IP Alerter

March 2020

DOWNS
SOLICITORS AND NOTARIES

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As always the IP Alerter provides you with a snapshot of the key developments and insight into key cases.

The topics covered in this issue include:

- **Statutory demands: guarantee debt**
- **FCA, ICO and FSCS warn insolvency practitioners and authorised firms on sales of personal data**
- **Statutory demands: formalities**

Barrister's non-contractual fees 'vest in trustee in bankruptcy'

A barrister who had been adjudged bankrupt in 2012 contended his aged debt did not fall within his bankruptcy estate because it was not owed to him pursuant to a contract, but under an old "honorarium" system. Pre 2013, there was normally no contractual relationship between a barrister and a solicitor, the fee did not create a debt, and the barrister could not sue for them.

The case reviewed whether the fees were to be considered property and therefore caught by section 306 of the Insolvency Act 1986?

The court decided that the definition of property was deliberately wide. Regardless of any contractual right held by the barrister, he would hope to be paid and the intention was there, even if only morally binding. Given that the barrister could pursue the instructing solicitor the fees were held to be property.

Gwinnutt v George & Anor [2019] EWCA Civ 656

Our Annual IP Seminar

With the uncertain times at the moment our annual IP seminar will take place later in the year.

A formal invite will be sent when we are in a position to confirm a date.

Court considers procedural defect in electronic filing and when notice of intention to appoint administrators expires (High Court)

The High Court has held that the identification in the court's electronic filing system (CE-file) as to which Business and Property Court (B&PC) a notice of appointment of administrators (NOA) was to be filed in, was not a requirement of Schedule B1 to the Insolvency Act 1986 nor of the Insolvency (England and Wales) Rules 2016.

Accordingly, an NOA that specified a regional B&PC that was not the same court to which court staff had allocated the preceding notice of intention to appoint administrators (NOI) was, if it was defective at all, entitled to a waiver of any defect under CPR 3.10(b).

The court also held that the ten-business day period within which an NOA could be filed following a preceding NOI should be calculated by including the day on which it was filed. Accordingly, an NOI filed on Friday 17 January expired at the end of Thursday 30 January 2020, and not at the end of Friday 31 January 2020. The NOA had, on this analysis, been filed out of time. Nevertheless, no substantial injustice was caused by the appointment out of time, and the court granted orders under paragraph 104 of Schedule B1 and rule 12.64 of the IR 2016 waiving the defect and declaring the administrators validly appointed from the time of filing of the NOA on 31 January 2020. *(Re Statebourne (Cryogenic) Limited [2020] EWHC 231 (Ch) (7 February 2020).*

FCA, ICO and FSCS warn insolvency practitioners and authorised firms on sales of personal data

On 7 February 2020, the FCA, the Information Commissioner's Office (ICO) and the Financial Services Compensation Scheme (FSCS) (the Authorities) published a *joint statement* warning insolvency practitioners to be responsible when dealing with personal data.

In the statement, the Authorities stated that they have become aware that some insolvency practitioners have attempted to sell clients' personal data to claims management companies unlawfully. These attempts have occurred before or after a company has gone into administration and where it was likely that claims for compensation will be made to the FSCS.

The Authorities warned that:

- The terms, conditions and clauses within a standard contract are highly unlikely to constitute sufficient legal consent for personal data to be shared with CMCs to market their services, and may not be lawful. In particular, by passing on personal data, companies may be failing to meet their obligations under the Data Protection Act 2018 (DPA) and the General Data Protection Regulation (*(EU) 2016/679)* (GDPR).
- CMCs that carry out subsequent direct marketing calls, texts or emails may be in breach of the Privacy and Electronic Communications Regulations 2003 *(SI 2003/2426)* (PECR). These CMCs must be able to demonstrate how they have considered the fair treatment of customers and how their actions comply with privacy laws. They may be in breach of relevant data protection legislation, as they are highly unlikely to meet the requirements of the GDPR ,if they seek to rely on legitimate interest grounds for processing such data, and in breach of their duty under the FCA rules to act in their customers' interests.

The FCA and the ICO stated that they will take appropriate action where they identify breaches of the relevant data protection legislation or the Claims Management: Conduct of Business sourcebook.

Promontoria (Chestnut) Ltd v. Bell [2019] EWHC 1581 (Ch)

The creditor brought an appeal against orders setting aside statutory demands served on Mr and Mrs Bell on the basis that the creditor held some security in respect of the debt claimed in the demand.

The statutory demands sought payment of £170,000 under a personal guarantee in respect of a company's indebtedness under a loan facility. The guarantees imposed secondary liability on Mr and Mrs Bell for the company's loans and contained standard provisions to the effect that the creditor could release or deal with any security without affecting the guarantor's liability.

In addition to the personal guarantee, Mr and Mrs Bell had executed third-party mortgages over properties owned by one or both of them to secure *the company's* lending to the bank. Each of the mortgages contained a clause negating any personal liability on the part of the mortgagor to pay to the bank the company's liabilities.

Mr and Mrs Bell successfully applied to set aside the statutory demands under Rule 6.5(4)(c) of the Insolvency Rules 1986 on the basis that the creditor held 'some security in respect of the debt claimed in the demand' and had not specified in the statutory demands the nature of the claim or the value put on it by the creditor.

The creditor argued that the security of the third-party mortgages was in respect of the company's indebtedness and not in respect of the personal liability of Mr and Mrs Bell.

The court rejected the creditor's submissions, noting the long-standing principle that secured creditors could only participate in a bankruptcy to the extent of the unsecured part of their debt unless they were willing to give up their security for the benefit of the general body of creditors. In the present case, although the company's debt to the creditor was separate from the debt owed by Mr and Mrs Bell under the guarantee, the security in respect of the company's liability would discharge Mr and Mrs Bell's liability under their guarantee,and was therefore (in the broad sense) rooted in the same debt as claimed in the demands. It followed that the third-party mortgages should be treated as security in respect of the debt claimed in the demand.

Administration applications: director removal

Summary

The High Court has held that during an administration application it can appoint interim managers and grant them power to remove a director of the insolvent company's subsidiaries without complying with the Companies Act 2006 (2006 Act) formalities for director removal.

Background

When hearing an administration application, the court has power to make an interim order, which can include the appointment of interim managers to conserve the insolvent company's assets pending final determination of the administration application. The order appointing interim managers can give those managers discretion in relation to the insolvent company *(paragraph 13(3), Schedule B1, Insolvency Act 1986)*.

It is fairly common for administrators to require the company to remove and replace the directors of their subsidiaries. Under the 2006 Act, this must be effected by resolution at a general meeting, and the director is entitled to receive notice of, and be heard at, the general meeting.

Facts

Investors sought administration orders over various companies (together, N) following the apparent dissipation of funds invested in them.

Pending final determination of the administration applications, the High Court made three orders appointing interim managers (together, D) to manage, secure and protect N's assets under Schedule B1.

Only one of the orders authorised D to appoint or remove the directors of any subsidiary of N. D applied for a variation of the other two orders to include this removal power, as one of the directors, W, had apparently been removing funds from the subsidiaries' accounts.

W argued that the power of removal could only be exercised in accordance with the 2006 Act, so it was necessary for W to have notice and an opportunity to oppose his removal. He argued that D had not followed this process in the removals already effected and did not propose to do so in future.

Decision

The court held in favour of D. It agreed to include a specific power to remove W as a director of N, if D thought that it was in the interests of the administrators to do so.

The court's power under Schedule B1 to make any other order that the court thinks appropriate in response to an administration application is very wide. It can include granting interim managers power to remove directors of subsidiaries without following the requirements of the 2006 Act, providing that it is appropriate on the evidence. The court is also entitled to grant the same specific power to administrators.

Comment

The most interesting aspect of this decision is the court's approach to its wide discretion under Schedule B1 to make appropriate orders that further the administrator's objectives. The court held that if the administrators viewed it as being in the interests of the administration, it would grant the power to interim managers to remove directors.

Some commentators have suggested that this is an expansive view of the court's jurisdiction on administration applications. While it is not unusual for administrators to cause companies over which they are appointed to remove and replace the directors of their subsidiaries, this decision, which suggests that the court has power to authorise administrators and interim managers to ignore the 2006 Act requirements and in relation to a company over which they are not appointed, may be considered by some to be a step too far. It is clear, however, that the court's decision was made with good intention and motivated by evidence that the director was taking steps to extract value from the companies in question.

Case: Re MBI Hawthorn Care Ltd [2019] EWHC 2365 (Ch).

Statutory demands: guarantee debt

Summary

The High Court has set aside a statutory demand made for payment under a guarantee as the creditor had failed to first make a demand under the guarantee itself.

Background

A statutory demand is a written demand for payment of a debt served on either an individual or a company under the Insolvency Act 1986 (1986 Act). The legal function of a statutory demand, if it does not result in payment, is to deem the debtor unable to pay his debts.

The court has a discretion to grant an application to set aside a statutory demand served on an individual where, among other grounds, it thinks this ought to be done *(rule 10.5(5)(d)*. For example, the court may do this where the demand is defective or the court considered that it would be unjust for the demand to stand *(re a Debtor (No 1 of 1987) [1989] 1 WLR 271)*.

The HM Courts and Tribunals Service standard form of statutory demand (form SD2) is intended to establish that the debtor is liable for, but unable to pay, debts payable immediately.

A statutory demand can only be served for a sum which is both liquidated and payable immediately *(Wallace LLP v Yates [2010] EWHC 1098)*.

Facts

An individual, M, provided a guarantee to a construction company, L. As guarantor, M was obliged to pay immediately on demand, although all notices and demands had to be in writing and personally delivered or sent by post or fax.

When the underlying debts went unpaid, L served a statutory demand in form SD2 on M seeking payment of the full sum with a view to making him bankrupt if he failed to pay. However, L failed to deliver a prior demand for payment under the guarantee before serving the statutory demand.

M applied to the court to set aside the statutory demand.

Decision

The court set aside the statutory demand.

The statutory demand was defective in form because it stated that the guarantee debt was payable immediately. The statutory demand was also flawed in substance because no written demand for payment had been made before the service of a statutory demand, as required by the terms of the guarantee. Therefore, no debt was yet owed at all.

It would be unjust to allow the statutory demand to stand, even though it did not appear that a prior formal written demand would have resulted in payment.

Following *Wallace LLP*, the statutory demand was unjust as it constituted a step towards insolvency proceedings where the test for these proceedings, which was that a debt was payable immediately, had not been satisfied.

Comment

This decision is an example of how the court will not be slow to exercise its discretion to set aside a statutory demand where the formal prerequisites of serving a demand have not been met. This is unsurprising, given the significant consequences that follow from serving a statutory demand on an individual. While the decision considers the position of failing to serve a formal written demand in accordance with the terms of a guarantee provided by an individual, and arises in an insolvency context, it also serves as a reminder more generally that beneficiaries of a guarantee must adhere to the terms of that guarantee when seeking to enforce it. In this case, the decision was undoubtedly influenced by the fact that the court had not been provided with any evidence explaining why the express terms of the guarantee had not been complied with, even though months had elapsed before the hearing and since the error had been identified, and the fact that no other creditors were seeking to pursue bankruptcy proceedings.

Case: Martin v McLaren Construction Ltd [2019] EWHC 2059 (Ch).

Administration orders: court's discretion

Summary

The High Court has held that it could make an administration order over a company despite the director's application not being properly authorised under the company's articles of association.

Background

An out-of-court administrator appointment will be defective where the resolution authorising it is invalid *(Re BW Estates Ltd)*.The Court may make an administration order in relation to a company only if satisfied that the company is, or is likely to become, unable to pay its debts, and that the administration order is reasonably likely to achieve the purpose of administration *(paragraph 11, Schedule B1, Insolvency Act 1986)*.

No proceedings will be invalidated by any formal defect or irregularity unless substantial injustice has been caused and that injustice cannot be remedied by the court *(rule 12.64,0)*.

Facts

B's articles of association contained provisions requiring B to have between three and five directors unless certain consents were obtained. A quorum of more than one for director decisions was also required, which was reduced to one if there was only one director.

Two of B's three directors resigned. The sole director applied to the court for an administration order for B. The order was needed urgently.

Decision

The court made an administration order over B despite the director's application not being properly authorised under B's articles.

B's articles did not allow the sole director to act alone. However, although an out-of-court administrator appointment will be defective where the resolution authorising it is invalid, in a court-led process the court has discretion to disregard such a defect of this kind. The proper standing of the applicant did not affect the court's jurisdiction to make an order under paragraph 11.

Comment

This decision is a useful reminder of the requirements that must be satisfied before the court can make an administration order: in particular, that the company is or is likely to become unable to pay its debts and that the administration order is likely to achieve one of its purposes. Here, the court was prepared to make the order and cure the irregularity caused by the invalid resolution by using its powers under rule 12.64 on the basis that not to make the order would create a grave injustice and there was a benefit in making the order.

Case: Lumineau v Berlin Hyp AG (Re Brickvest Limited and others) [2019] EWHC 3084 (Ch).

DOWNS
SOLICITORS AND NOTARIES

Cobham Office
15A High Street
Cobham
Surrey
KT11 3DH

T 01932 589 599
F 01932 867 587

Dorking Office
156 High Street
Dorking
Surrey
RH4 1BQ

T 01306 880 110
F 01306 502 283

Godalming Office
The Tanners
75 Meadrow
Godalming
Surrey
GU7 3HS

T 01483 861 848
F 01483 861 856

E enquiries@downslaw.co.uk