Quadrant CHAMBERS

Insolvency Insight

Issue 7 | January 2022

www.quadrantchambers.com

The set has an impressive roster of silks and juniors at all levels of experience, and bring a diverse array of skillsets to the table.

Legal 500 UK 2022

TOP RANKED Chambers Global 2021

TOP RANKED Chambers UK Bar 2022

The Legal 500 United Kingdom Top Tier Set 2022

The Legal 500 Asia Pacific Top Tier Set 2021

Chambers Shortlisted UK Bar 2021

The Legal 500 UK Awards 2020 Winner

The Legal 500 UK Awards 2019 Winner

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: Simon Oakes

Editors: Nicola Allsop and Emily Saunderson

Legislation

The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021 received Royal Assent on 15 December 2021.

In an 'anti-phoenix' measure, a director will no longer be able to avoid disqualification under section 6 of the Company Directors Disqualification Act 1986 by dissolving their company prior to it entering an insolvency process. In such circumstances, if the court is satisfied that a former director of a dissolved company is unfit to be concerned in the management of a company, the court must disqualify them (on application).

The provisions relating to directors of dissolved companies come into force on 15 February 2022.

Regulatory Consultation

On 21 December 2021 the Insolvency Service issued a consultation entitled 'The Future of Insolvency Regulation'. Key proposals include:

- The removal of the regulatory powers of the four professional public bodies which currently regulate Insolvency Practitioners, to be replaced by a single independent government regulator.
- A new system to authorise and regulate firms (rather than individuals) that offer insolvency services.
- A new public register of Insolvency Practitioners and firms that offer insolvency services, including any regulatory action against them.
- A formal compensation mechanism for errors by IPs/firms.
- Reform of bond claim arrangements.

Responses to the consultation are requested by 25 March 2022.

Case Law

Re Amicus Finance Plc [2021] EWHC 2340 (Ch): Further to the convening judgment handed down on 9 August 2021, and further the High Court's sanctioning of Amicus Finance Plc's restructuring plan for a solvent exit from administration - the first time a restructuring plan has been proposed as a means of exiting administration, and the first restructuring plan of an SME – the High Court handed down its reasoning. This was the second fully opposed cross-class 'cram-down' decision and the first involving the discretion to cram-down a dissentient secured creditor. Amongst other things, Sir Alastair Norris held that:

- On applications under Part 26A there is a natural tendency to focus upon the proposed scheme of arrangement in relation to the dissentient class of creditors. But the assenting classes of creditors must not be overlooked, and the scheme must be considered in relation to them in the same way as a scheme under Part 26
- When overriding the views of the dissenting class, two threshold conditions must be met before the court can exercise its discretion to sanction the scheme: (1) the No Worse Off test must be met; (2) the scheme must have been approved by 75% of those voting in any class that would receive a payment in the event of an immediate liquidation or otherwise has a genuine economic interest in the company;
- The 'No Worse Off' test (under the restructuring, vs the relevant alternative to the plan – here, liquidation) was normally to be determined on the balance of probabilities, rather than on a 'no real prospect' basis: the propounder of a scheme does not have to exclude all realistic possibility of a better outcome for a dissentient creditor under the realistic alternative.

Gostelow and another v Hussain and others [2021] EWHC 3276 (Ch) : A trustee in bankruptcy's application for an order for possession and sale of a bankrupt's family home is an insolvency application governed by rule 1.35 Insolvency Rules 2016, and should be brought by application notice under the IR 2016 rather than a Part 8 CPR Claim Form. *Obiter*, the court also had jurisdiction, using CPR 3.10, to correct errors of procedure by allowing proceedings initiated in the wrong form to continue, subject to being corrected.

Office of the Bankruptcy Adjudicator and another v Shaw [2021] EWHC 3140 (Ch) determined *inter alia* that:

- An applicant for a bankruptcy order bears the burden of demonstrating inability to pay their debts at the date of the adjudicator's determination (under s.263K(1)(b) IA 1986) – here, the timeframe for drawdown of a pension pot. A debtor who applies for their own bankruptcy order may have a higher evidential burden than would a creditor seeking the same order.
- In determining whether a debtor can pay their debts, a bankruptcy adjudicator may have regard, applying a cash-flow test, to pension assets in deciding whether to make a bankruptcy order
- *Obiter*, it was not appropriate to use the court's jurisdiction under section 51 of the Senior Courts Act 1981 to make a non-party costs order against the Secretary of State for Business, Energy and Industrial Strategy (on the basis that the SoS – who was not a party to the appeal - was responsible for the appointment of the adjudicator) in circumstances where Parliament has directed that no order for costs should lie against the adjudicator, the respondent to a statutory appeal, who was discharging her duty of assisting the court.

MEET THE AUTHOR

Simon Oakes practises in commercial law, with a particular focus on banking & financial services, and complex commercial fraud cases.

Simon represents international and domestic clients in the Business & Property Courts and has significant experience of a broad range of heavy commercial litigation, including conducting his own advocacy as sole counsel against more senior opponents. Simon has acted in some of the most significant banking and financial services cases of recent years, from major interest rate hedging product litigation to FOREX manipulation, and also regulatory investigations against individuals.

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