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Tolley's Company Law and Insolvency

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Dear Subscriber,

Welcome to the latest newsletter.

Following the news section this newsletter contains four analysis pieces from LexisPSL Restructuring and Insolvency. The first piece considers what the *Small Business, Enterprise and Employment Act 2015* (*SBEEA 2015*) will mean for restructuring and insolvency practitioners. Phillip Sykes, Baker Tilly's London head of restructuring and recovery, and Mark Sands, personal insolvency expert and partner at Baker Tilly, consider the likely implications of the new legislation.

The second analysis piece is from Stephen Leslie, a solicitor in the LexisPSL Restructuring and Insolvency team. Stephen's piece considers the following questions following the judgment in *Clarke v Cognita Schools Ltd* [2015] EWHC 932 (Ch), [2015] All ER (D) 17 (Apr): Where an application to set aside a statutory demand is dismissed on the papers, should the order contain a statement that the applicant has the right to apply to have the order set aside, varied or stayed? And if it should—but does not contain such a statement—what is the effect of that order?

In the third analysis piece the Lexis®PSL Restructuring & Insolvency team analyse the Deregulation Act 2015 (DA 2015) as it affects insolvency legislation.

Finally the 2015 budget is considered in the context of insolvency. 18 March 2015 saw George Osborne's Budget speech, heralded by Mr Osborne announcing that 'Britain is walking tall again' and promising to 'use whatever additional resources we have to get the deficit and the debt falling'. Patrick Cook, a partner and head of corporate turnaround

and insolvency, and Richard Clark, a legal director, both at Burges Salmon LLP, examine what the drivers behind the hyperbole might mean for the insolvency community.

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

Finally, the SBEEA 2015 is considered in outline.

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) Law Society highlights implications for solicitors of new business Act

The use of bearer shares will be prohibited and there is now a requirement for beneficial owners to disclose their ownership of the company to the company. These are among a number of broad changes introduced by the SBEEA 2015, which also amends existing legislation such as the Companies Act 2006 (CA 2006) and insolvency legislation.

The Law Society has highlighted the implications for solicitors of the SBEEA 2015, which regulates a number of aspects of business, including:

- appointment and disqualification of directors;
- insolvency;
- company filing requirements; and
- aspects of employment law.

A new provision in CA 2006 requires companies to maintain a register—which will be open to public inspection—of people with ‘significant control’ over the company. If someone wishes to see the register, they must state the purpose for which the information will be used, and the company may apply to the court to refuse access if the purpose is an improper one.

A new insolvency procedure is also introduced, to include the regulation of new professional bodies which authorises the practice of insolvency practitioners. The requirement for office holders and creditors to hold physical meetings in every instance has been removed.

There are also new reporting responsibilities for administrators, receivers and liquidators, including a requirement to prepare conduct reports about directors when the company becomes insolvent.

The Law Society urges members to familiarise themselves with the legislative changes in order to understand how they affect their practice and enable them to provide up-to-date advice to their clients.

(2) Insolvency Service: Director disqualifications 1 April 2015

A number of directors have been disqualified from being directors following investigations by the Insolvency Service.

Disqualifications

- Perdeep Kumar Bhatti has given a ten-year bankruptcy restrictions undertaking for disposing of assets to the disadvantage of his creditors.
- Seven restaurant bosses and a supermarket owner have been disqualified as directors for employing illegal workers as waiters, cooks and butchers in breach of UK immigration laws.
- Rafiuddin Ismail, otherwise known as Rafiuddin Ahmed Ismail, has received a 14-year bankruptcy restriction for being involved in a scheme linked to VAT fraud and for submitting wrongful VAT reclaims to HMRC.
- Robert Andre Jones and Amanda Louise Jones have been sentenced to two and a half years in custody and 18 months' suspended for two years respectively for fraudulently removing £129,875.71 from their company's bank account.
- Dr John Edward Hammond, previously trading from Park House Dental Practice, was ordered by Leicester County Court to be bound by restrictions set out in bankruptcy proceedings for an extended period of 14 years for taking and misusing money from investors with little prospect of recouping the investment.
- Glenn Andrew Delaney, Robert John Shillaker and Gareth Donald Onions, all directors of marketing service companies, have been disqualified for a combined total of 24 years for causing or allowing the companies to trade to the detriment of HMRC, including not paying due taxes.

- Colin James McKenzie, director of Blaina Manufacturing Ltd, has been disqualified from acting as a director for six years for failing to disclose company assets following liquidation, and for breaching agreements the company had entered into with the Welsh Government.

Liquidations

- APW Asset Management Ltd, which sold Australian wines to clients for investment and capital growth purposes, has been wound up by the High Court after making baseless claims which misled investors.
- Portman Chandlers Limited, which claimed to be an international investment business and contacted investment scam victims promising reclamation of their money, has been ordered into liquidation in the High Court for a lack of transparency in its management, and failure to maintain or deliver up adequate accounting records.
- Legal Support and Assistance Limited has been ordered into liquidation in the High Court on grounds of public interest following an investigation by the Insolvency Service.

(3) Chancellor announces case migration from Registrars to Central London County Court to reduce court waiting times

In an effort to reduce the current long waiting times to appear before a Registrar in the High Court, the Chancellor, in consultation with the court users committee, has agreed that certain cases that would usually appear before a Registrar in the High Court may now be transferred to the Central London County Court and be heard before a District Judge.

The Chancellor has produced a note setting the criteria upon which cases will be transferred. It should be noted that all winding-up petitions should continue to be issued in the High Court. The High Court will decide on any reallocation if appropriate. All bankruptcy petitions must be listed and allocated in accordance with the Insolvency Rules 1986, SI 1986/1925, r 6.9A. All High Court proceedings which are to be listed before a registrar in accordance with the Practice Direction—Insolvency Proceedings will continue to be issued and listed in the Royal Courts of Justice sitting in the Rolls Building.

With effect from 6 April 2015 certain proceedings will be issued and heard in the County Court sitting in Central London, such as applications to restore to the Register, among others. This will take effect from 6 April 2015.

The full text of the note is as follows:

Note on listing and criteria for the transfer of work from the registrars to the County Court sitting in Central London.

1 All winding-up petitions must be issued and listed for initial hearing in the Royal Courts of Justice sitting in the Rolls Building.

2 All bankruptcy petitions must be listed and allocated in accordance with the Insolvency Rules 1986, SI 1986/1925, r 6.9A.

3 Save as provided above, all High Court proceedings which are to be listed before a registrar in accordance with the Practice Direction—Insolvency Proceedings will continue to be issued and listed in the Royal Courts of Justice sitting in the Rolls Building. In each case consideration will be given by a registrar at an appropriate stage to whether the proceedings should remain in the High Court or be transferred to the County Court sitting in Central London.

4 When deciding whether proceedings which have been issued in the High Court should be transferred to the County Court sitting in Central London, the registrar should have regard to the following factors:

   a the complexity of the proceedings;

   b whether the proceedings raise new or controversial points of law;

   c the likely date and length of the hearing;

   d public interest in the proceedings; and

   e (where it is ascertainable) the amount in issue in the proceedings.

5 As a general rule, and subject to para 4(a)–(d) above, where the amount in issue in the proceedings is £100,000 or less, the proceedings should be transferred to the County Court sitting in Central London.

6 Subject to para 4(a)–(e), the following will be transferred to be heard in the County Court sitting in Central London:

   a private examinations ordered to take place under the Insolvency Act 1986, s 236 or 366 (but not necessarily the application for the private examination);

   b applications to extend the term of office of an administrator (Insolvency Act 1986, Sch B1, para 76);

   c applications for permission to distribute the prescribed part (Insolvency Act 1986, Sch B1, para 65(3)); and

- d applications to disqualify a director and applications for a bankruptcy restrictions order where it appears likely that an order will be made for a period not exceeding five years.

7 With effect from 6 April 2015 the following proceedings will be issued and heard in the County Court sitting in Central London:

- a applications for the restoration of a company to the register (CA 2006, s 1029ff);
- b applications to extend the period allowed for the delivery of particulars relating to a charge (CA 2006, s 859F); and
- c applications to rectify the register by reason of omission or mis-statement in any statement or notice delivered to the registrar of companies (CA 2006, s 859M) or to replace an instrument or debenture delivered to the registrar of companies (CA 2006, s 859N).

ANALYSIS

(1) Small Business, Enterprise and Employment Act 2015—restructuring and insolvency

What will the SBEEA 2015 mean for restructuring and insolvency practitioners? Phillip Sykes, Baker Tilly's London head of restructuring and recovery, and Mark Sands, personal insolvency expert and partner at Baker Tilly, consider the likely implications of the new legislation.

SBEEA 2015 is intended to ensure that the UK continues to be recognised as a trusted and fair place to do business and to open up new opportunities for small businesses to innovate and compete. It includes provisions to give small businesses greater access to finance sources, increase transparency around who owns and controls UK companies, require the payment practices of the UK's largest companies to be reported and introduce new insolvency measures to prohibit and limit certain aspects of pre-pack sales if deemed necessary.

SBEEA 2015 will make changes allowing the Secretary of State to allow, prohibit or impose conditions on the sale of assets by an administrator to connected persons—what is the reason for this change and what do you think will be the likely impact?

Phillip Sykes: This is a reserve power that has been taken by government in connection with Teresa Graham's report into pre-pack administrations (pre-packs) for the Department of Business, Innovation and Skills (BIS). The Graham report recommends the creation of an independent body called the Pre-Pack Pool, the establishment of which is now well under way. The intention is that where a connected party—usually one or more

of the directors—want to buy back their business through a pre-pack, they will approach the pool for an independent review of the proposed deal prior to it being completed. The report to creditors on the administration in accordance with SIP 16 will confirm whether such an independent review was carried out and whether or not the pool sanctioned the deal.

While such a review is not mandatory, the report to creditors will be expected to disclose the reasons why the connected party decided not to approach the pool for sanction.

The pool is likely to come into action over the course of the summer and should impact positively on public and stakeholder perception of the legitimacy of pre-packs.

The intention is to promote transparency and reduce public concerns about this kind of transaction. The insolvency profession and BIS will be monitoring progress and, subject to that being satisfactory, BIS have said that they would not intend to legislate further. However, the reserve power to enable him to intervene remains available to the Secretary of State should it be needed.

What changes are being made to the position of creditors and why? What practical implications will they have?

Mark Sands: Currently, there is a requirement to hold physical meetings with creditors in most cases. The changes prohibit physical meetings except where creditors request them and also allow creditors to opt out of being sent paperwork regarding insolvencies. This is aimed to reduce unnecessary costs associated with meetings being held where, for example, no one turns up, as well as large amounts of paperwork being printed and sent that simply isn't read. While in principle these changes will be welcomed, the balance will be in making sure creditors can still have meetings and paperwork if they want to.

The new rules provide that creditors representing at least 10% in number or value or 10 creditors in total (ie any one of these criteria) can require a meeting to be held so in most cases it should require only a relatively small number of creditors. Creditors will want reassurance, though, that they will be able to find out who the other creditors are—otherwise garnering the support of 10% of creditors would be a difficult task.

A major consideration is section 98 and paragraph 51 meetings. A section 98 meeting is the meeting of creditors immediately after the company is placed into creditors' voluntary liquidation and at which the liquidator's appointment is confirmed by the creditors. This is the time when creditors can:

- ask questions of the directors, and

- influence who is appointed as liquidator.

A paragraph 51 meeting is the equivalent in administration proceedings where creditors discuss and vote on the administrator's proposals.

The concern that we have is that fewer of these meetings will actually happen—potentially resulting in less creditor engagement and less scrutiny of directors' conduct.

Company voluntary arrangement (CVA) and individual voluntary arrangement (IVA) meetings will continue to be held in all cases. These meetings are held to decide whether to approve the proposals put forward by a company (CVA) or individual (IVA) for a compromise arrangement with their creditors; the outcomes are binding on all creditors so it's to be welcomed that these are still to be held physically. Having said which, there may be a case for the changes being introduced in due course for IVA meetings as many are usually not well attended by many creditors, if any at all, especially in cases when all debts are consumer debts (e g credit cards) and taxes.

What changes are being made to office-holder actions and what are the objectives behind these changes?

Mark Sands: SBEEA 2015 introduces changes that enable administrators to bring wrongful and fraudulent trading claims without a company first being placed into liquidation, and to allow liquidators and administrators to assign these and certain other claims.

The first of these changes is in part in connection with the extension of administrations to up to two years from the current 18 month time limit. This is a move to be welcomed as there are sometimes good reasons why a company cannot yet proceed into liquidation. I hope we will as a result see more actions being brought, and more quickly, for the benefit of the creditors.

As for the potential assignment of these claims, litigation is expensive and funding options are sometimes limited so BIS believes that the ability to assign such a claim will ensure that fewer actions are hindered by a lack of funds and this may lead to more certain and quicker returns to creditors. Time will tell and there are still uncertainties as to exposure for legal costs for administrators and liquidators where they assign office-holder actions as opposed to company actions.

(2) Setting aside a statutory demand—what should the order say?

Stephen Leslie is a solicitor in the LexisPSL Restructuring and Insolvency team In this piece he considers the following questions following the judgment in *Clarke v Cognita Schools Ltd* [2015] EWHC 932 (Ch), [2015]

All ER (D) 17 (Apr): Where an application to set aside a statutory demand is dismissed on the papers, should the order contain a statement that the applicant has the right to apply to have the order set aside, varied or stayed? And if it should—but does not contain such a statement—what is the effect of that order?

The appellant bankrupts applied for their bankruptcy orders to be set aside. This was on the basis that the orders dismissing their applications to set aside the statutory demands served on them did not contain a statement notifying them that they could apply to have the dismissal orders set aside, varied or stayed, which they submitted was required pursuant to the Civil Procedure Rules 1998, SI 1998/3132, 3.3(5) (CPR). Because of that, their applications to set aside the statutory demands were said to be outstanding at the time that the bankruptcy petitions were presented, meaning that the petitions should not have been presented in the first place and therefore that the bankruptcy orders should not have been made.

In dismissing the appeals, Newey J held that orders dismissing applications to set aside statutory demands—where such orders were made on the papers—did not have to notify the applicants that they could apply to have the orders set aside, varied or stayed. Even if he was wrong on that point, the absence of such notification did not mean the application to set aside the statutory demands could be said to be outstanding.

Briefly, what were the facts of this case?

Mr and Mrs Clarke were served with statutory demands by a judgment creditor.

Applications to set aside the statutory demands were made by Mr and Mrs Clarke on the ground that there was a discrepancy on the figures. However, their applications were dismissed on the papers pursuant to rule 6.5(1) of the Insolvency Rules 1986, SI 1986/1925 (IR 1986) as they showed no sufficient cause.

The judgment creditor subsequently presented bankruptcy petitions against Mr and Mrs Clarke, and bankruptcy orders were in due course made against them on those petitions. This was notwithstanding the district judge's view that the debt alleged in the petitions was overstated.

What were the legal issues that the judge had to decide?

There were two issues that Newey J had to decide:

1 whether the orders dismissing the applications to set aside the statutory demands should have contained a statement notifying Mr and Mrs Clarke that they could apply to have those orders set aside, varied or stayed (the first issue), and

2 if so, whether the absence of such a statement meant that the applications to set aside the statutory demands were still outstanding at the time that the bankruptcy petitions were presented (the second issue).

In order for the appellants to be successful on the appeal, they needed the judge to find in their favour on both issues.

What were the main legal arguments put forward?

The Insolvency Act 1986 (IA 1986), s 267(2) sets out the conditions that must exist at the time that a bankruptcy petition is presented. This includes the condition that there is no outstanding application to set aside a statutory demand served in respect of the petition debt (IA 1986, s 267(2)(d)).

The first issue

The appellants submitted that an order made pursuant to IR 1986, SI 1986/1925, r 6.5(1)—that is, an order made on the papers solely by reference to the application—is an order made pursuant to CPR 3.3(4), which states that the court 'may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations'. CPR 3.3(5) provides that any such order must contain a statement notifying a party affected by the order that they may apply to have it set aside, varied or stayed.

Given that there is no equivalent provision in IR 1986, and that the CPR applies to insolvency proceedings by virtue of IR 1986, SI 1986/1925, r 7.51A (subject to certain savings and modifications which did not apply in this case), the appellants submitted that an order made pursuant to IR 1986, SI 1986/1925, r 6.5(1) must comply with CPR 3.3(5) and contain the required statement.

The second issue

The appellants then developed their submission further, stating that, because the orders in this case setting aside the statutory demands did not contain the required statement, the orders would not be effective as they stood. That in turn meant that their applications to set aside the statutory demands were still outstanding at the time that the petitions were presented, contrary to IA 1986, s 267(2)(d).

What did the judge decide, and why?

The first issue

The judge stated that CPR 3.3(5) is in terms tied to CPR 3.3(4). In this case, the orders dismissing the set aside applications were made pursuant to IR 1986, r 6.5(1), and not CPR 3.3(4), so that CPR 3.3(5) had no

application in this case. Further, the dismissal of a set aside application simply means that a creditor can present a bankruptcy petition—it does not necessarily follow that a bankruptcy order will be made, and the debtor may still be able to dispute liability for the petition debt within the bankruptcy proceedings.

The judge therefore held that an order made pursuant to IR 1986, SI 1986/1925, r 6.5(1) does not have to state that the debtor can apply to have that order set aside, varied or stayed.

The second issue

Despite having found against the appellants on the first issue—which was sufficient to dispose of the appeal—the judge went on to consider the second issue, in the event that he was wrong on the first issue.

The judge held that an order which omits a statement required by the CPR must, at least in general, be effective unless and until set aside. That proposition derived support from the decisions in *Isaacs v Robertson* [1984] 3 All ER 140, and *Re Mid East Trading Ltd* [1998] 1 All ER 577.

Additionally, in the context of IA 1986, s 267(2)(d), the judge referred to *Ahmad v Commissioners of Inland Revenue* [2004] EWHC 2292 (Ch), [2004] All ER (D) 435 (Jul) in which the existence of a pending appeal against the dismissal of an application to set aside a statutory demand was held not to mean that the set aside application was outstanding—the application had failed and had been dismissed, and the presentation of a petition whilst the appeal was pending was not prohibited.

Taking the above into account, the judge held that, even if an order made pursuant to IR 1986, r 6.5(1) did have to contain the statement required by CPR 3.3(5), the absence of such a statement did not affect the validity of the order—it would be valid unless and until set aside—and the application to set aside the statutory demand could not be said to be outstanding.

In coming to his decision, the judge identified the serious implications that would result if the position was different. In that event, it could mean that numerous bankruptcies would be open to challenge, and could render nugatory orders made in ordinary civil proceedings which overlooked the requirements of, among others, CPR 3.3(5).

To what extent is this judgment helpful in clarifying the law in this area?

The argument made by the appellants in relation to CPR 3.3(4), (5) appears to have been a novel one, so in that respect the law has not been clarified as such. However, to the extent that any other debtor is thinking of challenging an order made pursuant to IR 1986, SI 1986/1925, r 6.5(1)

on the same grounds, the judgment is relatively unequivocal and clear in terms that such challenge will be unsuccessful.

This case also reiterates that a court order, once made, will ordinarily be effective unless and until it is set aside, even if the order does not necessarily comply with the CPR.

What practical lessons can those advising take away from the case?

The judgment mentions that Mr and Mrs Clarke had not received the orders from the court dismissing their set aside applications. Although not directly linked to the decision in this case, if you are acting for a debtor who applies to set aside a statutory demand, it is worth enquiring with the court, say, a couple of weeks after issuing the application to find out its status. Upon receiving an application to set aside a statutory demand, the court will either dismiss it pursuant to IR 1986, SI 1986/1925, r 6.5(1) as in this case, or it will list the application for a hearing pursuant to IR 1986, SI 1986/1925, r 6.5(2). That is not necessarily to say that Mr and Mrs Clarke or their advisers did not make any such enquiry in this case.

Another point to take away is that, while the CPR does in the main apply to insolvency proceedings, decisions in such proceedings are often made by reference to specific insolvency provisions, and would seemingly be given primacy. Therefore, if any challenge to a decision of the insolvency courts is contemplated by reference to the CPR, practitioners should first identify the basis upon which the order to be challenged was made.

Finally (and, again, not necessarily to say that the petitioning creditor in this case did not do this), petitioning creditors who have served a statutory demand on a debtor should ensure that the appropriate checks are carried out prior to the presentation of a bankruptcy petition to ensure, so far as possible, that there are no outstanding applications to set aside the statutory demand upon which the petition is based. This is particularly so given that the petitioning creditor may not be informed that such an application has been made. Although debtors would usually be advised to give notice to the creditor that they had made an application, in accordance with IR 1986, SI 1986/1925, r 6.5(2), the first time that a creditor may become aware of the application would be once a hearing of the application has been listed. As part of presenting a bankruptcy petition, the petitioning creditor will need to confirm with a statement of truth that, to the best of their knowledge and belief, the statutory demand has not been set aside and no application to set it aside is outstanding.

(3) The Deregulation Act 2015 for insolvency professionals

The Lexis®PSL Restructuring & Insolvency team analyse the DA 2015.

DA 2015 received Royal Assent on 26 March 2015. DA 2015 applies to a huge range of regulations in the UK—its purpose being to try to reduce the administrative burden on businesses, organisations and individuals by repealing a raft of legislation which is no longer of practical use.

In terms of insolvency and restructuring, DA 2015 only touches upon a small portion of the insolvency legislation. Some of the Act comes into effect in May 2015, the rest is to be brought into effect by way of separate statutory instruments.

The Lexis®PSL Restructuring & Insolvency team has published a Practice Note, The Deregulation Act 2015, which pulls out the parts of DA 2015 that apply to insolvency legislation and explains the key points that insolvency professionals need to know.

We set out below in brief, and in detail in the attached full note, where DA 2015 affects insolvency legislation specifically.

The applicable insolvency sections

There are two sections and one schedule that apply to insolvency in DA 2015:

- section 17—authorisation of insolvency practitioners;
- section 19—insolvency and company law: miscellaneous; and
- Schedule 6—insolvency and company law.

In summary the main changes relating to insolvency are:

- the ability for insolvency practitioners (IPs) to gain only partial authorisation, either over a company or an individual rather than both as the case currently is;
- the Secretary of State will no longer directly authorise insolvency practitioners—in future, all IPs will be authorised by recognised professional bodies;
- clarification on who is required to be served with notice of administration;
- a change to the after acquired property provisions regarding the use of bank accounts by bankrupts;
- amends to allow a company or director to appoint an administrator despite the presentation of a winding-up petition, if the petition was presented during an interim moratorium;
- amendments concerning the procedure around appointing interim receivers and special managers in bankruptcy;

- amendments to the Company Directors Disqualification Act 1986 to allow the Secretary of State to obtain information direct from any person without requiring authority from the office holder; and
- amends to allow the release of an administrator where the unsecured creditors' only interest is in the prescribed part.

(4) The Budget 2015—impact for the insolvency community

18 March 2015 saw George Osborne's Budget speech, heralded by Mr Osborne announcing that 'Britain is walking tall again' and promising to 'use whatever additional resources we have to get the deficit and the debt falling'. Patrick Cook, a partner and head of corporate turnaround and insolvency, and Richard Clark, a legal director, both at Burges Salmon LLP, examine what the drivers behind the hyperbole might mean for the insolvency community.

Further austerity as the key theme

Few can mistake the intent behind statements such as:

> 'no short term giveaway can ever begin to help people as much as the long term benefits of a recovering national economy …I said we would turn Britain around—and in this last Budget of the Parliament we will not waiver from that task.'

Osborne's message is clear: he expects to continue to make cuts to public finances in order to balance the books and will not be making 'unfunded spending' or 'irresponsible extra borrowing'. His announcements make clear that Britain needs to make an extra £30 billion of savings by 2017/18. Of that, he expects £13 billion to come from government departments, £12 billion from welfare savings and £5 billion from measures designed to prevent tax avoidance, tax evasion and aggressive tax planning. Although he has not—understandably, due to the impending election—stated where the axe will fall, fall it will. At the same time these Keynesian ideals are being pursued, it is also likely that interest rates will not rise significantly, not least because a financial recovery (and any inflation it brings) will help the government to reduce the deficit more quickly. Let's take a look at expected trends from these themes of the Budget, should Osborne and his cohorts be re-elected.

Benign deflation—a new challenge?

With one of the key themes from the Budget speech being cuts and deficit reduction, market commentators have started to question whether the spectre of 'benign deflation' is becoming an issue.

'Benign' deflation occurs where the relative unit price of goods or services reduces due to improvements in technology or better management practices. 'Malign' deflation, on the other hand, occurs where average prices decrease due to lack of demand.

Where does one begin and the other end, however? The protracted and unprecedented nature of this downturn—even now with inflation forecast at 0.2% and a GDP increase of 2.3% for 2015/16—raises some questions which should set alarm bells ringing. Have producers and suppliers of goods and services, in seeking to increase demand, taken efficiency and cost reduction measures to a stage where consumers of those goods and services now expect prices to stay at that level? Does the relatively stagnant level of wage inflation mean that—should the cost of production rise—consumers will not have the flexibility within their budgets to keep consuming at the same level? Equally, does the plethora of cost-saving measures employed by producers to reduce their pricing mean that, should things come to the crunch, the cupboard is bare when looking at the traditional methods of restructuring businesses through cost savings and efficiency drives?

Added to these micro-level factors, a further question remains as to what tools for economic policy remain within the Chancellor's arsenal should the present benign growth in GDP and employment not continue? With historically low interest rates and a consumer inclination to save extra increments of income, the impact of monetary (reduction in interest rates) and fiscal (tax reductions) stimulus may not be enough to counter a downturn in economic confidence and could even—in the medium term—prove damaging to the ability of the government to tackle the budget deficit.

The public sector

The detail of what the Budget means for the public sector in the short to medium term is unclear. What is clear is that the public sector is under scrutiny. With £13 billion of savings budgeted to come from 'government departments', what this means is increased uncertainty for publicly funded projects, giving rise to the very real possibility that some of these projects may simply have to be abandoned. There would appear to be opportunity for those of us working alongside both public and non-governmental organisations to advise on the best way forward should further expected funding be unforthcoming.

A focus on employment and welfare savings

Rather than focus on cuts, the Chancellor highlighted that the Government would focus upon employment as a means to economic success. The figures are impressive—unemployment, he says, is due to fall to 5.3%.

Whilst certain measures the Chancellor announced (such as decreasing the pensions lifetime allowance from £1.25 million to £1 million and index-linking that cap from 2018) may seem swinging in their nature, other measures, such as the increase in the national minimum wage to £6.70 per hour from October, and the increase in both taxpayers' personal allowances and the rise (to £42,700) of the higher rate tax band, seem to more positively promote it. With £12 billion in deficit reduction measures to come from welfare savings, the promotion of employment must certainly be a more effective way of tackling the issue than piecemeal welfare reform.

However, taking into account the potential for benign deflation to convert to malign deflation, one has to question what impact a general reduction in the average (rather than the relative) price of goods and services would have, and whether this might not have a negative effect on employment as producers of goods and services look to cut costs further. This raises questions both for those working in the insolvency sector, and on the wider macroeconomic field.

Tax avoidance and evasion countermeasures

Some of the more interesting potential developments arise from the Chancellors proposed measures to combat tax avoidance, tax evasion and aggressive tax planning (from which he is looking to recover £5 billion). Harder times appear to be ahead for the users and promoters of aggressive tax avoidance schemes, with announced measures including restriction of access to tax reliefs for those who persistently abuse them, and the increase in sanctions against promoters of tax avoidance schemes who fail to avoid these measures.

Nor is your ordinary man on the street immune from the government's roving eye. Some of the more eye-watering measures to be introduced include the widening of the DOTAS scheme to require employers to notify employees of their use of such schemes (and an obligation on employers to provide details of affected employees to HMRC), and the abolition of the paper tax return system (and its mandatory £100 fine for missing the 31 January deadline) with an online system and a motoring-style 'points' system for those who continuously fail to file on time (with maximum fines anticipated to be at a level of £2,000 or more).

On the advisory side, when coupled with previously announced proposals to directly access tax avoiders' bank accounts and to require participants in avoidance schemes to pay tax up-front, even in cases where analogous—but not identical—schemes have been impugned (and where the prospect of judicial review remains a very real one), these measures in particular constitute a platform for a very busy time for insolvency professionals where persons engaging in such schemes potentially face

immediate cash shortages, particularly with the up-front DOTAS payments having retrospective effect. Add to the mix the thrift factor of individuals and companies trying to shield more of their income from the taxman during harder times, this battleground looks set to be a bloody one.

Conclusion

Whilst this budget has been phrased in triumphant terms and no doubt carefully judged for public consumption just prior to the General Election, there remains little doubt that there are lean times to come, and that businesses and individuals will have tough decisions to make. With an eye to areas for potential opportunity, there is the potential for lots to be done by the insolvency community.

Patrick Cook is a partner and Head of Corporate Turnaround and Insolvency at Burges Salmon LLP. He specialises in restructuring, corporate insolvency and banking, with significant experience in the hotels and leisure, agriculture, health care and pensions sectors. Patrick's recent work includes advising a major financial institution on the refinancing and sale of an over leveraged group of 18 hotels to a third party investor. It involved rescheduling and paydown of bank debt and taking back security.

Richard Clark is a Legal Director within the banking team at Burges Salmon LLP, specialising in corporate turnaround and insolvency and corporate banking. Richard's clients include banks, corporates, insolvency practitioners and turnaround professionals. Richard also gets involved in complex corporate banking issues, including security structures, regulatory affairs, product development and the production of standard form documentation.

CASE LAW

(1) Re Buccament Bay Resort Ltd; Re Harlequin Property (SVG) Ltd [2014] All ER (D) 32 (Oct), [2014] EWHC 4776 (Ch)

Chancery Division, Companies Court, before Mr N Strauss QC (Sitting as a Deputy Judge of the High Court).

Company – Winding-up – Foreign companies – Jurisdiction – Companies being incorporated in foreign jurisdiction – Petitioners seeking to wind-up companies in respect of alleged debts owed – Preliminary issue arising – Whether English court having jurisdiction to hear petition to wind-up companies.

Facts:

The respondents (BBL and Harlequin) were two companies, which were part of the Harlequin group which developed and operated luxury Caribbean resorts. Both companies were owned and controlled by D, and had been incorporated in Saint Vincent and the Grenadines (SVG). The proceedings concerned debts which allegedly arose out of a development in SVG called 'the Buccament Bay Resort'. The petitioners were all investors who had paid deposits of 30% of the purchase price of individual hotel rooms sold as freehold investments, subject to a management agreement, under which they were to receive 10% of the purchase price for the first two years after completion of the hotel and, thereafter, 50% of the net rental income from the room. The petitioners contended that they had not received title to their hotel rooms. As against BBL, the petitioners claimed a total of £1,191,831.98 in respect of the non-return of outstanding deposit moneys, and in the case of Harlequin Property they claimed a total of £599,135.05 in respect of money due under finance agreements and in respect of the non-return of outstanding deposit moneys. Statutory demands had been served in respect of those debts. Some claims were settled. The petitioners sought to present a winding-up petition against the companies in the English court. They contended that the English court had jurisdiction on the grounds that, among other things: (i) s 221 of the IA 1986 related to the principal place of business; (ii) both BBR and Harlequin had acted via their sole director to sign all their contracts in the United Kingdom; (iii) all moneys payable under the investor contracts routed via another company in the Harlequin group in the UK; (iv) SVG operated under the Commonwealth structure of law with the Privy Council as the last resort of appeal, therefore, the system and judicial approach would be the same; and (v) the sole director of both of the above companies lived in Essex and had current proceedings in the UK High Court relating to the present matter. The companies contended that the English court should not accept jurisdiction for the petitions, as SVG was the more appropriate forum with an adequate winding-up process; the activities of both companies were overwhelmingly in the Caribbean; an English winding-up order would not be enforced in the SVG courts and the procedures to facilitate cross-border insolvency procedures would be unavailable there. The companies further contended that a liquidator appointed by, or under an order of the English courts would have considerable practical difficulties in relation to assets in SVG, especially if his authority as liquidator was not recognized and, in the circumstances, SVG was the appropriate forum. A preliminary issue accordingly arose for determination.

The issue was whether the English court should exercise its jurisdiction to hear winding-up petitions based on undisputed or largely undisputed debts, when neither of the companies was incorporated in England and Wales.

Held:

The application would be dismissed.

By s 221(1) of the IA 1986, the court had jurisdiction to wind up an unregistered company which was unable to pay its debts. The court's jurisdiction under that section was not limited to companies which had a principal place of business in the UK. The English courts had to make winding-up orders against foreign companies. The three core requirements were: (i) that there had to be a sufficient connection with England and Wales which might, but did not necessarily have to, consist of assets within the jurisdiction; (ii) that there had to be a reasonable possibility, if a winding-up order was made, of benefit to those applying for the winding-up order; and (iii) one or more persons interested in the distribution of assets of the company had to be persons over whom the court could exercise a jurisdiction. In addition to the three requirements, the court would always consider whether there was a more appropriate jurisdiction (see [18]–[20] of the judgment).

In the present case, there was no justification at all for a winding-up order. It was true that the companies' evidence was, in certain respects, unsatisfactory in relation to their activities in the UK, nevertheless, it was clear that all the assets, except from the claim against the auditors, were situated in SVG, and there was undisputed evidence that SVG had a perfectly satisfactory winding-up process which was available to the petitioners. There was undisputed evidence that an English liquidator would be likely to face considerable and possibly insuperable difficulties in gaining control of the company's assets. The court could see no advantage in winding-up proceedings in the UK, rather than in SVG. Applying settled principles, while the first core requirement, a reasonably substantial connection with England, was satisfied, as was the third, the second was not. No reasonable possibility had been shown of the petitioners deriving benefit from a winding up. Further, it was clearly a case in which SVG was by far the more appropriate forum. Accordingly, it was not a case in which the court should allow a petition to wind up the companies to go forward (see [21] of the judgment).

Real Estate Development Co, Re [1991] BCLC 210 applied; Latreefers Inc, Re, Stocznia Gdanska SA v Latreefers Inc [1999] 1 BCLC 271 applied; Banco Nacional de Cuba v Cosmos Trading Corp [2000] BCC 910 applied; Rodenstock GmbH, Re [2011] All ER (D) 62 (May) applied; Company, a (No 003102 of 1991), Re, ex p Nyckeln Finance Co Ltd [1991] BCLC 539 distinguished; Atlantic & General Investment Trust Ltd v Richbell Information Services Inc [2000] BCC 111 considered.

Richard Jones QC (instructed by Regulatory Legal Solicitors) for the petitioners.

Ceri Bryant QC and Chantelle Staynings (instructed by ELS Legal LLP) for the companies.

(2) Re MF Global UK Ltd (in special administration); sub nom Heis v MF Global UK Services Ltd (in administration) [2015] All ER (D) 10 (Apr), [2015] EWHC 883 (Ch)

Chancery Division, Companies Court, Mr Justice David Richards.

Company – Administration – Indemity from liability for debt – Company (Services) employing staff within group and seconding most of staff to principal operating company (MFG UK) – Services and MFG UK going into administration giving rise to 'relevant event' and debt under relevant pension legislation – Whether implied contract between Services and MFG UK in connection with secondment of staff and reimbursement of Services' outgoings in respect of the seconded staff – Whether MFG UK obliged to indemnify Services against liability under legislative provision – Pensions Act 1995, s 75.

Facts:

A company MF Global UK Services Limited (Services) and the principal operating company, MF Global UK Limited (MFG UK), were wholly-owned subsidiaries of MF Global Holdings Europe Limited (Holdings Europe). Holdings Europe was the holding company of the UK-based companies in the MF Global group. Companies in the MF Global group, whose operations were based in London and New York, carried on business as broker-dealers in financial markets throughout the world. Services employed all the staff within the group and seconded most of them to MFG UK. Under cl 3.1 of the services agreement, Holding had a contractual obligation of procuring that MFG UK, as a service recipient, met all payroll costs for the seconded staff. In 2011, the main group companies in the group entered formal insolvency proceedings in England and the United States. MFG UK went into special administration under the Investment Bank Special Administration Regulations 2011 and Services went into administration under Sch B1 to the IA 1986. Section 75 of the Pensions Act 1995, in certain circumstances, imposed a debt on an employer to the trustees of an occupational pension scheme where a 'relevant event', including an insolvency event, such as administration, occurred in relation to the employer. The administrators of MFG UK (and also of Services) applied for the determination of a question as to whether MFG UK was obliged to indemnify Services against a liability under s 75 of the Act (a s 75 debt), arising as a result of both companies becoming insolvent and going into administration.

The issues for consideration were: (i) whether there were any contract between Services and MFG UK in connection with the secondment of staff and the reimbursement of Services' outgoings in respect of the seconded staff; and (ii) whether, if there was a contract between them, its terms required MFG UK to indemnify Services against any s 75 debt. In respect of issue (i), it was common ground that there was no express agreement between them. Services based its claim for an indemnity on an implied contract. In respect of issue (ii), a question arose as to whether the definition of payroll costs in cl 3 of the services agreement extended to a s 75 debt. The administrators argued that it did not.

Held:

(1) Taking the evidence as a whole, it was overwhelmingly likely that MFG UK and Services had intended to enter into legal relations between each other, governing the provision of and payment for seconded staff. On the facts, Services could be taken to have offered to second staff to MFG UK on terms that MFG UK would be responsible for the costs associated with the seconded staff (see [57], [58] of the judgment).

Ilyssia Cia Naviera SA v Bamaodah, The Elli 2 [1985] 1 Lloyd's Rep 107 applied; *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 3 All ER 25 applied.

(2) On the basis that an agreement existed between MFG UK and Services, the critical issue was whether the terms of such agreement required UK to indemnify Services against the s 75 debt. Since all members of the scheme had been seconded to MFG UK, it followed that MFG UK was responsible for all the liabilities of Services as principal employer under the scheme. It was clear from the start that Services would simply be reimbursed without any mark-up for its liabilities as an employer by the companies to which staff had been seconded. It had no ability to meet any liabilities except through the amounts recharged to the Service Recipients. On the true construction of cl 3, a s 75 debt constituted a cost in relation to the pensions of seconded staff. The contract between MFG UK and Services had to have been on the basis that MFG UK would indemnify Services against all its costs as employer of the seconded staff (see [58]–[61], [65], [66] of the judgment).

MFG UK was obliged to indemnify Services in respect of its s 75 debt (see [67] of the judgment).

Richard Hitchcock QC and Farhaz Khan (***instructed by Weil, Gotshal & Manges***) ***for the administrators.***

George Bompas QC and Nicola Timmins (***instructed by Memery Crystal***) ***for Services.***

(3) JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] All ER (D) 11 (Mar), [2015] EWCA Civ 139

Court of Appeal, Civil Division, before Lady Justice Arden, Lord Justice Lewison and Lord Justice Christopher Clarke.

Practice – Pre-trial or post-judgment relief – Freezing order – First judge granting freezing order in respect of defendant's assets – Defendant making disclosures regarding assets, pursuant to freezing order – First judge ordering defendant provide further information about certain trusts and supply copies of certain trust documents – Second judge refusing trustees' application to discharge those paragraphs of order – Third judge ordering continuation of freezing order be conditional on provision of cross-undertaking unlimited in amount and fortification – Whether court having jurisdiction to order member of class of beneficiaries under discretionary trust to make disclosure of details of trust and trust assets – Whether third judge erring in requiring cross-undertaking unlimited in amount – Whether third judge erring in ordering cross-undertaking be fortified.

Facts:

The proceedings concerned three appeals, all of which related to powers exercisable in connection with the grant of a freezing order. P founded a bank (the bank) in Russia. In 2010, the bank was declared to be insolvent by the Russian court and placed into temporary administration. The DIA, as liquidator of the bank, had brought proceedings against P in Russia, alleging that, following receipt by the bank of substantial loans from the Russian Central Bank (the RCB), P carried out a scheme designed to extract money from the bank for the benefit of himself and companies under his control. Similar proceedings were commenced in England. P denied those allegations. The present proceedings concerned a freezing order made by Henderson J in aid of the Russian proceedings. Paragraph 7(c) of the freezing order provided that the prohibition on P's removal and disposal of assets included 'any interest under any trust or similar entity including any interest which may arise by virtue of the exercise of any power of appointment, discretion or otherwise howsoever'. P also had to provide disclosure of assets. Disclosure was provided, which stated that P was one of a class of discretionary beneficiaries under a number of specified trusts. On the bank and DIA's application, Henderson J ordered that P provide further information about the trusts and supply copies of certain trust deeds. The trustees of the trusts applied unsuccessfully to David Richards J to discharge those paragraphs of Henderson J's order. On P's application, Rose J ordered that the continuation of the freezing order should be conditional on the provision of a cross-undertaking unlimited in amount and ordered that it be fortified by

the payment of US$25m. P appealed against Henderson J's order and the trustees appealed again David Richards J's order. The bank and the DIA appealed against Rose J's order.

In respect of Henderson and David Richard JJ's orders, P contended that Henderson J had erred in having concluded that P's 'interest', as one of the class of beneficiaries under the discretionary trusts, had been within the scope of para 7(c) of the freezing order. Further, P and the trustees contended that if, on the evidence, bank and the DIA had not established good reason to suppose that the trust assets were susceptible to execution, then those assets could not or should not be frozen. The court, therefore, had no jurisdiction to make an order requiring disclosure of information unless the threshold conditions for the making of a freezing order were satisfied. In respect of Rose J's order, the bank and the DIA contended that, first, Rose J had been wrong to have required a cross-undertaking unlimited in amount, as the decision was contrary to the established (and almost invariable) practice of the court since the decision in *Re DPR Futures Ltd* [1989] 1 WLR 778. Further: (i) she had been wrong to have relied on her conclusion that there was evidence of likely loss on the part of P and, even if there was, it was less than the cap offered by the DIA; (ii) she had been wrong to have distinguished between a corporate office holder and an individual office holder; and (iii) the absence of a creditor willing to indemnify the DIA and the failure to seek insurance had been irrelevant considerations. Second, they contended that Rose J had been wrong to have ordered that the cross-undertaking be fortified.

Held:

(1) On the true interpretation of para 7(c) of the freezing order, P's interests under the discretionary trusts were caught by the prohibition on dealing with assets and were also subject to the disclosure requirements of the order. However, P had disclosed those interests and the question then was whether he could be compelled to go any further. What were already within the scope of the freezing order granted by Henderson J were P's interests in the trusts, whatever those might be. The underlying trust assets were not. There appeared to be a dispute between the bank and the DIA on the one hand, and P and the trustees on the other, about whether, in reality, P was in effective control of the trust assets. The court was not in a position to reach even a provisional conclusion on the present state of the evidence. However, the principle of flexibility came into play. If the threshold test for including an asset within the scope of a freezing order was not met, the court was not powerless. The bank did not ask that the trust assets be brought within the scope of the freezing order immediately. It asked for the opportunity to test its assertion that P was the effective owner of those assets against his (and the trustees') assertion that he was not. The court's concern that sophisticated and wily operators should not be able to make themselves immune to the courts' orders militated against

denying the DIA that opportunity. Therefore, Henderson J had had jurisdiction to have made the order that he had and David Richards J had had jurisdiction to have refused to set it aside. Once that position had been reached, the exercise of that jurisdiction was a question of judicial discretion. In light the light of the evidence taken as a whole, neither judge had exercised his discretion in an impermissible manner (see [25], [26], [57], [58], [60], [101], [102] of the judgment).

Fourie v Le Roux [2007] All ER (D) 171 (Jan) applied; *JSC BTA Bank v Ablyazov* [2012] All ER (D) 85 (Jul) applied; *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747 considered; *JSC BTA Bank v Kythreotis* [2010] All ER (D) 163 (Dec) considered.

(2) The question of the extent of the cross-undertaking was a matter of discretion for the judge who granted the injunction. The mere fact that litigation was being brought by a liquidator of an insolvent company did not compel the conclusion that the cross-undertaking had to be capped. Discretions of that kind should not be fettered by rigid judge-made rules (see [69], [73], [101], [102] of the judgment).

The bank and the DIA were not correct in their submission that P had to show that the freezing order was likely to cause him a loss before a cross-undertaking of unlimited amount was required. It was fairness, rather than likelihood of loss, that led to the requirement of a cross-undertaking. Further, Rose J had not simply distinguished between individual and corporate office holders. The DIA and the RCB, which was the largest creditor, were both effectively emanations of the Russian state. Rose J had not made an error of principle in distinguishing the position of a state-backed entity from that of an individual professional insolvency practitioner. Furthermore, the bank and the DIA were not correct in their submission that the potential availability of external funds could be dismissed as simply irrelevant. Rose J had been entitled to have taken into account the lack of evidence about what efforts the DIA had made to persuade substantial creditors, for whose benefits the recoveries would ensure, to back the cross-undertaking. She had been entitled to have concluded that the DIA had failed to discharge that burden. Rose J had been entitled to have exercised her discretion in the way that she had (see [77], [78], [80], [85], [86], [101], [102] of the judgment).

Financial Services Authority v Sinaloa Gold plc (Barclays Bank plc intervening) [2013] All ER (D) 320 (Feb) applied; DPR Futures Ltd, Re [1989] 1 WLR 778 considered; RBG (Resources) plc v Rastogi [2002] BPIR 1028 considered; Bloomsbury Int Ltd v Holyoake, Re [2010] All ER (D) 207 (May) considered.

(3) In respect of fortification, it could not be said that Rose J had erred in the principles of law that she had applied. The real question was whether there had been the evidential foundation for the general conclusion that

she had stated. Rose J had not descended into any detail why she had reached the general conclusions that she had and they were simply unsustainable on the evidence. Nor had the evidence placed before her on behalf of P, in fact, alleged that his business dealing had been stifled, if not brought to a halt, by the freezing injunction. Since Rose J's decision, further evidence had been given on P's behalf, but even that evidence had contained nothing about P's business activities since he left Russia in 2011 (see [98], [99], [101], [102] of the judgment).

Accordingly, the two appeals from Henderson and David Richards JJ would be dismissed, but the appeal from Rose J would be allowed in part (see [100]–[102] of the judgment).

Decision of Henderson J Affirmed.

Decision of David Richards J [2014] All ER (D) 18 (Nov) Affirmed.

Decision of Rose J Reversed In Part.

Stephen Smith QC and Ben Griffiths (instructed by Hogan Lovells International LLP) for the bank and the DIA.

Francis Tregear QC and Alexander Milner (instructed by Fried, Frank, Harris, Shriver & Jacobson LLP) for P.

Jonathan Adkin QC (instructed by Farrer & Co LLP) for the trustees.

(4) Clarke v Cognita Schools Ltd (trading as Hydesville Tower School) [2015] All ER (D) 17 (Apr), [2015] EWHC 932 (Ch)

Chancery Division, Birmingham District Registry, before Mr Justice Newey.

Bankruptcy – Order in aid of British court – Validity of order – Defendant obtaining judgment against claimants and serving statutory demands on them – Claimants submitting orders ought to have contained statement notifying them they could apply to have orders set aside, varied or stayed – Claimants subsequently being made bankrupt – Whether order needing to state debtor could apply to have it set aside, varied or stayed – Whether present orders defective – Insolvency Rules 1986, SI 1986/1925, r 6.5(1).

Facts:

The defendant obtained judgment for £7,862.75 against the claimants. It served statutory demands on them. The claimants applied to set aside the statutory demands. In May 2014, the deputy district judge dismissed the applications and made bankruptcy orders against the claimants. Each of his orders was made pursuant to r 6.5(1) of the Insolvency Rules 1986, SI 1986/1925, which empowered the court, if satisfied that no sufficient

cause was shown for an application to set aside a statutory demand, to dismiss it without giving notice to the creditor. The claimants appealed against the orders.

The claimants submitted that the orders ought to have contained a statement notifying them that they could apply to have the orders set aside, varied or stayed. They submitted that r 7.51A of the Insolvency Rules provided for the CPR to apply to insolvency proceedings to some extent, and obliged orders made under r 6.5(1) of the Rules to comply with CPR 3.3(5) and so contain a statement of the right to make an application to have the order set aside, varied or stayed. Consideration was given to s 267(2)(d) of the IA 1986.

Held:

The appeals would be dismissed.

CPR 3.3(5) did not apply to orders made under r 6.5(1) of the Rules. Firstly, CPR 3.3(5) was in terms tied to CPR 3.3(4). It was stated to apply where the court had made an order under that provision. There was no reason to suppose that CPR 3.3(4) was relevant to the judge's dismissal of the claimants' applications to set aside the statutory demands. His orders had been clearly made under r 6.5(1) of the Rules, not CPR 3.3(4). On the face of it, therefore, CPR 3.3(5) was not in point. Secondly, it was understandable that there should not have been thought to be a need for orders made under r 6.5(1) of the Rules to incorporate a statement such as that for which CPR 3.3(5) provided. After all, the dismissal pursuant to r 6.5(1) of an application to set aside merely meant that the creditor was free to present a bankruptcy petition, not that a bankruptcy order would necessarily be made: the debtor would still be free to dispute his liability to the creditor in the context of any petition. Further, there might be scope for the debtor to apply to have an order under r 6.5(1) of the Rules set aside under s 375 of the Act outside the seven-day period which (in the absence of any other direction) governed applications to set aside under CPR 3.3(5) (see [19] of the judgment).

An order under r 6.5(1) of the Insolvency Rules did not have to state that the debtor could apply to have it set aside, varied or stayed and, therefore, that the orders of May 2014 were not defective (see [20] of the judgment).

Isaacs v Robertson [1984] 3 All ER 140 considered; Mid East Trading Ltd, Re; Lehman Bros Inc v Phillips [1998] 1 BCLC 240 considered; Adams v Mason Bullock (a firm) [2004] All ER (D) 292 (Dec) considered.

Jamie McCracken (instructed by Lexton Law Solicitors) for the claimants.

Voldi Welch (instructed by CW Harwood & Co) for the defendant.

Jonathan Perry for the trustee in bankruptcy.

(5) Re Welcome Financial Services Ltd [2015] All ER (D) 329 (Mar), [2015] EWHC 815 (Ch)

Chancery Division, Companies Court, before Mrs Justice Rose.

Practice – Companies – Scheme of arrangement – Company and administrators of Scheme of Arrangement (the applicants) seeking declarations concerning proper construction of scheme made in respect of company and parent – Following passage of 'Bar Date' for claims under scheme two main groups of people purporting to claim under scheme – Whether and to what extent declarations to be made – Companies Act 2006 – Consumer Credit Act 1974.

Facts:

The company, Welcome, was in the business of making loans to individuals. It was part of a group of companies that was balance sheet insolvent at the end of 2010. A scheme of arrangement under Pt 26 of CA 2006 had been put in place for Welcome as part of the restructuring of the group with the intention of maximising cash collections to improve the expected return for creditors. Scheme creditors could submit a claim form to the scheme supervisors on or before a date (the bar date) fixed by the scheme in order to be entitled to receive a distribution in respect of their scheme claims. The effect of the scheme was that the scheme creditors were save in certain limited circumstances, prohibited from commencing or continuing proceedings against Welcome. The scheme became effective on 2 March 2011. Since the scheme came into effect, a large number of customers and former customers of Welcome have come forward asserting claims against Welcome arising out of their credit agreements. The question arose whether all or some of these claims were now barred as the customer had not submitted the claims before the 'bar date'. The two main groups of people who thought that they might have claims were those who had lost money investing in shares in the parent company and customers who had been mis-sold payment protection insurance (PPI). Welcome and the administrators of the scheme (the applicants) sought declarations concerning the proper construction of the scheme. The respondents were all Welcome's customers who would be affected by the declarations that the applicants were seeking. The applicants contended that all the claims the subject of the application were covered by the wording of the scheme and had therefore been compromised. If that was right, then there were only limited circumstances in which the customers would be able to assert any of the statutory or contractual rights they might have. The contrary arguments were put before the court by those acting for the respondents.

The claims (the application claims) raised by the respondents fell into five categories: (i) claims under Consumer Credit Act 1974 (CCA claims); (ii) non-PPI Liabilities; (iii) overpayment claims; (iv) uncashed cheques

claims; and (v) charges claims. For each kind of application claim it was necessary to consider three questions: (a) the first question: whether the customer making that kind of claim was a scheme creditor bearing in mind both that that term incorporated the word 'creditor' as used in s 895 of CA 2006 and that the jurisdiction of the court was limited to compromising claims between the company and its creditors: (b) the second question: whether a claim was a 'scheme liability' because it was a liability of Welcome and it arose after 2 March 2011 as a result of an obligation incurred by Welcome before that date; (c) the third question: whether the claim was an excluded liability. It was common ground that the word 'creditor' used in the term 'scheme creditor' bore the same meaning as it did in s 895 of the CA 2006.

Held:

(1) There were three kinds of claims that might be brought under the CCA. Improper execution claims under s 65(1) or s 142 of the CCA. Unfair relationship claims and extortionate credit bargains. PPI Liabilities that were also CCA Claims (see [9], [15], [19], [21] of the judgment).

Applying the first of the three questions to the CCA claims, it could be said that CCA claims were not claims that were compromised by the scheme where the customer making that claim had not been doing so in the capacity as creditor but in the capacity as a debtor, party to a consumer credit agreement. The fact that the same customer might have a claim as creditor as well as a claim as debtor did not convert all his claims in whatever capacity into claims as a creditor. Where a credit agreement had been completed so that the customer was no longer a debtor of Welcome, he might still wish to bring proceedings for a declaration under s 142 in order to generate an entitlement to the repayment of amounts that Welcome had received on realisation of the security it held, pursuant to s 106(d). In that situation he was, making the application for a declaration in the capacity as creditor because the only result could be that Welcome owed him money rather than the other way round. In that situation he was seeking a declaration in his capacity as creditor of Welcome, not as debtor. In relation to the second question, in so far as some CCA Claims for money would be made by customers in their capacity as creditors, whether there were scheme liabilities depended on whether the liability to make the payment arose from an obligation incurred before 2 March 2011. Further CCA provisions were 'superimposed' on the credit agreement. There was a sufficient link between the liability and the pre-existing contract even where all the conduct complained of as making the relationship unfair occurred after 2 March 2011. In relation to the third question of exclusion of liabilities, those credit agreements were entered into by Welcome before 2 March 2011 and the

obligations could not be regarded as obligations incurred after 2 March 2011 they were therefore not excluded (see [74], [82], [86], [90] of the judgment).

Those CCA Claims which were made by the customer as creditor were scheme liabilities because they arose from obligations incurred by Welcome before 2 March 2011. Where a CCA claim was of a kind that was brought by the customer in his capacity as creditor then in so far as it was not covered by the exclusion for PPI Liabilities, it was not an excluded liability (see [89, [94] of the judgment).

West End Networks Ltd (in liq), Re; Secretary of State for Trade and Industry v Frid [2004] All ER (D) 180 (May) applied; Lehman Brothers International (Europe) (in administration) (No 2), Re [2009] All ER (D) 83 (Nov) applied; Trustees of the Lehman Brothers Pension Scheme v Pensions Regulator [2013] All ER (D) 202 (Jun) applied; Marconi Corporation plc, Re; Marconi plc, Re [2013] All ER (D) 258 (Feb) applied; Lehman Brothers International (Europe) (in administration) (No 2), Re [2009] All ER (D) 36 (Nov) applied; Re Nortel GmbH (in administration) [2013] All ER (D) 283 (Jul) applied; T&N Ltd, Re (No 3) [2006] All ER (D) 188 (Jun) considered; Unite the Union v Nortel Networks UK Ltd (in administration) [2010] All ER (D) 164 (Apr) considered.

(2) Non-PPI claims were claims which arose from the sale by Welcome of general insurance rather than PPI. In relation to the first question, the non-PPI claims, were claims brought by the customers in their capacity as creditors for the purposes of s 895 of the CA 2006 and hence for the purposes of the definition of scheme creditors. Those claims were claims that arose by reason of an obligation incurred on or before 2 March 2011 and so were within the definition of scheme liabilities. Insofar as non-PPI claims were liabilities they were not excluded liabilities. That acceptance was subject to the caveat in relation to claims where reliance was placed on matters which occurred on or after 2 March 2011 for the purposes of a CCA Claim, consistent with his argument that CCA Claims did not arise from obligations incurred before that date. None of the non-PPI claims were excluded liabilities within the scheme (see [31], [95]–[97] of the judgment).

Unite the *Union v Nortel Networks UK Ltd* (*in administration*) [2010] All ER (D) 164 (Apr) applied.

(3) In relation to the overpayment claims, there were claims which might be made on the basis that Welcome was unjustly enriched at the customer's expense. Asking the first question, the answer was that in most cases a claim for an overpayment was made by the customer in his capacity as a creditor for the purposes of the definition of scheme liabilities. Even where the claim for an overpayment was asserted by claiming a set off against the amount still due from the customer as debtor, it was still a

claim for a pecuniary amount and so made by the customer in his capacity as a creditor. Those claims arose by reason of an obligation incurred on or before 2 March 2011 and so were within the definition of scheme liabilities. Insofar as overpayment claims were liabilities, they were not excluded liabilities (see [33], [34], [98], [100] of the judgment).

Re Nortel GmbH (*in administration*) [2013] All ER (D) 283 (Jul) applied.

(4) In relation to the uncashed question claims, these claims would be asserted by the customer in the capacity as creditor. All the claims were claims that arose by reason of an obligation incurred on or before 2 March 2011 and so were within the definition of scheme liabilities. Since those claims had to be limited to events that occurred on or before 2 March 2011, they could not be excluded liabilities if they arose from underlying liabilities of the three kinds described (see [101]–[103] of the judgment).

(5) In relation to the charges claims, in some instances Welcome had issued a cheque to a customer but the customer has not cashed the cheque. Provided the non-pecuniary claim had an intrinsic value to the customer, for example because it facilitated the return of property provided by way of security or a discharge from a continuing obligation, it was not a claim made as a creditor. Where the charges claimed had been imposed before 2 March 2011, the liability to repay had to be a scheme liability. Where the charges were imposed after 2 March 2011 under a contract entered into before that date, the obligation to repay the charges was a liability that arose after that date as a result of an obligation incurred before that date within the meaning of the Nortel decision. All the charges claims were scheme liabilities and none of were excluded liabilities (see [35], [37] of the judgment).

A declaration would be made in accordance with the terms of the judgment (see [115] of the judgment).

David Allison QC and Julia Smith (***instructed by Freshfields Bruckhaus Deringer LLP***) ***for the applicants.***

Andrew Clark (***instructed by Miller Gardner solicitors***) ***for the respondents*** (***those affected by the application***).

(6) Re Eiffel Steelworks Ltd [2015] All ER (D) 254 (Jan), [2015] EWHC 511 (Ch)

Chancery Division, before Andrew Hochhauser QC (sitting as a judge of the High Court)

Company – Administrator – Appointment – Directors of insolvent company appointing joint administrators – Directors failing to give notice of appointment to company – Directors applying for declaration as to validity of

appointment – Whether failure to give notice invalidating appointment – Insolvency Act 1986, Sch B1, para 26 – Insolvency Rules 1986, SI 1986/1925, r 2.20(2).

Facts:

The company, Eiffel Steelworks Ltd (the company), carried on business as a subcontractor manufacturing structural steelworks for larger steel companies. The company's management accounts as at 31 October 2014 showed an operating loss of £710,825.22, together with net liabilities of £4,869,813.91. The directors of the company and Eiffel UK Ltd agreed to convene board meetings for the purposes of considering whether administrators ought to be appointed over the company and whether Eiffel UK Ltd ought to be placed in creditors' voluntary liquidation. On 14 November, at the board meeting, the directors of the company unanimously resolved to appoint the joint administrators (S and D) as administrators of the company, pursuant to para 22 of Sch B1 of the IA 1986. The company had no outstanding security over its assets. There was no holder of a qualifying floating charge in respect of its property who might, under para 14 of Sch 1B to the Act, appoint an administrator of the company, upon whom a notice of intention to appoint an administrator had to be served. Further, the directors were not aware of any enforcement officer charged with execution or other legal process against the company, or any person who ought to be provided with a copy of a notice of intention to appoint pursuant to r 22.20(2) of the Insolvency Rules 1986, SI 1986/1925 (the Rules). All relevant parties had been aware of the proposed appointment of the joint administrators, including the shareholders of the company, as well as the directors themselves. However, no formal notice of intention to appoint was served on the company in accordance with para 26(2) of Sch B1 to the Act and r 2.20(2) of the Rules, prior to filing the notice of appointment on 17 November 2014. The company and the joint administrators (together the applicants) applied for orders, including a declaration that the appointment of the joint administrators of the company, pursuant to a notice of appointment filed with the court on 17 November 2014 was valid, notwithstanding that a notice or copy of a notice of intention to appoint administrators was not given to the company, pursuant to para 26.2 of Sch B1 to the Act and r 2.20(2) of the Rules (the first order sought).

The issue was whether the directors, who were appointed administrators with immediate effect, were obliged to give a separate notice to the company of which they were directors of their intention so to do and, if so, what was the result of a failure to give that notice and to what relief were the applicants entitled.

Held:

It was clear that a company intending to make an appointment was not to be equated with the directors of the company. The reference to 'the

company' in para 22(1) of Sch B1 to the Act was to the members of the company in general meeting. It was settled law that a board of directors was not entitled to present a petition in the name of a company without the sanction of members of the company in general meeting. Further, it was settled law that there was a requirement, under para 22.1 of Sch B1 to the Act, to give notice to a company of the appointment of administrators. However, that did not result in the administration being declared a nullity. It was simply a remediable defect (see [20], [21], [26] of the judgment).

Applying settled law to the facts, the question was to what relief were the applicants entitled. Having regard to the wording of r 7.55 of the Rules and the fact that there was no substantial irremediable injustice in the present case, the first of the orders sought by the applicants would be made. The owners, Eiffel UK Ltd, had been fully aware and had approved of the resolution to appoint the joint administrators. In such circumstances there was no ascertainable prejudice of any kind (see [27], [28] of the judgment).

The first order sought would be made (see [27] of the judgment).

Ceart Risk Services Ltd, Re; Bootes v Ceart Risk Services Ltd [2012] 2 BCLC 645 adopted; Assured Logistics Solutions Ltd, Re [2012] BCC 541 adopted; BXL Services, Re [2012] BCC 657 adopted; Emmadart Ltd, Re [1979] 1 All ER 599 adopted; Euromaster Ltd, Re [2013] 1 BCLC 273 not followed; BXL Services, Re [2012] All ER (D) 87 (Jul) considered; Virtualpurple Professional Services Ltd, Re [2012] 2 BCLC 330 considered.

Peter Arden QC for the applicants.

LEGISLATION

(1) Small Business, Enterprise and Employment Act 2015

The Small Business, Enterprise and Employment Act 2015 is intended to ensure that the United Kingdom continues to be recognised as a trusted and fair place to do business and to open up new opportunities for small businesses to innovate and compete. It includes provisions to give small businesses greater access to finance sources, increase transparency around who owns and controls UK companies, require the payment practices of the UK's largest companies to be reported and introduce new insolvency measures to prohibit and limit certain aspects of pre-pack sales if deemed necessary.

Access to finance

The credit data of small businesses will be opened up to allow them to seek loans away from their banks. At the same time, banks will, if

requested, pass on details of small and medium businesses (SMEs) they turn down for a loan to online platforms to match them with alternative finance options.

Payment

The transparency of payment practices will be increased through a new reporting obligation on the UK's largest companies. This is designed to mitigate the power difference between large and small companies when it comes to negotiating fairer deals. It will also highlight poor practice in the biggest businesses.

Red tape

Regulations affecting business will be reviewed frequently to ensure they remain effective. A target for the removal of regulatory burdens will be published in each Parliament.

An independent Small Business Appeals Champion will be appointed for non-economic regulators. This role is designed to guarantee the needs of business are taken into account through a straightforward complaints and appeals process.

Public procurement will be streamlined through more direct access to public sector contracts. Concerns about poor procurement practices will be easier to raise.

Employment

Zero hours contracts will not have exclusivity clauses stopping individuals from working for another employer.

The maximum penalty for underpayment will be amended for employers who fail to pay the national minimum wage, allowing the penalty to be calculated on a per worker basis.

More efficient management of employment tribunal postponements will be encouraged to reduce delay and cost. A penalty will be introduced to ensure employment tribunal awards are paid promptly and in full.

Ownership

Transparency around who owns and controls UK companies will be increased to deter and sanction those who hide their interest in UK companies to facilitate illegal activities. This will include the creation of a publicly accessible register of those holding significant control over a company.

Directors

A new approach for liquidators, administrators and administrative receivers will be introduced in relation to reporting misconduct by directors. In addition, there will be two new grounds for disqualifying a director in the UK, being:

- where they have been convicted of a company-related offence overseas
- where they have instructed a disqualified director

The range of matters a court must consider when disqualifying a director will be expanded to include:

- the nature and extent of harm the misconduct has had
- the director's track record in running failed companies

The Secretary of State will be able to seek compensation from a disqualified director where misconduct resulting in their disqualification has caused identifiable loss to creditors.

Insolvency

New objectives will provide insolvency regulators with a clearer, enhanced framework for their activities and the Insolvency Service with a legislative framework to hold the regulators to account.

Some unnecessary costs will be removed from the insolvency process and more effective oversight of insolvency practitioners will be introduced. The cost of an insolvency practitioner should reflect the work carried out.

There will be a power to establish a single insolvency regulator if these reforms fail to build confidence. This power will lapse at the end of the seven year period beginning on the day the provision of the Act containing it comes into force, unless the power is exercised during that period.

A power to create regulations will also be available to:

- prohibit administration sales to connected parties, or
- impose conditions or requirements to allow a connected party administration sale to proceed

This could apply to connected 'pre-pack' sales. This power will lapse at the end of the five year period beginning on the day the provision of the Act containing it comes into force, unless the power is exercised during that period. The government has said it would only be used if the voluntary measures arising from the Graham Review into pre-pack administration prove unsuccessful.

Liquidators and administrators will be able to assign certain legal claims to third parties, such as creditors.

Other matters

A Pubs Code and Adjudicator will be introduced to govern the relationship between large pub-owning companies and their tied tenants.

The electronic payment of cheques through 'cheque imaging' will be introduced.

The full factsheets produced by the Department of Business, Innovation & Skills setting out detailed information on the changes in the Small Business, Enterprise and Employment Act 2015 can be seen here.

Commencement

The provisions relating to the following come into force on 26 March 2015:

- regulations concerning financial information on small and medium sized businesses
- regulations on procurement
- postponement of employment tribunal hearings

On 26 May 2015, the following measures come into effect:

- the power to invalidate certain contract terms
- payment practices
- the Pubs Code

The provisions relating to the electronic payment of cheques through 'cheque imaging' will be in force from 31 July 2016.

The majority of the other provisions will be brought into effect by statutory instrument.

If you are interested in learning more about LexisPSL Restructuring and Insolvency, please visit www.lexisnexis.co.uk/en-uk/products/pslfreetrial.page or speak to your Account Manager.

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