XXIV

BARRISTERS' CHAMBERS

Insolvency Judgments

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Contents

Introduction

In this edition of our quarterly newsletter we cover the conjoined Supreme Court decisions in *New Cap Re-insurance* and *Rubin v Eurofinance*. The former case was decided on the narrow basis that submitting a proof and attending creditors meetings amounted to submission to the jurisdiction of the Court overseeing the liquidation. In the latter case, as predicted in this newsletter last year, the Supreme Court was divided. The majority held that the decision of the Court of Appeal had been wrong, and that there was no special rule upon which office holders could rely when seeking the English Court's assistance in enforcing overseas judgments, and the general conflict of law principles apply.

As well as this important case, we cover in this edition the interesting and important decision of *Wright Hassall v Morris* in the Court of Appeal on the personal liability of administrators, which may come as a surprise to many practitioners, as well as the decision of the High Court in *Neumans v Andronikou* about the (non-) recoverability of fees by a solicitor for a company opposing a winding up petition which was suspended due to the intervening administration of the company. These cases illustrate the value of looking for a solvent third party to underwrite liabilities and debts.

In *Re Colliers International*, the High Court resolved a conflict on the authorities about whether the Court could give retrospective authority to commence proceedings against a company in administration, and held that it could.

O'Donnell v The Bank of Ireland is an interesting decision on insolvency forum shopping, and moving COMI. The decision discussed the relevance of ensuring that third parties know when a person's COMI has moved.

Re Teathers is a case which throws light on the viability of landlords' claims in liquidation for reinstatement and repair following the surrender of leases by insolvent tenants. The cap in s.18 of the Landlord and Tenant 1927 remains relevant.

Finally in *Tallington Lakes v Ancasta* the Court of Appeal has reminded us of the risks of trying to shortcut the legal dispute resolution process by presenting a winding up petition on a disputed debt.

We also cover the new Practice Note, effective from 1 January 2013, relating to restoring companies under s.1029 of the Companies Act 2006.

Teathers Limited; Baroque Investments v Heis

[2012] EWHC 2886 (Ch)

Chancery Division (Morritt VC)

A tenant's covenants as to reinstatement works and yielding premises up in good repair are released by the surrender of the lease.

The corporate tenant of premises leased to 30 March 2014 was subject to covenants contained in the lease to keep the premises in good repair and to yield it up in good repair at the end of the lease or earlier determination.

A subsequent licence permitted the tenant to make alterations to the property provided it reinstated the premises before the end of the term of the lease. Upon the tenant's liquidation the liquidators surrendered the lease and the claimant landlord sought to enforce these covenants by proving in the liquidation.

As to the liability to reinstate, the court found that the covenant in the licence gave to the tenant the full period of the lease term to carry out the reinstatement and the tenant would only be in breach of this covenant if it failed to reinstate the premises by 30 March 2014. Thus the liability had not arisen before the surrender of the lease and the covenant was released by the surrender.

As to the liability to repair, the court found that:

i) The liability to keep the demised premises in a good state of repair during the lease arose during the term of the lease and hence may be the basis of a provable debt. However, it fell within the scope of s.18(1) Landlord and Tenant Act 1927, meaning that damages for breach of the covenant were not to exceed the amount (if any) by which the value of the reversion was diminished owing to the breach of the covenant.

ii) The liability to yield up the premises in a good state of repair could only arise at the end of the term and so was released by the surrender.

As the claimant had not given consideration to s.18(1) when valuing its proof the alleged debt was not provable.

The case offers assistance to landlords (i) when drafting the terms of a lease as it distinguishes between types of covenants which will and will not survive surrender, and (ii) when preparing proofs of debts to ensure that the value is calculated in accordance with statutory provisions. It also assists liquidators when considering a proof of debt submitted by a landlord.

Rubin v Eurofinance and New Cap Reinsurance Corp v Grant

[2012] UKSC 46

Supreme Court (Lord Walker, Lord Mance, Lord Clarke, Lord Sumption, Lord Collins)

Judgments in avoidance proceedings are in personam and not a separate category for the purpose of enforcement in the jurisdiction.

In both matters judgment had been obtained in another jurisdiction in avoidance proceedings against a party domiciled in England and Wales.

The issue was whether these judgments were enforceable by the High Court in circumstances in which it was alleged that none of the requirements for enforcement of judgments in personam applied i.e. that the defendants had not been present in the jurisdiction at the time proceedings were instituted and had not submitted to the jurisdiction ("the Dicey Rule").

The Court of Appeal found that judgments determining insolvency rights were a special category to which the Dicey Rule did not apply and fell within the Court's power to give assistance to foreign insolvency processes.

The appeal in *New Cap* failed on the grounds that New Cap had submitted to the Australian process. Whilst New Cap had not taken any steps in the avoidance proceedings it had submitted proofs of debt in the liquidation and attended creditors' meetings, which was sufficient to constitute submission to the jurisdiction.

The appeal in *Rubin* was allowed by a 4:1 majority. In reaching his conclusion Lord Collins saw no distinction in principle between civil claims brought by officeholders and avoidance proceedings. Further, no principled basis had been put forward for a novel and distinct set of rules to apply to the latter. The decision of the Court of Appeal was "*a radical departure from substantially settled law*", the law of enforcement of judgments being "*for the legislature and not for judicial innovation*".

The Supreme Court also held on a 3:2 majority that *Cambridge Gas v Unsecured Creditors of Navigator Holdings* [2006] UKPC 26 had been wrongly decided. Cambridge Gas had not submitted to the jurisdiction of the US Bankruptcy Court and accordingly there was no basis for the recognition of an order of that Court in the Isle of Man.

Parties need no longer be concerned that their non-participation in foreign insolvency proceedings might lead to judgments being enforced against them in this jurisdiction. However, creditors must be wary of the possibility of submitting to a jurisdiction for the purposes of avoidance proceedings by way of submitting proofs or attending creditors' meetings.

Colliers International UK plc (in administration); The Bank of Ireland v Colliers International

[2012] EWHC 2942 (Ch)

Companies Court (David Richards J)

The Court has jurisdiction to grant permission to commence proceedings retrospectively under the Insolvency Act.

In 2006, the Bank of Ireland instructed Colliers International – a firm of surveyors – to value a portfolio of care homes being bought by Southern Cross.

When Southern Cross went into administration in July 2011, the Bank began to investigate whether it had a claim against Colliers for negligence. By 2012, the limitation period on this potential claim was about to expire, and so the Bank issued proceedings. Unfortunately, by that stage Colliers had gone into administration.

In these circumstances, the Bank made a retrospective application for permission to commence proceedings against Colliers under paragraph 43(6) of Schedule B1 of the Insolvency Act. To avoid the limitation deadline, the Bank had in fact already issued its claim. For that reason, the application was for permission to commence proceedings to be granted retrospectively.

The Court noted that there was significant uncertainty as to whether jurisdiction existed to give permission retrospectively. In particular, there was a direct conflict in the authorities: *Re Saunders* [1997] Ch 60 and others holding that the jurisdiction does exist, and *Re Taylor* [2007] Ch 150 that it does not.

Referring to House of Lords and Court of Appeal authorities from other areas of the law, the Court ultimately resolved this uncertainty by deciding that it *did* have jurisdiction to give permission to commence proceedings retrospectively. In reaching this conclusion the Court had regard to the negative consequences of holding that proceedings are a nullity, as well as to the purpose of the requirement to obtain permission, which is to ensure that all proceedings having any bearing upon an insolvency process should remain under the supervision and control of the Court. Interestingly, the Court was also of the opinion (*obiter*) that an administrator could grant retrospective consent to commence proceedings against a company in administration.

This decision provides important clarity on the Court's jurisdiction to lift the moratorium on proceedings against companies in administration and compulsory liquidation. Where proceedings are commenced in breach of the moratorium, the practitioner should be aware that the Court may still allow the claim to proceed.

Portsmouth City Football Club; Neumans v Andronikou

[2012] EWHC 3088 (Ch)

Companies Court (Morgan J)

Solicitors' fees incurred before an out of court appointment of administrators were not administration expenses.

Neumans LLP was retained by the Club to oppose a winding up petition. The petition was suspended when administrators were appointed by a creditor out of court.

Neumans ceased to act for the Club before the administration. A year later, the administration was discharged when the Club went into compulsory liquidation. Neumans applied to have their fees paid as an expense of the administration, alternatively, the liquidation.

Neumans' difficulty was that its fees did not fall within any of the costs and expenses listed in either r.2.67(1) of the Insolvency Rules 1986. Nevertheless, it argued, imaginatively, that if the Court ordered its fees to be paid under s.51 of the Senior Courts Act 1981, they would then be payable as a "necessary disbursement" under r2.67(1)(f) Insolvency Rules. Alternatively, it argued that the Court should "treat" its fees as expenses on the *Lundy Granite* principle.

The judge rejected both of those arguments. Even assuming that the Court could make a costs order in favour of solicitors under s.51 (which the judge doubted), that would not make the fees "disbursements" under r2.67(1)(f). S.51 did not give the Court the power to add to the permissible list of administration expenses.

Nor could the fees be "treated" as administration expenses because the Neumans' retainer ended before the administration and the administrators had not elected to retain the benefit of its service. The judge discussed *Re Toshoku* and concluded that properly understood the *Lundy Granite* principle did not add to the exhaustive list of expenses.

Most costs were allowed under r4.218(3)(h) as liquidation costs incurred by "any person appearing on the petition". However, this was limited to costs that were sufficiently connected to the petition that resulted in the winding up.

The decision emphasises the exhaustive nature of the list of expenses in r.2.67(1) and r.4.218(3) and the Court's reluctance to add to them on a case by case basis to the detriment of other expense creditors and unsecured creditors generally. For solicitors retained by an insolvent company to oppose a winding-up petition, this is bad news and they would be well advised to ensure a third party is responsible for their fees.

Practice Note: Claims for an order restoring the name of a company to the Register

Section 1029 of the Companies Act 2006

Companies Court (issued by the Chief Bankruptcy Registrar)

An updated procedure for company restoration claims.

The Companies Court has issued a new Practice Note for company restoration claims, which supersedes Practice Note number 1 of 2003. The updated procedure came into effect on 1 January 2013. There are a number of points in the new code that practitioners should be aware of.

Under the new procedure, any application to adjourn the claim must be made before the first hearing, and the claimant must give reasons why a further hearing is required. If the claim has already been adjourned, the usual rule will be that subsequent adjournments will be refused, and any request for a further adjournment will have to show sufficient cause. The message is clear that the Court is taking a firmer line, and expects claimants to get on with restoration claims.

The other material updates to the Practice Note apply where the company to be restored was dissolved whilst in or following liquidation. In such a case, the claimant is now explicitly required to file evidence of service of the claim on the Official Receiver or former liquidator (if one was appointed). In addition, the Practice Note provides that, unless the Third Parties (Rights Against Insurers) Act 1930 is relied on for the purposes of the proposed claim, the claim should include an application for the appointment of a liquidator pursuant to s.108 of the Insolvency Act 1986 and a letter from the proposed liquidator consenting to act. The purpose of these updates is to ensure that a company dissolved following liquidation is restored to the register in the same state and, preferably, with the same IP in charge.

Practitioners should note that the standard forms for the provision of undertakings in company restoration claims have been amended. Thus, for example, the solicitor's undertaking has been tightened to provide that the claimant 'appeared to have understood the explanation' about the importance of keeping promises to the Court! Practitioners should ensure that they update any precedents that they hold on file for these forms.

The new Practice Note can be found at: www.xxiv.co.uk/legal/item/651.

Wright Hassall v Morris

[2012] EWCA Civ 1472

Court of Appeal (Mummery, Patten, Treacy LJJ)

Personal liability of an administrator when sued "as administrator".

Morris, as the administrator of two companies, entered into two conditional fee agreements (CFAs) with solicitors (Wright Hassall LLP) engaging them to act for the companies in litigation.

Morris signed the CFAs without reservation as to his personal liability. After the litigation settled, Wright Hassall later sued Morris in his capacity "as administrator" for fees due under the CFAs. The companies were not joined to the proceedings. Morris pleaded that that the retainer was with the companies.

Judgment was given in favour of Wright Hassall in the Mercantile Court. When payment was not made, because Morris asserted that Wright Hassall were expense creditors of the companies ranking pari passu with other expense creditors and would have to wait if and until such creditors were paid out of the companies, Wright Hassall brought proceedings in the Chancery Division of the High Court for directions. HHJ Cooke held that the judgment imposed liability on the companies in administration and not on Morris personally. Wright Hassall appealed.

The Court of Appeal unanimously held that Morris was personally liable on the judgment debt. Only Morris had been sued, and the judgment had been given against him. The companies had not been joined as parties and judgment could not be given against a non-party. The judgment had been based on the terms of the contracts against the person who had signed them.

Although sued "as administrator", the Court held that there was no authority which limited the personal liability of a defendant sued in such a representative capacity. Nor was there any authority for the proposition that suing a person "as administrator" meant that he was sued as an agent (for the company in administration) rather than in a personal capacity.

This decision will come as a surprise to many; an unwelcomed surprise for insolvency practitioners but perhaps a welcomed one for persons they have contracted with. Administrators who contract "as administrators", and who are sued as such, may find that is not sufficient to avoid personal liability for contract debts, and it will be scant comfort for them that they have a right of indemnity out of the company assets.

Tallington Lakes v Ancasta International Boat Sales

[2012] EWCA Civ 1712

Court of Appeal (Thorpe and Patten LJJ and David Richards J)

The court should not conduct a lengthy and detailed hearing when determining whether the debt on which a winding-up petition was founded was genuinely disputed on substantial grounds.

Tallington Lakes Limited and its controlling director, Mr Morgan, appealed against an order striking out the winding up petition they had presented.

The petition debt arose from the supply of an allegedly defective yacht by a company called Ancasta International Boat Sales Limited. The debts claimed included the costs of fixing the alleged defects and lost charter fees. Ancasta disputed the debts on a number of grounds and the issues between the parties included whether Tallington was a consumer for the purposes of the Unfair Contract Terms Act 1977 and the applicability and construction of Ancasta's standard terms and conditions.

The petition was struck out at first instance. The Court of Appeal upheld this decision. The court observed that the petition should never have been presented. It was not the function of the Companies Court to try disputed debts but to determine whether the class remedy of winding up was suitable in any given case. If it were otherwise the threat of winding-up proceedings could be used as improper pressure on a company to pay a disputed debt. Furthermore there would inevitably be delay in determining disputed issues, if the court choose to do so, and this would cause unacceptable damage to the business of the company subject to any petition.

There had been several rounds of evidence in this case which had taken over six months to finish. The court's role on a petition was simply to determine on the evidence before it whether the debt was or was not genuinely disputed on substantial grounds. It was neither practical nor appropriate to examine in minute detail the case made on either side or conduct a lengthy hearing which may well result in a wasteful duplication of court time. The petitioners should have followed their original threat which was to commence part seven proceedings.

The decision underlines the well-established position that the court is only prepared to resolve a very limited range of legal and factual disputes on a winding up petition. It is a clear warning that, far from being a convenient short cut, the use of a winding up petition where there is an arguable dispute can result in time and costs being wasted in a procedure that is not suited to the determination of factual and legal disputes. Those considering the presentation of a winding up petition should, at an early stage, take a realistic view of the suitability of the procedure if a dispute is likely.

O'Donnell v Bank of Ireland

[2012] EWHC 3749 (Ch)

Chancery Division (Newey J)

The debtor's COMI can change but such a change must be apparent to third parties.

Mr and Mrs Brian O'Donnell were well known Irish property investors. Their investments had fallen substantially in value and they were unable to repay their major creditor, the Bank of Ireland.

The Bank of Ireland brought proceedings against them as a result of which, on 12 December 2011, it obtained judgment for €71M and costs.

The O'Donnells had lived in a number of properties in Ireland prior to December 2011 when they moved to a large property in London, which had been acquired by an entity controlled by the O'Donnells in August 2007.

In March 2012 the O'Donnells presented petitions for their own bankruptcy in England and Wales. The Bank of Ireland subsequently presented petitions for the O'Donnell's bankruptcy in the Republic of Ireland. The O'Donnell's case was that their COMI had changed to England and Wales at some point between 2005 and 2007, or, at the very latest, by December 2011.

The Judge considered the authorities on the meaning of a COMI. The authorities show:

i) a debtor's COMI is to be determined at the date of the commencement of the insolvency proceedings not at the date of the hearing of them;

ii) a COMI must be ascertainable to third parties;

iii) activities which the debtor has carried out purely on behalf of some other person will not be relevant to determining the debtor's COMI;

iv) a COMI can be changed by the debtor;

v) what is required for a COMI to be ascertainable by third parties will depend on the facts of each case.

Newey J held that the O'Donnell's COMI remained the Republic of Ireland and dismissed their petitions. The O'Donnells may well have moved permanently to London in December 2011. But it did not follow that this was apparent to third parties. Most third parties would have no way of finding out about the shopping and leisure habits on which the O'Donnells had relied as evidence of a change of their COMI. By contrast the publically available information about the O'Donnells, including the electoral role and English and Irish company registers, still pointed to the Republic of Ireland at their COMI.

This case shows that care must be taken in concentrating on relevant evidence when determining a person or company's COMI. The evidence must be evidence that would be available to third parties. Where a person or company wishes to change its COMI, he should consider giving some notice of this to creditors or at least be assiduous to make sure that publically available records point to the intended new COMI and not the old one.

About XXIV Old Buildings

XXIV Old Buildings is a long-established set of self-employed barristers based in Lincoln's Inn, near the High Court at the heart of legal London.

We provide specialist legal advice and advocacy services in London, nationwide and worldwide to the financial, commercial and professional community as well as to private individuals.

The members of XXIV Old Buildings are particularly well-known for appearing in Court in off-shore and cross-border disputes and insolvencies. We also advise individuals and companies, in the UK and abroad, on a wide range of contentious and transactional matters.

XXIV Old Buildings is recognised in the legal directories as one of the leading insolvency chambers. Our members deal with domestic corporate insolvencies and bankruptcies as well as complex international insolvency disputes. As such we have been involved in the major insolvencies of recent years including Lehman Brothers, Kaupthing, Madoff, Bear Stearns.

As self-employed barristers, we are able to take instructions directly from English solicitors, foreign lawyers and also from qualified accountants and other professionals.

Members are experienced in all aspects of insolvency law including:

- Administrations & liquidations
- Asset tracing and recovery in fraud cases
- Bankruptcy & bankruptcy restriction orders
- Cross-border insolvency
- Off-shore and multi-national disputes
- Directors' disqualification
- Voluntary arrangements
- Public interest winding up

Further details are available on the website at: http://www.xxiv.co.uk/

About Cork Gully LLP

In 1906 WH Cork established WH Cork & Co as an insolvency practice largely focused on helping businesses in the grocery trade. In 1935, WH Cork formed a partnership with his son Kenneth and another accountant, Harry Gully, creating Cork Gully. After WH Cork's death and a period of war service, Kenneth became the owner of the firm and built the business to become the leading name in the field of insolvency work.

Sir Kenneth Cork (as he later became known) was chairman of the Cork Committee, which published the Cork Report in 1982, leading to a change in primary legislation and subsequent introduction of the Insolvency Act 1986.

Stephen Cork now leads the business, representing the fourth generation to be in the field of restructuring. Stephen and the vastly experienced team he has brought to Cork Gully have advised both owner-managed businesses and main listed publicly quoted companies on the recovery strategies available to the Board as well as their financiers.

They provide a comprehensive range of formal and informal corporate recovery and insolvency services. Their services are delivered by a team of seasoned professionals who have extensive experience of the restructuring environment. The current trading environment is increasingly complex and fast moving – so the solutions they provide to their clients are more creative, responsive and effective than ever.

More information can be found at www.corkgully.com

Nature of assignments undertaken:-

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- Operational restructuring
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- Refinancing
- Return of capital

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- Compromise agreements

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- Asset tracing and recovery
- Creditor services

Insolvency

- Contingency planning
- Advice to board of directors
- Administrations
- Company voluntary arrangement
- Receiverships
- Insolvent liquidations
- Personal insolvency

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