their companies after they have left office.

This analysis piece follows the recent decision in *Eurasian Natural Resources Corp Ltd v Judge* [2014] EWHC 3556 (QB), [2014] All ER (D) 353 (Oct). The claimant (the company) alleged that the defendant (the director) had breached his duties as a director by sharing confidential information with the media. The director applied for summary judgment against the company and/or to strike out the company's claims. In the shadow of an investigation into the company's dealings by the Serious Fraud Office (SFO), the director asserted that the company had no chance of success and that he was entitled to retain the confidential information still in his possession. The High Court (Queen's Bench Division) ruled that the director was under no contractual or equitable duty to return the information sought by the company. It ultimately refused the director's application, however. The company's claims for breach of confidentiality and a permanent injunction could proceed.

What was the background?

The company, described as a 'leading diversified natural resources group', was a public company listed on the London Stock Exchange until November 2013. It was re-registered as a private company in January 2014.

The director was a non-executive director from 6 December 2007 until 5 June 2013. The term of the director's office expired each year on the date of the company's AGM. The director retired and offered himself for re-election at each AGM until the company's 2013 AGM, held on 5 June 2013.

Prior to the 2013 AGM, the company threatened to terminate the director's office for breach of his contractual and equitable duties. It never did. Instead, the director resigned from office at the AGM and did not seek re-election.

The SFO publicly announced on 25 April 2013 that it was investigating the company for allegations of fraud, bribery and corruption committed in Kazakhstan and Africa. The criminal investigation was continuing as at the date of judgment.

The director was subject to three sources of obligations relating to the use of information acquired in his capacity as a director:

- the Companies Act 2006 (CA 2006), including CA 2006, s 175 (which subsists after a director's office ends);
- equity, which arose both from the director's position as a fiduciary and the quality of the information and the circumstances in which it was imparted; and
- contract, in the form of his letter of appointment, which largely mirrored the relevant sections of CA 2006 in respect of duties owed to the company.

What was the dispute?

Upon the director retiring, the company demanded the return of all confidential information and undertakings not to use or disclose confidential information.

On the same day the SFO issued the director with its first notice pursuant to the Criminal Justice Act 1987, s 2 (s 2 notice). Three other s 2 notices followed. The notice issued on 21 June 2013 required the director to produce by 2 July 2013 all materials relating to the company and its subsidiaries from the date of his appointment.

The company pressed for the return of all confidential information held by the director. The director refused. He relied on his obligations under the s 2 notices and the company's inability to substantiate its demands.

A subsidiary issue arose about legally privileged information. The director agreed that such information should not be disclosed to the SFO but again the parties disagreed as to how it should be identified and isolated.

In the event, copies of the confidential information identified by the director were handed to the company's solicitors handling the SFO investigation. Those solicitors were different to the company's solicitors handling the dispute with the director. The process of identifying privileged information began in August 2013. That process was still ongoing as at the date of judgment. The judge recorded that the SFO's deadline had been extended to September 2013 but did not mention where that deadline now stood.

The company relied on three instances of the director misusing confidential information (leaks):

- first, disclosures to a journalist in September and November 2011 regarding the company's affairs;
- second, sharing internal e-mails with the Daily Telegraph in October 2012 regarding the appointment of the company's new CEO; and
- third, a disclosure to the Financial Times in July 2013 regarding the SFO's investigation.

The journalist in the first instance, in a 'somewhat curious incident', turned out to be an investigator posing as a journalist. The investigator was appointed by a third party, who the judge presumed to be connected with the company. The company suspected that one or more senior officials were misusing confidential information and were conducting their own investigation.

The director claimed to have known at the time that the journalist was an imposter and went along with the interview in order to expose the wrongdoing of certain other senior officials. He said he knew the information disclosed would not be published and (for appearances) only spoke to the journalist on the condition that anything he said would not be reported. As it turns out, nothing was reported from the meetings.

The disclosure in the second instance was said to be the basis for an article in the Daily Telegraph criticising the appointment of the company's new CEO. It quoted the director in the same terms as he had used to protest over the appointment in an internal email.

The disclosure in the third instance was said to be the basis for an article in the Financial Times reporting that the director had been issued with a s 2 notice.

The company sought an order for the return of confidential information and ancillary orders. It claimed that the director's conduct, namely the leaks and his refusal to cooperate, gave rise to an inference that he would not abide by his duties of confidentiality in the future.

In the lead up to the trial, the director offered to deliver the documents and information he held to a third-party escrow agent after he had discharged his obligations under the s 2 notices. This was also refused by the company. It maintained that the director had no right or need to retain the information.

What did the court decide?

Contractual duties

The company accepted that the director's letter of appointment did not contain an express obligation on him to return confidential information following the termination of his appointment. It therefore had to rely on an implied term.

Unlike the employee in *Brandeaux Advisers* (*UK*) *Ltd v Ruth Chadwick* [2010] EWHC 3241 (QB), [2011] IRLR 224, the director had good reason to seek to retain the documents and information he had been provided as a director. There was the quantity of information to consider as well as the director's ongoing obligations, particularly concerning the SFO investigation. The employee in Brandeaux was also in breach of an express term of her employment contract in retaining confidential information (and this justified her dismissal).

The implied term sought by the company was not justified in the circumstances. If the obligation was obvious, it should have been expressed in the director's letter of appointment. Nor did the evidence establish a practice whereby directors would return the confidential information they receive as a director at the end of their office. This was understandable given the practical difficulties involved, particularly where multiple directorships are held. 'Business efficacy' would not be achieved. There would be too much work (considering how information can be sent to, and stored in, multiple locations) for too little return.

Equitable duties

The director was not subject to a wider obligation of confidence, embracing a duty to deliver up the confidential information, based on his fiduciary duties. As recognised in *Vercoe v Rutland Fund Management* [2010] EWHC 424 (Ch), [2010] All ER (D) 79 (Jun), in the ordinary case, equitable duties of confidence will be coextensive with contractual duties.

Injunctive relief

Notwithstanding the absence of contractual or equitable obligations requiring the return of the confidential information, the court trying the case could make an equivalent order as part of, or in addition to, a permanent injunction to protect the company's confidential information.

For a judge to exercise their discretion in the company's favour, it would have to be satisfied that there is a real or arguable risk of disclosure by the director.

The court's function in this application is merely to decide whether or not the company has a real prospect of success in establishing that the director misused the confidential information.

Here the company's case was not so speculative that it should be struck out or summarily dismissed. By the director's own admission, he disclosed a 'considerable' amount of confidential information to the investigator posing as a journalist. It may not be believed that he participated on the basis that what he shared would not be reported. Further, it would be open to a court to conclude that there is a possibility that the director will disclose confidential information in the future. Much will depend on the evidence and the witnesses. There is also the ongoing SFO investigation to consider. There may be pressure from the media for the director to reveal more about the investigation.

What can commercial lawyers take from this case?

The facts of this case, particularly the circumstances of the director's alleged infidelity, may be unique. The underlying problems are not. The disintegration of the relationship highlights the challenges of managing confidential information, particularly in the case of directors. Companies and directors do not always part ways on friendly terms. Contractual, equitable and statutory duties must be complemented with policies and practices that ensure confidential information is confined to the intended recipients and uses.

Companies must communicate their expectations of directors, both during and after the term of their office, from the start. This begins with the letter of appointment.

It may be appropriate to provide for a broad obligation to return confidential information. There may difficulties in implementing the term in practice but the company can always pick and choose which information it requires to be returned. In the absence of the SFO's investigation, the judge may have been less impressed with the director's claim to possession of the confidential information. Perhaps a mechanism could be included for some information to be held for a company and a director by a neutral third party. Directors may have legitimate claims to confidential information to show that they have discharged their duties. A compromise should be achievable.

Then, thought needs to be given as to how confidential information is distributed to directors and managed thereafter, with one eye towards how it may be protected upon the termination of their office. The judge alluded to how company information can be initially sent to multiple locations, even outside of the company. Information can then be disseminated further still to other (private) e-mail accounts or other people entirely. Some information should be strictly controlled and limited to secure locations. Directors should be made aware that the information must not be copied or stored elsewhere (where applicable). Information should generally be kept to company e-mail accounts and the use of private and other external e-mail accounts should be discouraged. This might be widely accepted but it is not always practised.

A further difficulty that the company encountered here was knowing what information the director held. There should be transparency and accountability in this aspect of a director's duties as well. The information they receive will not always be limited to organised directors' meeting folders. They will receive information through informal channels as well. Movements in some information may need to be logged and stored.

Equitable duties are unlikely to take contractual duties any further in this context. Contractual duties will usually cover the field. Gaps may remain unfilled as a result. If, for instance, there is an expectation that a director should return confidential information then it should be spelt out in the relevant contract. Injunctions aside, the court did not countenance an equitable duty to return confidential information (even in circumstances where equity might augment contractual duties). An express duty is also preferable to relying on basic injunctive relief. There would be no need to prove that the information is likely to be misused. It is enough that the director holds the information.

As a final point, the certainty sought by companies in this area should be welcomed by directors. Parties minimise the possibility of a dispute when they communicate their expectations ahead of time. It is in a director's interest to ensure that they and their colleagues use confidential information correctly. It is integral to their (perceived) suitability to hold office as well as the functioning of their company. The distrust shown towards the director by others within the company, as manifested in the sting operation, should not have to be repeated.

(3) What should administrators consider before seeking relief?

The court's decision in *Re Business Environment Fleet Street Ltd* highlights how important it is for administrators to properly analyse the circumstances they face to ensure the relief sought is appropriate and a relief the court has jurisdiction to give. Stephen Atherton QC of 20 Essex Street considers the issues.

This analysis piece follows the recent decision in *Re Business Environment Fleet Street Ltd* (*In Administration*) [2014] EWHC 3540 (Ch), [2014] All ER (D) 334 (Oct). A company applied under the Insolvency Act 1986, Sch B1, para 72 (IA 1986) to dispose of certain assets. The Companies Court held that it had no jurisdiction to grant the application where it was not persuaded on the balance of probabilities that a chattel leasing agreement had given possession of the assets to the company.

What were the key features of this case?

The key features of the case were:

- the proper interpretation of the contract between the company (in administration) that owned the leasehold (and sublet serviced offices space to its tenants) and the company (within the same group of companies) which provided the staff, assets and ancillary services necessary for the business of providing serviced office space to operate; and
- as part of the process of contractual interpretation it was also necessary to characterise/classify the nature of the obligations and the true nature of the relationship created as between the parties to the contract by reference to the terms of the contract.

What were the issues in relation to the administrator's claim?

The administrators' principal application was for an order under IA 1986, Sch B1, para 72 as against the company which contended that it had title to the goods. Such an order, if made, permits an administrator of a company to sell assets which are in the possession of the company in administration under a hire-purchase agreement as if all the rights of the owner under the agreement were vested in the company.

The administrators also sought an order for the sale of the relevant assets under IA 1986, Sch B1, paras 67 and 68. Paragraph 67 provides that the administrator of a company (on his appointment) is permitted to take custody or control of all the property to which he or she thinks that the company in administration is entitled. Paragraph 68 allows the court (in certain circumstances) to provide an administrator with directions as to how he or she is to conduct the administration of the company.

As regards the first limb of the administrators' application the issues were as follows:

- Did the agreement in issue constitute a 'hire-purchase agreement'?
- In other words, did the agreement fall within the definition of such an agreement as contained in IA 1986, Sch B1, para 111, which is in

the following terms: ' "hire-purchase agreement" includes a conditional sale agreement, a chattel leasing agreement and a retention of title agreement …'?

- Did the agreement constitute a 'chattel leasing agreement' defined in IA 1986, s 251 as meaning: 'an agreement for the bailment …of goods which is capable of subsisting for more than 3 months'?

The essential question therefore was: Was the agreement a chattel leasing agreement, i e did a bailment exist in relation to the relevant assets and pursuant to that bailment was the company in administration in possession of the relevant assets?

It should also be noted that there was a long-running dispute as to which of the companies had title to the relevant assets.

How did the court approach the arguments in this case?

The court began by accepting that the issue as to title in the assets was not before it, but that for the purposes of the present application it had to assume that the assets were owned by the company against which the application had been commenced.

The court further accepted that the burden was on the administrators to establish that the relevant agreement was a 'chattel leasing agreement' and that therefore there existed a bailment of the relevant assets pursuant to which the company in administration had possession of those assets.

The court concluded that the following questions arose on the administrators' application:

(i) Did the court have jurisdiction under IA 1986, Sch B1, para 72 to grant the application? As a subsidiary question, did the assets come into the possession of the company in administration pursuant to a chattel leasing agreement?

(ii) Alternatively, did the court have jurisdiction under IA 1986, Sch B1, para 68 to grant the application?

(iii) If the answer to (i) or (ii) was yes, should the court in the exercise of its discretion, grant the application?

What did the court decide? And what is the significance of this decision?

The court concluded that it had no jurisdiction to make the order sought by the administrators under IA 1986, Sch B1, para 72. First, the court considered the proper interpretation of the relevant agreement (applying the now well established tenets of construction for commercial contracts). The court determined that the effect of the agreement was, on the balance of probabilities, not to give possession of the relevant assets to the company in administration. On the assumption that the relevant assets belonged to respondent company, either it had retained possession or it had transferred possession to the subtenants.

As regards, IA 1986, Sch B1, paras 67 and 68, the court concluded that it could not order the sale of the assets on the basis that the administrators (subjectively) thought that the assets belonged to the company in administration. If the effect of the relevant paragraphs was to enable the court to order a sale of assets in such circumstances this would confer on the court and the administrator an exorbitant jurisdiction to convert property belonging to third parties, simply because it happened to be desirable on the balance of convenience. Whether IA 1986, Sch B1, paras 67 and 68 were read on their own or in conjunction with IA 1986, s 234 (the effect of which is to relieve an administrator from a liability which he would otherwise have for conversion of a third party's assets where he has acted reasonably) they do not give the administrator licence to convert third-party chattels, nor do they serve to extend the court's limited powers (e g under IA 1986, Sch B1, para 72) to override the rights of third parties.

The court went on to consider whether, assuming it did have jurisdiction under one or other of the limbs of the administrators' application, in its discretion it should exercise that jurisdiction in favour of the administrators. By reference to a number of authorities relevant to the exercise of the court's powers under IA 1986, Sch B1, para 71 – which permits the court to enable an administrator to sell property which is subject to non-floating charge security –the court accepted that in exercising its discretion it had to embark upon a 'balancing exercise'. By reference to that balancing exercise, and on the facts of the case, the court concluded that even if it had had jurisdiction it was not satisfied that the balance of convenience lay in ordering an immediate sale of the relevant assets.

What are the practical lessons for restructuring and insolvency practitioners?

The case illustrates that it is important for administrators to subject the circumstances they face to proper analysis in order to ensure that the relief they are seeking is appropriate and is relief which the court has jurisdiction to give. And, assuming there is jurisdiction, that the circumstances are such that the court will grant the relief which they seek.

What are your final observations?

In the course of its reasoning the court applied the reasoning in a case (*Re David Meek Plant Ltd*; *Re David Meek Access Ltd* [1994] 1 BCLC 680) concerning the forerunner of IA 1986, Sch B1, para 71 (i e IA 1986, s 15 – now repealed) to the effect that the application of IA 1986, Sch B1, para 71 is not precluded by the relevant agreement having been terminated either before or during the administration.

In addition, the analysis of the Court of Appeal in *Re Atlantic Computers Systems Ltd* [1992] Ch 505, [1992] 1 All ER 476 (another case concerning IA 1986, s 15) as regards the identity of the party in possession, although referred to in the course of the hearing was not specifically addressed. However, by finding that the respondent company, as an alternative to the respondent company having possession of the relevant assets, may have parted with possession of the relevant assets to the subtenants of the company in administration, the court effectively distinguished *Re Atlantic Computers Systems Ltd* by reference to the facts of the case before it.

Stephen Atherton QC's practice comprises international and domestic corporate insolvency and restructuring, personal insolvency, company law, banking, general off-shore and international commercial litigation, civil aspects of international and domestic commercial fraud and international and domestic asset tracing. In *Re Business Environment Fleet Street Ltd* (*In Administration*), Stephen was counsel for the first and second respondents.

(4) Section 236 and third parties – striking a balance

What does the latest Comet Group case tell us about applications made by insolvency office-holders for information from third parties pursuant to the Insolvency Act 1986, s 236 (IA 1986)? Stephen Leslie, solicitor in the Lexis®PSL Restructuring and Insolvency team mulls on the issues.

This analysis piece follows the recent decision in *Re Comet Group Ltd* (*in liquidation*)*; Khan v Whirlpool* (*UK*) *Ltd* [2014] EWHC 3477 (Ch), [2014] All ER (D) 336 (Oct). Mr John Baldwin QC, sitting as a Deputy Judge of the Chancery Division, was faced with the issue of whether the court had jurisdiction to make an order for production of information and documents sought by the liquidators of Comet Group Ltd (Comet) against Whirlpool (UK) Ltd (Whirlpool) and Embraco Europe srl (Embraco) pursuant to an application made under IA 1986, s 236. If it did, the second issue for the judge was whether the court should exercise its discretion in favour of the liquidators.

The judge held that the court did have jurisdiction (once the liquidators confirmed they were content with a slight variation to the order originally sought). Further, taking all relevant matters into account, and being careful not to impose an unreasonable burden on the respondents, the judge ordered that the respondents provide to the liquidators the documentation sought.

Why is this case of interest?

For office-holders, this case provides some guidance as to what the court can and cannot order under IA 1986, s 236, and calls for some precision when drafting the application as to what relief is sought, to ensure that it falls within the court's jurisdiction.

This case also confirms that office-holders need to be as specific as possible as to the classes of documents sought, and that a fishing expedition will generally not be tolerated.

What does IA 1986, s 236 say?

IA 1986, s 236 forms part of the armoury available to administrators, administrative receivers, liquidators, or provisional liquidators to assist in their investigations into the assets, affairs and dealings of the company in respect of which they have been appointed.

Where appropriate, the office-holder can apply to court under this section seeking an order that an officer of the company, or any relevant third party, be summoned to appear before it to be questioned or, alternatively, that they provide a witness statement setting out their dealings with the company. The court may also order that any books, papers or records in that person's possession or control relating to the company or their dealings with it be delivered up to the office-holder.

What were the facts of the case?

Whirlpool was a supplier of white goods, including fridges and freezers to Comet. Embraco is a manufacturer and supplier of refrigeration compressors for use as components in fridges and freezers. Whirlpool and Embraco (together the respondents) form part of the same corporate group. Embraco supplied compressors to manufacturers of fridges and freezers within that group, who then in turn supplied them to Whirlpool.

In December 2011, the European Commission held that Embraco and its parent, Whirlpool SA had infringed Art 101 of the Treaty on the Functioning of the European Union by participating in a cartel between April 2004 and October 2007, and were fined circa €54m.

Comet considered that it might have a damages claim against the respondents as a 'victim' of the cartel, where it was believed that inflated prices might have been paid.

The liquidators' solicitors sent a letter before action to the respondents, quantifying the claim at just over £49m, and said that steps would be taken to issue proceedings in the event that no satisfactory response was received. That letter was met with a response to the effect that the claim was misconceived, and that Embraco could demonstrate that even direct customers of compressors were not harmed by the conduct of the cartel.

Further correspondence followed, including a request for disclosure from the respondents for sales data, input cost data and pricing methodology for the period from April 2004 to October 2007. Ultimately, the liquidators made their application to court pursuant to IA 1986, s 236 for production of this, asserting that it was needed in order to investigate whether (and, if so, to what extent) Comet suffered recoverable loss as a result of the cartel and to decide (for the benefit of Comet's creditors) whether or not to commence formal proceedings for damages.

What were the respondents' grounds of opposition, and what did the court decide?

The respondents opposed the liquidators' application firstly on the ground of jurisdiction, and secondly on the ground of discretion, with each ground made up of separate heads:

Jurisdiction

Head one

The respondents submitted that the court had no jurisdiction to order production of anything beyond material relating to the company itself, or its business, dealings, affairs or property, and that this therefore excluded any pricing information relating to third parties.

The judge held that this information may very well bear directly on the business and affairs of Comet, and that the court therefore had jurisdiction to order production of that specified information.

Head two

The respondents submitted that the jurisdiction to order production did not extend to anything other than books, papers and records, and therefore did not include 'information' as sought by the liquidators.

The judge considered that it was not appropriate to mix up requests for information and documents, and held that the court had no jurisdiction to order production of information other than pursuant to a summons to appear or via interrogatories or the submission of witness statements (ie in accordance with the Insolvency Rules 1986, SI 1986/1925, r 9.2 – the liquidators had not sought this relief). The judge did however agree that the liquidators could amend their application so as to seek documentation containing the sales and other data, which would then bring the request within the court's jurisdiction. The judge also made it clear that documents included documents in electronic form.

The respondents further submitted that the documentation sought should be framed by particular books, papers or other records in their possession or control.

The judge considered that this was a factor to be considered on the issue of discretion, not jurisdiction. If an applicant adequately describes documentation by reference to the subject matter it contains, that should be sufficient. In this case, the respondents knew what documentation they had – the liquidators did not.

Head three

The respondents submitted that the court has no jurisdiction to order production of documents which are not in the possession or control of the respondents.

The judge accepted that point, but that none of the documentation sought by the liquidators fell into that category.

Discretion

Head one

The respondents submitted that the documents sought were not reasonably required for the purpose contended, and that it was clear from the letter before action that the liquidators had already decided to issue proceedings. The real purpose behind their application was to seek early disclosure of documents and gain an unfair advantage in litigation.

Having taken into consideration the correspondence between the parties, the asymmetry of information between the parties and the difficulties in proving causation in cartel damages claims, the judge held that the liquidators reasonably required the documents sought in order to properly carry out their functions and obligations.

Head two

The respondents submitted that production of the documents would be oppressive.

The judge accepted that the court had no jurisdiction to order the respondents to provide a summary of the information sought, which was an option the liquidators had offered to the respondents.

The respondents made the following further submissions:

- The liquidators would have a clear and unfair advantage if they were to have available documents which would ordinarily only become available during disclosure or through witness evidence. The judge held that, in light of the admitted infringement by Embraco of the anti-cartel provisions, the only benefit was of early sight of the documentation, and that might lead to a saving of costs.
- The English courts might not have jurisdiction to hear and determine any cartel damages claim, and that Whirlpool had not admitted any wrongdoing and was a mere customer of the Whirlpool group. The judge held that this was an important factor when carrying out the balancing exercise.
- The order sought was extremely and unjustifiably wide and was in the context of a long period of time (three and a half years). The production of the documents would be burdensome and costly. The

judge was not impressed by the respondents' evidence on this point, which did not address the liquidators' detailed evidence to the effect that the respondents must already have collated the relevant documentation bearing in mind the cartel finding and the various claims arising from it. The judge further held that the classes of documents sought were sufficiently described by reference to their subject matter.

- As a cartel damages claim is variety of fraud, the claimant alleging fraud is required to prove their case. It was submitted that it is oppressive to use IA 1986, s 236 to run contrary to that requirement. The judge held that it was another important matter to consider, especially in relation to Whirlpool, although Embraco had admitted to being party to an infringing cartel.
- The respondents were third parties, and an order made pursuant to IA 1986, s 236 is more readily made against an officer or former officer of the insolvent company than a third party. The judge accepted that point, and that it would be taken into account, but that it did not carry as much weight. The aim of price fixing manufacturers' cartels is to achieve profits at the expense, usually, of retailers or consumers.

Having taken everything into account in conducting a balancing act, and being careful not to impose an unreasonable burden on the respondents, the judge held that it was appropriate to make the order sought (subject to the permitted amendment mentioned above). In doing so, the judge concluded that the benefit likely to be gained by the liquidators as a result of making the order substantially outweighed the burden likely to be imposed on the respondents.

What are the practical lessons for restructuring and insolvency professionals?

IA 1986, s 236 provides administrators, administrative receivers and liquidators with an important court-backed power of investigation into the assets, affairs and dealings of the company in respect of which they have been appointed. That extraordinary power must, however, be used reasonably, and the court will carry out a careful balancing exercise between the benefit to the office-holder, and the burden imposed on the respondent, as demonstrated in this case.

For office-holders, this case provides some guidance as to what the court can and cannot order, and calls for some precision when drafting the application as to what relief is sought, to ensure that it falls within the court's jurisdiction.

This case also confirms that the office-holder needs to be as specific as possible as to the classes of documents sought, and that a fishing expedition will generally not be tolerated.

Further, although the court cannot order summaries of documents to be provided (as held in this case), the willingness of an office-holder to accept these, or to otherwise come up with options to minimise the burden on the respondent, would appear to be in the office-holder's favour when it comes to the matter of discretion.

As a general rule, any indication that an office-holder has decided to issue substantive proceedings will cause them difficulties if they subsequently make an application pursuant to IA 1986, s 236. Care should therefore be taken in any pre-action communications.

For those advising respondents where production of documents is sought, it would appear to be important to properly consider what those documents are, whether those documents properly relate to the assets, affairs and dealings of the insolvent company (which is likely to be construed widely), whether those documents are in the possession or control of the respondent, and to discuss with the respondent what steps would need to be taken to produce those documents.

The office-holder should be asked to explain why the documents are required, and it is likely that the court would expect to see some evidence of engagement with the office-holder. In this case, the judge stated that the respondents had done nothing to help themselves in declining to respond positively to the liquidators' requests.

For further reading on this area of law, see Practice Note: Basic principles – the delivery-up of information and property to the insolvency office-holder.

(5) On the edge – data protection law for insolvency practitioners

In a series of guides highlighting areas of legislation that may not fall within the everyday work of insolvency practitioners, Mark Gleeson, partner, Rachel De Souza, associate, and Helen Kavanagh, professional support lawyer, of Squire Patton Boggs give guidance on key areas of data protection law that insolvency practitioners need to be aware of.

What are the main laws and regulations governing this area?

The Data Protection Act 1998 (DPA 1998) regulates the use of personal data. Personal data is data that relates to a living individual who can be identified from that data, or from that data and other information, is in the possession of, or is likely to come into the possession of, a data controller. It includes, but is not limited to, any expression of opinion about the individual and any indication of the intentions of a data controller or any other person in respect of the individual.

Examples of personal data which an insolvency practitioner dealing with the assets of an insolvent company may come across include employee records held by the insolvent company, customer lists, supplier contact information and individual creditor details.

In relation to insolvency practitioners' own practice, personal data processed will include records relating to the directors of the companies in respect of which they are appointed, lists of debtors, list of creditors and the dividend distribution to the creditors.

DPA 1998 is based around the following eight principles of 'good information handling' which give individuals (known as data subjects) specific rights in relation to their personal information and place certain obligations on those organisations (known as data controllers) that are responsible for processing the personal information:

Data protection principles

- personal data shall be processed fairly and lawfully;
- personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes;
- personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed;
- personal data shall be accurate and, where necessary, kept up to date;
- personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes;
- personal data shall be processed in accordance with the rights of data subjects under DPA 1998 (this includes a data subject's right to access his or her personal data held by a data controller by way of a data subject access request (DSAR));
- appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and
- personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or

> territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

Unless one of the limited exceptions applies, data controllers must be registered with the Information Commissioner's Office (ICO). It is a criminal offence under DPA 1998 for a data controller to process personal data without being registered.

Why is it relevant to insolvency practitioners? In particular, in what circumstances may liquidators or trustees in bankruptcy become data controllers?

In the course of an insolvency appointment (for example, as administrator of a company or trustee in bankruptcy), the insolvency practitioner will encounter a large array of data, some of which will be personal which will be caught by the provisions of DPA 1998. It is important for the insolvency practitioner (and their staff) to understand what personal data they hold and accordingly how they must treat it.

Data relating to directors

Licensed insolvency practitioners are required to keep records of their appointments. This includes keeping records relating to the directors of the companies in respect of which they are appointed. The insolvency practitioner has a duty, under the Company Directors Disqualification Act 1986 (CDDA 1986), to report to the Secretary of State in respect of the directors. This information is likely to be personal data and so needs to be dealt with in accordance with the requirements of DPA 1998.

Data relating to the insolvent entity or individual

The insolvency practitioner may also personally hold other information they have a duty to deal with, for example, list of debtors, list of creditors and the dividend distribution to the creditors and which may contain personal data. These records are kept by the insolvency practitioner and are not the same as the records of the insolvent company or bankrupt (although these may also be physically held by the insolvency practitioner).

Data held by the insolvent company

Under guidance issued by the ICO, 'A Guide to Data Protection', where an insolvency practitioner is appointed, they will also become the data controller of the personal data held by the insolvent company. This is because the insolvency practitioner will control the purpose and manner in which the personal data is processed by the insolvent company. The insolvency practitioner must therefore comply with the relevant requirements of DPA 1998 when dealing with personal data held by the insolvent company.

However, in the case of *Re Southern Pacific Personal Loans Ltd* [2013] EWHC 2485 (Ch), [2014] 1 All ER 98, the High Court challenged the view that an appointed insolvency practitioner will always become a data controller of the personal data held by an insolvent company. Southern Pacific Personal Loans Limited (SPPL) collected and retained a large amount of personal data and was a data controller within the meaning of DPA 1998. In September 2012, SPPL entered into liquidation. As a result, management companies, on behalf of borrowers who had taken personal loans from SPPL, made a large number of DSARs (see meaning above in the sixth data protection principle) against SPPL to determine whether borrowers had a claim against SPPL for mis-sold personal protection insurance. The liquidators applied to the court for directions as to the nature of their obligations and liabilities in respect of the DSARs.

The court distinguished between the activities performed by the liquidators being:

- those activities undertaken by virtue of their office as liquidator – i e not undertaken on behalf of the company in liquidation; and
- those performed as agents of the company in liquidation.

The court held that the insolvency practitioners are data controllers in relation to their activities in the first category. For example, where an insolvency practitioner receives and adjudicates upon proofs of debts submitted by those claiming to be creditors of the company, the insolvency practitioner does so as the liquidator and not as an agent of the company. Personal data will be processed and retained by the insolvency practitioner in the course of performing those duties. The court held that it therefore follows that the insolvency practitioner is required to register as a data controller in relation to these activities. However, insolvency practitioners were not data controllers in relation to activities performed as agents of the company in liquidation, which included responding to the DSARs. The liquidators' function, as agents for the company, replaced that of the directors of the company and directors were not considered to be data controllers.

The High Court ultimately decided that the liquidators were not data controllers within the meaning of DPA 1998, s 1(1) in respect of personal data processed by the company prior to its liquidation.

The court did not give guidance in this case as to the position of a bankruptcy trustee. In bankruptcy, the bankruptcy trustee is likely to handle personal data, such as bank account information, relating to the bankrupt individual. This data will have vested in the trustee by virtue of the trustee's appointment and so, following the SPPL case, it is likely that the trustee will be a data controller of this data. Bankruptcy trustees will therefore need to ensure compliance with DPA 1998 when handling the personal data in their possession.

Registration with the ICO

The insolvency practitioner should be registered as a data controller with the ICO in relation to personal data they hold in their capacity as data controller. Registration will include notifying the ICO what data processing the insolvency practitioner is carrying out and the type of personal data they store. The registration tends to be of a general nature (rather than specific to each appointment) and must be renewed annually. This must be distinguished clearly from the insolvency practitioner's firm's registration and is a personal registration in the name of the insolvency practitioner.

Failure to comply with DPA 1998

Failure to register with the ICO is an offence and may result in a fine. The ICO has enforcement powers under DPA 1998 which include:

- requiring the data holder to modify or delete personal data it holds;
- compelling the data holder to take various steps in relation to data processing; and
- imposing a fine of up to £500,000.

In addition, an individual can claim compensation for:

- damage caused by the breach; and
- distress if damage has occurred or the breach relates to processing for special purposes.

Could you give some examples of the type of insolvency situations where data protection issues arises?

Sale of the business or assets

Following appointment, an insolvency practitioner will likely look to dispose of the insolvent company's assets – this could include selling customer databases or transferring other assets which include personal data. Insolvency practitioners will need to be careful not to disclose personal information relating to the business or assets of an insolvent entity or individual in breach of DPA 1998 – for example, when undertaking any marketing activities as part of any sale.

Where a buyer of an insolvent company wishes to conduct due diligence and requires the disclosure of information relating to the insolvent company, steps should be taken to ensure that any disclosure of information complies with DPA 1998. The insolvency practitioner should identify the personal data that may be impacted by the transaction and determine whether the personal data needs to be disclosed. Where personal data will be disclosed, insolvency practitioners should ensure that the data will be kept secure by the buyer and seek to minimise disclosure as far as possible by redacting personal data and limiting the purposes for which any disclosed data can be used for.

Request for DSARs

DPA 1998 gives individuals rights of access to personal information held about them. An insolvency practitioner may receive DSARs in respect of either:

- information held by an insolvent individual or company prior to insolvency; or
- information held by the insolvency practitioner themselves arising from the insolvency.

The first data protection principle requires fair processing of personal data. This includes providing adequate and transparent information to data subjects about how their data is processed. Insolvency practitioners will need to ensure that fair processing notices, explaining the purpose or purposes for which the personal will be processed and information on who the personal data may be shared with, are provided to data subjects who request these. These will be particularly important where the insolvency practitioner sells personal data to a new data controller, for example, where personal data is included in the sale of an insolvent business to a third party.

Employees of the insolvency practitioner

Where an insolvency practitioner engages staff who, as part of their role, handle personal data, of which the insolvency practitioner is the data controller, the insolvency practitioner, rather than the staff member, will remain the data controller of that personal data. Even if an individual is given specific responsibility in relation to that personal data, they will be acting on behalf of the insolvency practitioner, who will remain the data controller. As part of their responsibility as a data controller, insolvency practitioners must ensure that staff understand the importance of protecting personal data, the insolvency practitioner's obligations under DPA 1998 and restrictions on the use of personal data. DPA 1998 also requires data controllers to take reasonable steps to ensure the reliability of any staff who have access to personal data.

How should selling data as an asset in the estate be treated differently from the sale of other types of assets?

Normally personal information should not be sold as an asset if the individuals have not been told originally that their information could be passed on to other organisations.

However, where a business is insolvent, DPA 1998 will not prevent the sale of data containing the details of individual customers, providing certain requirements are met. For example, the seller must ensure that the buyer understands that they can only use the information for the purposes for which it was originally collected. Personal information should not be used in a way that would be outside of the reasonable expectations of the individuals concerned. For example, selling the asset to a business for a different use is likely to be incompatible with the original purpose and likely to breach the first data protection principle. Where the buyer intends to use the personal data for any other purposes than for the purposes for which it was originally collected, consent for the new purpose will need to be obtained from each data subject. Any consent from a data subject must be freely given, specific and informed.

Where personal data is disclosed through the sale of the data as an asset of the company, an acknowledgement needs to be obtained from the buyer that the buyer will become the data controller of the personal data from the date of sale. Fair processing requirements under the first data protection principle require that information is given to all the data subjects to notify them that the buyer has taken over the personal data, the purposes for which the buyer intends to use the data and of their rights under DPA 1998. A sale and purchase agreement should normally contain an undertaking by the buyer to deal with such notifications.

How long should personal data be retained by insolvency practitioners and at what point can this be destroyed?

Under the fifth data protection principle, personal data processed for any purpose shall not be kept for longer than is necessary for that purpose. DPA 1998 does not specify how long is ‘necessary’. In practice, this means that the length of time personal data is kept will be dependent on legislation and good business practice and will need to be continually reviewed. In deciding how long to retain personal data, the insolvency practitioner will need to consider the purpose for which the data is held (with information that is no longer needed for the purpose securely deleted). Information should also be updated, archived or securely deleted if it goes out of date.

In *Re Southern Pacific Personal Loans Ltd*, when deciding what should be done with such data held by SPPL, the court gave weight to the fifth data protection principle. It held that as SPPL was only holding data relating to fully redeemed loans, which was no longer required for the purpose of administering those loans, liquidators were entitled to dispose of the information. However, two exceptions to this general principle were expressed by the court:

- that sufficient data should be retained to deal with the DSARs; and
- that sufficient data should be retained to deal with claims that have been/are received as proofs of debt in the liquidation.

The court held that the right course was to advertise for claims against the company, inviting claimants to submit proofs and setting a date by which such proofs must be lodged. Provided that adequate publicity was given to such notification and sufficient time allowed for the submission of proofs, the liquidators were entitled to proceed with the confidential destruction of records and distribution of assets without regard to any possible claims which had not been notified to them.

Is there a tension between the costs of compliance with data protection laws and the obligations to not deplete the funds available for distribution in an insolvency situation?

A number of tensions can arise when insolvency practitioners are trying to ensure that they maintain funds within the business, while complying with the requirements of DPA 1998. For example, often the costs of complying with the data protection principles – such as the requirement to process data in accordance with the rights of data subjects, the requirement to ensure that adequate security is in place to protect the personal data, and the requirement to process data fairly – can have a material impact upon the available distribution of funds to the creditors. These costs will need to be continually balanced against obligations not to deplete funds.

What steps can insolvency practitioners take to protect themselves from liability?

As stated above, insolvency practitioners should ensure they have registered with the ICO in their personal capacity when required.

Insolvency practitioners must adhere to the non-disclosure obligations contained in DPA 1998. There are some limited exceptions in relation to non-disclosure – for example, where disclosure is required by any enactment, rule of law or court order, such as information required to be disclosed by the Insolvency Act 1986, the Insolvency Rules 1986, SI 1986/1925 or CDDA 1986. Before disclosing any personal data, an assessment should be made to ensure the disclosure complies with DPA 1998.

Where personal data is disclosed through the sale of the data as an asset of the company, an acknowledgement needs to be obtained from the buyer in the sale agreement that the buyer will become the data controller of the personal data from the date of sale and will deal with any notifications to data subjects that they have taken over the personal data, the purposes for which the buyer intends to use the data and of their rights under DPA 1998.

As discussed above, where personal data is disclosed through the sale of the data as an asset of the company, an acknowledgement needs to be obtained from the buyer in the sale agreement that the buyer will become the data controller of the personal data from the date of sale and will deal with any notifications to data subjects that they have taken over the personal data, the purposes for which the buyer intends to use the data and of their rights under the DPA 1998.

What are the take away points?

- Personal data covers a wide range of information – basically, any data which relates to a living individual or from which an individual can be identified.
- All insolvency practitioners that are 'data controllers' (as defined in the DPA 1998) need to register with the ICO – ignore this at your peril, as it's an offence to process personal data unless the data controller is registered.
- Take adequate measures to protect personal data when disclosing information to third parties as part of any sales process – this may, for instance, require redaction of personal data or undertakings from the buyer to be included in the sale and purchase agreement to deal with the notifications to data subjects are required to be made under DPA 1998 on the sale of the business.
- Retain personal data only for so long as is needed for the purpose(s) for which it is being processed, and securely delete it when it is no longer needed for that purpose – your firm should follow a clear policy outlining when and how personal data should be stored, updated, archived and/or securely deleted.
- Your firm should implement a detailed data protection policy for dealing with personal data in connection with an insolvent company and bankrupt individuals – train your staff on what it says and on proper personal data handling practices. Your firm will also need to ensure that its internal functions that deal with personal information (eg HR, payroll and marketing) are similarly compliant.

CASE LAW

(1) Re Comet Group Ltd (in liquidation); Khan v Whirlpool (UK) Ltd [2014] All ER (D) 336 (Oct), [2014] EWHC 3477 (Ch)

In the Chancery Division, before Mr John Baldwin QC (Sitting as a Deputy Judge of the Chancery Division).

Winding up – Liquidator – Powers – European Commission holding respondent companies having participated in cartel – Retail company, Comet, having been supplied with goods by companies in cartel – Comet becoming insolvent and being wound up – Liquidators of Comet making application to examine documents to assist in deciding whether to pursue claim against respondents – Insolvency Act 1986, s 236.

Facts:

The first respondent company, Whirlpool, was a supplier of white goods including fridges and freezers. It supplied goods to one of the largest electrical retailers in the United Kingdom, Comet. The second respondent company, Embraco, was a subsidiary of Whirlpool. In December 2011, the European Commission held that the respondents had infringed Art 101 of the Treaty of the Functioning of the European Economic Area Agreement by participating in a cartel between April 2004 and October 2007. The scope of the cartel extended to the whole European Economic Area. Comet became insolvent and was wound up. Its liquidators applied to the court pursuant to s 236 of the Insolvency Act 1986 for information and documents which, they contended, they required to enable them to investigate and decide whether or not to pursue a claim in damages against the respondents. Comet's claim arose from the fact that Embraco had supplied refrigeration compressors, at prices believed to have been inflated by the cartel activity, to entities in the Whirlpool group, who had used them in the manufacture of refrigerators, which Whirlpool had supplied to Comet.

The respondents submitted that the order ought not to be granted, on grounds of jurisdiction and discretion. With regard to jurisdiction, they submitted that there was no jurisdiction to order production of: (i) anything extending beyond material relating to the company itself or to its promotion, formation business, dealings, affairs or property; (ii) anything other than books, papers or other records; and (iii) books, papers or other records that were not in the possession of or under the control of the respondents. With regard to discretion, the respondents submitted that the information/documents sought were not reasonably required for the purposes for which the liquidators contended, in that the liquidators had been clear in correspondence that they intended to issue proceedings and could not resile from that position. They invited the court to find that the true motive behind the application was that the liquidators sought early disclosure of documents without having to provide security for costs in any litigation and in order to place pressure on the respondents to settle the claims and/or to obtain an unfair advantage in the proceedings.

Held:

Taking all the relevant matters into account, and being carefully not to impose an unreasonable burden on the respondents, it was appropriate to make the order sought. Further, the benefit likely to be gained by the liquidators as a result of making the order substantially outweighed the burden likely to be imposed on the respondents (see para [42] of the judgment).

Cloverbay Ltd (*joint administrators*) *v Bank of Credit and Commerce International SA* [1991] 1 All ER 894 applied; *British and Commonwealth Holdings plc* (*joint administrators*) *v Spicer and Oppenheim* (*a firm*) [1992] 4 All ER 876 considered; *Re BCCI v Bank of America* [1997] BCC 561 considered; *Atlantic Computers plc, Re* [1998] BCC 200 considered.

Paul Greenwood (instructed by Stewarts Law LLP) for the liquidators.

Tom Smith QC (instructed by Cleary Gottlieb Steen and Hamilton LLP) for the defendants.

(2) Re Apcoa Parking Holdings Gmbh and other companies [2014] All ER (D) 221 (Nov), [2014] EWHC 3849 (Ch)

Chancery Division, Companies Court, before Mr Justice Hildyard.

Company – Scheme of arrangement – Jurisdiction – Company seeking order of court sanctioning schemes of arrangement – Whether court having jurisdiction to make order sought – Whether court should exercise discretion to make order – Companies Act 2006, Pt 26.

Facts:

The proceedings concerned nine corporate bodies (the scheme companies) in the Apcoa group (the group), which was a leading pan European car park operator. The scheme companies were not in a position to repay the facilities as required on the maturity date. The scheme companies were borrowers and guarantors of liability, pursuant to an existing senior facility agreement (SFA) (see [26] of the judgment). The relevant banking facilities matured and became repayable on 25 October 2014. In April 2014, the governing law and jurisdiction clause of the banking facilities had been changed from German law and jurisdiction to English law. The expert evidence was that (i) Regulation (EC) No 593/2008 (on the law applicable to contractual obligations) (the Rome 1-Regulation) enabled a change of governing law, that there was nothing in the existing SFA to exclude or preclude those changes. The scheme companies applied to the court to sanction schemes of arrangement to effect a restructuring which, they contended, was essential to avoid formal insolvencies. A foreign law expert concluded that the German court would recognise and give effect to the schemes. The restructuring proposed that existing priority senior lenders would be repaid or prepaid amounts outstanding to them under an existing senior facility agreement (SFA) by the issue of €275m of new debt and the grant of a new €50m bank guarantee facility, to be used to repay the principal facilities under a bank guarantee facility. It further proposed the issue of new debt in repayment of the remaining amounts outstanding under the existing SFA to existing priority senior lenders. Second lien lenders were to transfer their claims to the senior allocation lenders in return for a cash sum (see [28] of the judgment for details on the proposed restructuring). Four consenting lenders saw the schemes as preferable to the alternative outcome. Two creditors, FMS and Litespeed, opposed the scheme. FMS contended that an agreement (the turnover agreement) which was to encourage the introduction of new money facilities, created differences of legal rights against the relevant scheme companies and that FMS and Litespeed retained rights of priority, which those who had signed the turnover agreement had agreed to relinquish. Accordingly, FMS contended that that different interest required a separate class meeting. In September, orders were made convening meetings of creditors in each case, the court having determined that the composition of the class meetings proposed, namely a single class, was satisfactory. The class meetings were convened and the schemes were approved by the requisite majorities, pursuant to Pt 26 of the Companies Act 2006. The matter came back before the court for the purpose of obtaining the court's sanction for each scheme. The court declined to do so because of two features it considered to be beyond its jurisdiction. Amendments were made to the proposed schemes to address those two features and the court was again asked to sanction the schemes.

FMS contended firstly, that there ought to have been a separate class meeting. Secondly, whether the termination of the turnover agreement after the conclusion of a lock-up agreement, followed by the execution of a new turnover agreement, constituted a deliberate manipulation of the classes such as should preclude sanction of the schemes (the class manipulation point). Thirdly, FMS submitted that the court had no jurisdiction, under Pt 26 of the 2006 Act, to sanction a scheme which introduced a new obligation, which would go beyond the obligations of the scheme creditors under the existing SFA, namely to indemnify the issuer of new guarantees in respect of the future business of the Apcoa Group (the new obligations point). Fourthly, that, having regard to its cross-border recognition, the court should decline to sanction the schemes because the restructuring they were designed to enable would not be effective in Germany and would involve a breach of contract, in particular of an existing Inter-creditor Agreement (the existing ICA), which continued to be governed by German law and a German jurisdiction clause. It was contended that the changes of the governing law and jurisdiction clauses of the existing SFA had no real commercial purpose other than to persuade the English court to exercise its scheme jurisdiction and that was an insufficient connection for that purpose and an insufficient basis for the assertion of jurisdiction over foreign scheme companies and their mainly foreign creditors. Consideration was given to whether the scheme companies were 'liable to be wound up' under the IA 1986 (the 1986 Act), namely, whether there was a sufficient connection with England. The question arose as to whether, having regard to its cross-border recognition, the court should decline to sanction the schemes because the restructuring they are designed to enable would not be effective in Germany and would involve a breach of contract, and especially of the existing inter-creditor agreement (the existing ICA), which continued to be governed by German law and a German jurisdiction clause (the German Issue).

Held:

(1) The authorities made clear that the court had to give full weight to the decision of the creditors, acting in their capacity as members of the class in which they were voting. It was not sufficient for the court to determine that it would not have reached the same decision as the creditors themselves reached. In the absence of some procedural or jurisdictional hurdle, or of some blot on the face of the scheme itself, the court should only decline to sanction a scheme if an intelligent and honest member of the relevant class acting in respect of his interest could not reasonably have approved it. The court's role was not to substitute its own assessment of what was reasonable for that of the creditors. The principal jurisdiction question at the convening hearing was normally the identification of the appropriate classes for the purpose of convening meetings to vote upon the scheme proposals; but other matters going to the jurisdiction of the court might also be raised, and it was obviously optimal that any such matters be adjudicated, if possible, since if the court lacked jurisdiction there was no point in any class meetings at all. A class had to be confined to those persons whose rights were not so dissimilar as to make it impossible for them to consult together with a view to their common interest. The starting point was to identify the differences in legal rights as against the company and personal interests or objectives in the case of particular creditors, and then to determine whether, if there were differences in rights, they were such as to make impossible sensible discussion with a view to the common interest of all concerned. The modern approach was to break the question into two parts, and ask first whether there was any difference between the creditors in point of strict legal right,

and only to proceed to the second question, at the convening stage, if there was; and if there was, to postulate, by reference to the alternative if the scheme were to fail, whether objectively there would be more to unite than divide the creditors in the proposed class, ignoring for that purpose any personal or extraneous interest or subjective motivation operating in the case of any particular creditor(s). The fact that a member of a class comprised of persons all with the same legal rights had a different interest did not preclude it from being included in and voting in that class, although that separate interest might lead the court to consider that the decision of the class was not in its interests, and on that basis to refuse to sanction the scheme as a matter of discretion (see [41]–[43], [45], [47], [48], [52], [54], [128]–[130] of the judgment).

In the present case, the risk of imminent insolvency would have caused reasonable existing SFA creditors to unite in a common cause. Reassurance could be taken from the fact that at least four consenting lenders, who had nothing to gain from the turnover agreement, saw the schemes as plainly preferable to the alternative outcome. In all the circumstances, there was sufficiently more to unite than divide all creditors within a single class so as to make further classes unnecessary (see [107], [117], [118] of the judgment).

In all the circumstances, there had not been sufficient reason demonstrated as to why the court should not accept the decisions of the meetings as representative, commercially sensible and fair (see [202] of the judgment).

Alabama, New Orleans, Texas and Pacific Junction Rly Co, Re [1891] 1 Ch 213 applied; *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 applied; *English, Scottish and Australian Chartered Bank, Re* [1893] 3 Ch 385 applied; *Real Estate Development Co, Re [1991] BCLC 210* applied; *Hawk Insurance Co Ltd, Re* [2001] 2 BCLC 480 applied; *Equitable Life Assurance Society, Re* [2002] BCC 319 applied; *Telewest Communications plc, Re*; *Re Telewest Finance* (*Jersey*) *Ltd* [2004] EWHC 1466 (Ch) applied; *Drax Holdings Ltd, Re*; *InPower Ltd, Re* [2004] 1 BCLC 10 applied; *Telewest Communications plc, Re*; *Telewest Finance* (*Jersey*) *Ltd, Re* [2005] 1 BCLC 752 applied; *Hellenic & General Trust Ltd, Re* [1975] 3 All ER 382 considered; *Stocznia Gdanska SA v Latreefers Inc* (No 2) [2001] 2 BCLC 116 considered; *T&N Ltd, Re* (*No 3*) [2007] Bus LR 1411 applied.

(2) The proposition that the English court's jurisdiction did extend to the variation or release of claims against third parties designed to recover the same loss was entirely logical and necessary to protect schemes from being undermined by such collateral claims. But that proposition did not extend to the imposition of new obligations, even where the obligations could be said to be similar to existing ones arising in a tripartite context. The imposition of a new obligation to third parties was very different from the

release in whole or in part of an obligation to such third parties. More generally, obligations might not be imposed under a scheme of arrangement under Pt 26 of the 2006 Act: in creditors' schemes. It was likely that the jurisdiction existed for the purpose of varying the rights of creditors in their capacity as such, and not imposing on such creditors new obligations (see [149], [164] of the judgment).

It was not necessary or wise to express a final view in respect of the new obligations point, save for acknowledging that the court felt especial unease in imposing new and more extensive obligations in the context of a cross-border scheme and on dissentients (see [166] of the judgment).

Lehman Brothers International (*Europe*) (*in administration*) (*No 2*)*, Re* [2009] All ER (D) 83 (Nov) considered.

(3) The court was not persuaded that the turnover agreement created new rights against the relevant scheme companies. The answer to the class manipulation point lay in the court's approach to the class constitution issue. In all the circumstances, the class manipulation point did not provide any separate or sufficient reason for refusing sanction of the schemes (see [173], [174] of the judgment).

(4) All that had to be established to engage the jurisdiction of the court under Pt 26 of the 2006 Act, was whether a company was 'liable' to be wound up under the 1986 Act. It was not necessary for the purposes of s 895 and for Pt 26 to be engaged for grounds for a winding up to exist. To engage the jurisdiction of the court under Pt 26 of the 2006 Act, was whether a company was liable to be wound up under the IA 1986, it was not necessary for the purposes of s 895 and for Pt 26 to be engaged for grounds for a winding up to exist in any cross-border context, it is important that the court should not trespass over the boundaries of comity by applying its jurisdiction in an exorbitant way (see [213], [214] of the judgment).

The court accepted the expert evidence on jurisdiction. The schemes offered the means of enabling a restructuring which was necessary to avoid insolvency in the interests of all creditors. They were fair, and had been approved at properly constituted classes at which those approving the schemes were acting in a manner reasonably considered to be in the interests of that class. The change of governing law was understood and intended to enable such a result. The changed choice of law was not alien or indiscriminate or such as could not reasonably have been contemplated by commercial parties aware of the Rome 1-Regulation. The court was satisfied that it was proper to proceed on the basis of a valid choice of English law and jurisdiction and that, in all the circumstances, the same faith and credit should be accorded to that choice as if it were the original choice. There was a sufficient connection to warrant and justify the exercise of the court's jurisdiction under Pt 26 of the Act. In all the circumstances, there was no real reason to doubt that the schemes would be recognised and enforced in the relevant EU jurisdictions, and, accordingly, the court, in giving sanction, should not be acting in vain (see [231], [253], [255] [256], [261] of the judgment).

Re Reodenstock applied.

FMS's arguments based on German law did not provide any sufficient basis for the court to decline to sanction the schemes. It followed that each of the schemes would be sanctioned (see [9], [276], [279], [282] of the judgment).

William Trower QC and Adam Goodison (instructed by Clifford Chance) for the scheme companies.

David Allison QC (at the Convening Hearing) and Jeremy Goldring QC (at the sanctions hearing) (instructed by Kirkland and Ellis International LLP) for Centerbridge.

Richard Snowden QC and Daniel Bayfield (and Adam Al-Attar at the sanctions hearing) (instructed by Jones Day) for FMS.

LEGISLATION

(1) Small Business, Enterprise and Employment Bill

A Bill to make provision about improved access to finance for businesses and individuals; to make provision about regulatory provisions relating to business and certain voluntary and community bodies; to make provision about the exercise of procurement functions by certain public authorities; to make provision for the creation of a Pubs Code and Adjudicator for the regulation of dealings by pub-owning businesses with their tied pub tenants; to make provision about the regulation of the provision of childcare; to make provision about information relating to the evaluation of education; to make provision about the regulation of companies; to make provision about company filing requirements; to make provision about the disqualification from appointments relating to companies; to make provision about insolvency; to make provision about the law relating to employment; and for connected purposes.

(2) Financial Services and Markets Act 2000 (Market Abuse) Regulations 2014, SI 2014/3081

The prohibition on market manipulation set out in the Financial Services and Markets Act 2000 (FSMA 2000) is extended until the new civil regime on market abuse under the EU Market Abuse Regulation takes effect on 3 July 2016. The prohibition would otherwise cease to apply on 31 December 2014.

The Regulations amend FSMA 2000, ss 118(9) and 118A(6), and add new sub-s (10) to s 118.

FSMA 2000, Pt 8 (Penalties for Market Abuse), sets out the UK civil prohibition on market abuse.

The effect of the amendments is to change the date on which ss 118(8), 118A(2) and (3), and the definition of 'regular user' in s 130A, which class particular forms of behaviour as market abuse for the purposes of FSMA 2000, are due to expire from 31 December 2014 to 3 July 2016.

Correspondence about this bulletin may be sent to Victoria Burrow, Content Acquisition and Development Specialist, LexisNexis, Lexis House, 30 Farringdon Street, London EC4A 4HH (tel: +44 (0)20 7400 2707, email: victoria.burrow@lexisnexis.co.uk). If you have any queries about the electronic version of this publication please contact the BOS and Folio helpline on tel: +44 (0)845 3050 500 (08:00–18:00 Monday – Friday) or for assistance with content, functionality or technical issues please contact the Customer Service teams between 08:00–18:30 Tel: +44 (0)800 007777; Email: contentsupport@lexisnexis.co.uk

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