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Insolvency Insight

Issue 6 | November 2021

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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.

Authors: Jeremy Richmond QC and Joseph Gourgey

Editors: Nicola Allsop and Emily Saunderson

Legislation Update

As foreshadowed in the last edition of Insolvency Insight the legislative provisions easing the restrictions on the presentation of winding up petitions entered into effect on 1 October 2021.

The Corporate Insolvency and Governance Act 2020 restricted the presentation of winding up petitions in that a petition could not be presented on the basis of a statutory demand or on the basis of other evidence of a company's inability to pay unless the petitioning creditor had reasonable grounds to believe that either (a) Covid-19 did not have a financial effect on the company; or (b) that the company would have been unable pay its debts even if Covid-19 had had a financial effect on the company.

From 1 October 2021 until 31 March 2022 a petitioning creditor must now satisfy four conditions:

- Condition A: the debt owed: (i) is for a liquidated amount; (ii) has fallen due for payment; and (iii) is not rent or any other payments that are due under a relevant business tenancy;
- Condition B: the petitioning creditor has delivered a written notice to the company containing, inter alia, a statement: (i) that the creditor is seeking the company's proposal for the payment of the debt; and (ii) that if no satisfactory proposal is made within 21 days of the date of delivery of the notice then the creditor intends to petition for the company's winding-up (a Condition B Notice);
- Condition C: 21 days have passed since the delivery of the Condition B Notice and the company has not made a satisfactory proposal to the creditor for the payment of the debt; and
- Condition D: the debt owed to the petitioning creditor (or a group of petitioning creditors provided they have all met Conditions A to C) is at least £10,000.

A creditor can apply to court for an order that Conditions B and C shall not apply or that the 21-day time period in Condition C be abridged.

On 9 November 2021 the Department for Business, Energy and Industrial Strategy announced that it was introducing a Commercial Rent (Coronavirus) Bill and a new Code of Practice to address the issue of commercial rent debts accrued during the pandemic. The Bill is due to be implemented from 25 March 2022 and will establish an arbitration procedure pursuant to the principles set out in the new Code of Practice. Any request for arbitration will need to be made within six months of the passing of the Bill. The arbitration procedure will apply to arrears accrued in the period(s) when the business in question was mandated to close. The Bill also provides that claims for judgments for commercial rent debts falling within the scope of the Bill made between 10 November 2021 and the passing of the Bill will also be eligible for the arbitration procedure. The Bill provides for a corresponding moratorium on court proceedings for such claims pending the determination of the arbitration.

The Bill and the new Code of Practice can be found here:

https://bills.parliament.uk/bills/3064 and

https://www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021

Case Law update (cross-border insolvency)

- PJSC Bank Finance and Credit (in Liquidation) [2021] EWHC 1100 (Ch): The Court addressed the question of when a foreign insolvency proceeding was subject to the control or supervision by a foreign court – which is a necessary condition for recognition of such proceedings in England under the Cross-Border Insolvency Regulations 2006 ("the CBIR"). The National Bank of Ukraine ("the NBU") revoked PJSC's banking licence and determined that it should enter into liquidation, which, in turn, obliged the Ukrainian Deposit Guarantee Fund ("the DGF") to place the bank into liquidation. The DGF is a Ukrainian government body responsible for providing deposit insurance to bank depositors in Ukraine and for the winding down of insolvent banks in Ukraine. DGF and Ms Groshova (DGF's authorised officer) applied for recognition of PJSC's liquidation in England under the CBIR, which implements the UNCITRAL Model Law on Cross-Border Insolvency. In order for a foreign insolvency proceeding to be recognised the English Court must be satisfied that the foreign (insolvency) proceeding is "a collective judicial or administrative proceeding in a foreign State….pursuant to a law relating to insolvency in which proceedings the assets and affairs of the debtor are subject to the control or supervision by a foreign court, for the purpose of reorganisation or liquidation." (Article 2(i), Schedule 1, CBIR) [emphasis supplied]. It fell to the English Court to decide whether DGF was such a "foreign court." The Court held that DGF was "a foreign court" because (a) the definition of "foreign court" extended to quasi-administrative bodies (as noted in the UNCITRAL Guide to Enactment of the Model Law) and (b) even though DGF was accountable to certain branches of the Ukrainian government, it had independence from the NBU and had its own extensive powers (including the filing of court claims).
- *Greensill Bank AG (a company incorporated in Germany, in administration)* [2021] EWHC 966 (Ch) (no judgment available for download): The Court considered the question of whether the insolvency of a bank, which pre-Brexit, would have been excluded from the scope of the CBIR (and thus from having its insolvency recognised in England under the CBIR) could have its insolvency so recognised post-Brexit. Greensill Bank pre-Brexit would have been an EEA credit institution under regulation 2 of the Credit Institutions (Reorganisation and Winding Up Regulation) 2004 ("the 2004 regulation"). Art.1(2)(h), CBIR provides that its (the CBIR's) provisions do not apply to such insolvencies. Post-Brexit regulation 2 of the 2004 regulation was revoked but Art.1(2)(h), CBIR was not amended accordingly. The Court held that the CBIR had been left unamended in this regard so that the exclusion in Art.1(2)(h), CBIR would cover the insolvency of EEA credit institutions within the transitional period under the UK/EU Exit Regulations (i.e. EEA credit institutions that were subject to insolvency proceedings as at 31 December 2020 would fall within the exclusion at Art.1(2)(h), CBIR). However, since Greensill Bank's insolvency proceedings were opened after 31 December 2020 the exclusion did not apply so that its insolvency could be recognised in England under the CBIR.

Case Lase update (domestic insolvency)

- PSV 1982 Ltd v Langdon [2021] EWHC 2475 (Ch): Where liability for a company's debt has been established in court proceedings, a director in breach of s216 Insolvency Act 1986 (the provisions relating to the restriction on re-use of company names concerning "phoenix" companies) will be automatically liable for the debt under s217 Insolvency Act 1986. As a result, there is no need to bring fresh proceedings and prove any liability separately against the defaulting director. The judge found that although the director was being fixed with a liability established in proceedings they were not a party to, they were close enough to the company that they would likely be aware of any proceedings and could apply to be joined as a party to them. They could also seek to rely on the exceptions contained in s216. On balance, the court was satisfied that Parliament intended any risk of injustice should lie with the director rather than the creditor.
- Lehman Brothers Holdings Scottish LP 3 v Lehman Brothers Holdings Plc (In Administration) [2021] EWCA Civ 1523: The Court of Appeal modified the rule against double proof so as to mitigate some of its harsh consequences. This rule: (i) permits the creditor to prove for the whole of the original debt without giving credit for part payment from the surety; and (ii) precludes the surety from proving until the creditor has made full recovery. The Court found that where the surety has made part payment but released its right to an indemnity against the principal debtor, the creditor must give credit for the part payment made by the surety when proving against the insolvent party.
- Virgin Active Holdings Limited & others: [2021] EWHC 1246 (Ch) (sanction judgment, 12 May 2021): The Court sanctioned Virgin Active's restructuring plans in the face of a challenge by a group of landlords by exercising its power under the Companies Act 2006 s901G. In applying the relevant test, the Court found that the members of the dissenting classes would be no worse off under the proposed plans than the likely relevant alternative plans, namely administration involving an accelerated sale of the regional businesses.
- Lazari Properties 2 Limited and others v New Look Retailers Limited, Butters and another [2021] EWHC 1209 (Ch): In this case, landlords unsuccessfully challenged the proposed CVA on a number of grounds. Perhaps most significantly, the Court rejected the unfair prejudice challenge, including on the ground that the creditors whose claims were compromised received differential treatment from those that were not. The Court found that whilst this was an important consideration, it was not necessarily unfairly prejudicial, and the differences in the present case were not sufficient so as to lead to the conclusion that the landlords were unfairly prejudiced.

MEET THE AUTHORS

Jeremy Richmond QC specialises in commercial and modern chancery law. He is ranked as a leading barrister for Commercial Litigation and Insolvency in The Legal 500 and has been described in Chambers and Partners as a "superb advocate" whose "expertise in chancery, commercial and banking matters is a useful complement to his insolvency skills".

"He is one of the rising stars at the bar. He has a superb grip of technical issues and is a go-to counsel." (Legal 500, 2021)

jeremy.richmond@quadrantchambers.com

Joseph Gourgey joined Quadrant Chambers on 1 October 2021, upon successful completion of pupillage. He is developing his practice in line with Chambers' core areas of work.

He graduated from St Hilda's College, Oxford with a first in jurisprudence, obtaining the College prize in both Finals and Prelims. On the BCL he studied Commercial Remedies and Conflicts of Law, winning the Reynolds Scholarship from Worcester College, Oxford. He completed the BPTC with an Outstanding.

joseph.gourgey@quadrantchambers.com

Editors: Nicola Allsop and Emily Saunderson

MEET THE INSOLVENCY TEAM


Robert Thomas QC


Robert-Jan Temmink QC


Thomas Macey-Dare QC


Jeremy Richmond QC


Nicola Allsop


Paul Henton


Turlough Stone


Emily Saunderson


Claudia Wilmot-Smith


Peter Stevenson


Christopher Jay


Simon Oakes


Tom Bird


Joseph England


Jamie Hamblen


William Mitchell


Tom Nixon


Joseph Gourgey