

# Insolvency Insight

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Welcome to the next edition of the insolvency insight bulletin from the insolvency specialists at Quadrant Chambers.

All cases link to the relevant judgments.

### Legislation

- » Readers are reminded that the exemption for small business suppliers from the prohibition on enforcement of *ipso facto* clauses in contracts for the supply of goods and services (in s.233B IA 1986) ended on 30 June 2021. The impact could be considerable, given that the exemption applied to companies with an annual turnover of up to £10.2 million and/or balance sheets up to £5.1 million and/or up to 50 employees, and suppliers can only terminate upon a customer's insolvency in the limited circumstances set out in s.233B(5) IA 1986.

### Case law

- » **Receiver v. Deuss [2021] EWHC 1842 (Ch)**. In the first reported decision on costs relating to an application under s.133 IA 1986, Chief ICC Judge Briggs has refused to make a third party costs order against a liquidator who had requested public examination of an individual, following that individual's successful resistance to the application. The liquidator was not the "real party" to the application, because he had not made the request in a personal capacity, nor had he funded or controlled the application (that being in the hands of the Official Receiver).
- » **Re Hurricane Energy PLC [2021] EWHC 1759 (Ch)**. For the first time since the introduction of Part 26A IA 1986 in June last year, the Court has refused to sanction a restructuring plan which had been rejected by 92% of shareholders, whilst approved by 100% of bondholders. Zacaroli J was not satisfied that one of the threshold requirements for a "cross-class cram-down" in s.901G IA 1986 (the "no worse off test") was met in circumstances where the "relevant alternative" was the company's continued trading rather than immediate liquidation.
- » **Lakatamia Shipping Co Ltd v. Nobu Su [2021] EWHC 1866 (Ch)**. In allowing the claimant judgment creditor's appeal against the refusal of its application to annul a bankruptcy order against the judgment debtor, Bacon J held that "place of residence" for the purposes of s.263I(2)(b)(ii) IA 1986 should be given its natural and ordinary meaning, and the focus of enquiry should be on whether the debtor's address was his usual place of abode or home and was occupied with a degree of continuity.
- » **Re DTEK Energy BV [2021] EWHC 1551 (Ch)**. In sanctioning two inter-conditional schemes of arrangement (in the face of opposition from one scheme creditor), Sir Alistair Norris emphasised that the Court needs to be satisfied that a scheme will achieve a substantial purpose in the key jurisdictions in which the scheme company has liabilities or assets, and that credible evidence will need to be adduced showing that there is at least a reasonable prospect that the scheme will be recognised and given effect (which, on the facts, the Judge held was the case here).
- » **Emerald Pasture Designated Activity Co v. Cassini SA [2021] EWHC 2010 (Ch)**. The Court dismissed an application by the debtor defendant (subject to a French *sauvegarde* procedure) challenging the Court's jurisdiction to hear a claim by the claimant creditor for declaratory relief. The declarations sought concern the debtor's contractual obligation under a senior facilities agreement (SFA) to provide information to the creditor's agent. Zacaroli J rejected the debtor's contention that the claim derived from and was closely linked to the *sauvegarde* and thus fell within Article 6(1) of the Recast Insolvency Regulation (because the only matter in issue was whether the rights to information under the SFA were overridden by the *sauvegarde*); Instead, he considered that the question which the declarations were designed to answer was the enforceability of the claimant's contractual rights under the SFA, and that its source was the common rules of civil and commercial law. As a result, the English courts had jurisdiction by reason of an exclusive jurisdiction clause in the SFA, pursuant to common law principles.
- » **State Bank of India v. Mallya [2021] EWHC 1740 (Ch)**. The Court refused to make a validation order under s.284 IA 1986 in respect of a debtor's costs of litigation in India related to English bankruptcy proceedings. There was no evidence to show that those costs would be for the benefit of the creditors as a whole (which Miles J emphasised was the principal criterion for determining s.284 applications).
- » **Goldtrail Travel Ltd v. Grumbridge [2021] EWHC 1713 (Ch)**. Mr Justice Adam Johnson declined to extend time under s.32 Limitation Act 1980 for a claim by the liquidators of the claimant company against the defendant for dishonest assistance in breaches of duty by its former sole director. The liquidators had sufficient material to bring such a claim as long ago as 2012, when they commenced fraud proceedings against the director; the discovery of a small cache of "new" documents was insufficient to cure their lack of diligence in bringing a claim within time.

## MEET THE AUTHOR



**Turlough Stone** has a wide-ranging commercial dispute resolution practice, with an emphasis on banking, financial services, civil fraud and insolvency, both domestic and international. He has particular expertise in asset finance law – a field in which he was described in the 2020 Legal 500 as being "very strong" – and in surety and structured finance arrangements, which is particularly valuable in retention of title and security disputes in corporate and personal insolvency situations. His insolvency work ranges from obtaining freezing, search and asset preservation orders to applications for the restraint of the advertisement/presentation of winding-up petitions and for validation orders.

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