Volume 15 Issue 2 August 2015

Tolley's Company Law and Insolvency

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Dear Subscriber,

Welcome to the latest newsletter! Welcome back to the new legal term and the new academic term! I hope your summer was relaxing and that you managed to get some holiday.

Following the news section this newsletter contains three analysis pieces drawn from *Lexis@PSL Restructuring and Insolvency.* In the first piece Alex Rogan, an associate in the corporate restructuring team at Skadden, argues that the judgment in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), [2015] All ER (D) 241 (Jul) is the latest example of a trend in recent years for schemes of arrangement to be successfully used to restructure the English law governed financial obligations of overseas companies that do not have their centre of main interest (COMI), or an establishment, or any significant assets in England.

The second analysis piece also features a case. In *Eaton v Mitchells & Butler plc* [2015] Lexis Citation 173, [2015] All ER (D) 103 (Aug), the court was asked to strike out proceedings commenced by a discharged bankrupt in circumstances where the underlying cause of action was, and remained to be, vested in the claimant's trustee in bankruptcy. Stephen Leslie, solicitor in the Lexis®PSL Restructuring & Insolvency team examines the case.

The case theme continues in the third piece. The following question is examined—when is it just and equitable to wind up a company? Reuben Comiskey, barrister at 11 Stone Buildings, explores the recent case of *Secretary of State for Business Innovation and Skills v PAG Management Services Ltd* [2015] EWHC 2404 (Ch), [2015] All ER (D) 74 (Aug) and explains that it suggests certain schemes ought to be wound up in the public interest.

This newsletter contains six summary reports of case law apposite to the jurisdictions of insolvency law and company law. There then follows details of two new apposite pieces of legislation.

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) Report into Comet's collapse to remain secret

The Independent newspaper reported on 15 September 2015 that the former owners of Comet will no longer be pursued by the government over the company's collapse. This was announced by the minister for small business, Anne Soubry. An Insolvency Service report into the company's collapse will also remain secret.

Former business secretary Vince Cable had previously promised to release details of the collapse, which left 7,000 workers redundant and cost the taxpayer £70m.

Comet collapsed in 2012 shortly after it had been bought by US financier Henry Jackson, who began a major asset-stripping exercise and set up a shell company called Hailey Acquisitions, with all funds needed by Comet filtering through it.

(2) Insolvency Service: Director disqualifications—September 2015

- Sameena Bi Shaikh, director of SN Clothing Ltd for periods between April 2012 and February 2014, has been disqualified from acting as a director for six years after an investigation by the Insolvency Service found she was employing six workers who were not eligible to work in the UK.
- Ian Andrew Kimberley, a former company director, has had a 13-year bankruptcy restrictions order made against him for breaching the restrictions of his bankruptcy, and an earlier bankruptcy restrictions undertaking, by acting as the director of a limited company.

- Russell Bloore and Karen Bloore, directors of IT consultancy Insight Computing Ltd, have been disqualified as company directors for five and three years respectively having left a large tax bill unpaid despite transferring nearly £1m out of the company to their personal bank account.
- Jason MacDonald and Scott Darren McDonnell have each been disqualified by the Insolvency Service from acting as directors for five years for withdrawing funds from Longbridge PWM Limited to pay themselves and their personal tax liabilities, while the company owed HMRC more than £200,000.
- Nasser Ghesmati, director of the company running a Hampshire pub, has been disqualified from acting as a company director for eight years for failing to make tax payments of £178,000 despite transferring over half a million pounds out of his company bank account.

(3) Insolvency Service guidance on claiming money in cases of a bankruptcy or liquidation

New guidance from the Insolvency Service describes how a creditor can make a claim for sums owed when an individual has gone bankrupt or a company has gone into compulsory liquidation.

If the insolvent person is not in bankruptcy proceedings, a creditor can apply to bankrupt them to try to get their money back. To try to get money back from an insolvent company that is not in liquidation, a creditor can apply to wind the company up.

If the person or company has no assets, a creditor will not get their money back.

Managing bankruptcy or liquidation

The early stages of a bankruptcy or liquidation are normally handled by an official receiver (OR). ORs work for the Insolvency Service and are attached to the court.

If there are significant assets, an insolvency practitioner (IP) may be appointed later. IPs are usually accountants or solicitors who are authorised to deal with insolvency cases through the Insolvency Act 1986 (IA 1986).

In the case of a bankruptcy, the OR or IP (known as the trustee) realises—i e sells—any assets (except any reasonable domestic items and items needed for the bankrupt's job). In the case of a compulsory liquidation, an OR or IP (known as the liquidator) will take control of the company and realise the company's assets.

Distribution of assets to creditors

The money raised by selling the assets or recovering moneys owed to the individual or the company is divided between the creditors in a strict order of priority after the cost of the bankruptcy or liquidation (ie winding up) have been paid.

The trustee or liquidator will distribute any proceeds from sold assets to unsecured creditors in the following order of priority:

- fees and charges of the bankruptcy or liquidation;
- debts to preferential creditors, such as wages owed and contributions to occupational pension schemes;
- for a company, any creditor holding a floating charge over an asset;
- all unsecured creditors;
- any interest payable on debts; and
- for a company, the shareholders.

The guidance also includes advice on claiming money owed, report of assets and liabilities, appointing an IP and meetings of creditors, situations in which an IP is not appointed, a creditors' or liquidation committee, who pays the trustee or liquidator, how much a creditor will be paid, registering a claim on a dividend, legal action against a bankrupt or liquidated company and how to complain about the handling of a case.

(4) Revised statement of insolvency practice issued

The Recognised Profession Bodies (RPBs) and Competent Authorities have jointly agreed and issued a revised Statement of Insolvency Practice (SIP 1). 'SIP 1—an introduction to statements of insolvency practice', will be effective from 1 October 2015.

Changes are being introduced to increase transparency and confidence in the insolvency profession and related processes as part of the wider ethics work being undertaken by the Joint Insolvency Committee.

The revised SIP extends each RPB's current requirement for an insolvency practitioner to report the actions of any other insolvency practitioner authorised by the same RPB which may discredit the profession to such actions of any insolvency practitioner.

Changes are also made to require an insolvency practitioner to inform creditors at the earliest opportunity that they are bound by the Insolvency Code of Ethics and, if requested, provide details of any threats.

ANALYSIS

(1) Jurisdiction in cross-border schemes

According to Alex Rogan, an associate in the corporate restructuring team at Skadden, the judgment in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), [2015] All ER (D) 241 (Jul) is the latest example of a trend in recent years for schemes of arrangement to be successfully used to restructure the English law governed financial obligations of overseas companies that do not have their centre of main interest (COMI), or an establishment, or any significant assets in England.

The Chancery Division held that, in all the circumstances, it had jurisdiction and it was appropriate to exercise its discretion to sanction cross-border schemes of arrangement in respect of the group, Van Gansewinkel Groep BV. The scheme creditors could be regarded as coming within the jurisdiction of the English court under Regulation (EU) 1215/2012, art 8(1) (Brussels I (recast)) for the purposes of the exercise of the scheme jurisdiction in relation to them. The court further considered the proper approach, in practice, to applying for the sanction of schemes of arrangement where jurisdictional issues might be involved.

What is the background to the schemes?

The case concerned an application for the sanction of inter-conditional schemes of arrangement for five Dutch companies and one Belgian company in the Van Gansewinkel Group. The schemes were a necessary part of the steps required to enable an urgent restructuring of the group's financial indebtedness. The scheme companies did not have their COMI, or any establishment, or any significant assets in England—nevertheless, the terms of their debt documentation were governed by English law.

What practical guidance did the judge give on best practice for schemes applications?

This judgment provides welcome guidance on best practice for scheme applications and in particular will assist practitioners to identify which matters they will be required to bring to the court's attention. In particular it sets out a number of points relating to the so called 'Practice Statement Letter' and the amount of information that should be provided to scheme creditors and the court in relation to the consequences if the scheme is not implemented.

In regard to the Practice Statement Letter, the judgment provides guidance on how to ensure that any jurisdictional issue, beyond class issues, that is raised for determination at the convening hearing is appropriately addressed. In this regard, the proponent of the scheme must set out their arguments in the Practice Statement in the same way as is required for a class issue. The proponent must also clearly bring the issue to the judge's attention at the convening hearing so that the judge can give a reasoned judgment on the point or at least have his reasoning recorded so that there is a basis for persuading the judge at the sanction hearing that the point does not have to be revisited. This is important to ensure that jurisdictional issues that are addressed by the court at the sanction hearing are confined to those which have not already been determined at the convening hearing.

In regard to information on the consequences of the scheme not being implemented, the judgment requires that a greater level of detail should be set out both in the explanatory statement and in the evidence before the court on the possible alternatives to the scheme in circumstances where (as is almost always the case) a scheme is being put forward on the basis that it provides a more advantageous outcome than the possible alternatives. The Van Gansewinkel explanatory statement provided a range of recoveries (38–46%) that scheme creditors could expect in the alternative, liquidation scenario. Nevertheless, it did not provide any detail on the basis for this range beyond referring to advice that the directors of the scheme companies had received from their financial and legal advisers as well as KPMG. Ultimately the evidence was accepted but the judgment provides a warning that greater detail can be expected of future scheme proponents.

Does the EC Regulation on Insolvency Proceedings 1346/2000 (the Insolvency Regulation) and/or Brussels I (recast) apply to schemes?

The judgment notes that addressing jurisdictional issues is particularly important for schemes involving overseas companies which have a limited jurisdictional nexus with England and where recognition of the scheme in other countries is therefore an important factor. The jurisdiction of the English court to sanction a scheme of arrangement under the Companies Act 2006, Pt 26 extends to any company which is liable to be wound up under the IA 1986. This provides a very broad extra-territorial jurisdiction which covers foreign companies by virtue of IA 1986, ss 220 and 221(1). However, when considering its scheme jurisdiction for a foreign company with its COMI in another EU member state and no establishment in England the court must consider any restrictions imposed by the Insolvency Regulation and Brussels I (recast).

A number of scheme cases have considered these issues and this judgment accepts the prevailing view that the Insolvency Regulation imposes no limitation on the scheme jurisdiction of the court. In relation to the application of Brussels I (recast), this judgment, like a number of scheme cases before it, does not decide the point on whether or not Brussels I (recast) applies. Nevertheless, it notes that there is force in the view that it does not apply on the basis that either:

- a scheme falls within the exclusion in art 1(2)(b) for 'bankruptcy proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' (as per the view taken by Lewison J in *Re DAP Holding NV* [2005] EWHC 2092 (Ch)), or
- the jurisdictional provisions in Ch II do not apply as no one is being sued (as per the view taken by Hildyard J in *Primacom Holding GmbH v a group of the senior lenders & Credit Agricole* [2011] EWHC 3746 (Ch)).

The countervailing argument is that Brussels I (recast) is designed to dovetail with the Insolvency Regulation which leads to the conclusion that it must apply where the Insolvency Regulation is found not to apply.

In the light of the possibility that Brussels I (recast) does apply in scheme cases, the judgment considers the potential application of arts 25 and 8.

Brussels I (recast), art 25(1) is potentially engaged where the relevant documents contain a jurisdiction clause pursuant to which parties have agreed that the courts of a particular member state are to have jurisdiction to settle disputes. This judgment provides that a one way exclusive jurisdiction clause (ie, a jurisdiction clause which is for the benefit of the scheme creditors and only provides for the scheme company but not the scheme creditors to submit exclusively to the jurisdiction of the English courts) cannot be relied upon to establish jurisdiction for the purposes of art 25.

Brussels I (recast), art 8(1) provides that a defendant may be sued in a member state where another defendant is domiciled provided that 'the claims are so closely connected that it is expedient to hear and determine them together'. This judgment provides that this article may be engaged on the basis provided for in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] All ER (D) 62 (May). It was then provided that scheme creditors can be shoehorned into Brussels I (recast) as defendants in light of the fact that they are entitled to appear and oppose the relief sought, and that they will be bound by the court's judgment. The judgment provides that the number and value of the scheme creditors in this case (around 14% by number and 12% by value) were not immaterial and that they were sufficiently large to satisfy the art 8(1) test for expediency which in any event could potentially be engaged on the basis of one scheme creditor being domiciled in England.

What does the judgment tell us about considerations around establishing a 'sufficient connection'?

The mere fact that the court has scheme jurisdiction does not mean that it will necessarily see fit to exercise its jurisdiction. This judgment is consistent with an ever-growing line of scheme cases where the court has exercised its jurisdiction on the basis of a sufficient connection between the scheme company and English jurisdiction by virtue of the relevant rights of the scheme creditors being governed by English law and a one way exclusive jurisdiction clause in favour of the English court.

What did the judge find in relation to the release of a non-scheme company guarantor where the release had not been provided for?

The court will not generally sanction a scheme if there is a blot on the scheme so that it will not have the effect that the company and scheme creditors intend. The Van Gansewinkel restructuring required the scheme creditors to release each of the existing guarantor companies from their obligations in respect of part of the existing debt. The relevant release for one of the group companies (which was not a scheme company), however, had not been provided for in the scheme or the restructuring documentation. It is well settled that a release of a third party is possible in circumstances where the release is necessary to give legal or commercial effect to the scheme compromise. The documentation nevertheless needs to provide for the applicable release.

The judgment provides that an applicable deed of release could be drawn up on the basis that the schemes allowed for 'restructuring documents' to be entered into on behalf of scheme creditors and the definition for restructuring documents referenced 'any other documents that the scheme companies consider necessary or desirable to give effect to the restructuring'. Providing for this release was held to have been in line with the intention behind the scheme and importantly it could be inferred by scheme creditors from the general description in the explanatory statement relating to the release of guarantors.

What standard of expert evidence that the schemes will be recognised abroad is required?

The judgment helpfully clarifies the position on expert evidence in providing that the court does not need certainty as to the recognition of the scheme under foreign law, but it will be looking for some credible evidence that it will not be acting in vain. The judgment provides that there was a realistic prospect that the Van Gansewinkel schemes would be recognised under private international law in both Belgium and the Netherlands even if Brussels I (recast) was not applicable.

In relation to recognition through Brussels I (recast), Ch III, the judgment sets out two possibilities. The first being that if the court's jurisdiction is established under Brussels I (recast), Ch II then the scheme would automatically be recognised in the Netherlands and Belgium under Ch III at the same regulation by virtue of the English court's judgment.

The second possibility considered was that where the English court's jurisdiction has not been founded upon Ch II because the scheme fell outside Brussels I (recast), the scheme could nevertheless be recognised automatically under Ch III by virtue of the English court's judgment on the basis that the foreign court would not review an assumption of jurisdiction by the English court pursuant to Brussels I (recast), art 45(3) and 45(2)(e). The judgment does not support this argument and notes that the basis for this conclusion was not explicitly discussed in the expert reports.

Did Apcoa push the envelope too far?

In the Apcoa scheme, the court did not accept that changing the governing law of the debt documentation which was the subject of the scheme claims to English law in order to establish jurisdiction was 'a step too far' (*Re Apcoa Parking Holdings Gmbh* [2014] EWHC 3849 (Ch), [2014] All ER (D) 221 (Nov) and *Apcoa Parking (UK)* [2014] EWHC 997, [2014] All ER (D) 49 (Apr)). The *Apcoa* judgment has significantly increased the scope for the implementation of a restructuring by means of an English law scheme of arrangement. *Apcoa* has now been followed by a number of other cases, including DTEK and TORM, which employed a governing law amendment to establish jurisdiction. This provides practitioners with further confidence when advising clients on the availability of the scheme jurisdiction following a governing law amendment in order to establish a 'sufficient connection'.

Nevertheless, it is important to note the factors which supported the conclusion in *Apcoa* that establishing jurisdiction primarily on the basis of an amended governing law clause was not a step too far in the circumstances. Notably these include that the governing law amendment had been approved by scheme creditors who had nothing to gain from the compromise, it could reasonably have been contemplated by the lenders when they entered into the documents and the lenders had been advised that it would be a gateway to the implementation of a scheme under English law when approval for the amendment was sought. The fact that certain of the agreements in their original form and as executed by all parties, had identified and selected English law for certain (albeit limited) purposes, was also a relevant consideration.

Final remarks

The *Van Gansewinkel* judgment is the latest example of a trend in recent years for schemes of arrangement to be successfully used to restructure the financial obligations of overseas companies that do not have their COMI, or an establishment, or any significant assets in England. The judgment notes the inherent flexibility of schemes of arrangement has proved particularly valuable in cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings would prove very difficult to achieve without substantial difficulty, delay and expense.

Nevertheless, the judgment emphasises that despite the utility of the scheme jurisdiction and the resulting commercial pressures on the court to approve schemes where the overwhelming majority of creditors have supported the scheme, it is important to appreciate that the court does not act as a rubber stamp.

(2) Issuing proceedings without owning the cause of action

In *Eaton v Mitchells & Butler plc* [2015] Lexis Citation 173, [2015] All ER (D) 103 (Aug), the court was asked to strike out proceedings commenced by a discharged bankrupt in circumstances where the underlying cause of action was, and remained to be, vested in the claimant's trustee in bankruptcy. Stephen Leslie, solicitor in the Lexis®PSL Restructuring & Insolvency team examines the case.

A claimant issued personal injury proceedings, and won the trial on liability. Prior to the trial on damages came the realisation that the accident—and therefore the underlying cause of action—vested in the claimant's trustee in bankruptcy, where a bankruptcy order had been made following the accident. The County Court was asked to strike out the proceedings as a nullity, or alternatively that it was an abuse of process for the proceedings to continue. The judge dismissed the application, giving the claimant three months in which to regularise the situation.

Briefly, what were the facts of the case?

Mr Eaton commenced proceedings against Mitchells & Butler plc (M&B) in respect of serious injuries he suffered in an accident. The trial of liability occurred five years after the accident, resulting in judgment being entered in Mr Eaton's favour, with the amount of damages to be subsequently decided by the court. Mr Eaton valued his claim at £3m, whereas M&B valued it in the region of £500,000.

It was disclosed during the proceedings that, three months after his accident, and before the proceedings were issued, Mr Eaton had been adjudged bankrupt on his own petition. However, despite this disclosure, no one involved in the case appreciated its effect—that the cause of action (being a hybrid claim as it sought damages for both personal injuries and consequential losses) had vested in the official receiver as Mr Eaton's trustee in bankruptcy (trustee) under the IA 1986, s 306. The cause of action had neither been assigned by the official receiver (OR) to Mr Eaton, nor was the OR a party to the proceedings.

The impact of Mr Eaton's bankruptcy was picked up two years after the trial of liability by Mr Eaton's new solicitors, and they informed M&B's solicitors of this development.

M&B filed an appellant's notice seeking permission to appeal the decision in the trial of liability. In response, Mr Eaton made an application seeking an annulment of his bankruptcy under IA 1986, s 282(1)(b) on the ground that the debts and expenses of the bankruptcy estate had been paid in full notwithstanding that—at that time—they had not. M&B applied to strike out the proceedings.

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

His Honour Judge Keyser QC, sitting in the county court at Wrexham, had to decide the following issues:

- Were the proceedings a nullity on the basis that the cause of action did not vest in Mr Eaton when he began them? (the first issue)
- If they were not a nullity, would it be an abuse for Mr Eaton to continue with his claim in the knowledge that the cause of action did not vest in him? (the second issue)
- Could the issue be regularised and, if so, in what way? (the third issue)

What arguments were put forward?

M&B submitted as follows:

- first, that the proceedings were a nullity, relying principally on *Ingall v Morgan* [1944] 1 KB 160, in the sense that, as Mr Eaton did not own the cause of action when the proceedings were commenced, they were fundamentally flawed and could not be saved; and
- second, in the alternative, that continuation of the proceedings by Mr Eaton in the knowledge that the cause of action did not vest in him was an abuse of process and that the proceedings should therefore be struck out immediately either as a matter of principle, or alternatively because the proceedings could not be cured—there was no evidence that Mr Eaton's annulment application would be successful.

Mr Eaton's case was that the proceedings were not a nullity, and that the decisions in cases such as *Ingall v Morgan* were of no application in the current case. Notwithstanding that, the proceedings still had to be—and could be—regularised.

What did the judge decide and why?

The first issue

The judge did not agree that the proceedings were a nullity. As a preliminary matter the expression 'nullity' meant something else—in this case, the claim was regularly issued and the proceedings were not a nullity. M&B's actual complaint was that Mr Eaton did not have title to sue at the time the claim was issued, which was a different thing.

On that latter point, *Ingall v Morgan* dealt with narrow circumstances concerning whether a personal representative had title to sue before taking a grant of administration. The circumstances in the present case were different, and there was a chain of authority concerning bankruptcy cases (including *Pickthall v Hill Dickinson* [2009] EWCA Civ 543, [2009] All ER (D) 235 (Jun), *Haq v Singh* [2001] EWCA Civ 957, [2001] All ER (D) 394 (May), *Pathania v Adedeji* [2014] EWCA Civ 681, [2014] All ER (D) 01 (Jun), and *Munday v Hilburn* [2014] EWHC 4496 (Ch)) where the decisions were inconsistent with *Ingall v Morgan*. There was no problem in itself of Mr Eaton having issued the proceedings when the cause of action vested in the OR.

The second issue

It was accepted by M&B that Mr Eaton did not know at the time of issue that the cause of action did not vest in him. The abuse of the *Pickthall v Hill Dickinson* kind did not therefore apply.

The judge agreed that the proceedings could not continue in their current state now that Mr Eaton was aware of the effect of the cause of action vesting in his trustee (*Pathania v Adedeji*). However, there was no rule of law that meant that the proceedings had to be struck out immediately.

The third issue

The judge commented that there were two obvious ways to cure the defect—the annulment of the bankruptcy, or the substitution of the OR as claimant in the proceedings.

A possible third option was for Mr Eaton to take an assignment of the cause of action from the OR. However, in this case, the judge's view (it was not a point decided by him) was that was unlikely to be productive—the limitation period would have expired and, following *Haq v Singh*, the court would probably not permit any amendment to the pleadings dealing with the assignment.

Taking everything into account, the judge gave Mr Eaton three months in which to regularise the situation.

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

Insolvency professionals, particularly those specialising in personal insolvency, will already be aware that hybrid claims vest in trustees.

This case confirms that, where an individual (whether or not discharged from bankruptcy) commences a claim based on a cause of action that vests in his trustee, those proceedings are not a nullity.

Whether the court will then permit an amendment to the proceedings in circumstances where the individual's bankruptcy has been annulled, or the trustee takes over the claim, will depend on whether the individual knew that the cause of action did not vest in them at the time the proceedings were issued. If they actually knew (as opposed to ought to have known), it is unlikely that an amendment will be permitted, as to commence (*Pickthall v Hill Dickinson*) or continue with (*Pathania v Adedeji*) proceedings in those circumstances will be an abuse.

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

The judge was amazed by just how far along this case had proceeded before the effect of Mr Eaton's bankruptcy was finally appreciated.

While the outcome of this case will perhaps be unsurprising to insolvency professionals, it emphasises the need for non-insolvency litigators to ask at the time of being first instructed by an individual—and prior to issuing any claim:

- whether the individual has been adjudged bankrupt since the cause of action arose;
- if he has, whether the cause of action has vested in his trustee; or
- if it has, whether the cause of action has re-vested in the individual as a result of him taking an assignment from his trustee, or the bankruptcy order being annulled under IA 1986, s 282—discharge from bankruptcy does not in itself result in any re-vesting.

If the cause of action remains vested in the individual's trustee, enquiries should be made of the trustee to decide on how to proceed.

(3) Winding up and the public interest test

When is it just and equitable to wind up a company? Reuben Comiskey, barrister at 11 Stone Buildings, explores the recent case of *Secretary of State for Business Innovation and Skills v PAG Management Services Ltd* [2015] EWHC 2404 (Ch), [2015] All ER (D) 74 (Aug) and explains that it suggests certain schemes ought to be wound up in the public interest.

The Secretary of State presented a petition, under the IA 1986, s 124A, seeking an order that the respondent company be wound up on the basis that it would be expedient in the public interest. The Chancery Division, in allowing the application, held that misuse of insolvency legislation by the respondent's scheme demonstrated a lack of commercial probity, such that it was just and equitable to wind up the company.

What was the background to the petition briefly?

Under the Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008, SI 2008/386, the occupier of business property is exempted from paying business rates on that property if it is in liquidation, either compulsory or voluntary.

Recently, a series of businesses have attempted to take advantage of this exemption to save landlords business rates on commercial properties while they are unoccupied. The method adopted by PAG Management Services Ltd is typical of these schemes. It involved the following steps:

- PAG would incorporate a special purpose vehicle;
- PAG's client (the landlord) would grant a lease to the special purpose vehicle (SPV), generally for three years on a rent of £1 per year and with obligations as to use and repair, but terminable on seven days' notice;
- at the same time as granting the lease:
  - the landlord would waive the right to receive sums due under the lease; and
  - the SPV would be placed into members' voluntary liquidation (MVL)—so that it is exempt from business rates;
- the MVL would proceed slowly, allowing the landlord time to refurbish and market the property without itself having to pay business rates—since the SPV was in occupation of the property; and
- if a new tenant was found for it then the lease to the SPV would be terminated.

PAG received a fee for this service of between 15% and 40% of the business rates saved.

The Secretary of State petitioned to wind up PAG in the public interest and presented a petition pursuant to IA 1986, s 124A.

What were the arguments advanced in support of this petition?

The Secretary of State's primary complaints against PAG were as follows.

- The leases were shams because the SPVs did not have the assets to comply with the obligations, and the landlord would not have accepted anybody other than the SPV as tenant on the terms of the leases.
- The statutory declaration of solvency (crucial to a voluntary liquidation continuing as an MVL) could not properly be given as it was given by a person who did not know the assets and liabilities of the SPV.
- The scheme involved a breach of IA 1986, s 87 which requires a company to cease to carry on its business on winding up, because the SPV had no business prior to and outside the MVL.
- The scheme involved a breach of IA 1986, ss 91, 92 because if the liquidator of an SPV indicated his intention to disclaim the leases, he would be removed and no replacement would be appointed.
- The scheme involved an abuse of the insolvency legislation.
- The business of PAG was artificial and demonstrated a lack of commercial probity.

What did the judge decide, and why?

Norris J wound up PAG, but only the fifth and sixth grounds mentioned above.

As to the first ground, he held that the leases were not shams. He drew a distinction between a transaction that was artificial—as these leases obviously were—but still intended to take effect, and a sham transaction that was not intended to be effective at all. The leases clearly were intended to be effective, as the scheme would not have worked otherwise.

In relation to the second ground, this was irrelevant. The only people who were affected by the declaration of solvency were the SPV's creditors, and there were none. The third ground was not made out either, since the SPVs were not carrying on business before the liquidation, and so had nothing to cease.

The fourth ground was decided on the facts—there had been a delay in the appointment of replacement liquidators, but on the evidence, this may have been the result of Insolvency Service advice (through a 'Dear IP' letter).

The fifth and sixth grounds were taken together. The judge held that the promotion of a scheme to avoid business rates was not, of itself, sufficient reason to wind up PAG.

However, he went on to hold that the purpose of liquidation was 'the collection, realisation and distribution of assets in satisfaction of the claims of creditors and the entitlements of members'. The SPVs, on the other hand, used liquidation in order to act as shelters for assets and in so doing subverted the purpose of the insolvency legislation.

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

There are numerous examples of schemes similar to that operated by PAG, and recently there have been several instances where these schemes have been wound up on the petition of the Secretary of State. However, this is the first time that such a case has come before a High Court judge. To that extent, therefore, this judgment should be helpful since it determines the question of whether schemes such as this ought to be wound up in the public interest.

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

The judgment is also helpful in other ways, particularly in relation to the grounds on which the Secretary of State did not succeed. In particular, it is confirmed that mere artificiality does not engage the public interest test. Neither does tax avoidance as a matter of necessity—though the judge was clearly impressed with the evidence as to the unsatisfactory nature of the business rates regime.

Therefore, the simple use of liquidation—however artificial—as a tax mitigation scheme seems unlikely to fall on the wrong side of the line. What seems clear, however, is that if a scheme necessarily involves failing to progress that liquidation, then it is likely to constitute an abuse of the insolvency legislation.

CASE LAW

(1) Re SSRL Realisations Ltd (In Administration) [2015] All ER (D) 74 (Sep), [2015] EWHC 2590 (Ch)

In the Chancery Division, Companies Court, before Richard Spearman QC (Sitting as a Deputy Judge of the Chancery Division)

Landlord and tenant – Forfeiture of lease – Application for relief – Applicant landlord applying for permission to forfeit lease held by fourth respondent tenant in administration by peaceable re-entry – Whether grant of permission impeding purposes of administration – Whether permission should be limited to permission to forfeit by legal proceedings – Insolvency Act 1986, Sch B1, para 43.

Facts:

The applicant landlord purchased a property and thereby became the fourth respondent tenant's landlord. The first to third respondents (the administrators) were appointed administrators to the tenant. The landlord applied for permission to forfeit the lease by peaceable re-entry.

The landlord contended that para 43(4) of Sch B1 to the IA 1986 applied, with the effect that it could not exercise a right of forfeiture by peaceable re-entry to the property, except with the consent of the administrators or the permission of the court. In particular, its contentions included that: (i) the grant of permission would not impede the purposes of the administration and, accordingly, there was no reason to refuse its application; and (ii) any application by the administrators to limit permission to forfeit by legal proceedings, rather than peaceable re-entry, so that it could cross-apply for relief from forfeiture, should be rejected.

Held:

The application would be allowed.

(1) The purpose of the administration would not be impeded by granting the landlord permission to pursue its proprietary rights. There were no grounds to believe that the administrators would be able to achieve a premium by assigning the lease. While the leasehold interest had some potential premium value, the administrators were unable to unlock that value due to the landlord's lawful exercise of its rights. The legislation, the case law and the parties' arguments did not go so far as to suggest that a lessor was not entitled to rely on rights which it could invoke without legal process, even if it would further the purpose of the administration for the lessor to agree or to be prevailed upon not to rely on them. Alternatively, the balancing exercise which the court had to perform, if the grant of permission would impede that purpose, came down in favour of granting the landlord the permission that it sought (see [107], [121] of the judgment).

Lazari GP Ltd v Jervis [2012] EWHC 1466 (Ch) applied; *Atlantic Computer Systems plc, Re* [1992] 1 All ER 476 considered.

(2) The wording of the application notice did not restrict the landlord to seeking permission to forfeit by way of court proceedings. Whether the landlord sought permission to forfeit by peaceable re-entry or by legal proceedings, it would be open to the tenant to apply for relief from forfeiture and, at least on the tenant's case, the procedure and time scales would be the same. The only difference was that, if the landlord had to forfeit by legal proceedings, the tenant would be able to counterclaim for relief from forfeiture, whereas if the landlord was permitted to forfeit by way of peaceable re-entry, the tenant would need to commence separate proceedings. In the circumstances and because there was no identifiable purpose of the administration which would be served by limiting the landlord to seeking forfeiture by legal proceedings, it was not appropriate to impose such a limitation (see [119] of the judgment).

Blair Leahy* (*instructed by Charles Russell Speechlys LLP*) *for the applicant.

Katharine Holland QC* (*instructed by Taylor Wessing LLP*) *for the respondents.

(2) *Re Crown Holdings (London) Ltd (in Liquidation); Re Crown Currency Exchange Ltd (in Liquidation) [2015] All ER (D) 305 (Jun), [2015] EWHC 1876 (Ch)

In the Chancery Division, Companies Court, before Mr M H Rosen QC (Sitting as a Deputy High Court Judge)

Company – Insolvency – Creditors' voluntary liquidation – Distribution of funds – Companies in administration subsequently being placed in creditors' voluntary liquidation – Liquidators applying to court to determine question concerning ownership of money in companies' bank account – Whether money paid in to companies' bank account by customers being held on trust for customers – Whether, at time companies going into liquidation, sums paid by their customers being sums to which companies having full legal and beneficial title – Whether equity to rescind fraudulently induced contract giving innocent party proprietary rights in property – Insolvency Act 1986, s 112.

Facts:

Two companies (the companies), which had operated a currency exchange business, entered into administration in October 2010 and were placed in creditors' voluntary liquidation in March 2011. The companies' directors and shareholders were, at all material times, P and E. P's son-in law, R, had been the operations manager until 2010, with day-to-day control of the business. The companies had become insolvent in 2008 and had ceased to trade after their bank (the bank) had stopped all payments out of their accounts on 29 September 2010, and all payments into the accounts in October, at which time the company had had some £2.8m, but had owed some £22m. P, E and R were prosecuted for fraudulent trading and false accounting, among other things, and E and R were convicted. An issue arose concerning the ownership of money held by the bank, which had been paid in by customers to the companies' account. The liquidators of the companies applied, under s 112 of the IA 1986 for the court to determine whether the companies held the money in their possession in trust for customers who had paid the sums into the companies' bank account. Representatives were appointed to act on behalf of the customers.

The first issue was whether some £1.1m, which had been paid into the companies' bank accounts in September 2011 (the Barclays money) was held on trust for the customers who had paid in that sum (the customers' proprietary claim). Questions arose as to whether: (i) currency exchange contracts (the contracts) entered into by the customers with the companies, had been rescinded for fraudulent misrepresentation; (ii) there was a constructive trust arising from unconscionable receipt in circumstances of total failure of consideration and/or mistake, in particular, the bank's alleged knowledge of the customer's mistake in making the payments to the companies towards the end of their fraudulent trading (from 29 September 2010 when payments out of the accounts had been stopped); and (iii) there was an express trust on the part of the bank, as alleged agent of the companies, in respect of the money received after 29 September 2010. The second issue was whether some £360,000, which on administration, had been found in envelopes in the companies' counting house (the completed money order), belonged to and/or were held on trust for the customers to whom they were addressed. The question was whether legal title had passed to the identified customers when the envelopes had been sealed and addressed to them. The liquidators argued against the existence of any constructive trusts.

Held:

(1) The equity to rescind a fraudulently induced contract did not give the innocent party any proprietary rights in property which was transferred pursuant to that contract. However, the equity to rescind was a personal right against the fraudster. A party with an equity to rescind a contract did not have any proprietary interest in property transferred under that contract. When a company went into voluntary liquidation, its property became subject to the statutory scheme imposed by the Act (see s 107 of the Act). The provisions of the Act applied to all property that was beneficially owned by the company at the date of liquidation. It was only where the property held legally by the company was subject to the present, rather than contingent, proprietary rights of a third party that it would fall outside the statutory trusts imposed by the Act. The Act might, however, operate differently as between a corporate and a personal insolvency, with the consequence that a 'mere equity' might be capable of assertion against the estate of a bankrupt, even though it might not be asserted against the estate of a company in liquidation (see [38], [42], [43] of the judgment).

At the time of the companies going into liquidation, the sums paid by their customers were sums to which the companies had had full legal and beneficial title. The customers' equity to rescind as the result of any fraudulent misrepresentation was a personal right against the companies, and did not encumber the sums which had been paid by the customers as against the general body of its creditors. It followed that the sums in the Barclays accounts, which had been paid in by customers, were the companies' property as at the date which they went into administration (in October 2010), and liquidation (in March 2011) and, accordingly, fell to be dealt with, under s 107 of the Act, for the benefit of the companies' creditors. There had been no express trust, as alleged by the customers. The bank had been a third party, acting to protect its own position and the opposite of either the companies' agent or an express trustee. However, on the facts, there was a constructive trust arising from unconscionable receipt, confined to payments received into the Barclays account after 1.10 pm on 29 September 2010, when the companies had stopped paying out money and had to ceased their fraudulent trade as of the next day (see [44], [45], [62], [65], of the judgment).

In principle, the Barclays money had been unconscionably received by the companies and so held on trust for those customers making payments received after 1.10 pm on 29 September 2010 (see [73] of the judgment).

Bristol and West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698 applied; *Twinsectra Ltd v Yardley* [1999] All ER (D) 433 applied; *Barclays Bank plc v Boulter* [1999] 4 All ER 513 applied; *Shalson v Russo* [2003] All ER (D) 209 (Jul) applied; *Farepak Food and Gifts Ltd, Re* [2007] 2 BCLC 1 applied; *Eastgate, Re, ex p Ward* [1904–7] All ER Rep 890 considered; *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1975] 2 All ER 537 considered; *Neste Oy v Lloyds Bank plc, The Tiiskeri, Nestegas and Enskeri* [1983] 2 Lloyd's Rep 658 applied; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961 considered; *Box v Barclays Bank plc* [1998] Lloyd's Rep Bank 185 considered; *Halley v The Law Society* [2003] All ER (D) 186 (Feb) considered.

(2) In respect of the completed money order, the question of when titled passed depended on the intention of the parties. The relevant contract terms contained no express provision dealing with the passing of title. The contract and the circumstances as a whole made it entirely clear that title in the completed order money did not pass prior to the administration to the customers identified by reason of the companies preparing them for dispatch, but that they would have passed only on deliver made the result that title did not pass entirely clear. The representatives might contend, in those circumstances, that they nonetheless had proprietary claim. However, those matters could not be determined at the present stage (see [67], [70], [71] of the judgment).

The other proprietary claims put forward by the representatives would be rejected, subject to (i) the consequences of findings as to legal title to the completed order money; and (ii) tracing into the money still held in the companies' accounts at the bank (see [73] of the judgment).

Federspiel (Carlos) & Co SA v Charles Twigg & Co Ltd [1957] 1 Lloyd's Rep 240 considered.

Jonathan Brettler **(*instructed by Edwin Coe LLP*)** ***for the representatives.***

Abra Bompas (***instructed by Kennedys***) ***for the liquidators.***

(3) *Sands v Singh [2015] All ER (D) 304 (Jun), [2015] EWHC 2219 (Ch)

In the Chancery Division, Birmingham District Registry, before Judge Purle QC

Insolvency – Bankruptcy – Bankrupt's estate – Matrimonial home – Claimants being trustees in bankruptcy of first defendant (T) – Claimants applying to court for orders for possession and sale of T's dwelling-house (property) but proceedings not being issued by court until later date – Property being registered in T's name and being sole or principal residence of T's wife – True construction of 'applies' within meaning of relevant provision – Whether trustees attempt to apply for orders of possession and sale amounting to application being made within required period within meaning of relevant provision – Whether trustees application being brought in time or whether trustees losing all rights under statutory provision – Insolvency Act 1986, s 283A(3).

Facts:

Under s 283A of the IA 1986, where a bankrupt had an interest in a dwelling-house, which, at the date of the bankruptcy, was his sole or principal residence or that of the bankrupt's spouse solely or jointly owned (s 282A(1) of the Act), the trustee had a three-year period to deal with the bankrupt's interest in that property. If the trustee failed to do so within that period, the interest in the property would re-vest in the bankrupt, under s 282A(2) of the Act. The claimants (the trustees) were the trustees in the bankruptcy of the first defendant (T). They applied to the court for, among other things, orders for the possession and sale in respect of a dwelling-house (the property), which was registered in T's name and was the sole or principal residence of T's wife. An issue arose as to whether the trustees had applied within the requisite three-year period, under s 282A of the Act. It was accepted that on 26 September 2014, before the period of three years had expired, an attempt had been made by the trustees to apply for orders for possession and sale. A paralegal from the trustees' solicitors had been sent to the county court in Coventry with a cheque for £155, being the proper issue fee. She had asked that the application be issued, but she contended that the court staff had stated that a fee of £70 only was payable and had refused to accept the fee of £155 tendered. Thereafter, the matter had been transferred to Birmingham and the proceedings were issued on 1 November 2014. In those circumstances, a preliminary issue concerning s 282A of the Act arose for determination.

The preliminary issue was whether or not the trustees had lost all their rights, under s 282A of the IA 1986, to the property. The issue was whether the attempt made by the paralegal on behalf of the trustees, to issue proceedings had been sufficient to engage s 283A(3) of the Act, such that the trustees had to be taken as having applied for the orders for possession and sale of the property during the three-year period required by s 283A(2) of the Act. Consideration was given to CPR 23.5, which applied to proceedings under the Act and provided that, where an application had to be made within a specified time, it was so made if the application notice was received by the court within that time.

Held:

The condition of s 283A(3) of the Act was that 'the trustee applies for' an order for possession or sale. The operation of s 283A(3) was not dependent upon the court doing anything. It merely required that 'the trustee applies'. It could not be right to construe those words so as to require something to be done by the court. The section focused upon something to be done by 'the trustee alone'. Further, CPR 23.5 was readily applicable to the provisions of s 283A of the Act (see [19], [20], [24] of the judgment).

In the present case, the trustees had applied for both an order for possession and sale. The only issue was when the trustees had applied. On the facts, the trustees had applied when they had delivered the application notice and tendered the relevant fee to the County Court at Coventry. Birmingham had ultimately issued the application on 1 November 2014. What had happened to the application once made was out of the trustees' hands, but had been in the hands of the court. It followed that the trustees had applied in time. They could not have done anything over and above what they had and had, therefore, complied with the statutory condition. It was immaterial that that had resulted in the disapplication of substantive property rights which would otherwise arise. That was the effect of s 283A(3) of the Act. It followed that the application had been made when the papers had been lodged with the court and the appropriate fee had been tendered (see [19], [20] of the judgment).

The application had been made, in the sense that it had been brought in time, and that had been sufficient for the purposes of s 283A(3) of the Act (see [28] of the Act).

Salford City Council v Garner [2004] All ER (D) 465 (Feb) considered; *Barnes v St Helens Metropolitan Borough Council* [2007] 3 All ER 525 considered; *Secretary of State for Trade and Industry v Vohora* [2007] All ER (D) 256 (Nov) considered; *Lewis v Metropolitan Property Realisation Ltd* [2009] 4 All ER 141 considered.

John de Waal QC (instructed by Wright Hassall) for the trustees.

Joseph Curl (instructed by Dent Abrams) for T.

Lydia Pemberton (instructed by Barker Gooch and Swailes) for the fourth to sixth defendants.

(4) Re Angel Group Ltd and other companies Davey v Croxen [2015] All ER (D) 33 (Sep), [2015] EWHC 2372 (Ch)

In the Chancery Division, Companies Court, before Robin Hollington QC sitting as a deputy judge of the High Court

Company – Administration – Application for disclosure of documents and information – Respondents being appointed administrators of companies – First applicant owner of companies and second applicant company applying to remove respondents as administrators – Respondents bringing claim against applicants for misfeasance and applying for specific disclosure concerning dividend payment – Applicants cross-applying for disclosure – Whether orders for specific disclosure should be ordered – Insolvency Rules 1986, SI 1986/1925, r 7.60.

Facts:

The respondents, who were partners in a firm, had been appointed, under para 22 of Sch B1 to the IA 1986, as administrators of a number of companies in a group. The respondents had been appointed apparently at the behest of secured creditors, who were banks in the Lloyds Group of banks (the banks). The companies in questions were owned and run by the first applicant (D). D and the second applicant, a company essentially owned by her, applied to remove the respondents as administrators and to replace them with an independent liquidator, H. That application was pending. D had also recently sued the respondents and the banks for unlawful conspiracy. The respondents were, at the time, pursuing a claim against the applicants for misfeasance. They applied for specific disclosure from the applicants regarding payment of a dividend of about £11m. The applicants cross-applied for disclosure, including in relation to costs.

The issue for consideration was whether specific disclosure should be ordered. The applicants contended, in response to the application for disclosure, that there was no case to answer and that the respondents had raised the issue only as a defense to their removal and to divert attention from due consideration of their own incompetence and inefficiency and delay in any investigation and pursuit of any claim against the applicants for misfeasance. The respondents submitted that the applicants had an improper collateral purpose in seeking their removal, namely to obstruct and delay the proper investigation and pursuit of the claim in misfeasance against them, arising out of the dividend payment, said to have been fraudulently backdated. Consideration was given to the Insolvency Rules 1986, SI 1986/1925 (the Rules), in particular r 7.60, which provided that any party might, with the court's leave, obtain discovery.

Held:

The Rules gave the court power to order disclosure and cross-examination on the application of any party to insolvency proceedings. It was settled law that whether such an order would be made would depend upon the nature of the proceedings and of the disputed questions. Any application for disclosure and cross-examination by a party to insolvency proceedings had to be viewed in the light of the overriding objective laid down by the CPR, which was not inconsistent with the Rules. If application was made and the court was satisfied that it was desirable in the interests of justice, then discovery should be ordered. Only very exceptional circumstances would justify an order for disclosure or cross-examination in proceedings for an administration order. An applicant had to have a legitimate interest in the relief sought, in other words, in the removal of the administrator (see [9], [10], [13] of the judgment).

The first question in respect of the respondents' application for disclosure, was whether the issue of misfeasance was material to the trial of the removal application. It might well be. The court would have to decide what weight to attach in the exercise of its discretion to the respondents' allegation that the removal application was issued so as to stifle the investigation of that claim. The question was whether the present court needed to order disclosure or whether it should be left to the discretion of the trial judge to determine what adverse inferences might fairly be drawn from the failure of the applicants to give disclosure on the issue. The present court's job was to make an order which would best enable the trial judge to reach a fair result at the trial without undue cost to the parties. The best course was to leave it to the trial judge to draw such inferences adverse to the applicants as he saw fit from their failure to give full and frank disclosure of what they knew in relation to the misfeasances alleged against them and of the documents which case light upon it, which either were, or had been, in their possession. In respect of the applicants' cross-application for disclosure, much had already been given. In respect of disclosure in relation to costs, the right thing to do was to adjourn that to the trial judge ([45], [47], [48], [52] of the judgment).

No orders would be made on any of the applications. One aspect of the application, to do with costs, would be adjourned to the trial judge (see [2] of the judgment).

Primlaks (UK) Ltd (No 2), Re [1990] BCLC 234 applied; *Highberry Ltd v Colt Telecom Group plc* [2003] 1 BCLC 290 applied; *Deloitte & Touche AG v Johnson* [2000] 1 BCLC 485 considered; *Buildlead Ltd, Re, Quickson (South and West) Ltd v Katz* [2006] 1 BCLC 9 considered; *Clydesdale Financial Services Ltd v Smailes (No 1)* [2011] 2 BCLC 405 considered.

Per curiam: 'This is a classic type of case … where the court can avoid the cost and expense of disclosure and cross-examination by adopting the alternative course of drawing inferences which were appropriate from any failure on the part of any party to be full and frank with the court …' (see [49] of the judgment).

David Lawne of Hausfeld & Co LLP for the applicants.

Graeme Halkerston (instructed by Stephenson Harwood LLP) for the respondents.

(5) Re Pro4Sport Ltd (in Liquidation); Subnom Hedger (Liquidator of Pro4Sport Ltd) v Adams [2015] All ER (D) 12 (Sep), [2015] EWHC 2540 (Ch)

In the Chancery Division, Leeds District Registry, before Judge Behrens (Sitting as a Judge of the High Court in Leeds)

Company – Director – Liability – Respondent former director and majority shareholder of company, on behalf of company, transferring all or practically all of company's assets to associated company for deferred consideration – Associated company making some payments – Associated company going into creditors' voluntary liquidation – Remainder of contract price outstanding – Liquidator of company seeking to recover loss from respondent – Whether respondent in breach of statutory duties – Insolvency Act 1986, s 212 – Companies Act 2006, ss 172, 174.

Facts:

The present proceedings arose out of one transaction which had taken place shortly before the liquidation of a company, Pro4Sport, in July 2012. On 25 June 2012, the respondent former director and majority shareholder of Pro4Sport, A, on behalf of Pro4Sport, transferred all or practically all of the assets of Pro4Sport to an associated company, Pro4Sport.co.uk, for a deferred consideration of £47,000 plus VAT of £9,400. A was the majority shareholder and a director of Pro4Sport.co.uk. No part of the consideration was paid at the time. The only security provided was a retention of title clause. At a creditors' meeting in July, H was appointed as liquidator of Pro4Sport. It was not in dispute that H had adopted the contract and agreed a payment schedule with A. There was, however, a dispute as to whether he had been present on 25 June and whether he had agreed the schedule at that time. Between July and December, payments were made by Pro4Sport.co.uk and, between February 2013 and January 2014, four further payments were made. In July 2014, Pro4Sport.co.uk went into creditors' voluntary liquidation. In summary, £35,910 of the contract price of £56,400 had been paid. There was, accordingly, £20,490 outstanding. H made an application under s 212 of the IA 1986 against A, seeking to recover his loss from A.

H contended, among other things, that A had been in breach of his duties under ss 172 and 174 of the Companies Act 2006 (the 2006 Act). A denied that he was in breach of duty at all. He submitted, among other things, that he had considered the interests of creditors and had honestly believed that his actions had been in the interests of creditors. He drew attention to the fact that he had consulted a partnership of business advisors (BCIA), that he had had a valuation of the assets and that he had entered into the agreement on the advice of BCIA. Further, he had consulted his two major suppliers who had confirmed that credit would be extended to Pro4Sport.co.uk. In those circumstances, he had been entitled to believe that Pro4Sport.co.uk would be able to honour the payment schedule under the agreement.

Held:

The application would be dismissed.

(1) The claim under s 172 of the 2006 Act failed. A had considered the interests of the creditors and had considered that the contract had been in their best interests. It had avoided the costs of sale. Three valuations had been given for the stock and fixtures. In assessing the price to be paid, A had not been obliged to take the maximum figure in respect of each. He had been entitled to take into account the fact that the liquidator might not be able to sell as a going concern. He had further been entitled to rely on advice. It was true that the contract had involved a deferred consideration. However, an immediate consideration had not been on offer. The question for A had been whether a sale with deferred consideration was a better deal for the creditors than no sale at all. A had formed the view that Pro4Sport.co.uk would be able to fund the sale after having checked with the two main suppliers. A's views had been honestly held. That was supported by the fact that H had taken no steps to avoid the contract after his appointment and had agreed a schedule of repayments with A when the contract had been formed (see [38], [39] of the judgment).

(2) In all of the circumstances, A had not been in breach of his duty under s 174 of the 2006 Act. It was self-evident that the terms agreed between Pro4Sport and Pro4Sport.co.uk could have been more favourable to Pro4Sport. The price to be paid by Pro4Sport.co.uk could have been higher. The consideration could have been payable immediately. There could have been a personal guarantee by A. Those factors, however, did not establish that A had not been exercising reasonable skill and care. Further, the present case was a case where A had sought professional advice from BCIA. The agreement between Pro4Sport and Pro4Sport.co.uk had been drawn up by BCIA and entered into under their advice. H had been present when it had been drawn up and had not objected to its terms. He had agreed a repayment schedule at the time. He had not complained or sought to avoid the agreement when he had been appointed liquidator one month later. He had not sought a personal

guarantee at any time. A had been obliged to exercise his own independent judgment. However, the fact that he had been relying on advice was an important factor in determining if he had been in breach of his duty to exercise reasonable care (see [41], [45]–[47] of the judgment).

In the light of the decision on liability, the question of loss did not arise (see [56] of the judgment).

James Hannant* (*instructed by Prodicus Legal Ltd*) *for the liquidator.

***Ian Tucker* (*instructed by MD Law, Sheffield*) *for A*.**

(6) Re Nortel Networks UK Ltd [2015] All ER (D) 05 (Sep), [2015] EWHC 2506 (Ch)

In the Chancery Division, before Mr Justice Snowden

Company – Administration order – Administrator – Applications – Group of companies filing for insolvency protection – Net proceeds of sale held in escrow account – United Kingdom administrators applying for permission to make distributions and other matters – Whether permission to be given to administrators – Insolvency Act 1986 – Insolvency Rules 1986.

Facts:

Nortel Networks UK (NNUK), and the other Nortel companies (together the EMEA companies) were incorporated in a variety of countries in Europe, the Middle East and Africa. The EMEA Companies formed part of the worldwide Nortel Group which operated a networking solutions and telecommunications business. All the Nortel companies formed part of the worldwide Nortel Group which was placed into administration. The EMEA Companies were all placed into administration in England. After filing for insolvency protection, a global sale of the businesses and assets of the group was undertaken and to facilitate that sale, an Interim Funding and Settlement Agreement (the IFSA) was entered into. The IFSA provided that the net proceeds from the global sale should be allocated among the parties and the proceeds of sale were paid into escrow bank accounts in New York. The joint administrators in the United Kingdom applied for various orders to permit them to institute fair and efficient procedures for requiring creditors of the EMEA Companies to file their claims against the companies and to permit those companies to share in the allocation of the moneys in the account. There would, however, have to be some differences between the proposed procedures for inviting and determining claims and for making distributions to creditors in relation to: (i) NNUK, (ii) the other EMEA Companies apart from another set of Nortel companies, NNSA, and (iii) NNSA. A proof of debt process and a distribution was not an automatic feature of every administration in England. The process for proof of debts was contained in Ch 10 of the Insolvency Rules 1986 (the Rules) and, by r 2.68, and was only applicable where the administrator made or proposed to made a distribution to a class of creditors, and had given notice of his intention to creditors in accordance with r 2.95. An administrator did not have a free standing discretion to decide to make a distribution to unsecured creditors. That power was given by para 65 of Sch B1 of the IA 1986.

The issues were: (i) whether there should be an order pursuant to para 65(3) of Sch B1 of the IA 1986, that the administrators of NNUK be at liberty to make such distributions in accordance with Ch 10 of Pt 2 of the Rules to its unsecured non-preferential creditors as the administrators considered appropriate; (ii) whether there should be an order pursuant to r 2.97(2) that the administrators of NNUK be at liberty to declare dividends notwithstanding that there might be pending applications to the court to reverse or vary a decision of the administrators on a proof, on the basis that full provision be made for such disputed proofs; (iii) whether there should be an order that the administrators of the EMEA Companies, apart from NNUK and NNSA be at liberty to promulgate company voluntary arrangements under the Act in substantially the terms set out in evidence filed by the administrators; and (iv) whether there should be an order that the administrators of NNSA be at liberty to promulgate a company voluntary arrangement under the Act in respect of NNSA providing for a claims determination mechanism and such other terms as they might think appropriate.

Held:

The matter was to be judged at the time when permission was sought. The court had at that time to be satisfied that the proposed distribution was conducive to the achievement of the then current objectives of the administration. The court had to be satisfied that the distribution was in the interests of the company's creditors as a whole and that proper provision had been made for secured and preferential creditors. The court had to consider what were the realistic alternatives to the proposed distribution sought by the administrators (see [20] of the judgment).

On the facts, an order would be made pursuant to para 65(3) of Sch B1 of the Act that the administrators of NNUK be at liberty to make such distributions in accordance with Ch 10 of Pt 2 of the Rules to its unsecured non-preferential creditors as the administrators considered appropriate. The solution proposed was for the notice to specify a date for proving on the basis that the administrators would make a very modest interim distribution from the funds to hand. Further, there would be an order that the administrators of the EMEA Companies apart from NNUK and NNSA be at liberty to promulgate company voluntary arrangements under the Act in substantially the terms set out in evidence filed by the administrators. Finally, there would be an order that the administrators of NNSA be at liberty to promulgate a company voluntary arrangement under the act in respect of NNSA providing for a claims determination mechanism and such other terms as they might think appropriate (see [3], [25] of the judgment).

The administrators were generally to be at liberty to seek further directions from the court so as to ensure that they met any requirements under the IFSA and/or as might be imposed by the US and Canadian courts for participation of the EMEA companies of the moneys (see [50] of the judgment).

MG Rover Belux SA/NV (in admin), Re [2007] BCC 446 considered.

William Trower QC and Daniel Bayfield (instructed by Herbert Smith Freehills LLP) for the Administrators of the Nortel companies.

Adam Al-Attar (instructed by Clifford Chance LLP) for the Comité d'enterprise (Works Council) of Nortel Networks SA.

LEGISLATION

(1) Small Business, Enterprise and Employment Act 2015 (Consequential Amendments) (Insolvency and Company Directors Disqualification) Regulations 2015

SI 2015/1651: Amendments to director disqualification forms specified to be used by certain court officers are made following the commencement of parts of small business, enterprise and employment legislation. Amendments are also made relating to the collective investment scheme. These changes come into effect on 1 October 2015.

The Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) makes provision about, among other things, improved access to finance for business and individuals, regulatory provisions for business, and provision on the exercise of procurement functions by certain public authorities.

A number of amendments are made to secondary legislation in consequence of the commencement of SBEEA 2015, ss 104–116, 137–146.

Following the commencement of SBEEA 2015, ss 104–116, amendments are made to secondary legislation relating to the procedure for disqualification under the Company Directors Disqualification Act 1986 (CDDA 1986), which gives specified courts power to disqualify individuals, and gives the Secretary of State powers to accept disqualification undertakings.

Specifically, forms specified to be used by court officers are amended to include reference to the new CDDA 1986, ss 5A, 8ZB, 8ZD, in form DQ01. Similar amendments are made to forms in Northern Ireland.

In consequence of SBEEA 2015, ss 137–146, amendment is made to secondary legislation relating to collective investment scheme.

(2) Deregulation Act 2015 (Insolvency) (Consequential Amendments and Transitional and Savings Provisions) Order 2015

SI 2015/1641: Amendments are made to secondary legislation in consequence of amendments made to primary legislation on insolvency, deeds of arrangement and company director disqualification. These changes affect individuals seeking authorisation to become insolvency practitioners, and will come into effect on 1 October 2015.

The Deregulation Act 2015 (DA 2015) made a number of amendments to the IA 1986, the Deeds of Arrangement Act 1914 (DAA 1914), and CDDA 1986.

Deregulation Act 2015, s 17, contains partial authorisation provisions which are meant to increase insolvency sector competition by reducing certain entry barriers. This is done by letting insolvency practitioners specialise in either personal or corporate insolvency, or being fully authorised to act in both.

Deregulation Act 2015, Sch 6, Pt 6, simplifies the regulatory regime for insolvency practitioners and provides that the Secretary of State as sole competent authority will withdraw from the direct authorisation of insolvency practitioners after a transitional period. It also repeals a provision allowing the Secretary of State to recognise a body whose members may act as a nominee or supervisor of a voluntary arrangement under IA 1986.

In consequence of DA 2015, s 17, Sch 6, Pt 6, a number of amendments are made to secondary legislation including the Solicitors Recognised Bodies Order 1991, SI 1991/2684, and the Money Laundering Regulations 2007, SI 2007/2157.

Transitional provision is made so where an individual applies to the Secretary of State for authorisation to act as an insolvency practitioner before 1 October 2015, and authorisation is granted between then and 30 September 2016, the formula for fee calculation which the individual must pay is £2,400 multiplied by the days between authorisation and 30 September 2016, divided by 365.

Saving provisions are made regarding these amendments, between 1 October 2015 and 30 September 2016, in relation to individuals who apply for insolvency practitioner authorisation before 1 October 2015 or who hold such an authorisation before that date. This includes provisions relating to:

- the Insolvency Practitioners Tribunal operation; and
- the requirement for insolvency practitioners authorised by the Secretary of State to submit returns containing certain information, which will include the number of cases in which the insolvency practitioner has acted recently as well as details relating to a professional development, and the power for the Secretary of State to request such information.

In addition, the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986, SI 1986/952, and the Deeds of Arrangement Fees Order 1984, SI 1984/887, are revoked.

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ISSN 1475-1887