Quadrant CHAMBERS

Insolvency Insight

Issue 8 | February 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: Turlough Stone and Maya Chilaeva

Editors: Nicola Allsop and Emily Saunderson

Kireeva v Bedzhamov [2022] EWCA Civ 35

Where a Court recognises a foreign bankruptcy order at common law, is the foreign trustee entitled to an order entrusting the bankrupt's immovable property (a property in Belgrave Square) to her? That was the more interesting and significant of the two questions arising for determination in this high-profile appeal against a decision of Snowden J in which he (i) recognised a foreign bankruptcy order notwithstanding the bankrupt's allegations that it had been procured by fraud, but (ii) held that, as a matter of English law, a foreign court had no jurisdiction to make orders in respect of land in England and there was no general power in the court at common law to make an order vesting the property in the trustee, or ordering its transfer to her. The bankrupt's appeal on the first point was allowed; the trustee's cross-appeal was dismissed.

As Stuart-Smith LJ noted, in his short judgment concurring with the leading judgment of Newey LJ, what was in issue in the cross-appeal was a "demarcation dispute" between "modified universalism" and the "immovables rule". By a majority of 2:1 (Arnold LJ dissenting), and in what can be seen as yet another retreat from the trend towards "modified universalism", the Court of Appeal held that the "immovables rule" – namely the rule that rights over immovable property are governed by the lex situs of the property – prevailed. Whilst the principle of "modified universalism" is part of the common law, it is subject to English law (as explained by Lord Sumption in ***Singularis Holdings Ltd v. PWC [2014] UKPC 36)*** and the "immovables rule" is "long-standing and entrenched". To grant the relief sought by the trustee would be to create a common-law exception to that rule, which was properly a matter for Parliament and not the courts. It was further held that, while it was possible for the English Court to make a receivership order against the property of the bankrupt, who was resident in England, the jurisdiction to do so was not unfettered and it would not be proper for the Court to exercise that power to side-step the "immovables rule". As a matter of English law, the trustee had no interest in the property that could be protected by the grant of a receivership order.

Levi Solicitors LLP v. (1) Wilson (2) JKR Property Development [2022] EWHC 24 (Ch)

In a judgment handed down on 14 January 2022, Mr Justice Fancourt was faced with a novel question, for which no authority apparently existed. In an application by a creditor of a company that has entered into a CVA, challenging the admission by the CVA supervisor of another creditor's proof of debt, on whom does the burden of proof lie?

The applicant ("A"), was the major creditor of a construction company, and had brought just such an application – under s.7(3) IA 1986 and IR 1986, r.4.83(2) (which the creditors had agreed should apply to the CVA, with necessary amendments) – seeking a direction from the Court that the proof of the second respondent ("R2"), another creditor, be rejected (it being alleged that the first respondent, the supervisor, was wrong to admit it). The parties were at odds as to where the burden of establishing the claim lay. R2 contended that the burden lay on A, who was seeking to disturb a decision taken by the supervisor in a quasi-judicial capacity. A contended that the burden lay on R2, as the creditor seeking to have its proof admitted. Fancourt J considered that A had the better of the argument, given that (i) an application under r.4.83(2) – or its successor provision in r.14.8(3) IR 2016 – proceeds as a rehearing and not a review of the office-holder's decision, with the relevant creditor's claim being considered afresh (see ***Re a Company (no. 004539 of 1993) [1995] BCC 116)*** – and (ii) as a result, it was not the correctness of that decision that was in issue, but rather whether the disputed proof was established. He held that, in the circumstances, the proving creditor – in this case R2 – bore the legal and evidential burden of making good its claim.

Costley-Wood & Ors v Rowley & Anor (Re Patisserie Holdings PLC & Ors) [2021] EWHC 3205 (Ch)

The Court was asked to give retrospective approval to (i) the conduct of the administration of three companies in the Patisserie Valerie Group, notwithstanding the administrators' non-compliance with the requirements of Schedule B1 IA 1986, and (ii) the appointment of liquidators who had not been properly appointed as a result.

Two issues arose. First, when the initial proposals of the administrators of the holding company were rejected by an ad hoc creditors' committee representing more than 50% of the company's outstanding liabilities, the administrators had not sought directions from the Court or the approval of the full body of creditors, but had simply obtained the approval of the ad hoc committee to move to a creditors' voluntary liquidation and the appointment of liquidators. The validity of that step, and thus of the liquidators' appointment, was accordingly in question. Second, in respect of the administration of two trading entities within the Group, there had been non-compliance with the requirements for holding physical meetings of creditors. The issue was whether those defects invalidated the decisions taken at those meetings.

In circumstances where the applications were not opposed by any of the creditors and were unlikely to cause them prejudice, the Court adopted a pragmatic approach and held that the liquidators' appointment was not invalid: approved proposals are not a pre-requisite to a valid administration (***Re Stanleybet UK Investment Ltd [2012] BCC 550***), and the procedural defect in failing to obtain the approval at a meeting of all creditors for the appointment of the liquidators was a defect capable of remedy (***Re Zoom UK Distribution Ltd [2021] EWHC 800 (Ch)*** followed). Similarly, the defects in the calling of the meetings were "technical" only, and insufficient to invalidate what were otherwise valid decisions. This decision, whilst pragmatic, afforded considerable leniency to the office-holders. In the future, office-holders would be well-advised to ensure that they do not permit what might seem to be commercial common sense to override the letter of the law: it cannot be assumed that the Court will always be so forgiving.

Re West African Gas Pipeline Company Ltd [2021] EWHC 3360 (Ch)

The Court gave permission to a Bermudian-registered company to convene a meeting of its members for the purpose of considering a proposed scheme of arrangement pursuant to the Companies Act 2006 Part 26.

Miles J noted that although a scheme such as that proposed might usually be expected to take place in the country of incorporation, there were two grounds for making an exception here. One was very fact-specific, namely the fact that the company's affairs were governed by an English-law Shareholders' Agreement (which provided a sufficient connection to England and Wales to engage the: ***Re Drax Holdings Ltd [2021] EWHC 2743 (Ch)***). The other was that there was an inter-dependent, parallel scheme of arrangement on foot in Bermuda. The latter ground raises the interesting question of whether the "jurisdictional roadblock" to an English statutory scheme of arrangement of a non-UK company can now be side-stepped by issuing parallel proceedings in the country of incorporation.

Doran v County Rentals Ltd (t/a Hunters) [2021] EWHC 3478 (Ch)

The Court considered the interpretation of paragraph 5(3) of the (former) Schedule 10 to the Corporate Insolvency and Governance Act 2020 (CIGA), which was in force until the end of September 2021. That provided, that the Court may only wind up a company on the ground specified in s.123(1)(e) or (2) IA 1986 ("inability to pay debts") if satisfied that the ground would apply "even if" coronavirus had not had a financial effect on the company.

HHJ Cadwallader, sitting as a Judge of the High Court, held that as a matter of construction, the words "even if" direct the Court to the financial effect of the pandemic on the company, not to the applicability (or otherwise) of the relevant ground. Put another way, the "coronavirus test" is not to be answered by considering the effect of coronavirus upon the indebtedness of a company but rather by asking whether the company would have been unable to pay its debts even if the pandemic had not caused a worsening of its financial position.

Applying that test, and reiterating the principle that the Court should be slow to infer an inability to pay from the mere fact of non-payment of a debt, the Court declined to overturn the dismissal of a winding up petition against a company for non-payment of a debt accruing pre-pandemic (which the company was presently unable to pay because of the pandemic) where there was a dispute as to whether the debt in question had been discharged and, if not, whether that was a result of a mistake on the part of the company.

MEET THE AUTHORS

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.

"Very user-friendly and thorough … extremely adept at spotting the little details that make all the difference" (Legal 500, 2021)

turlough.stone@quadrantchambers.com

Maya Chilaeva joined Quadrant Chambers on 1 October 2021 following the successful completion of her pupillage. She is developing a broad commercial practice in line with Chambers' profile.

Maya graduated from the London School of Economics and completed the GDL with distinction at City University. She was the winner of the Times 2TG national mooting competition in 2020.

maya.chilaeva@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


Maya Chilaeva


Joseph Gourgey