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BARRISTERS' CHAMBERS

# Insolvency Judgments

Produced in conjunction with

Cork Gully

**November 2012**

# Contents

# Introduction

**STOP PRESS - Supreme Court decision update**

**Eurofinance v Rubin**

Since this report was drafted, the Supreme Court has handed down its much-awaited decision in *Eurofinance v Rubin* which has clarified the law on enforcement of foreign judgments in an insolvency context.

This report is the third of our quarterly publications prepared in conjunction with Cork Gully, summarising some of the important insolvency decisions of the last 3 months.

Although the summer is traditionally a quiet time for the Courts, there have been a number of interesting decisions, including cases considering the hot topic of defects in the appointment of out of court administrators. The first is *Re Eco Link Resources*, decided in Birmingham by His Honour Judge David Cooke. That case adopted the logic of Arnold J in *Re Ceart Risk Services* in giving a purposive construction to the statutory provision which had been breached. However the Judge held that failure to give notice of intention to appoint administrators to a prior floating charge holder was an incurable defect and he refused to uphold the purported appointment.

It might be optimistic to accept the Judge's view that the law in this area is settled, given the differing views of the members of the judiciary in London and Birmingham. Indeed one of the most recent cases is *Re Euromaster*, in which Norris J did not echo HHJ Purle QC's view that the law is settled, but he did follow essentially the same approach. If the law is not settled, than at least it appears to be converging.

In the depths of August, *Globespan Airways* went to the Court of Appeal which overturned the decision of Briggs J and held that the conversion of an administration into CVL occurs only when the requisite notice is actually registered (not merely received) by Companies House, but that in that event the administration is automatically extended until the date of conversion

The Court of Appeal also decided, in *Joddrell v Peaktone*, that the new provision in the 2006 Companies Act concerning restoration to the register has assimilated the two different procedures which had been in place in the 1985 Act (and before). The new provision has the effect of retrospectively validating proceedings commenced against dissolved companies if they are later restored to the register.

Other cases summarised in this edition include *Wedgwood Museum Trust* which illustrates the dangers of office holders running up unnecessary legal costs.

*Asegaai Consultants, Wood v Mistry* is a rare case of liquidators bringing a claim for disqualification against a former liquidator, who was found to have siphoned money out of 43 companies of which he was liquidator into his own offshore accounts.

In *Relfo Ltd (In liquidation) v Varsani* a liquidator succeeded in his claim for knowing receipt against a former director; it reminds us of the availability of traditional equitable remedies as tools for office holders seeking to recover assets or damages suffered by the company at the hands of its former controllers, in addition to the familiar provisions of the Insolvency Act itself.

Finally, in *Re BTR (UK) Ltd; Lavin v Swindell*, a Judge in Leeds held that an administrator whose proposals have been rejected by the creditors must apply to the Court to wind the company up, and if he does not the court will hear an aggrieved creditor and can then wind up a company without a petition having been presented.





# Eco Link Resources Ltd (in CVL)

**[2012] EWHC (Ch) unreported**

**Chancery Division, Birmingham (HHJ Cooke)**

In this case involving a defect in the appointment of administrators, the Judge considered the requirement to give notice of intention to appoint to a prior floating charge holder. He held that the failure to do so rendered the appointment invalid.

This case is another in the increasingly long line of cases considering the effect of failures to follow the rules concerning appointment of administrators that stretches back to *Minmar v Khalatschi* [2011] EWHC 1159 (Ch) and *Hill v Stokes Plc* [2010] EWHC 3726.

In the instant case, the directors of the company wished to put the company into a CVL. They properly gave notice to the two qualifying charge holders and held the requisite meeting on 26 June at 11am. Less than an hour later, a call was received advising that one of the charge holders had filed a notice of appointment of administrator at 10.10am that same morning.

The liquidators argue that the purported appointment of administrators was invalid not least because the charge holder who had filed the notice at court had not previously given notice of intention to appoint administrators to the other charge holder.

The Judge considered *Re Ceart Risk Services* [2012] EWHC 1178 (Ch) which concerned a failure by directors of a regulated financial services company to obtain the consent of the Financial Services Authority before purporting to appoint administrators. Arnold J had found that the failure to obtain FSA consent did not incurably invalidate the purported appointment and was cured by its later consent.

In the instant case, the Judge said that the requirement to give other qualified floating charge holders notice of intention to appoint under para 15 of Schedule B1 to the Insolvency Act 1986 served a different purpose, as had been explained by Norris J in *Virtualpurple Professional Services* [2011] EWHC 3487 (Ch), which was to enable the holder of a prior floating charge to make his own appointment. Although in this case, the prior charge holder did not wish to do so, his interests might be potentially prejudiced if an inferior charge holder could act first and seek consent later. Paragraph 15 of Schedule B1 was a precondition not a mere curable defect.

*This case is an illustration of the Court reviewing the purpose of the legislative provision in deciding on the effect of a breach of it but concluding that the breach was incurable notwithstanding the fact that in this case the prior charge holder did not wish to appoint its own administrators.*

# Asegaai Consultants Ltd and 43 other companies; Wood v Mistry

**[2012] EWHC 1899 (Ch)**

**Companies Court (Newey J)**

Disqualification of a former liquidator of a company under section 4 of the Company Directors Disqualification Act 1986. Disqualification of a former liquidator on the application of new liquidators.

An application was made by the liquidators of certain companies for the disqualification of the former liquidator of those companies.

The Defendant was a qualified chartered accountant and licensed insolvency practitioner. Between August 2003 and July 2004 the Defendant became the sole or joint liquidator or administrator of 184 personal service companies ("PSCs"). The PSCs had been established and run by Safe Solutions Accounting Limited and Safe Solutions Management Services Limited, which provided a tax-saving scheme to individuals coming to work in the UK on a temporary basis. On 27 July 2004 the Defendant's insolvency licence was restricted and then subsequently withdrawn for reasons unconnected with the PSCs. In 2005 the Claimants were appointed the liquidators of 102 PSCs, of which the Defendant had previously been an office holder.

The Claimants applied for a disqualification order against the Defendant under section 4 of the Company Directors Disqualification Act 1986.

It was alleged that the Defendant had:

a) paid monies from the insolvent companies to an offshore vehicle (Dreamcast) which he controlled;

b) had concealed these payments by employing a third party to act as a conduit for the funds; and

c) had accepted bulk appointment of the PSCs without taking any steps to recover monies owed to the companies by the Safe Solutions companies and, in particular, failed to demand that the Safe Solutions Companies pay the sums retained by them in respect of the companies' liabilities for tax and NICs.

The Judge found all these allegations to be proved and disqualified the Defendant for 12 years on the basis that the case was "particularly serious". The judge commented that although the sums, which Dreamcast received, were not that large (£27,000 in total), the Defendant's conduct had been grossly improper and was not confined to an isolated incident or caused by incompetence.

*The judge rejected the submission that the Claimants had no interest in the relief sought and so no standing to bring the application. He stated, however, that such an application would be dismissed if brought for an improper ulterior purpose and may not be permitted to proceed if the Secretary of State considered it would not be in the public interest.*





# Wedgwood Museum Trust Ltd (in administration); Young v HM Attorney-General

**[2012] EWHC 1974 (Ch)**

**Chancery Division, Birmingham (HHJ Purle QC)**

Administrators who brought a claim for directions as whether the assets of the company were subject to a charitable trust did so properly but had unreasonably instructed leading counsel to appear at the hearing.

The administrators had been properly advised that there was a real issue about whether assets of the company were subject to a charitable trust. The advice they received from counsel was that the better view was that the assets were subject to that trust, but, recognising the opposing arguments, they brought proceedings for directions.

HM Attorney-General was a defendant, as he had to be, as were the company's pension trustee and the Pension Protection Fund. The Attorney-General argued that the assets were subject to the charitable trust, whilst the pension trustees and PPF argued that there were not. In the event (for reasons set out in an earlier judgment of 19 December 2011), the Court held that the assets were not subject to the trust. In that sense, the pension trustees and the PPF won the case, and they accordingly asked for their costs against the AG.

The Court considered it an oversimplification to regard the AG's position as hostile. He was a necessary party and had advanced proper arguments in the public interest. The Judge was reluctant to say anything to discourage the AG from adopting a pro-active role in charity proceedings.

In the circumstances of this case, it was right that the AG could have his costs out of the assets of the company and he ought not to be ordered to pay the costs of the pension trustees or the PPF.

By contrast, on the first day of the 3 day hearing, the Judge queried the attendance of leading counsel for the administrators and referred him to *BNY Corporate Trustee Services v Eurosail* [2011] EWCA Civ 227.

Leading counsel, who throughout indicated that he took a neutral position on the substantive issue, did not return to Court after that first day. His refreshers were accordingly avoided but his brief fee of £45,000 had been incurred.

*The Court denied that administrators the right to recoup that fee from the estate of the company; once the AG had decided to participate in the hearing and it was known he was briefing leading counsel, the administrators ought to have recognised that it was no longer necessary for them to brief their own leading counsel just in case he failed to put all the proper arguments before the Court. All other costs, including those of the victorious pension trustees, were to be paid out of the assets of the company.*

# Joddrell v Peaktone

**[2012] EWCA 1035**

**Court of Appeal**
**(Etherton, Munby and Lewison LJJ)**

Is an action, commenced against a dissolved company which is later restored to the register, retrospectively validated by s.1032(1) Companies Act 2006?

On 31 March 2009 Peaktone was struck of the Register of Companies and dissolved pursuant to s.652 Companies Act 1985.

Mr Joddrell, who had been employed by Peaktone between 1986 and 2003/2004, purportedly commenced proceedings against Peaktone for damages for noise induced hearing loss (of which he said he first became aware in 2006) on 24 August 2009. He sought and obtained an order restoring Peaktone to the Register of Companies pursuant to s.1029 Companies Act 2006. Peaktone applied to strike the claim out. The District Judge struck it out. Mr Joddrell appealed. HHJ Stewart allowed the appeal and reinstated the claim. Peaktone sought to appeal to the Court of Appeal. Permission was given by Ward LJ who observed that *"this is an amusing enough point of just enough importance to justify a second appeal"*.

Peaktone contended that the proceedings issued, as they were, against a non-existent company were a nullity (although time for the purposes of the Limitation Act 1980 continued to run against Mr Joddrell). If Mr Joddrell had to issue fresh proceedings, his claim would be statute barred.

Mr Joddrell contended that s.1032(1) means what it says, and that is that the Company is deemed never to have been struck off or dissolved such that his proceedings issued against Peaktone were retrospectively validated when the order restoring Peaktone to the Register was made.

The Court of Appeal held that Parliament assimilated, in the 2006 Companies Act, two different procedures for the restoration of companies to the Register which had been in place in the 1985 Act (and before) and that in doing so, Parliament intentionally applied the deeming provision which had, in the 1985 Act, only been applicable to one of the two procedures for the restoration of companies to the Register, to the new assimilated procedure. Thus s.1032(1) has the effect of retrospectively validating proceedings commenced against dissolved companies if they are later restored to the Register under the assimilated procedure in the 2006 Act.

*The case draws attention to the significant change the 2006 Act made to the statutory framework for the restoration of companies to the register, doing away with the two different routes which there were under the 1985 Act, replacing it with a new single procedure. The old 2 and 20 year time limits have been replaced with a single period of 6 years (except for personal injury proceedings). The new Act extends the old deeming provision (i.e. deeming the company to have continued in existence as if it had not been dissolved or struck off the register) to every case, whereas they had only applied previously where the application was made pursuant to s.653 Companies Act 1985 and not where it was made pursuant to s.651.*





# Relfo Ltd (In liquidation) v Varsani

**[2012] EWHC 2168 (Ch)**

**Chancery Division (Sales J)**

Liquidator's successful claim to recover monies diverted by the Company's former director to a third party based of a constructive trust arising out of knowing receipt.

The Court had to decide whether a liquidator could recover monies paid by the Company's former director to a third party.

The company's director failed to cause the company to pay its tax liability promptly when it fell due. He caused the company to pay £500,000 to another company and the next day, a third company paid a sum, equivalent to the £500,000 less 1.3% to the defendant.

The liquidator commenced proceedings, *inter alia*:

i) to trace the payments to the defendant on the grounds that the company had a 'superior title in equity' (the property claim); and,

ii) that the defendant held the second payment as constructive trustee, as he had received it with sufficient knowledge of the company's rights in relation to it (the knowing receipt claim).

The court held that the property claim failed as the liquidator had failed to show that the defendant retained any part of the funds and there was no evidence of what those funds might have been spent on. Furthermore, the liquidator had not attempted to introduce any claim to trace into the funds or some other asset derived from the funds.

However, the court also held that the knowing receipt claim succeeded. It was highly probable that it had been explained to the defendant at the time of the relevant payment that the director had been using money diverted without legitimate reason from the company. The court held that it was fair and just to treat the defendant's conscience as affected at the time of the receipt so as to warrant the imposition on him of an equitable obligation to account to the company for the money which had come into his hands. The defendant was therefore held liable to account to the liquidator for the payment.

*The case is interesting as it highlights the availability and use of traditional equitable remedies (in particular the constructive trust based on knowing receipt) in assisting liquidators and other insolvency professionals in recovering assets, or a sum representing the equivalent value of such assets, transferred to third parties. Such remedies may prove attractive and useful in situations where there may be problems, for whatever reason, of attacking such transactions or transfers under the relevant provisions of the Insolvency Act.*

# Euromaster Ltd

**[2012] EWHC 2356 (Ch)**

**Chancery Division (Norris J)**

Appointment of administrators out of time is a curable defect.

On 3 May 2012 Euromaster's directors filed notice of intention to appoint administrators. Its secured creditor consented to the appointment on 17 May 2012.

Notice of the appointment was filed at court on 18 May 2012 – i.e. the eleventh business day after the notice of intention, contrary to Sch. B1, paragraph 28(2) which provides that an appointment "*may not be made*" if more than ten business days have elapsed.

Adopting the approach of courts in recent cases (e.g. *Re BXL Services* [2012] EWHC 1877 (Ch)) the judge focused on whether Parliament intended the outcome of non-compliance with paragraph 28(2) to be total invalidity. Norris J held that it did not: the requirement did not go the directors' power to appoint but was a procedural matter; and the court should avoid the artificiality of making a retrospective administration order to regularise the position. Instead there was a mere irregularity.

After conducting a review of many of the "Minmar" cases in this area, he returned to IR 1986, r. 7.55 which provides that: "*No insolvency proceedings shall be invalidated by any formal defect, or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused… and… cannot be remedied…*" and concluded that "someone who wishes to rely on the defect must show:

a) that substantial injustice has been caused by the defect; and

b) that that injustice cannot be remedied by some order of the court short of an order invalidating the entire insolvency proceedings".

The court thus declared that:

i) the administrators were in office and (subject to any further application) would continue to be so and

ii) no prior act of theirs would be invalidated by reason of the defect in their appointment.

However, the judge refused to make an order waiving the defect in their appointment: under r. 7.55 it would still be open to a creditor to apply to invalidate the appointment – at least if he could show "*substantial injustice*". Finally, the court commended to others the administrators' decision not to seek their costs of the application as an expense of the administration.

*Another example of the court adopting a pragmatic approach to technical defects in the appointment of administrators – although the judge left open the possibility of subsequent attack by a disgruntled creditor. Care should therefore always be taken in complying with technical requirements for a valid appointment.*





# BTR (UK) Ltd; Lavin v Swindell

**[2012] EWHC 2398 (Ch)**

**Chancery Division, Leeds (HHJ Behrens)**

The duties of an administrator whose proposals are rejected by creditors include an obligation to apply to the Court under paragraph 55 of Schedule B1 of the Insolvency Act 1986. The Court can wind up a company without a petition having been presented.

The administrator of BTR (UK) Ltd sent his proposals to the creditors, which stated that there was unlikely to be a distribution to unsecured creditors and therefore that he would not convene a meeting of creditors.

A creditor, supported by in excess of the necessary 10% of creditors, requisitioned a meeting under paragraph 52(2) of Schedule B1 at which meeting the creditors rejected the administrator's proposals and made clear that they wanted him to petition for the compulsory winding up of the company. He was not in funds to petition for a compulsory winding up so he didn't do so. A creditor therefore applied for an order to compel him to do so, submitting that an administrator whose proposals are rejected was bound to apply for directions under paragraph 55. The administrator submitted that he could choose whether or not to make such application.

The Judge decided that the language of paragraph 55(2) necessarily implied that if the administrator's proposals were rejected, there must be a hearing. An application must ordinarily be made by the administrator and if it is not, there is no reason why it cannot be made by a creditor.

Furthermore, whilst the Judge had little doubt that he had power to direct the administrator to present a winding up petition, he also held that he had power (to be exercised cautiously and in an exceptional case) to make a winding up order under paragraph 55(2)(e) of Schedule B1 without any such petition having been presented. A winding up order was made against BTR.

*This case establishes that:*

1. *An administrator whose proposals are rejected is required to make an application to court. Administrators might be well advised to ensure that they retain sufficient funds to be able to do so;*

2. *Not only are administrators required by statute to perform their functions in the interests of the creditors as a whole, but creditors themselves can successfully apply to Court to compel the administrator to act;*

3. *The Court can, of its own motion, make a winding up order under s.122(1) Insolvency Act 1986 without a winding up petition having been presented.*

# Globespan Airways Ltd; Cartwright v Registrar of Companies

**[2012] EWCA Civ 1159**

**Court of Appeal (Neuberger MR, Arden and Moses LJJ)**

Conversion of administration into CVL occurs only when notice registered by Companies House; but administration automatically extended until date of conversion.

Administrators appointed on 17 December 2009 subsequently decided to convert the administration into a CVL (Sch. B1, paragraph 83), filing Form 2.34B which was received by the registrar on 14 December 2010.

The first notice failed to include the address of the proposed liquidators (who were the administrators) and was therefore rejected. A subsequently corrected conversion notice, received on 19 January 2011, was registered on 4 February 2011 i.e. after the automatic expiry of the administration.

Despite the minor defect the first notice was valid and the registrar should have accepted it. Thus registration of the subsequent notice would be treated as registration of the first notice. Given that a conversion notice can be filed even though the administrator will vacate office before it takes effect (*Re E-Squared Ltd* [2006] 1 WLR 3414), two important issues therefore remained:

1. Is conversion effected by filing the notice, or does it only occur when the notice is registered?

2. If the latter, what happens if the administration automatically ceases before the conversion takes effect?

Arden LJ held that conversion does not occur until the notice is actually registered by Companies House: paragraph 83(6) talks of "*registration*", not "*receipt*"; and the important policy behind requiring registration is to ensure that the conversion is adequately publicised to creditors and others.

That conclusion, however, raised an obvious concern: if the conversion did not take effect until February 2011 and the administrators' appointment ceased in December 2011, then in the meantime the company would be subject to no insolvency regime: its assets would be back in the control of its directors and subject to creditor execution. The court answered that difficulty by holding that in those circumstances the administrators' term of office would be "*automatically extended*" to the date of conversion: paragraph 76 was not a complete code on when administration ended, and the statutory purpose of "*facilitating a seamless conversion*" required that effect to be read into paragraph 83.

*Although conversion from administration will be delayed by the time it takes Companies House to register the relevant notice, the case provides useful clarification that an officer-holder remains in place in the interim.*





# 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.

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# 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.

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