International Corporate Rescue – Special Issue

Quadrant Chambers

Cross-Border Insolvency and International Trade (Volume 3)

1 Foreword
Simon Croall QC

2 Using Force Majeure Clauses in Relation to Inability to Pay: A Forlorn Hope?
Simon Rainey QC

5 Termination Rights in the Event of Insolvency: Where Are We Now with Ipso Facto Clauses; Are They Still a Potent Weapon in a Creditor's Armoury
Nigel Cooper QC

9 The Position of UK Directors during the COVID-19 Pandemic
Robert-Jan Temmink QC and Stephanie Barrett

13 Valuation of Services for the Purposes of Section 245 of the Insolvency Act 1986
Robert-Jan Temmink QC and Victoria Kühn

18 Return of the MAC: The English Courts' Approach to Material Adverse Change Clauses
Jeremy Richmond QC and Liisa Lahti

21 Fighting Cryptocurrency Fraud: What's in the English Lawyer's Toolkit?
Jeremy Richmond QC and Chris Recker

24 *Green & Newman v SCL Group Ltd and others* [2019] EWHC 954 (Ch): The English Court Provides Some Useful Guidance on Administrators' Duties
Jeremy Richmond QC

28 Winding-Up in the Post CIGA World
Nicola Allsop

32 The CIGA Moratorium: A Lifeline for UK Companies?
Emily Saunderson

35 A Reach Too Far? A Review of the Extra-Territorial Scope of the Court's Powers to Support Office-Holder's Investigations
William Mitchell

Quadrant CHAMBERS

ChaseCambria

Editor-in-Chief

Mark Fennessy, Proskauer Rose LLP, London

Publisher

Sasha Radoja, Travers Smith LLP, London

Editorial Board

Emanuella Agostinelli, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan
Scott Atkins, Norton Rose Fulbright, Sydney
James Bennett, KPMG, London
Dan Butters, Deloitte, London
Geoff Carton-Kelly, FRP Advisory, London
Gillian Carty, Shepherd and Wedderburn, Edinburgh
Charlotte Cooke, South Square, London
Katharina Crinson, Freshfields Bruckhaus Deringer, London
Hon. Robert D. Drain, United States Bankruptcy Court, Southern District of New York
Simon Edel, EY, London
Matthew Kersey, Russell McVeagh, Auckland
Prof. Ioannis Kokkoris, Queen Mary, University of London
Prof. John Lowry, University College London, London
Neil Lupton, Walkers, Cayman Islands
Nigel Meeson QC, Conyers Dill Pearson, Hong Kong
Mathew Newman, Ogier, Guernsey
John O'Driscoll, Walkers, London
Karen O'Flynn, Clayton Utz, Sydney
Prof. Rodrigo Olivares-Caminal, Queen Mary, University of London
Christian Pilkington, White & Case LLP, London
Susan Prevezer QC, Brick Court Chambers, London
Prof. Arad Reisberg, Brunel University, London
Jeremy Richmond QC, Quadrant Chambers, London
Daniel Schwarzmann, PricewaterhouseCoopers, London
The Hon. Mr Justice Richard Snowden, Royal Courts of Justice, London
Anker Sørensen, De Gaulle Fleurance & Associés, Paris
Kathleen Stephansen, New York
Dr Artur Swierczok, CMS Hasche Sigle, Frankfurt
Meiyen Tan, Oon & Bazul, Singapore
Stephen Taylor, Isonomy Limited, London
Richard Tett, Freshfields Bruckhaus Deringer, London
The Hon. Mr Justice William Trower QC, Royal Courts of Justice, London
Mahesh Uttamchandani, The World Bank, Washington, DC
Robert van Galen, NautaDutilh, Amsterdam
Miguel Virgós, Madrid
L. Viswanathan, Cyril Amarchand Mangaldas, New Delhi
Prof. em. Bob Wessels, University of Leiden, Leiden, the Netherlands
Angus Young, Hong Kong Baptist University, Hong Kong
Maja Zerjal Fink, Arnold & Porter, New York
Dr Haizheng Zhang, Beijing Foreign Studies University, Beijing

US Corner

Editor: **Maja Zerjal Fink**, Arnold & Porter, New York

Economists' Outlook

Editors: **Prof. Ioannis Kokkoris**, Queen Mary, University of London
Kathleen Stephansen, New York
Mahesh Uttamchandani, The World Bank, Washington, DC

Case Review Section

Editors: **Charlotte Cooke**, South Square, London
Prof. John Lowry, University College London, London
Prof. Arad Reisberg, Brunel University, London

Publishers

Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

Annual Subscriptions

A hardcopy subscription is EUR 730 / USD 890 / GBP 520; online: EUR 730 / USD 890 / GBP 520; and hardcopy + online: EUR 840 / USD 1045 / GBP 625. Rates per additional hardcopy or online user are: EUR 165 / USD 220 / GBP 145.

VAT is charged on online and hardcopy + online subscriptions. Hardcopy-only is zero-rated for VAT purposes. For package subscriptions, VAT is charged on the entire package.

For enquiries, please contact our sales department at: + 44 (0) 114 255 9040 or sales@chasecambria.com

Special Issues

Price for individual Special Issues for subscribers: EUR 125 / USD 175 / GBP 105; for non-subscribers: EUR 165 / USD 225 / GBP 135. Online access to all Special Issues for subscribers: EUR 375 / USD 535 / GBP 315; for non-subscribers: EUR 495 / USD 695 / GBP 420. Online subscription plus access to all Special Issues: EUR 995 / USD 1250 / GBP 740. Hardcopy + online subscription plus access to all Special Issues: EUR 1150 / USD 1450 / GBP 875.

Advertisements

For advertisements please contact:
ads@chasecambria.com

Copyright

ISSN: 1572-4638

© 2020 Chase Cambria Company (Publishing) Ltd

Permissions

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior permission of the publishers.

Permission to photocopy must be obtained from the copyright owner. Please apply to:

E-mail: permissions@chasecambria.com

Website: www.chasecambria.com

Disclaimer

The information and opinions provided on the contents of the journal was prepared by the author/s and not necessarily represent those of the members of the Editorial Board or of Chase Cambria Company (Publishing) Ltd. Any error or omission is exclusively attributable to the author/s. The content provided is for general purposes only and should neither be considered legal, financial and/or economic advice or opinion nor an offer to sell, or a solicitation of an offer to buy the securities or instruments mentioned or described herein. Neither the Editorial Board nor Chase Cambria Company (Publishing) Ltd are responsible for investment decisions made on the basis of any such published information. The Editorial Board and Chase Cambria Company (Publishing) Ltd specifically disclaims any liability as to information contained in the journal.

Foreword

Simon Croall QC, Head of Chambers, Quadrant Chambers, London, UK

Welcome to Quadrant Chambers' third special edition of *International Corporate Rescue* – Cross-Border Insolvency and International Trade. In light of the ongoing business uncertainty occasioned by the COVID-19 pandemic it is perhaps more important than ever that the international trade lawyer is aware of the practical impact of cross-border insolvency on their clients' rights. To that end, the articles in this special edition address a wide range of topical practical issues including Material Adverse Change clauses, Contractual Termination clauses and the doctrine of frustration. In addition to these common law areas the special edition contains articles addressing the impact of the Corporate Insolvency and Governance Act 2020, or CIGA, that entered into force in June 2020. CIGA represents a significant change for international trade lawyers since (among other things) it restricts rights to terminate contracts upon the event of counter-party insolvency and also provides some protection from personal liability for directors of companies that may be wrongfully trading before they enter into insolvency. The breadth and depth of the articles illustrates the broad range of expertise that Quadrant Chambers now boasts in the area. Pre-COVID we had as a Chambers represented many of the main players in the large cross-border insolvencies in recent times including OW Bunkers and Hanjin Shipping. Since the pandemic we have continued that trend by advising major parties in all our main areas of practice including international trade, energy, banking and shipping. I hope you enjoy this special edition. We, as a Chambers, look forward to assisting you in the future in this increasingly important and complex area.

Using Force Majeure Clauses in Relation to Inability to Pay: A Forlorn Hope?

Simon Rainey QC, Barrister, Quadrant Chambers, London, UK

Synopsis

The impact of coronavirus on businesses has been dramatic. Markets have vanished overnight, supply chains have been disrupted or suspended, and many financing arrangements entered into in a different, pre-COVID-19, world have become unmanageable. Worse still, many of the fixed payment obligations of the business under other long term contracts, such as equipment leases or agency or franchise arrangements remain in place and require to be met, even though turnover may have collapsed and payment has either become very difficult or impossible rendering the non-paying party vulnerable to being served with a statutory demand and being wound up on a cash flow insolvency basis.

Faced with an inability to perform, many parties turn to their contracts and look for a way out, clutching at the words 'Force Majeure'. For the reasons explained below, that is likely to be an exercise in clutching at straws.

Force majeure and payment obligations

Almost all modern commercial contracts contain a force majeure provision in one form or another which work effectively when a party is prevented by circumstances outside its control from performing a contractual obligation. But these types of provision present special difficulties where the obligation in question is an obligation to pay money due under a contract.

This is because, most commonly, force majeure clauses have express provisions excluding their operation in the case of obligations to make payment of sums due under the contract. This can be total, e.g. 'all events beyond the control of the party ... which prevents or interrupts the performance of the obligations or any of them under this Agreement (except any obligation to make any payment hereunder)' or 'Force Majeure shall not include lack of available funds, financial insolvency or financial distress of the Party seeking to claim Force Majeure'. It can also be partial, 'Notwithstanding the foregoing, the following events shall not constitute Force Majeure [...] inability of a Party to pay any amounts when due where such inability is solely caused by lack of funds' or 'events caused by fluctuating economic conditions in local, national or global markets'.

Further, financing and loan agreements where the reciprocal obligations are purely financial rather than commercial agreements, where payment is the consideration for goods or services, typically do not contain any force majeure clause (as evidenced by their absence from the Loan Market Association precedents). While there may be more sophisticated provisions which can address the economic effect and increased costs of performance and alternative means of performance, such as 'material adverse change' (MAC) or 'material adverse effect' (MAE) clauses which allow termination of the contract, or suspension or adjustment of contract obligations, where external events impact upon the value of performance, even these commonly do not extend to pure market or price movements.

But what of the contracts which contain a force majeure clause which does not exclude or restrict the availability of the clause in relation to payment obligations? Even then it is suggested that relying on force majeure will in most cases be extremely difficult.

Force majeure clauses: the basics

A force majeure clause is a contractual term which regulates the consequences of supervening events beyond the parties' control on the obligations of one or both of the parties to the contract. Such clauses typically require a causal link between such events and performance, and provide for the consequences of the event on the parties' obligations. The event may result in the cancellation of the contract, excuse non-performance (whether in whole or in part), or entitle a party to an extension of time and/or to suspend performance.

In addition to fulfilling any procedural requirements such as the giving of notice, it is for the party relying upon a force majeure clause to prove the facts bringing it within the clause. The party must prove the following, and this checklist must be applied to any COVID-19 non-payment force majeure argument:

1. The occurrence of an event identified in the clause;

2. It has been prevented or hindered (as the case may be) from performing the contract by reason of that event;
3. That its non-performance was due to circumstances beyond its control; and
4. There were no reasonable steps that could have been taken to mitigate the event or its consequences.

(1) What is the relevant force majeure event?

'Force majeure' is not a term of art. Whether the viral outbreak falls within a force majeure clause will turn on the proper construction of the wording of the clause.

Contractual provisions commonly enumerate force majeure events, which may include a 'pandemic' or 'epidemic', potentially by reference to WHO classification or, more generically, 'disease'. It is unlikely that the pandemic in and of itself will have had immediate ramifications on contractual performance. With daily changes in the legal and regulatory landscape as the government enacts lockdown and lockdown easing management measures, events of this nature or more likely to be invoked under force majeure clauses. It is the knock-on effects which will be in issue, which gives rise to difficult questions of causation (discussed further below). It is the ripple effect of the disruption caused by the virus which will in almost all cases provide the relevant putative 'event'. For example, the virus leads to Government rules which restrict commercial activity altogether (by banning all non-essential shops from opening). That ban leads to a sharp falling off in trade which causes a supply company to lose orders. Social distancing rules may prevent the supply company from operating at all, given its premises and numbers of staff, which means it can operate an online business to mitigate the effects. Lockdown is eased and restrictions eased just in time, but consumers do not then return. If financial difficulties are then encountered which means that one can no longer pay one's equipment leasing charges, what was the relevant causative event? Is customer fear after the restrictions are over a force majeure event? Did it really flow from it or is it a new cause outside the force majeure clause?

(2) 'Beyond a party's reasonable control'

Most force majeure clauses contain sweep up language such as 'any other cause beyond [the party's] reasonable control'. The COVID-19 outbreak itself is clearly capable of constituting such a cause. But again, is the secondary or tertiary effect produced by it such a cause, and which is the actual trigger for inability to perform?

In *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] 2 Lloyd's Rep 668, which concerned a contract for the sale of a Bombardier executive jet aircraft, Hamblen J stated that a seller unable to deliver the aircraft on time due to a pandemic causing a dearth of delivery pilots would be able to bring itself within the wording of a force majeure clause which provided 'any other cause beyond the seller's reasonable control'.

(3) Causation: the effect on performance

Once a party has established the occurrence of a force majeure event occurring beyond its control, the next criterion is establishing that the event had and/or is having the contractually stipulated effect on performance.

Where the clause states that a party is relieved from performance or liability if it is 'prevented' from performing its obligations or is 'unable' to do so, it is necessary to show physical or legal impossibility, and not merely that performance has become more difficult or unprofitable: *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* (see below). Economic impossibility because the company cannot get funds at all may be difficult to show. It would be necessary to be able to show that the funding crisis of the business has been directly caused by the force majeure event (or events), not by anything else, and to demonstrate how it is now said to be impossible to fund the payment in question. If borrowing is possible, even on very unfavourable terms, or mortgaging or re-mortgaging the factory or premises is possible, then it cannot be said that the performance of the payment obligation (and one is talking about the specific payment obligation under the particular contract when it falls due, without regard to other commitments falling due at other times) is not possible, when it fell due. The general economic toll of the pandemic by its various routes upon the business will therefore be unlikely to suffice.

The *Tandrin Aviation* case is a sobering reminder of the extreme difficulty in relying on force majeure in an economic context and in relation to payment obligations. A party sought to excuse its non-payment in pointing to its inability to get funds due to 'the unanticipated, unforeseeable and cataclysmic downward spiral of the world's financial markets' (words which could be paraphrased for the post-COVID trading world). The Judge (Hamblen J.) pointed out (at [40]) that it is well established under English law that a change in economic / market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a force majeure event. Thus a failure of performance due to the provision of insufficient financial resources has been held not to amount to force majeure – see *The Concadoro* [1916] AC 2 AC 199; and likewise a rise in cost or expense – see *Brauer & Co. (GB) Ltd. v James Clark (Brush Materials) Ltd.* [1952] 2 All ER 497. He referred with approval to the then edition of *Chitty on Contracts* (now 33rd, at para. 15-163) and 'a failure of performance

© 2020 Chase Cambria Publishing

due to the provision of insufficient financial resources or to a miscalculation, a rise in cost or expense,' was not capable of constituting force majeure. See also *Thames Valley Power Ltd. v Total Gas & Power Ltd.* [2006] 1 Lloyd's Rep. 441.

Note that some types of force majeure clause are more generous in the sense that they do not require outright prevention of impossibility, but only that that the force majeure event should 'hinder' or 'delay' performance or make it 'unreasonably onerous'. Such clauses may offer an easier route, but the casual connection must still be established.

(4) But for causation?

A further question which will frequently arise is: what if, although the pandemic or knock-on effect indisputably prevents performance of the payment obligation, the party claiming the benefit of the clause would not have paid even absent the pandemic? Take an example of a counterparty already in deep financial difficulty who, before coronavirus, was suspected of being unable to perform the long-term contract or the next obligation when it fell due. Coronavirus intervenes and prevents any performance of the contract, relieving the pressure on the counterparty, who then declares force majeure.

This was the position in *Classic Maritime v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102 (in the author appeared). The contract was a long term contract of affreightment ('COA') for the carriage of Brazilian iron ore. The relevant contractual force majeure clause excluded liability for loss or damage 'resulting from' a series of specified events, including one applicable on the facts, which 'directly affect the performance of either party'. The Samarco tailings dam-burst destroyed all means of the party sourcing Brazilian iron ore and prevented any possible performance of the COA. The non-performing party was in financial difficulties and had missed several shipments just before the dam-burst event as a result. It was held to be unable to rely on this clause despite performance having been rendered wholly impossible because, but for the dam burst, on the facts it would not have performed anyway.

(5) Avoidance/mitigation: working round the problem

The existence of any steps which the non-performing party could have taken to avoid or mitigate the effects of a force majeure event will preclude reliance on the clause.

The burden on the party claiming force majeure is in this respect a heavy one and in the context of the non-payment of a particular debt as it falls due, particularly demanding. Can it show that there were no steps it could have taken to pay that instalment when it fall due, even by not paying another creditor? Or by asking the directors for a mortgage over their homes? For example, in *Classic v Limbungan* it was held that the non-performing party had no means of avoiding or mitigating the dam-burst and its effect on supplies of Brazilian iron ore, but only after an exhaustive analysis (at summary judgment: [2017] EWHC 867 (QB)) of all possible sources of supply, including going into the market, buying afloat and shipping back to the Brazilian ports to reship and thereby perform the COA by this alternative route and, subsequently, a full debate in expert evidence (at trial) as to market quantities available: see e.g. [2018] EWHC 3489 (Comm). Faced with COVID-19 problems preventing the immediately obvious means or manner of performance of a payment obligation, a party may be faced with a much more expensive and inconvenient means of performing. If that is open to it, then it may later be unable to justify its invocation of force majeure.

Looking ahead … future-proofing new contracts

Even in these troubled times, trade and commerce continue. New contracts face particular challenges in that they are concluded against the backdrop of the pressing current problems but also forecasts of continuing or extended lockdowns into the future and with the spectre of secondary outbreaks and recurrence of the virus next winter. Special provision will need to be made in contracts attaching specifically to payment obligations, either in the form of 'material adverse change' (MAC) or 'material adverse effect' (MAE) clauses.

© 2020 Chase Cambria Publishing

Termination Rights in the Event of Insolvency: Where Are We Now with Ipso Facto Clauses; Are They Still a Potent Weapon in a Creditor's Armoury

Nigel Cooper QC, Barrister, Quadrant Chambers, London, UK

Introduction

Long term contracts frequently contain clauses which either terminate the contract automatically or entitle a party to terminate the contract in the event of the other party becoming insolvent; so-called 'ipso facto' clauses. The use of such clauses is controversial and in many jurisdictions such clauses are unenforceable because they are seen as allowing one creditor to take priority over other creditors in relation to property that should otherwise form part of the bankruptcy estate. English law did not share this approach but viewed the operation of such clauses as being essentially a matter of contractual construction. That position has now changed with the coming into force of amendments to the Insolvency Act 1986 ('IA 1986') introduced by the Corporate Insolvency & Governance Act 2020 ('CIGA 2020'), which make ipso facto clauses in contracts for the supply of goods and services unenforceable against an insolvent party. The purpose of this article is to examine some of the issues which arise in relation to the construction of ipso facto clauses and to explain the effect of the amendments to the IA 1986.

Ipso facto clauses are generally considered valid under English law. They do not, without more, offend against the public policy that prevents a party contracting out of the pari passu distribution of an insolvent's assets. Nor do they offend against the anti-deprivation rule, which prevents a party from withdrawing assets on bankruptcy, liquidation or administration so as to reduce the value of the insolvent estate to the detriment of creditors. As to the last, the Supreme Court held in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383 that the rule would not invalidate clauses which did not amount to an illegitimate intent to evade bankruptcy or insolvency law and had a legitimate commercial basis.

Construction of the contract

The starting point for considering the applicability and effectiveness of an ipso facto clause will therefore be, as is so often the case, the construction of the contract. In this regard, clauses inevitably vary in their complexity, whether it be in the definition of what constitutes a triggering event or as to the procedures, such as the giving of notice, which have to be followed in order for termination to be valid. There are no special rules of construction applicable to ipso facto clauses. The general principles laid down in cases such as *Arnold v Britton* [2015] AC 1619 and *Wood v Capita* [2017] AC 1173 apply. In summary, one is looking to ascertain the objective meaning of the language used by the parties to express their agreement. This means looking at the contract as a whole and, depending on the nature, formality and quality of the drafting, giving more or less weight to the wider context of the agreement. However, the consequences of triggering an ipso facto provision are inevitably severe. In addition, the courts have emphasised in a series of recent judgments that the principles which apply to the construction of exclusion clauses and indemnity provisions do not represent special rules applicable only to certain types of clauses but represent principles of construction which are to be used alongside the general principles of construction for the purposes of determining the intention of the parties; cf. *Fujitsu Services Ltd. v IBM United Kingdom Ltd* [2014] EWHC 752 (TCC) at [24] – [26] and *CNM Estates v VeCref I Sarl* [2020] EWHC 1605 (Comm) at [14] – [18]. As such, when questions arise as to the construction of an ipso facto clause, a court should be guided by the principle that clear words are necessary to define the circumstances in which the parties intended that the right of termination would accrue.

The first question with any ipso facto clause is whether there has been a triggering event, which gives rise to the right to terminate. Clauses may define when a party is deemed to be insolvent by reference to specific insolvency events and may include a proviso that insolvency events include any similar or equivalent event under any applicable law. But even in the absence of such proviso, the question arises as to which law determines the nature of the event said to constitute insolvency.

Conflicts of law

If the relevant insolvency proceedings take place in the same jurisdiction as the applicable law of the contract, there is no difficulty in answering the question, it is the applicable law of the contract. But in many contracts subject to English law, it is equally possible that the relevant insolvency proceedings will take place in another jurisdiction. Is it still then only the governing law of the contract which determines the nature of the proceedings or should one also look to the law of the country where the event in question is taking place?

The better view must be that the construction of the contract is a matter for English law and, therefore, whether or not the attributes of a foreign proceeding bring it within the scope of the clause is a matter of English law. However determining the nature of the proceeding and whether or not the proceeding is an insolvency proceeding within the foreign jurisdiction is a question for the law governing the proceeding. So, for example, the contract clause may allow a right of termination in the event of 'winding up'. One party is the subject of proceedings in a foreign jurisdiction, which as a matter of translation, are considered to be winding-up proceedings. However, the proceedings in question are in fact used to enable solvent companies to re-structure and it is only in the event that such a restructuring is not possible that the party may then be put into liquidation. The law of the jurisdiction where the proceeding are taking place does not consider the 'winding-up' to be an insolvency proceeding. In these circumstances, even though winding up might otherwise be considered under English law to be an insolvency proceeding, the foreign proceedings should not be sufficient to trigger the right to terminate under an ipso facto clause. By way of analogy, it is noteworthy that in *In re Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123, the court overturned a recognition order granted *ex parte* in respect of a Bermudan liquidation because the liquidation in question did not constitute 'foreign proceedings' for the purposes of the CBIR. The essential reason for the court's decision not to recognise the liquidation under the CBIR was that the regulations only applied to the resolution of a debtor's insolvency or financial distress. They did not apply to allow recognition of foreign proceedings for the winding up of a solvent company, which was not in financial distress.

Preventing the operation of an ipso facto clause

If the triggering event has occurred, the next question is whether any conditions precedent to termination, for example in relation to the giving of notice, have been complied with. However, unless the contract provides otherwise, no particular formality will be required as long as there is substantive compliance with the terms of the contractual provisions. So, for example, any notice of termination needs to be in sufficiently clear terms to communicate the decision to terminate; see *Newland Shipping & Forwarding Ltd v Toba Trading FZC* [2014] EWHC 661 (Comm). The contrast is unilateral contracts, such as options, where strict compliance with the express requirements of any termination clause will be required; see *Siemens Hearing Instruments Ltd v Friends Life Ltd* [2014] EWCA Civ 382.

If the conditions for termination are met, can the exercise of a termination clause be prevented? On the face of it, if the requirements of the termination clause have been met, then should be enough to bring the contract to an end. But what if the party alleged to be insolvent claims that it is only in such a situation because of the actions of the terminating party or that the terminating party has engineered a situation, which has allowed insolvency proceedings to be commenced notwithstanding that there is no genuine insolvency.

English law does not (at least at present) recognise a general duty of good faith but there are a number of possible principles, which may assist the party alleged to be insolvent.

One line of argument, which has been put forward in connection with other forms of termination clauses is that there is an implied term that the right of termination should not be exercised in an arbitrary, capricious or unreasonable way adopting the reasoning in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661. However, a series of cases has found that where one party is given an unqualified right of termination, there is no place to imply a term along Braganza lines; see *TAQA Bratani Ltd v Rockrose* [2020] EWHC 58 (Comm), *Monk v Largo* [2016] EWHC 1837 and *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch).

While arguments based on good faith are unlikely to succeed, there are alternatives that given the right combination of facts may succeed. First simply as a matter of construction, it may be possible to argue that notwithstanding the existence of an insolvency proceeding, there is no genuine insolvency and on the proper construction of the relevant clause there are therefore no sufficient proceedings to trigger a right to terminate. Alternatively, if the events said to trigger the operation of the termination clause have arisen because of interference by the party relying on the clause in the performance of the contract, it may be possible to make good an argument that there has been a breach of one or more of the following implied terms: an implied term that both parties will perform the contract honestly; an implied term that neither party will frustrate the purpose of the contract or an implied term that both parties would cooperate in the performance of the contract and would not seek to prevent the other party's performance of the contract. Whether such terms will be implied depends of course on matters such as whether such terms would be consistent with the express terms of the contract and whether or

© 2020 Chase Cambria Publishing

not the nature and circumstances of the contract are such that the general test for the implication of terms, namely one of necessity, is met; see *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 and the discussion in *Lewison on The Interpretation of Contracts*, 6th ed at §6.05.

In the context of implied terms that one party will not prevent the other from performing the contract, the more general test has been refined further to require: first that the implied term must not be illegal, contrary to public policy or ultra vires the contracting party; second that the term is limited to active prevention of performance (and probably does not extend to passivity in the face of the action of some third party) and third that the act complained of is wrongful either as being a breach of the express or implied terms of the contract or wrongful independently of the contract. These principles were recently re-stated in *Jiangsu Guoxin Corporation Ltd v Precious Shipping Public Co. Ltd* [2020] EWHC 1030 (Comm) at [20]. It is unlikely that there will often be an issue with the first of these requirements. The issue is more likely to be whether the party opposing termination can satisfy the second and third requirements. Nevertheless, if the circumstances are such that one party had deliberately delayed or refused to make payments under a contract for the purposes of putting the other party in a position where it can no longer resist insolvency proceedings and therefore termination of the contract, the prevention principle or one of the other implied terms mentioned above may provide redress. Again, it will be a question of the particular facts whether that claim for redress sounds in damages (combined with a claim for renunciatory breach) or in the form of injunctive relief to restrain termination of the contract.

Statutory control

The discussion above reflects the contractual means by which a party may challenge the application of an ipso facto clause. However, in certain jurisdictions, such as the United States, legislative controls either limit or exclude the enforcement of a such a clause against an insolvent party. The need for such controls under English law was under discussion prior to the outbreak of the Covid-19 pandemic. However, the dire financial consequences of that outbreak have pushed through the introduction of those controls. The relevant provisions are to be found at sections 14 and 15 and Schedule 12 of the *Corporate Insolvency & Governance Act 2020* which amend the *Insolvency Act 1986* by introducing section 233B and Schedule 4ZZA. In summary the affect of these provisions is to prevent a supplier relying on an ipso facto clause in a contract for the supply of goods and services once a company has entered into an insolvency procedure as defined in s.233B. The statutory restriction prevents the supplier terminating the contract or exercising any other right which accrues in the event of the debtor company becoming subject to a relevant insolvency procedure.

There are exclusions from the scope of s.233(B) for contracts with certain types of person or certain types of contracts. The exclusions include, for example, contracts with insurers and banks (subject to the qualifications in the Schedule) and contracts including financial services such as commodities contracts. The Schedule also provides an exclusion to ensure that the United Kingdom does not infringe its international obligations in the aviation sector under the Cape Town Convention. Those obligations are set out in the *International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015* and provide, among other things, for debtors and creditors under relevant agreements to be able to agree in writing the events which constitute default and the remedies for default (see in particular regulations 18 and 21).

Section 15, of *CIGA 2020* provides a temporary exemption for small company suppliers, which originally ended on 30 September 2020 but has now been extended until 30 March 2021. A small supplier is defined as being a company which meets two of the following conditions: (1) it has a turnover of no more than £10.2 million, (2) its balance sheet total was not more than £5.1 million and (3) the number of the supplier's employees was not more than 50. In addition a supplier can enforce its ipso facto clause with the consent of the office holder or of the company or the permission of the court.

It should be emphasised that the restrictions on ipso facto clauses introduced by *CIGA 2020* are not just temporary measures. They are intended to have long-term effect. They are also likely to give rise to a number of difficult disputes as to the meaning of the provisions. There is, for example, no definition of what is a contract for the supply of goods and services. It may well be difficult in a complex web of project contracts with interlinking rights and obligations to determine whether a contract is a contract for the supply of goods and services or not. What is meant by termination is not defined. Does the restriction apply if the debtor company is otherwise in renunciatory or repudiatory breach of contract? One would anticipate that the answer to this question should be 'no' but that answer is not certain. What is the meaning of 'any other thing'? Does the restriction prevent a supplier enforcing an associated guarantee or relying on a clause which accelerates the payment of all sums due under a contract if one payment instalment is missed? There are certainly at least two major uncertainties.

First, how the provisions of s.233B will operate in the event of foreign insolvency proceedings? Will those proceedings still engage the restrictions on ipso facto clauses imposed by s.233B? Where the foreign insolvency proceedings have been recognised under English law, for example under the *Cross Border Insolvency*

© 2020 Chase Cambria Publishing

Regulations, the answer would seem likely to be 'yes'. In other situations, the position is far more uncertain bearing in mind the very specific provisions of s.233B(2) defining the types of insolvency procedures which engage the section's protection.

Second, s.233B(4) prevents a party relying on events occurring prior to the start of the insolvency period as a ground for termination once the insolvency period starts. However, the language of the clause suggests that this restriction is only temporary so that if debtor comes out of the insolvency procedure in a state of solvency, the supplier can rely on the prior events to terminate the contract. What is not clear from the language of s.233B is whether the same result is intended to apply to a right of termination in the event of insolvency. If s.233B is suspensory only, then in theory once the relevant insolvency procedure is over, the supplier could terminate the contract based on the prior insolvency. Alternatively, if the ipso facto clause provides for termination on an event of insolvency, there might be an argument that the contract terminates automatically once s.233B ceases to have effect. Such a result would seem to undermine the initial purpose of s.233B especially if the debtor company has come out of the insolvency in a solvent position. It could also be said to be inconsistent with the language of s.233B(2), which speaks of relevant clauses ceasing to have effect once a company becomes subject to a qualifying insolvency procedure. Nevertheless, the position is uncertain and there is certainly scope for argument that the effect of s.233B is suspensory only.

Conclusion

Overall well-drafted ipso facto clauses remain a valuable contractual asset and are likely to become potentially more valuable in times of financial uncertainty. The case law makes clear that if the provisions of the clause are complied with, it will be difficult to say the least to prevent their operation. However, the position under English law has moved on and statutory controls which initialled looked to be some way off, have now been brought in. There are uncertainties in the legislation which will need to be resolved. The tension that exists between the use of such clauses to protect the interests of individual creditors over the interests of the insolvency estate as a whole remains.

© 2020 Chase Cambria Publishing

The Position of UK Directors during the COVID-19 Pandemic

Robert-Jan Temmink QC, Barrister, and **Stephanie Barrett**, Barrister, Quadrant Chambers, London, UK

Synopsis

In the current pandemic and consequent lockdown UK company directors face many challenges and risks. The government has recently announced that wrongful trading liability under Section 214 of the Insolvency Act 1986 will be suspended for an initial period of 3 months in order to alleviate directors' concerns about personal liability when deciding whether or not to continue trading. However, other duties and routes to personal liability remain in place and directors are by no means 'off the hook'. This article examines the impact of the suspension of wrongful trading liability and gives some advice on best practice for directors seeking to minimise the risk of liability should the company later enter an insolvency proceeding.

Introduction

The COVID-19 pandemic has changed everyday life immeasurably in a short space of time, and presented businesses with a range of serious challenges, both in the short-term and for the future. Many businesses are facing their toughest trading environment in living memory and some have been forced by lockdown measures to stop trading altogether. With no certainty as to how and when the current lockdown will end, many company directors face the difficult task of deciding whether to enter an insolvency procedure, or to try and trade out of a position of cash-flow or even balance-sheet insolvency.

As company directors try to meet the immediate challenges to their business on a daily basis, they may well be mindful of the potential risk that they will be held personally liable for their current actions. Although, as set out below, the UK Government is trying to reduce directors' anxieties in this regard by suspending wrongful trading liability under Section 214 of the Insolvency Act 1986, English law imposes a number of other specific duties on directors that must be complied with even in these extraordinary times.

Directors' duties and liabilities – the factual position

Directors' duties under English law derive from a variety of sources, principally common law, the Companies Act 2006 and other statutes, for example health and safety, employment and environmental legislation. The 2006 Act codified long-standing (and perhaps common-sense) duties, as a reminder:

- to act within their powers according to the company's constitution and only exercise powers for the purposes for which they are conferred (section 171);
- to act in a way that they consider in good faith will promote the success of the company for the benefit of its members as a whole (section 172);
- to exercise independent judgment when fulfilling their duties (section 173);
- to exercise reasonable care, skill and diligence (section 174);
- to avoid actual or potential conflicts between the director's interest and the interests of the company, and not to exploit or profit from their position within the company (section 175);
- not to accept benefits from third parties conferred by reason of being a director or doing (or not doing) anything as a director (section 176);
- to declare any interest in proposed or existing transactions or arrangements with the company to the board (sections 177–182).

These general duties, owed to the company, are cumulative (section 179) and, in the event of wrongdoing, it is not uncommon for a director to be held in breach of more than one of them.

The general duties are focussed on the director's duties to promote the company's success in the interests of its shareholders. However, when the company is insolvent or likely to become so, the directors are then required to act primarily in the best interests of the company's creditors as a whole, maximising (or at least preserving) the value of the company's assets.

As is well-known, a company can be insolvent in cash-flow terms if unable to pay its debts as they fall

due, and/or in balance sheet terms, where its liabilities are more than its assets at a given time (see section 123 of the Insolvency Act 1986). At present, with large sectors of the economy shut down and many businesses unable to generate revenue but still liable to meet fixed costs, it is anticipated that a large proportion of otherwise viable companies could find themselves technically insolvent.

In an insolvency context other potential claims against directors also arise. Apart from wrongful trading (which will be dealt with below) the 1986 Act provides a range of remedies against directors and ex-directors of companies in liquidation. For instance, pursuant to section 212 any director who has misapplied or retained, or become accountable for, any company money or other property or who has been guilty of any misfeasance or breach of duty can be ordered to repay, restore or account for that property (plus interest) or to pay such compensation to the company as the court thinks just. Breaches of duty in this context include negligence and breaches of the general 2006 Act duties set out above. Section 213 of the 1986 Act provides that directors who are guilty of carrying on company business with intent to defraud creditors can be ordered to make contributions to the company's assets.

Furthermore, certain transactions can be set aside or clawed-back in the event of liquidation or administration. The most common examples are transactions at an undervalue (section 238) and transactions amounting to unlawful preferences of particular creditors, sureties or guarantors (section 239).

It should also be noted that where a company has become insolvent a director may be disqualified from acting as a director pursuant to the Company Directors' Disqualification Act 1986 if his conduct makes him unfit to be concerned in the management of a company. There are also numerous criminal offences under the Insolvency Act 1986 relating to fraudulent conduct e.g. in relation to falsification of company books or false representations to creditors (see Sections 206–211).

Wrongful trading liability

By way of summary, wrongful trading pursuant to section 214 of the Insolvency Act 1986 is the continuation of trading by a company at a time when the company is unable to pay its debts as they fall due.

The Section applies if, at some time before the commencement of winding up, the director 'knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration' (Section 214(2)(b)), but nonetheless allowed the company to keep on trading. The director is held to the standard of a reasonably diligent person with (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions; and (b) the director's actual general knowledge, skill and experience (Section 214(4)). The standard therefore contains an objective element.

However, pursuant to Section 214(3) the Court should not require a director to make a contribution if, after the time when the director first knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation 'that person took every step with a view to minimising the potential loss to the company's creditors as [assuming him to have known that there was no reasonable prospect that the company would avoid going into liquidation] he ought to have taken'.

This defence is construed strictly and requires a director to demonstrate not only that continued trading was intended to reduce the company's net deficit, but also that it was designed so as to minimise the risks of loss to individual creditors, including new creditors incurred during the wrongful trading period (see *In re Ralls Builders Ltd* [2016] Bus LR 555 (Snowden, J.) at para. 245).

Directors are therefore potentially subject to unlimited personal liability for their conduct prior to commencement of the winding-up. The case-law suggests that any contribution is based on the loss suffered by the company caused by the wrongful continuation of trading. The starting point for assessment is the increase in the net deficiency of the company's assets as regards unsecured creditors during the wrongful trading period, but only to the extent that that increase was caused by the wrongful trading (see *Ralls Builders* (cited above) at paras 241–242). Losses that would have been incurred in any event due to the company's insolvency or entering a formal insolvency procedure are not included. It is possible, as in *Ralls Builders* itself, that a period of wrongful trading may actually improve the company's net deficiency by allowing for enhanced collection of contract debts compared to an earlier cession of trading.

However, liability for wrongful trading is relatively rare and the mere fact that a company is insolvent (whether on a balance-sheet or cash-flow basis) and carries on trading is insufficient. It is common for companies to experience cashflow difficulties or balance sheet deficits from time to time. The requirement is not that the company was insolvent, but that there was no reasonable prospect of avoiding liquidation as a result, and the courts are mindful that it is unhelpful to rely too much on hindsight (see *In re Hawkes Hill Publishing Co* [2007] BCC 937 per Lewison J. at paras 28 and 47). The typical case is one where a director closes his or her eyes to obvious reality and has no rational basis for believing that an event which would save the company will come about.

© 2020 Chase Cambria Publishing

Suspension of the application of Section 214 – the government announcement

Given the obvious risks of insolvency during the current pandemic, directors who carry on trading, incurring credit and/or paying salaries and suppliers, could be exposed to liability for wrongful trading under section 214 if their companies enter liquidation. At present it is very difficult for directors to make the sort of assessment required by section 214, in that the chance of avoiding insolvent liquidation will depend on when and how the current lockdown is lifted and what financial support, if any, companies receive from the State.

On 28 March 2020 the Business Secretary Alok Sharma announced that wrongful trading liability will be suspended retrospectively from 1 March 2020 for an initial period of three months. The relevant press release stated as follows:

> 'The government will also temporarily suspend the wrongful trading provisions to give company directors greater confidence to use their best endeavours to continue to trade during this pandemic emergency, without the threat of personal liability should the company ultimately fall into insolvency. Existing laws for fraudulent trading and the threat of director disqualification will continue to act as an effective deterrent against director misconduct'.[1]

The suspension is intended to give directors some breathing space, and to prevent a rush of insolvent liquidations as directors opt for winding-up rather than face potential personal liability. As of 11 May 2020 there is only a short Commons Briefing Paper (number 8877) regarding the suspension of wrongful trading and the government have not presented any draft legislation on this subject. The precise way in which the suspension will operate and its scope are therefore unknown. Given the uncertainty it would be a brave company director who relied solely on the announcement when making key business decisions at the moment.

Implications of government announcement

While the government's announcement gives something of a boost to directors trying to 'keep calm and carry on', it also raises a number of practical issues. Most obviously, while liability for wrongful trading is suspended, directors may still be liable for breaching their other duties, including the duty to consider the interests of the company's creditors as a whole in times of doubtful solvency.

Furthermore, other avenues to personal liability remain, such as fraudulent trading, misfeasance, breach of the Companies Act 2006 duties, as well as the threat of disqualification. While the practical effect of the suspension may be that certain expenditure or borrowing during the suspension period does not amount to wrongful trading, a director incurring further credit at a time when they know that the company will be unable to pay it back when due may face liability (e.g. under section 213 of the Insolvency Act 1986). Any future administrator or liquidator of the company is likely to review directors' conduct and explore any avenues for recovery against them.

Given the urgency of the situation, it is perhaps regrettable that the government has not yet produced draft legislation or provided any real detail of how the suspension will operate. For instance, it is unclear whether section 10 of the Company Directors' Disqualification Act 1986 (which allows a court to make a disqualification order against a director found guilty of wrongful trading under section 214 Insolvency Act 1986) will also be suspended. If a director would (bar the suspension) have been found liable under section 214 then it is unclear whether this is a ground for disqualification under section 10 of the 1986 Act.

Another obvious problem is that the suspension is merely temporary and, unless extended in due course, only for three months – to the end of May 2020. There may be cases where wrongful trading predated 1 March and continued into the suspension period or, conversely, began within the suspension period and then continued after the suspension was lifted. It is unclear how such cases will be dealt with from a liability standpoint but further difficulties arise regarding quantum. As set out above, a director's contribution under section 214 is usually calculated by reference to the amount that the net deficiency increases as a result of the wrongful trading after the date that the court finds the directors should have put the company into an insolvency proceeding. The added complexity of applying this approach in a case where a director has been wrongfully trading both within and outside the suspension period is obvious.

Advice for directors

The situation faced by any company director is of necessity fact-specific. Any concrete steps or business decisions will depend on the particular business and the factual scenario that the company finds itself in. However, some general advice on best practice can be given:

Notes

1 Press release dated 28 March 2020 <https://www.gov.uk/government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19> accessed on 5 May 2020.

© 2020 Chase Cambria Publishing

- Seek professional advice on key legal and financial issues and, potentially, from an insolvency practitioner or 'turnaround specialist'.
- Explore the various measures announced by the government to ease cash-flow and assist with the financial impact of the pandemic e.g. loan schemes, employee furlough schemes and business rates holidays.
- Consider and act in the best interests of the company's creditors as a whole, especially when deciding whether or not to continue trading. In a rapidly evolving situation such as the current pandemic, the course of action in the creditors' best interests may change, and therefore this needs to be reviewed very regularly. Taking and recording advice from an insolvency practitioner or lawyer may provide some assistance in the event of subsequent enquiry by a liquidator or administrator.
- Remember that, given the likely difficulty of finding a buyer willing to pay a business' fair value at the present time, it is not inevitable that a company's creditors would be in a better position if the company immediately entered an insolvency procedure. However, no assumptions should be made in this regard and the question must be considered on a regular basis.
- Document all business decisions and the reasoning behind them. This is crucial in order to evidence that directors took creditors' interests into account when making decisions. As well as board minutes, directors should consider producing and/or reviewing revised versions of documents such as management accounts, trading and cash flow projections and a plan of how the company will operate during the pandemic and its aftermath. These documents should also be re-considered and adapted as necessary to keep up with changing circumstances.
- Keep communicating with key creditors and stakeholders such as banks and suppliers.
- Once the suspension of wrongful trading liability ends, reconsider the requirements of section 214 and ensure that directors are not wrongfully trading or at risk of doing so. In particular, a director should assess whether there is a reasonable prospect of avoiding insolvent administration or liquidation and, if not, take every step to minimise losses to creditors.

Things to avoid:

- Incurring new liabilities (whether from government schemes or other sources) when the director knows that there is no prospect of repayment or no credible plan for meeting such liabilities when they fall due.
- Repaying liabilities where directors have given personal guarantees in preference to other liabilities or otherwise preferring certain creditors over others, other than in the normal course of trading. The obligation is to consider the interests of creditors as a whole, not just particular creditors or classes of creditor.
- Transferring assets to connected persons or companies other than in the usual course of business.
- Paying out dividends or bonuses where the company is on the brink of failure.

Conclusion

The above analysis is not meant to strike fear into the heart of company directors, but to encourage a conscientious and responsible approach. The suspension of wrongful trading liability is intended to ensure that directors acting in good faith in difficult circumstances are not unduly penalised. Some comfort may also be taken from section 1157 of the Companies Act 2006, where the Court is empowered, in any proceedings against a director for (inter alia) negligence, breach of duty or breach of trust, to relieve the director either wholly or partly from liability if they have acted honestly and reasonably and ought, in the circumstances, fairly to be excused. The need for further Government guidance and, preferably, draft legislation, is pressing. It should not fall to the courts to have to determine (in an information vacuum) what is fairly to be excused. However, directors can take some comfort from the pragmatism and common-sense of the commercial and chancery judges upon whom the burden of filling the information void may, ultimately, fall.

© 2020 Chase Cambria Publishing

Valuation of Services for the Purposes of Section 245 of the Insolvency Act 1986

Robert-Jan Temmink QC, Barrister, Quadrant Chambers, London, UK, and **Victoria Kühn**, Associate, Wilkie Farr & Gallagher LLP, London, UK

Synopsis

Section 245 of the Insolvency Act 1986 ('IA 1986') declares certain floating charges automatically invalid if they were created within a specific time before the commencement of an administration or winding-up of the chargor, subject to certain exceptions. Floating charges are not invalid to the extent that they secure new value provided in the form of money, goods or services or a reduction (including a discharge) of a debt of the chargor.

In *Re Peak Hotels and Resorts Ltd Crumpler and another (joint liquidators of Peak Hotels Resorts Ltd) v Candey Ltd* [2019] EWCA Civ 345 the Court of Appeal (the 'Court') provided clarification and guidance in relation to the valuation of services provided to a chargor under a fixed fee agreement where payment for those services had been secured by a floating charge.

The Court made clear that a floating charge is valid only to the extent of the value of the services actually supplied under the fixed fee agreement. That was so irrespective of the fact that the fixed fee arrangement might provide for a facility for the chargor to draw on as many services under the fixed fee agreement as required. To the extent that the value of the services actually supplied fell short of the full amount of the fixed fee - and the floating charge therefore did not cover the whole of the fixed fee - the difference remained provable in the insolvency proceedings as an unsecured claim.

Section 245 of the Insolvency Act 1986

A common method under English law of taking security over an asset is to encumber the asset with a charge. A charge entitles the charge-holding lender to such amount of the proceeds of sale of the encumbered asset as is required to discharge the debt secured by the charge. English law distinguishes between fixed and floating charges. A fixed charge attaches to a specific asset, or assets, while a floating charge 'hovers' over a shifting pool of assets (present and future), e.g. inventory, allowing the chargor to use or trade the assets in the ordinary course of business until some future step is taken by or on behalf of those interested in the charge. At that point, the floating charge crystallises and the chargor is no longer permitted to use or trade the assets without the charge-holder's consent. A charge is not categorised as fixed or floating merely by dint of the label creating it; instead, the court will consider whether a charge-holder has sufficient control over the charged assets. Where there is control the charge will be considered a fixed charge, otherwise it will be a floating charge. The distinction becomes particularly important when a chargor becomes insolvent.

Section 245 IA 1986 provides that a floating charge is invalid if it was created within one year (or two years where the chargee is a connected party) before an administration or winding-up of the chargor is commenced unless, and to the extent that, the charge secures new money's worth provided by way of consideration at the same time or after the creation of the charge ('New Value Exception'). New money's worth can be provided in the form of new money (as the name suggests), the discharge or reduction of existing debt, or by goods or services supplied to the chargor.

In an insolvency situation, the classification of security is of critical importance for the ranking of the creditor's debt claim in the subsequent payment to creditors out of the insolvent's assets. The general position is that the proceeds from the realisation of any company assets which are subject to a fixed charge are distributed first to satisfy the debt secured by the relevant fixed charges, followed then by the expenses of the administration or winding-up, and after that by debts secured by floating charges (subject to a relatively small deduction of the prescribed part which is made available to unsecured creditors) and, lastly, *pari passu* to the unsecured creditors.

Facts of the case and findings of the High Court

British Virgin Islands-incorporated holding company Peak Hotels and Resorts Limited ('Peak') held a stake via a joint-venture vehicle in the luxury Aman Resorts hotel group. Shortly after purchase of the hotel group

in January 2014, the joint venture partners' relationship broke down and international litigation in relation to control of the hotel group and funding arrangements ensued. Candey Ltd, a small firm of solicitors, acted for Peak in that litigation which involved proceedings in the English High Court, international arbitration in Hong Kong and proceedings in the BVI courts.

Peak had experienced cash flow issues and faced a potential bill for Candey's fees at the conclusion of the litigation in a sum estimated to be £5 to £6 million if no settlement could be reached. Peak and Candey agreed that Candey would be entitled to a fixed fee of circa £3.86 million (plus interest of 8% p.a. from judgment or settlement) for its legal services provided in the proceedings and the payment of outstanding fees would be rescheduled. The fixed fee would not have to be paid until a judgment on liability was handed down or a settlement was agreed in the subset of the proceedings referred to by the Court as the 'London Litigation' unless Peak obtained cash from elsewhere (the 'Fixed Fee Agreement'). To secure Candey's claims under the Fixed Fee Agreement, on 21 October 2015 Peak executed a deed of charge and security in favour of Candey (the 'Charging Deed') creating continuing security by way of fixed and floating charges over all of Peak's assets, undertakings, any damages and any other sums flowing from the claims.

In February 2016, Peak entered liquidation proceedings in the BVI while the London Litigation was at a critical stage. The Liquidators subsequently managed to achieve a settlement in the London Litigation so as to prevent further costs being incurred. Upon Peak's entry into liquidation, the fixed fee became due under the Fixed Fee Agreement and, relying on the Charging Deed, Candey claimed to be a secured creditor for the full £3.86 million in the liquidation. Candey claimed the whole sum despite the fact that, based on its standard hourly charging rates, the value of the services provided by Candey had been significantly lower.

While not challenging the fixed fee in their application before the English High Court, the Liquidators challenged the asserted security. The English court had recognised the BVI liquidation proceedings in relation to Peak in February 2016 as main foreign proceeding under the Cross-Border Insolvency Regulations 2006 and the parties agreed that the matter should be conveniently dealt with in the English court.

The main issues before the High Court were (1) whether certain properties fell within the relevant charges of the Charging Deed; (2) to the extent the property fell within the charge, whether the charge was a fixed or floating charge; and (3) to the extent the charge was a floating charge, whether s.245 IA 1986 applied to limit the sums secured.

In a judgment dated 23 June 2018[1] the Deputy Judge in the High Court, His Honour Judge Davis-White QC, found that (1) both the monies paid into the court by Peak and received by the Liquidators upon settlement of the London Litigation, and the monies formerly held on trust for Peak in a bank account, were 'property' falling within the terms of the Charging Deed; (2) the charges over that property were floating charges because there was inadequate control over the assets for the charges to be considered fixed; and (3) the threshold conditions of s.245 IA 1986 were satisfied so as to limit the sums secured to the value of the services supplied at or after completion of the Charging Deed. The judge considered that further evidence was required to determine the value of the services supplied and that matter would have to be dealt with separately. A separate hearing on the valuation of the services was heard by His Honour Judge Raeside QC on 22 November 2017 who held that the value of the services supplied was to be measured by reference to the Fixed Fee Agreement and was therefore the whole of the fixed fee.

The Liquidators' appeal of HHJ Davis-White QC's decision that the monies paid into court and subsequently paid out to the Liquidators were subject to the charge was dismissed. The Liquidators also appealed the valuation of the services by HHJ Raeside QC with permission granted by the judge.

Judgment

The Court (judgment by Lord Justice Henderson with whom the others agreed) allowed the Liquidators' appeal of HHJ Raeside QC's judgment and remitted the question of the valuation of the services supplied by Candey after completion of the Charging Deed to the High Court.

The Court rejected the submission by Candey that the Fixed Fee Agreement was akin to a facility by which Peak could draw on Candey's legal services regardless of the amount of work that would be required and should consequently be valued on that basis for the purpose of ascertaining the extent of the floating charge. Instead, the Court relied on the wording in s.245(6) IA 1986 which focused on the services actually supplied after the creation of the charge ([36-37]). The charge would be valid only to the extent of the value of those services actually supplied while the consideration agreed in the Fixed Fee Agreement would merely determine the extent of Candey's claim in the liquidation as an unsecured creditor.

With respect to the test for determining the value of the services supplied, the Court referred to s.245(6) IA 1986 and considered that the test was an objective one. '[T]he exercise required by section 245 [...] is

Notes

1 [2017] EWHC 1511 (Ch).

© 2019 Chase Cambria Publishing

retrospective, and requires a valuation with the benefit of hindsight of the work which has actually been done.' ([39])

Value, therefore, must be ascertained by 'an objective and retrospective assessment of the amount that Candey could reasonably have charged for those services in the ordinary course of business' on the same terms as they had been supplied save for the consideration agreed ([40]). For the purpose of determining what Candey could reasonably have charged, the Court considered that Candey's standard terms, charging on a time-basis with monthly invoices, would be 'likely to provide an appropriate basis' ([40]) for valuation. At the same time the Court cautioned that the service supplier's standard terms could only serve as guidance and could not be conclusive because, given that the test was objective, it could not necessarily be assumed that the supplier of the services would have been Candey itself rather than another firm with comparable expertise and resources ([41]).

Analysis

The Court recounted the legislative history of s.245 IA 1986, tracing its history from s.212 of the Companies (Consolidation) Act 1908 (when floating charges created within a specified time before entry into insolvency were invalid *ab initio* save when cash was provided at or after their creation) to s.245 IA 1986 (in which the provision of goods and services was accepted as an equivalent of cash for the purposes of the New Value Exception). In contrast to the view presented by the authors of *Sealy & Milman: Annotated Guide to the Insolvency Legislation* in their commentary on s.245(2) IA 1986 who consider it is hard to see why other value provided, e.g. real property, is not to be taken as as providing good value for the purposes of the New Value Exception, at [17] the Court approved the passage in Goode, *Principles of Corporate Insolvency* (5th Edition, 2018, para 13-111) which explicitly states that the extension of the New Value Exception to goods and services is expressly restricted to 'those forms of benefit to the company which arise from day-to-day trading and finance and have readily ascertainable value. Excluded are a wide range of other assets, both tangible and intangible, including land and buildings, intellectual property rights, debts and other receivables and rights under contracts.'

From this analysis the Court distilled the purpose of s.245 IA 1986 as being:

(i) the prevention of the preferential treatment of a floating charge-holder in the payment waterfall vis-à-vis the company's unsecured creditors; where

(ii) the charge is created at a time when the chargor is already in financial difficulty and is later placed into administration or liquidation; and where

(iii) such charge-holder has obtained the charge without providing value equivalent to the charge in addition to the assets existing at the time of creating the charge. ([33])

The valuation test in s.245(6) IA 1986 prescribes that 'the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business on the same terms (apart from the consideration) as those on which they were supplied to the company'.

In the light of that explicit wording, the Court considered that the valuation test should be the sole guide to the valuation of the services. It rejected the approach of adducing other standards as aides for measurement, as HHJ Raeside QC had done when he considered whether the fee in the Fixed Fee Agreement was reasonable within the meaning of s.61 of the Solicitors Act 1974.

Analogy to facility

The Court rejected the argument that the Fixed Fee Agreement was a facility provided by Candey under which Peak could draw legal services as and when Peak required them. And consequently rejected the argument that the valuation of the service should take that call-off arrangement into account when determining the extent to which the floating charge is valid under the New Value Exception.

The Court concluded that the Fixed Fee Agreement did not, in fact, create a commitment on the part of Candey akin to a facility: the legal work which Candey had undertaken to provide was specifically related to specific proceedings and did not allow Peak to draw whatever legal services it might require. Additionally, Candey had the right to withdraw from the Fixed Fee Agreement at any time.

Notwithstanding the Court's conclusion as to the nature of Candey's commitment under the Fixed Fee Agreement, the Court made clear that whether or not there was a facility-like commitment was irrelevant. The words 'at the time [the services] were supplied' in s.245(6), presumably as interpreted in light of the section's purpose, required the valuation to be based on the work actually done by Candey at or after the creation of the floating charge. Services 'promised' but not supplied under the Fixed Fee Agreement would not be value for the purpose of the New Value Exception.

To hold otherwise would, of course, have given Candey an unwarranted windfall: it would have jumped the queue of unsecured creditors for a *pari passu* distribution in respect of fees it hoped to receive for work it hoped to carry out, but which in fact it had not done and for fees which had not, in fact, been incurred.

© 2019 Chase Cambria Publishing

That said, whilst the Court's conclusion that the valuation should be based on the actual work done by Candey is unassailable in this particular case, it remains to be seen whether another Court could be convinced to find that a fixed fee agreement by which a client could draw on legal services as and when required could, as a matter of principle, amount to a valuable service for the purpose of the New Value Exception. That position appears to have been contemplated by HHJ Davis-White QC. At [119] of his judgment he explained that he 'accept[s] what has to be valued is the services supplied to the company and not the services contracted to be supplied, but that of course does not determine what services were, for these purposes, 'provided'.'

As ever in these situations, everything will depend on the context and what, precisely, has been agreed. On the one hand, a call-off arrangement for legal services required from time to time, subject to an overall cap on fees, is likely to result in a Court considering what has been called-off and what the value of those services were. On the other hand, a fixed-price fee for work over a period of time, however much work was done, might well amount to the provision of a service sufficient to trigger the New Value Exception.

Guidance on the valuation of services

The Court provided further guidance on the valuation of Candey's services since creation of the floating charge.

In respect of the term 'ordinary course of business', the Court clarified that this denoted the ordinary course of the supplier's business, i.e. Candey's business as solicitors, irrespective of the enhanced credit risk associated with Peak as the purchaser of the services ([44, 45]). Therefore, neither a charge for credit in the form of compensation for delayed payment nor increased charging rates or other special terms of business attributable to the risk of non-payment can enter the valuation considerations for the purposes of s.245.

The Court reached this conclusion on the basis that the purpose of the words 'ordinary course of business' clearly had a function to perform, part of which was to insulate the valuation of the services actually provided from any increase in the supplier's normal charging rates or other special terms of business caused by an increased risk of non-payment.

Similarly, the objective standard did not, in the Court's view, permit consideration of the particular circumstances which led Peak to negotiate the Fixed Fee Agreement to be taken into account. Accordingly, the value pursuant to s.245(6) IA 1986 could not include compensation for the delay in payment. Instead, s.245(2)(c) IA 1986 provided a saving for contractually-agreed interest and it would have been inconsistent with that express statutory right if Candey were also able to include such charge by means of the definition of the services supplied.

In this respect, by excluding any special terms of business attributable to the increased credit risk, the Court seems to have concluded that the valuation test in s.245(6) IA 1986, by reference to 'the ordinary course of business on the same terms [...] as those on which they were supplied', requires that the terms assumed for the purposes of valuation be the same as would be agreed with a healthy solvent company. However, it is not obvious that the valuation test does require that such terms should be assumed, nor is it clear why it should. Why should service-providers not put in place either extra security, or additional terms to protect themselves, or to compensate them for the unwelcome effects of insolvency as part of their normal course of business? If it is market practice to provide services to financially distressed companies on different terms compared to financially healthy companies, why should the former be considered to be supplied outside the ordinary course of business?

Moreover, if the legislators had intended that the value of services for the purpose of the New Money Exception be determined by reference to a healthy going-concern, would it not be expected to have said so expressly and without adding 'on the same terms (apart from the consideration) as those on which they were supplied'?

By including services in the New Value Exception, the legislators added a source of value supporting a floating charge which is more flexible than the mere provision of money. *Goode* stated that the value of services in day-to-day trading is readily ascertainable and was therefore added to s.245 as another foundation of value for the purposes of the New Money Exception. However, the assumption that value is readily ascertainable is only correct where the valuation basis is taken either to be the actual consideration agreed for the services supplied, or fair market value determined for the service actually delivered. In either case, at least certain special terms of business that take into account the increased credit risk, e.g. increased rates, should not reasonably be disregarded in such consideration and valuation. If they were to be disregarded, the legislators could and should have expressly stated as much.

In fact, the statement that the legislators intended to insulate the valuation of the service for the purpose of s.245 from any terms of business occasioned by an increased credit risk also appears inconsistent with the saving provision for interest in s.245(2)(c). In the case of cash provided to a company under a new money facility, it is accepted market practice for the lender to charge higher interest if lending to a financially distressed entity than if lending to a financially healthy company. Section 245(2)(c) saves all of such interest charged without restriction as to the portion of interest attributable to the higher credit risk of the borrower-chargor.

© 2019 Chase Cambria Publishing

Conclusion

The Court in *Re Peak Hotels and Resorts Ltd Crumpler and another (joint liquidators of Peak Hotels Resorts Ltd) v Candey Ltd* helpfully provided further guidance in relation to the definition of services supplied for the purposes of s.245 IA 1986 where a fixed fee was agreed and in relation to the terms which can be taken into consideration when determining the value of the services supplied for the purpose of the New Value Exception.

While the Court's conclusions in respect of the facts of the case are readily understandable, the Court's statements of principle may have inadvertently excluded perfectly reasonable agreements and intentions between supplier and consumer/chargor and chargee where the price of services was agreed between the parties and legally secured prior to any insolvency. In excluding the possibility that a facility type of service could be taken into account when determining the valuation of a service actually supplied; or that special terms occasioned by working for a risky client could be taken into account, the Court may have gone slightly too far.

© 2019 Chase Cambria Publishing

Return of the MAC: The English Courts' Approach to Material Adverse Change Clauses

Jeremy Richmond QC, Barrister, and **Liisa Lahti**, Barrister, Quadrant Chambers, London, UK

Synopsis

In light of the significant business downturn occasioned by the COVID-19 pandemic, we anticipate that the meaning and effect of 'Material Adverse Change' or 'MAC' clauses will be of critical potential importance to all businesses reliant on debt financing, and the professionals who advise them.

MAC clauses are commonplace in loan facility agreements and are provided for in substantially all loan facilities on the Loan Market Association standard forms (save for certain investment grade debt). MAC clauses are also found in business acquisition agreements (most typically, in the UK at least, in public acquisitions) and other more general contracts (such as long-term supply agreements in the commodities context). In the interests of brevity we only consider in this article the paradigmatic case of MAC clauses in loan facility agreements. However, the principles applicable to the consideration of MAC clauses in loan facility agreements will have general application to MAC clauses in other business contexts.

Where are MAC clauses typically found?

While their meaning and effect obviously turn on their precise terms, MAC clauses are often found in the following instances:

– as 'event of default' clauses that provide that in the event of a generally unforeseeable event that materially effects the borrower, the lender will have the option to accelerate the debt due or to place a stop on drawdowns;

– as part of a borrower's representations and warranties to the lender either between the signing of the loan facility and first drawdown, or before each drawdown e.g. there has been no material adverse change in the financial condition of the borrower since the most recent borrower's audited financial accounts provided to the lender; and

– as an important qualifier to certain covenants, representations or warranties provided by the borrower to the lender (e.g. the borrower is not in breach of any covenants where such breach would give rise to a Material Adverse change in the borrower's business).

Guidance from the Court

The leading English case on the interpretation of MAC clauses is *Grupo Hotelero Urvasco SA v Carey Value Added SL* [2013] EWHC 1039 (Comm).

The case concerned the financing of a hotel in London by a Spanish fund that invested in hotels (Carey). Grupo Hotelero Urvasco (GHU) was involved in developing the hotel and had entered into a loan agreement with Carey in 2007. The agreement contained a 'plain vanilla' MAC clause pursuant to which GHU represented that there had been 'no material adverse change in its financial condition'. The representation was made and repeated at specified times. Carey ceased lending in 2008 after it become concerned about GHU's financial position given the decline in the Spanish economy due to the collapse of the Spanish property bubble. Work on the hotel development stopped and GHU claimed damages for breach of contract. Carey argued that it was entitled to refuse drawdown because a MAC to GHU's financial position had taken place.

Though the interpretation of the MAC clause turned on the specific wording of the clause in question Blair J's judgment in *Carey* provides some helpful guidance as to the approach a Court is likely to take (see [334-364] of the Judgment). In particular:

1. If the MAC clause requires a change in the 'financial condition' of the borrowing company that condition will be assessed *primarily* by reference to the company's financial information (interim financial reports and/or management accounts), though other information relevant to the company's financial condition can be taken into account (such as missed debt payments in *Carey*). If the clause in question refers to the '*business* and financial condition' it is likely that a wider range of matters can be considered.

2. Evidence of 'external economic or market changes' (e.g. the collapse of the Spanish property bubble in *Carey*) will not generally be sufficient to trigger a

MAC clause. This is because the individual borrower may perform better or worse than the sector in question. However it is worth noting that evidence of external economic or market changes may be more relevant and persuasive in the context of the COVID-19 pandemic than it was in the context of the collapse of the Spanish property bubble. This is because the strict lockdowns imposed across the world have meant that certain sectors have simply been unable to trade at all such that questions about a company's ability to perform better or worse than others in the same sector do not arise in the same way.

3. There must be a change. Therefore a lender cannot rely on circumstances that it was aware of when the agreement was entered into unless 'conditions worsen in a way that makes them materially different in nature'. This is most relevant to contracts entered into after the pandemic was under way.
4. The change must be 'material'. It must affect 'the borrower's ability to perform its obligations, in particular its ability to repay the loan'. Further it must 'significantly' affect that ability because otherwise 'a lender may be in a position to suspend lending and/or call a default at a time when the borrower's financial condition does not fully justify it, thereby propelling it towards insolvency' and the impact must not be temporary (even if the event causing the impact is).
5. The burden of proof is on the lender (or party seeking to rely on the MAC clause). The importance of the quality of evidence required was emphasised in *Decura IM Investments LLP v UBS AG London Branch* [2015] EWHC 171 (Comm).

Key considerations when interpreting/drafting a MAC clause

Given the above, the key considerations when interpreting an existing MAC clause or drafting a new one include:

1. Scope of the clause: What needs to have changed? Is it only a change in a company's *financial* condition that will suffice or are other matters taken into account? There is a wide range of possible wording from clauses that allow a range of generally defined matters to be taken into account (finances, business, prospects and property for example) to clauses which are triggered on the occurrence of a specific narrowly defined event (a particular change in the company's accounts or a downgrading of its credit rating for example).
2. Timing: Does the clause require the material change to have occurred or is it enough to point to an event that has occurred and a change that is likely to (or may) occur. If the latter, what is the standard that is to be reached?
3. Whose assessment: Is the lender's subjective assessment enough or is the position to be determined by some objective criteria, and if so, what? On appeal from a decision of the British Virgin Islands Court of Appeal, the Privy Council in *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd* [2016] A.C. 293 considered a MAC clause in a facility agreement that provided 'Any event or circumstance which in the opinion of [the lender] has had or is reasonably likely to have a material adverse effect on the financial condition, assets or business of [the borrower].' It was common ground between the parties that the MAC clause only required the lender to believe that the MAC clause engaged and that such belief had to be both honest and rational. The Privy Council considered that the lender would have to convince the Court by admissible evidence that it had in fact formed the requisite opinion and that such opinion was honest and rational. See also *Torre Asset Funding Ltd v Royal Bank of Scotland Plc* [2013] EWHC 2670 (Ch) where the MAC clause was conditioned on 'the reasonable opinion of the [agent for certain lenders]' with the effect that the MAC clause was not triggered even though another event of default relating to the borrower's finances was.

Wider clauses are usually considered 'lender friendly' (and outside of the lending context friendly to the party entitled to trigger the clause if the relevant change occurs in its counterparty's finances). However it is worth bearing in mind that the interpretation and application of a clause drafted in wide and general (sometimes even intentionally vague) terms is inherently more unpredictable than a clause referring to a specific, narrowly defined event or events. Some lenders may prefer certainty especially given the risk of becoming liable to the borrower for a repudiatory breach of contract if a MAC clause is triggered when no material change has occurred. This could prove costly especially if the financing in question is central to the borrower's business (such that without it the borrower would become insolvent) or a particularly lucrative business venture.

In addition to the above matters, when drafting a MAC clause it is also important to consider practical matters such as what documents are likely to be required in assessing whether a MAC has taken place. As set out above the burden of proving a MAC is on the lender but the borrower will likely hold the most relevant information about its finances (and, if relevant, business prospects, property etc.). A lender may therefore wish to include express contractual obligations on the borrower to e.g. hand over relevant information periodically or when prompted to do so.

When drafting a clause it is also crucial to consider what the MAC clause is intended to achieve. Some MAC

© 2020 Chase Cambria Publishing

clauses can simply be relied on to trigger an event of default. Others allow for a wider range of outcomes and can be relied on to trigger an obligation to provide further security for example. There is a range of possibilities. It should not be assumed that a lender will always wish to call an event of default. In the current unusual circumstances where entire sectors of the economy are under threat a lender may reasonably take the view that it would be better to allow a borrower to try and (eventually) 'trade out' of a dire financial situation with the hope of keeping that company (or sector) as a client in the future. But such a lender may still wish to rely on the MAC clause to trigger further security or other similar protection in the event of a material change in the borrower's finances or business.

Conclusion

The meaning of each MAC clause will obviously turn on its wording. While perhaps the conventional reading of *Carey* is that a downturn in general or sectoral market conditions would not *generally* be sufficient to trigger a MAC clause, it may be arguable that the effects of the COVID-19 pandemic raise such widespread and novel circumstances that the English Courts will take a more expansive approach.

Stop press

Shortly before publication of the Quadrant Chambers Special Edition of International Corporate Rescue and well after our article was initially published, Cockerill J handed down her decision in *Travelport Limited et. al. v. Wex Inc*. [2020] EWHC 2670 (Comm). The case raised complex factual issues which, for reasons of both time and space, are not addressed in this brief Stop Press. The case concerned the construction of the provisions of a Share Purchase Agreement and in particular the construction of a 'Material Adverse Effect' clause. The Judge expressly referred to *Carey* and described it as the leading English authority on point even though on the facts of the case in *Travelport* it was of limited assistance. *Carey* concerned a banking transaction, and not a share purchase agreement. The Judge reviewed many of the leading US decisions on MAC clauses including the case of *Akorn Inc. v. Fresenius Kabi AG* (Del. Ch. 1 October 2018). In *Akorn*, the Vice-Chancellor of the Delaware Chancery Court had observed that: 'The typical MAE clause allocates general market or industry risk to the buyer, and the company specific risks to the seller.' Cockerill J derived some, albeit limited, assistance from these US authorities while noting at paragraph 176 of the judgment that: 'there is a dearth of English authority on point … those [US] authorities will obviously not be binding or formally persuasive, but to ignore the thinking of the leading forum for the consideration of these clauses, a forum which is both sophisticated and a common law jurisdiction, would be plainly imprudent – as well as discourteous to that court.' On the main issue of construction, Cockerill J ultimately found for Wex on well-established principles of contractual construction.

JR QC

© 2020 Chase Cambria Publishing

Fighting Cryptocurrency Fraud: What's in the English Lawyer's Toolkit?

Jeremy Richmond QC, Barrister, Quadrant Chambers, London, UK, and **Chris Recker**, Senior Associate, Trowers & Hamlins LLP, UK

Synopsis

Cyber criminals reportedly have taken advantage of the COVID-19 pandemic (and lapses in cybersecurity) on a significant scale. We anticipate that knowledge of the developing English and Commonwealth jurisprudence concerning cryptocurrency will become increasingly essential in combatting such fraud. This article: (1) highlights some of the occasions when a litigator may come across cryptocurrency, (2) outlines some of the interim remedies potentially available where cryptocurrency is concerned; and (3) addresses some of the recent authorities in England and some other Commonwealth jurisdictions dealing with the issue of whether cryptoassets can be considered property, and thus subject to a proprietary claim – a question of particular importance in fraud claims within an insolvency context.

When might a lawyer come across cryptocurrency?

Whilst the paradigm case would be one where cryptocurrency has been misappropriated from a client, there are other examples which may be less obvious. For example, an asset may be sold and the proceeds converted into cryptocurrency, or a client may have made a ransom payment in cryptocurrency and want to recover the payment. It is also possible that a client could have innocently purchased cryptocurrency from a fraudster and be caught up in a dispute with the victim/initial owner of the cryptocurrency. Whichever example, it is essential that the modern commercial lawyer dealing with the matter has at least some knowledge of how cryptocurrency is treated as a matter of English law.

What remedies are available to restrain or control the proceeds of fraud?

As practitioners will be aware, a litigator has a wide range of interim remedies available to him or her in fraud cases under CPR 25.1(1) as well as at common law and in equity. These remedies include: (1) the Freezing Order; (2) the Search Order; (3) the Asset Preservation Order; (4) the Proprietary or Tracing Injunction; (5) orders directing a party to provide information about the location of assets; and (6) Norwich Pharmacal/'Bankers Trust' orders. These interim remedies are varied, and often hinge on a particular asset being classed as 'property.' When deployed at the right time, a challenging case can be completely resolved in a client's / victim's favour by the use of such interim remedies. However, the balance is a fine one: when used incorrectly an interim remedy can become a new battleground (and lead to a diversion of time and resource).

In addition, there are powers in criminal proceedings in the form of (among other things): (1) confiscation orders (under the Proceeds of Crime Act 2002), (2) account freezing and forfeiture orders, (3) unexplained wealth orders (both (2) and (3) under the Criminal Finances Act 2017); and (4) freezing orders (under the Criminal Justice Act 1988). The substance of these powers is beyond the scope of the article. However, one of the main purposes of these remedies is to deprive someone of the benefit of criminal conduct and/or to prevent the dissipation of assets pending trial. For those reasons, they may also have a role to play in cryptocurrency related litigation. We expect that the battle against cryptocurrency related fraud will require the use of multiple remedies (the nature of which will turn on the circumstances of the particular case).

The authorities on cryptocurrencies

The UK Jurisdiction Task Force's legal statement on the status of cryptoassets and smart contracts of November 2019 (the 'UKJT Statement') addressed, among other things, the extent to which cryptocurrency could be considered to be property. The Task Force concluded (among other things) that cryptoassets could be considered 'property' within the meaning of section 436 of the Insolvency Act 1986. We set out below short summaries of some of the recent cases in England and certain other Commonwealth jurisdictions that

have addressed this issue and the related question of the remedies available to the victim of cryptocurrency fraud.

1. Vorotyntseva v Money-4 Ltd (T/A Nebus.com) and others [2018] EWHC 2596 (Ch)

Vorotyntseva transferred approximately £1.5m of Ethereum and Bitcoin to Money-4 and its directors (who were also defendants), for the purposes of Money-4 dealing with that cryptocurrency on its new trading platform (on behalf of Vorotyntseva). Vorotyntseva became concerned that those funds had been dissipated and applied for a proprietary and freezing injunction (which was subsequently granted). The defendants were represented at the hearing. The decision indicated that cryptocurrency could be a form of property and be subject to an injunction.

2. Robertson v Persons Unknown (unreported – 2019)

Robertson was the victim of a 'spear phishing attack' which resulted in him transferring 100 Bitcoin (worth approximately £1.2 million at the time) to a fraudster's cryptocurrency wallet. By tracing the transfer on the public Bitcoin blockchain, it became apparent that the fraudster had then transferred 80 of those Bitcoin to another wallet which was operated by Coinbase (a well-known cryptocurrency exchange).

The Commercial Court acknowledged that there was a serious issue to be tried in respect of whether or not the 80 Bitcoin were Robertson's personal property and granted an Asset Preservation Order in respect of those Bitcoin. The Commercial Court also granted a Bankers Trust order, which required Coinbase to disclose certain information about the wallet holder.

3. AA v Persons Unknown [2019] EWHC 3556 (Comm)

A hacker gained unlawful access to the IT system of a Canadian Insurance company and deployed ransomware. The hacker demanded $1.2m in Bitcoin, as the ransom payment, in exchange for the decryption software and keys.

The Canadian Insurance company was itself insured by an insurer in England. The English insurer appointed a specialist negotiator who agreed a reduction of the ransom directly with the hacker to $950,000 (in Bitcoin) and facilitated the transfer to the hacker's proposed Bitcoin wallet. Once the Bitcoin had been transferred, the decryption keys were provided so as to 'unlock' the encrypted files and systems.

The English insurer then worked with specialist blockchain tracing experts to 'follow' the transfer of the Bitcoin. A substantial amount (96 Bitcoin) had been transferred to a wallet operated by the cryptocurrency exchange, Bitfinex (which is itself the trading name of two BVI entities). The English insurer applied for a proprietary injunction against persons unknown and sought disclosure orders against Bitfinex to obtain the relevant KYC documentation provided to Bitfinex by the true controller of the wallet.

The Commercial Court adopted the rationale as set out in the UKJT Statement and confirmed that cryptocurrencies are capable of being subject to an interim proprietary injunction. The Commercial Court ordered that Bitfinex provide information in relation to the potential 'persons unknown' in order to police the injunction.

4. B2C2 Ltd v Quoine Pte Ltd [2020] SGCA(I) 2 (a Singapore case)

B2C2 entered into a contract with Quoine (an automated cryptocurrency exchange) so as to allow it to make trades on their platform. Due to an error, the platform executed a trade (Ethereum to Bitcoin) in favour of B2C2 at 250 times the market rate. The proceeds were credited to B2C2's account on the platform. Quoine reversed the trade (notwithstanding the fact that the underlying contract stated that trades were 'irreversible') because of the error. B2C2 sued Quoine for breach of contract and breach of trust. B2C2 and Quoine both accepted during the course of the proceedings that cryptocurrencies were a species of property. Judgment was given in the High Court on liability in favour of B2C2's claims for breach of contract and breach of trust, with damages to be assessed (at a later hearing) if not agreed.

Quoine appealed against the decision. The Court of Appeal upheld the breach of contract claim, but held that there was no trust over the Bitcoin in B2C2's account. The High Court had considered that a decisive factor in the breach of trust determination was the fact that Quoine segregated and held the cryptocurrency separately (rather than as part of its trading assets). The Court of Appeal considered that the segregation of assets from its customers cannot, of itself, lead to that conclusion. The Court of Appeal did not determine that Bitcoin was 'property,' but acknowledged that 'cryptocurrencies should be capable of assimilation in the general concepts of property.'

5. Ruscoe and Moore v. Cryptopia Limited (in liquidation) [2020] NZHC 728 (a New Zealand case)

Cryptopia was a New Zealand-based cryptocurrency exchange that provided an online platform or exchange to allow users to trade pairs of cryptocurrencies between themselves, with Cryptopia charging fees for trades,

© 2020 Chase Cambria Publishing

deposits and withdrawals. Its servers were hacked in January 2019 and some NZD 30 million of cryptocurrency stolen. Soon after, its shareholders placed Cryptopia into liquidation by special resolution. The liquidators applied to the Court for directions in order to resolve a dispute between, respectively, Cryptopia's creditors on the one hand, and its account holders on the other. The dispute concerned whether the remaining cryptoassets were 'property' within the meaning of section 2 of the NZ Companies Act 1993; and if so, whether such cryptoassets were held on trust by Cryptopia for the benefit of the account holders or whether they fell to be part of Cryptoptia's assets available for distribution to the general body of creditors. The Judge held that the remaining cryptoassets were 'property' within the meaning of the NZ Companies Act 1993 both on the authorities and as a matter of statutory construction. The Judge also found that as a matter of principle the cryptoassets could be held by Cryptopia on trust for the accountholders; and found as a matter of fact that they were so held on trust since each of the three certainties necessary for a trust (intention; subject matter and objects) were met in the case.

Conclusion

Our provisional conclusion is that there will be a continuing trend for the English Courts to find no conceptual problem in treating cryptoassets as property where the facts and circumstances allow. As such, we anticipate that the English Courts will have no problem in providing, and developing, appropriate interim remedies for victims of cryptocurrency related fraud. We also anticipate in light of the recent case law that tracing or following of cryptoassets (or its proceeds) will present no conceptual difficulty for the English Courts in appropriate cases.

© 2020 Chase Cambria Publishing

Green & Newman v SCL Group Ltd and others [2019] EWHC 954 (Ch): The English Court Provides Some Useful Guidance on Administrators' Duties

Jeremy Richmond QC, Barrister, Quadrant Chambers, London, UK

Synopsis

In *Green & Newman v SCL Group Ltd and others*,[1] the Court had to decide whether to appoint the incumbent administrators of the Cambridge Analytica group of companies as liquidators in the face of wide-ranging objections by a contingent creditor. In considering the matter, the Court provided some useful guidance to administrators touching upon their decision-making and duties.

Background facts

The case concerned a number of companies in the group commonly known as Cambridge Analytica, (hereinafter, for ease of exposition, referred to as 'Cambridge Analytica'). The business involved the acquisition of commercial data from multiple vendors, its amalgamation and analysis and the use of the analysis to target and message clients. Cambridge Analytica's clients included political parties and campaign groups who used its services to seek to influence voting behaviour in both the United Kingdom and the United States.

On 10 January 2017, a Professor Carroll submitted a Subject Access Request ('SAR') in England to one of Cambridge Analytica group companies, SCL Group Limited ('Group'), seeking to find out whether it (or any associated companies) held any of his personal data, what was the legal basis for any processing of that data and, for each 'data point', full information as to its source. He did not receive a reply he regarded as satisfactory. Therefore, on 16 March 2018, he issued court proceedings against some of the group companies (including Group and Cambridge Analytica (UK) Limited) founded on section 7 of the UK Data Protection Act 1998. It would seem that Prof. Carroll's legal action had a wider strategic purpose since on his 'crowd funding' website he had solicited donations to fund his campaign to establish the principle that 'companies cannot use personal data in any way they see fit'.

Following allegations over Cambridge Analytica's misuse of personal data of Facebook users in March 2018, the UK Information Commissioner's Office ('the ICO') raided the offices of Cambridge Analytica and seized several servers and significant quantities of evidence (including accounting books and records). The controversy led to a number of Cambridge Analytica's clients cancelling their contracts and seeking the return of payments made. Moreover, Cambridge Analytica's inability to access accounting data meant that it failed to pay debts as and when they fell due. Consequently, each of the group companies applied to enter into administration.

At the conclusion of the hearing of the administration application (which spanned over two-days) on 3 May 2018, the Judge (Hildyard J) found, with some hesitation and 'on balance', that there was a real prospect of a better result for Cambridge Analytica's creditors in an administration (compared to a liquidation) and consequently appointed Messrs. Green and Newman as the joint administrators of each of the group companies ('the Joint Administrators'). The main plan of the Joint Administrators was to effect the sale of all or part of Cambridge Analytica's business.

It quickly became apparent, however, that Cambridge Analytica could not continue to trade because the ICO had seized its laptops and servers such that the sale of the business could not be achieved. Consequently, the Joint Administrators proposed to creditors that the group companies of Cambridge Analytica should be placed into compulsory liquidation and that they, the Joint Administrators, be appointed as Joint Liquidators. The creditors for each of the group companies accepted the proposal. Prof. Carroll voted against the proposal as far as it concerned SCL Elections Limited ('Elections'), the only group company in whose administration he held voting rights as a contingent creditor.

On 11 August 2018 the Joint Administrators presented petitions for the winding up of Cambridge Analytica and their appointment as Joint Liquidators. Prof. Carroll objected to the proposal. He initially

Notes

1 [2019] EWHC 954 (Ch).

expressed his objections on the basis that 'he was concerned that the administrators [were] insufficiently objective' and would 'fail to hold the balance fairly as between him ... and the directors/shareholders of Cambridge Analytica who were responsible for their initial appointment'. He subsequently broadened his objections so as to attack both the personal integrity and professional competence of the Joint Administrators. His objections were wide-ranging. Some of those objections are addressed immediately below.[2]

The objections to the Joint Administrators' conduct

The Joint Administrators' alleged failure to disclose Prof. Carroll's pending court proceedings at the time of the administration order

Since, on the evidence, it was clear that the Joint Administrators only became aware of the court proceedings after the administration order was made, Prof. Carroll mainly argued that the Joint Administrators' duty of candour included a duty to make reasonable enquiries (analogous to the duty of parties applying 'without notice' for interim relief). In this regard Prof. Carroll relied on the case of *Re OGX*[3] (a case concerning an application for recognition of a Brazilian insolvency proceeding under the GB Cross-Border Insolvency Regulations 2006 specifically in order to obtain a stay of a London arbitration, where the judge was not told that the subject matter of the arbitration was not affected by the collective insolvency proceedings in Brazil). He argued that had such investigations been made, the court proceedings would have come to light and the Court would have modified the automatic stay to permit the court proceedings to continue notwithstanding the administration order.

The Judge (Norris J) rejected the submission on the basis that the Joint Administrators had a duty to make reasonable enquiries relating to their ability:

a. to provide a certificate that one of the purposes of the administration was reasonably likely to be achieved; and

b. to perform the duties of their office.

In light of those duties the Joint Administrators were under no duty to make themselves as fully informed about the company's general affairs as the applicant company. As noted by the Judge:

> 'In general (there is always the possibility of an exceptional case) he or she [the administrator] is not before appointment bound to seek out every piece of litigation in which the company is involved and to consider the impact of the statutory moratorium upon it: not least because the alternative will generally be liquidation, which will impose its own stringent moratorium under section 130 [of the Insolvency Act 1986.]'[4]

The Joint Administrators' alleged lack of candour concerning the funding of their fees

The Judge found that it was not unusual, as in this case, for the ultimate holding company (which is also a major creditor) to underwrite the costs of the administration of its subsidiaries in order to obtain the best recovery. The Judge did, however, emphasise that administrators were not the sole judges of what may or may not be material as regards funding and should, where necessary, be prepared to expose their judgement to the consideration of others (including the Court). The Judge found that the Joint Administrators 'belatedly' disclosed the funding arrangement to the Judge hearing the administration application (and, in so doing, belatedly complied with their duty in this regard). However, the Judge did find that the Joint Administrators showed misjudgement in not having volunteered information concerning the funding of their fees earlier in the administration application.

The Joint Administrators' alleged incompetence in certifying that there was a reasonable likelihood of achieving the purpose of the administration

Given the concerns expressed by Hildyard J at the administration application hearing, the Judge found that this allegation potentially had some weight. After eschewing the 'hindsight element' (this is what happened, so it should have been foreseen) the Judge set out the relevant question as follows:

> 'The question for the proposed administrators was whether at the date of the hearing (and in particular on its second day), and looking ahead from the standpoint of their current knowledge, they were able to abide by the statement in their respective consents to act that 'the purpose of administration was reasonably likely to be achieved' i.e. that there was a real prospect of that outcome. This is a question of

Notes

2 It was accepted by the Joint Administrators that the identity of the joint liquidators of Elections was the key issue and that to appoint the Joint Administrators as joint liquidators of the other Cambridge Analytica companies simply because Prof. Carroll could not object (because he was not a creditor) would not make sense.

3 [2016] Bus LR 121.

4 At [41] of the judgment.

© 2019 Chase Cambria Publishing

immediate judgment, where there may be a reasonable difference of view.'[5]

The Judge found that the Joint Administrators had (among other things) acted on information from the directors about 'concrete expression[s] of interest' in the businesses so that they were entitled to form the view they did. The Judge found that the Joint Administrators' view was not 'irrational, perverse or outside the range of views that might be held by reasonably competent practitioners (even if some proposed office holders would have taken a different view)'.[6] The Judge also suggested that in order to prove such a case of incompetence against administrators appropriate expert evidence might be necessary.

The Joint Administrators' alleged lack of candour concerning the costs of the administrations

The Joint Administrators' proposed fees were almost double the fees contained in their initial estimated outcome statement. Prof. Carroll argued that in the circumstances the Joint Administrators had not told the truth about their fees such that they were rendered unfit to be liquidators. The Judge rejected the argument. The Judge found that the increase from the initial estimated fees (based on four days of familiarity of the companies' business) to the actual fees did not mean that the Joint Administrators had not told the truth or lacked candour. Taking a pragmatic approach, the Judge was also comforted by the fact that, in addition to Creditor Committee scrutiny, the approval of creditors was required in any event before the Joint Administrators could draw their fees.

The Joint Administrators' alleged actual bias against Prof. Carroll

Prof. Carroll had requested the provision of all the materials adduced for the administration application. The Joint Administrators' solicitors refused the request on grounds of costs. The Judge found that the Joint Administrators should have disclosed to Prof. Carroll their pre-appointment certificates, estimated outcome statement and skeleton argument relied on at the administration application hearing when asked since such documents were readily to hand. The Judge applied the following test: 'Are the acts of the Joint Administrators disclosed by the incontrovertible parts of the documentary record so perverse that they can only be attributed to bias?' The Judge found that the acts and omissions of the Joint Administrators were equally consistent with the Joint Administrators thinking in good faith (for good reason or bad) that they had a strong case for acting as they did, supported by the majority of the general body of creditors. As such, the Judge rejected the allegation of actual bias by the Joint Administrators against Prof. Carroll.

The Joint Administrators' alleged misconduct in not petitioning for liquidation sooner

The Judge found that the Joint Administrators could have applied for directions from the Court earlier as soon as it became clear that the sale of the business could not occur. However, the Judge found that it was not outside the proper range of decisions for the Joint Administrators to wait for the delivery of the Statement of Affairs in order to ascertain the number and value of creditors and seek their views on the proposal to place Cambridge Analytica into compulsory liquidation.

The Joint Administrators' alleged misconduct in relation to Prof. Carroll's Subject Access Request

On 4 May 2018, the ICO served an Enforcement Notice on Elections requiring it to provide better answers to Prof. Carroll's SAR. The Joint Administrators did not cause Elections to take steps to comply with the Enforcement Notice since (a) they were not themselves 'data controllers' (per *Re Southern Pacific Personal Loans Ltd*);[7] (b) the relevant servers were in the custody and control of the ICO; (c) from 22 May 2018, Elections had no staff; and (d) the costs of complying would have been disproportionate to the value of the assets and would impact adversely on recovery for the general body of creditors. Elections pleaded guilty to a subsequent prosecution by the ICO for not complying with the Enforcement Notice. It was fined £15,00 and ordered to pay in addition £6000 in costs. Prof. Carroll argued that the Joint Administrators were guilty of misconduct in relation to the Enforcement Notice. The Judge found that the attempts at compliance with the Enforcement Notice would have involved Elections incurring costs that would have ranked as an expense of the administration (to the potential detriment of general creditors); in contrast, non-compliance by Elections with the Enforcement Notice had resulted in some minimal costs and an additional unsecured claim. Since there was no evidence that the latter situation would be more burdensome to the creditors than the former situation, the Judge could not find that the Joint Administrators had misconducted themselves.

Notes

5 [50] of the judgment.
6 [52] of the judgment.
7 [2014] Ch 426.

© 2019 Chase Cambria Publishing

Outcome

Having rejected the complaints of Prof. Carroll the Judge stepped back and considered whether it was right in any event to place Cambridge Analytica into compulsory liquidation with the Joint Administrators as the Joint Liquidators. The Judge found that it would be 'conducive to the proper operation of the liquidation'[8] to place Cambridge Analytica into compulsory liquidation and appoint the Joint Administrators as the Joint Liquidators, especially in light of the Joint Administrators' familiarity with the business.

Conclusion

The case emphasises the generous margin that administrators are afforded by the court in making difficult decisions in the conduct and affairs of a company in administration. It also provides some welcome clarification of the extent to which the administrators have a duty to make reasonable enquiries of a company pre-their appointment as administrators.

Notes

8 [91] of the judgment.

© 2019 Chase Cambria Publishing

Winding-Up in the Post CIGA World

Nicola Allsop, Barrister, Quadrant Chambers, London, UK

Synopsis

The Corporate Insolvency and Governance Act ('CIGA') which came into force on 26 June 2020 represents one of the biggest changes to the insolvency law of England and Wales in two decades.

This Article focuses on the significant changes contained in schedule 10 of CIGA relating to statutory demands and winding-up petitions and the recent decision in *In Re A Company* [2020] EWHC 1551 (Ch). It also touches upon the new procedure as laid down in the Insolvency Practice Direction relating to the Corporate Insolvency and Governance Act 2020 which was published on 3 July 2020.

Important timing points

Before turning to the specific provisions of schedule 10 of CIGA, two general points are noteworthy. First, the changes brought about by schedule 10 are temporary and presently expire on 30 September 2020. However, the Secretary of State has power to extend beyond that date for up to a further six months if necessary. Secondly, practitioners should not assume that because the changes came into force on 26 June 2020 that they apply from that date as the restrictions imposed by schedule 10 have retrospective effect.

The end of the statutory demand?

The effect of paragraph 1(1) of schedule 10 of CIGA is that a winding-up petition cannot be presented on or after 27 April 2020 based upon a statutory demand served between 1 March 2020 and 30 September 2020. This provision is to be regarded as having come into force on 27 April 2020. This prohibition is absolute – there is no carve out for debtor companies unaffected by coronavirus.

It is doubtful that this provision in isolation will have a far-reaching effect. This is because, unlike its equivalent in bankruptcy, the statutory demand has never been a central feature of corporate insolvency law. An unsatisfied statutory demand provides one circumstance in which a company is deemed, under section 123(1) of the Insolvency Act 1986 ('the IA 1986') as unable to pay its debts.

A company will also be deemed unable to pay its debts, if it is proved to the satisfaction of the court that it is insolvent on a cash flow or balance sheet basis: that is, if it is proved to the satisfaction of the court 'that the company is unable to pay its debts as they fall due' (section 123(1)(e) of the IA 1986) or 'that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities' (section 123(2) of the IA 1986).

It remains open to a creditor to send a letter demanding payment of a debt and to present a petition otherwise than in reliance upon a statutory demand. However, the circumstances in which such petition may be presented and a winding-up order made have been significantly curtailed by schedule 10 of CIGA.

Restrictions on winding-up petitions

A creditor may not, between 27 April 2020 and 30 September 2020, petition for the winding up of a company on a ground specified in section 123(1)(a) to (d) of the IA 1986 unless the 'coronavirus test' is satisfied (CIGA schedule 10 para. 2(1)). Similarly, a creditor may not, between 27 April 2020 and 30 September 2020, petition for the winding up of a company on the ground it is insolvent (either on a cash flow or balance sheet basis) unless the 'coronavirus test' is satisfied (CIGA schedule 10, para. 2(2)). Parallel restrictions in respect of the winding up of unregistered companies are contained in paragraph 3 of schedule 10.

So, what is the coronavirus test? The wording is slightly different depending on which ground of the IA 1986 is relied upon, but the substance is the same. The creditor must have reasonable grounds for believing that:

(a) coronavirus has not had a financial effect on the company, or

(b) the facts by reference to which the relevant ground applies would have arisen [or the relevant ground would apply] even if coronavirus had not had a financial effect on the company.

Paragraph 21(3) of schedule 10 provides that, 'coronavirus has a "financial effect" on a company if (and only if) the company's financial position worsens in consequence of, or for reasons relating to, coronavirus.'

It will be a rare case in which a creditor is able to demonstrate reasonable grounds for believing that coronavirus has not had a financial effect on the company given the breadth of the definition in paragraph 21. It will be easier for a creditor to bring itself within sub-paragraph (b). In this regard, timing is likely to be critical. If the debt arose long before coronavirus took hold, the creditor will have a better prospect of demonstrating that the company was and is insolvent absent coronavirus. The recent decision of ICC Judge Barber in *In Re a company* [2020] EWHC 1551 (Ch), discussed below, sheds some light on how the Court is likely to approach the coronavirus test.

Winding-up petitions: transitional provision

Paragraph 4 of schedule 10 applies where a creditor presents a petition under section 124 of the IA 1986 between 27 April 2020 and 25 June 2020.

If the court to which the petition is presented is satisfied that the creditor presented it in the absence of the coronavirus test being met, the court may make such order as it thinks appropriate to restore the position to what it would have been if the petition had not been presented. The form this order will take is unclear. Presumably at the very least the petition will be dismissed, or perhaps deemed withdrawn if the creditor so indicates. If the company has incurred any costs in defending the petition, it seems likely that the petitioner will be ordered to pay these.

Restrictions on winding-up orders

Paragraph 5 of schedule 10 applies where:

(a) a creditor presents a winding-up petition under section 124 of the IA 1986 between 27 April 2020 and 30 September 2020;

(b) the company is deemed unable to pay its debts on a ground specified in section 123(1) or (2) of the IA 1986; and

(c) it appears to the court that coronavirus had a financial effect on the company before the presentation of the petition (CIGA schedule 1, paragraph 5(1)).

Where those three conditions are met, the court's power to wind up a company is restricted. It may wind the company up under section 122(1)(f) of the IA 1986 on a ground specified in section 123(1)(a) to (d) of that Act only if satisfied that the facts by reference to which that ground applies would have arisen even if coronavirus had not had a financial effect on the company (CIGA schedule 1, paragraph 5(2)). It may make a winding-up order on a ground specified in section 123(1)(e) or (2) of the IA 1986 only if satisfied that the ground would apply even if coronavirus had not had a financial effect on the company (CIGA schedule 1, paragraph 5(3)).

The operation of this provision in practice is analysed below in the context of the decision in *In Re a company*.

Winding-up order: transitional provision

Any winding-up order made between 27 April 2020 and 25 June 2020 on the basis that a company is unable to pay its debts is to be regarded as void if it would not have been made because the coronavirus test would not have been satisfied (CIGA schedule 10, paragraph 7).

The wording of this provision suggests that it is intended to have automatic effect. However, one can readily see the benefit, in terms of certainty, of applying to the Court for a declaration that a winding-up order is void. It seems likely such an application will be necessary in any event, to deal with issues such as the status of any transactions entered into by the Liquidator and the Liquidator's costs. Paragraph 7(4) of schedule 10 provides that, 'The court may give such directions to the official receiver, liquidator or provisional liquidator as it thinks fit for restoring the company to which the order relates to the position it was in immediately before the petition was presented.'

In Re A Company – an application of the coronavirus test

On 16 June 2020, ICC Judge Barber handed down judgment in *In Re A Company* [2020] EWHC 1551 (Ch), which concerned an application by the company to restrain the advertisement of an extant petition (presented on 13 May 2020 based on a stat demand served on 27 March 2020) and the presentation of a further petition. Although the case was decided before CIGA came into force, it was common ground that the Court should have regard to the provisions of the then Corporate Insolvency and Governance Bill in deciding whether to exercise its discretion to restrain advertisement and presentation. Paragraph 1 of schedule 10 was fatal to the petition as it was founded on a statutory demand served during the relevant period. However, the Court accepted that the petitioner would be able, instead, to rely on a pre-action letter and if necessary, amend the petition to make it clear that it was based on s.123(1)(e) of the IA 1986.

The Court, therefore, considered whether the coronavirus test was met in relation to the presentation of the petition: namely, whether the petitioner

© 2020 Chase Cambria Publishing

could show that, as at the date of presentation, it had reasonable grounds for believing (a) coronavirus had not had a financial effect on the company, or (b) that s.123(1)(e) would apply even if coronavirus had not had a financial effect on the company.

The petitioner accepted that it could not come within paragraph (a). However, the Court accepted that the petitioner satisfied paragraph (b). Key in the Court's decision was that the loan which gave rise to the petition debt was due for repayment on 22 January 2019 which, as the Court said, was 'long before Covid-19 hit.' Further, rather than repay the loan on the repayment date, the company reached an agreement with the petitioner pursuant to which the company was to make interest payments. The company did not make the interest payments, which suggested ongoing significant cashflow problems. By letters starting in December 2019 and culminating in a formal demand letter dated 24 January 2020, the petitioner enquired and latterly demanded repayment of the debt, which letters were met with silence or holding responses. It was not until 16 April 2020, almost three months following the formal demand for repayment that the company wrote to its creditors, including the petitioner, effectively blaming coronavirus for its financial problems. The Court accepted that the petitioner was entitled to view the April communication as 'something of an opportunistic attempt to jump on the Covid bandwagon.'

That was not the end of the matter, as the Court had to consider whether the petition would be likely to result in a winding-up order, having regard to paragraph 5 of schedule 10. The first two conditions in paragraphs 5(1)(a) and (b) were clearly met: the petition had been presented in the relevant period and the company was deemed unable to pay its debts on a ground specified in section 123(1) of the IA 1986.

In relation to the third condition, the Judge noted that the burden was on the company to demonstrate that coronavirus had had a financial effect on the company. That was clearly intended to be a low threshold; the requirement is simply that 'a' financial effect must be shown: it is not a requirement that the pandemic be shown to be the, or even a, cause of the company's insolvency. Moreover, the language of that provision, which requires only that it should 'appear' to the court that coronavirus had 'a' financial effect on the company before presentation of the petition, is in marked contrast to that employed in paragraph 5(3), where the court is required to be 'satisfied' of given matters. The term 'appears' must be intended to denote a lower threshold than 'satisfied'. Taking all that into account, the Judge held that the evidential burden on the company for these purposes must be to establish a prima facie case, rather than to prove the 'financial effect' relied upon on a balance of probabilities.

The evidence before the Court was that the company was not solvent for its day to day operations but relied on rolling over corporate debt and fund-raising by the issue of equity for its long-term financing. The company said that COVID-19 had prevented both routes to acquiring new financing as international capital markets had frozen. According to the company, it had agreements in principle for significant capital financing, all of which fell away in March 2020 when the coronavirus crisis ensued. Although the Court expressed some reservations regarding the quality of the company's evidence, it was satisfied that the company met the relatively low threshold in paragraph 5(1)(c).

This meant that the test in paragraph 5(3) fell to be applied and that the Court was only able to wind up the company if satisfied that the relevant ground, in that case s.123(1)(e) would apply even if coronavirus had not had a financial effect on the company. The burden was on the petitioner to show that even if the financial effect of coronavirus was ignored, the company would still be insolvent. The petitioner was unable to discharge that burden because the company's re-financing efforts had been hampered by coronavirus.

The facts of *In Re a Company* demonstrate the difficulty of fulfilling the coronavirus test in relation to the making of a winding-up order. Notwithstanding that the evidence was consistent with the company being insolvent pre-COVID, the company's ability to return to solvency had been thwarted by COVID-19.

A new insolvency commencement date

In respect of winding-up petitions under s.124 of the IA 1986 presented between 27 April 2020 and 30 September 2020 which result in a winding-up order, the winding up is deemed to commence on the making of the winding-up order rather than at the time of the presentation of the petition (CIGA, schedule 10, paragraph 9). This amendment is significant because the presentation of a petition would normally lead to the freezing of the company's bank account by reason of section 127 of the IA 1986 and the need to apply for a validation order in the event that the company wished to continue to trade or to dispose of any property. This amendment strips s.127 of any potency and removes the need to apply for a validation order. It also changes the commencement date to the date of the winding-up order for the purpose of antecedent transactions such as preferences and transactions at an undervalue.

The new practice direction

A new insolvency practice direction relating to CIGA 2020 was published on 3 July 2020. This makes significant amendments to the relevant procedure for the hearing and determination of petitions. It is suggested that practitioners read the new PD in full. The following are its key features:

© 2020 Chase Cambria Publishing

- There will be an initial review of the petition when it is sent to the Court and it will not be accepted for filing unless it contains a statement that the creditor has reasonable grounds for believing that the coronavirus test is satisfied along with a summary of the grounds relied upon by the petitioner.
- The petition will initially be treated as private and should not be advertised until the Court directs.
- Upon being issued, the petition will be listed for a non-attendance pre-trial review with a time estimate of 15 minutes for the first available date after 28 days from its presentation.
- The purpose of the non-attendance pre-trial review is to enable the Court to give directions for a preliminary hearing or, in the event the company does not oppose the petition and the Court is likely to may make a winding-up order having regard to the coronavirus test, to list the petition for further hearing in the winding-up list.
- The parties may file evidence in accordance with the time limits specified in the PD to be relied upon at the preliminary hearing.
- At the preliminary hearing, if the Court is not satisfied it is likely it will be able to make a winding-up order having regard to the coronavirus test, it shall dismiss the petition. If the Court is satisfied that it is likely it will be able to make a winding-up order having regard to the coronavirus test, it shall list the petition for hearing in the winding-up list.

Concluding comment

The reforms introduced by CIGA certainly seem to mark the start of a more debtor friendly regime. It remains to be seen just how friendly. One thing is clear at this stage: given the new restrictions introduced by schedule 10 and the steps detailed in the Practice Direction, practitioners can expect that it will take considerably longer for petitions presented during the relevant period to be determined.

© 2020 Chase Cambria Publishing

The CIGA Moratorium: A Lifeline for UK Companies?

Emily Saunderson, Barrister, Quadrant Chambers, London, UK

Synopsis

The new moratorium provisions introduced into UK law by the Corporate Insolvency and Governance Act 2020 ('CIGA') are designed to provide breathing space for viable companies that have been laid-low by the effects of the COVID-19 pandemic to allow them to either trade out of trouble or come up with a rescue plan before creditors take enforcement action.

Commercial lawyers need to be aware of the basics of the new procedure because of the challenges it presents to creditors seeking to enforce debts and because it includes a change of priorities in any subsequent insolvency. This article outlines the key aspects of the new moratorium process.

Introduction

CIGA, which runs to a mammoth 254-pages, was rushed through the United Kingdom's Parliament during the country's lockdown. It came into force on 25 June 2020, and it makes significant amendments to the Insolvency Act 1986 ('IA'). Despite the compressed timetable for Parliamentary approval, the new moratorium provisions meet a problem that has troubled insolvency practitioners in the UK for years: UK law did not provide for a 'debtor in possession' process. Directors of struggling companies often did not have sufficient time to consider rescue options before their plans were disrupted by creditor action.

There were previously two contexts in which a company could obtain protection from creditors: *(i)* the moratorium available to small, eligible companies pursuing a Company Voluntary Arrangement, further to IA section 1A and Schedule A1, which was not widely used and which has been repealed by CIGA; and *(ii)* the moratorium further to Schedule B1 of the IA for a company in administration.

The new regime represents a step-change. It is a free-standing process which does not lead to any or any particular insolvency procedure. It prevents creditors from taking enforcement action while a company's directors, overseen by a licensed insolvency practitioner referred to as 'the monitor', seek to save the company as a going concern. It also introduces a change in priorities if the company subsequently enters administration or liquidation to incentivise counterparties to continue to trade with the company through its moratorium.

Eligibility

A company must be 'eligible' in order to obtain a moratorium under the new regime.

A company is eligible unless it falls within one of 14 excluded categories set out in detail in new Schedule ZA1 of the IA. The excluded categories include: companies subject to or recently subject to a moratorium or insolvency procedure; insurance companies; banks; electronic money institutions; parties to capital market arrangements; and certain overseas companies, which essentially covers any company whose registered or head office is outside the UK and whose functions correspond to any of the other exclusions.

The exclusion of financial services companies is not surprising given that they are subject to their own rules and procedures in respect of insolvency.

The exclusion for companies subject to or recently subject to a moratorium or insolvency procedure applies if on the date of filing the relevant papers at court, a moratorium or other insolvency procedure is already in place, or at any time during the 12 month period ending with the filing date, a moratorium or other insolvency procedure was in force, unless the court orders that a previous moratorium is not to be taken into account (IA Sched ZA1 para 2). However, the exclusion in respect of the 12-mont period is suspended temporarily, until 30 September 2020, further to Schedule 4, paras 6-7 of CIGA to account for the impact of the COVID-19 pandemic.

How to obtain a moratorium

A company may obtain a moratorium by either simply filing the relevant documents at court or by making a successful application to the court. There are three routes to a moratorium depending on the company's specific circumstances.

Firstly, if a company is eligible, is not subject to a winding-up petition and is not an overseas company, the directors may obtain a moratorium simply by filing the 'relevant documents' at court: IA s.A3.

Secondly, if a company is eligible but is subject to an outstanding winding-up petition, the directors may apply to court for a moratorium, and the court may order a moratorium only if it is satisfied that it would achieve a better result for the company's creditors as a whole than would be likely if it was wound up without first being subject to a moratorium: IA s.A4.

Thirdly, if a company is eligible, is not subject to an outstanding winding-up petition and is an overseas company, the directors may apply to court for a moratorium: IA s.A5.

All three routes require the directors to produce the 'relevant documents' for the court. The 'relevant documents' are defined in s.A6 of the IA. They include: a notice that the directors want a moratorium and that in their view, the company is or is likely to become unable to pay its debts; a statement from the proposed monitor that he or she is a qualified person, that he or she consents to act as monitor, that the company is eligible; and that in his or her view, it is likely that a moratorium would result in the rescue of the company as a going concern, or until 30 September 2020 that it would do so were it not for any worsening of the company's financial position for reasons relating to the current pandemic: IA sA6(1)(e), and Sched 4 para 7(a) CIGA.

The selection of the proposed monitor is a matter for the company's directors rather than its creditors or one particular creditor. Further, the monitor does not run the business once appointed; he or she must be kept appraised of progress and consider whether the purpose of the moratorium is being met.

The emphasis in CIGA is on saving *the company* as a going concern rather than saving *the business* as a going concern, which is the aim in administration. The distinction may signal that the primary aim of CIGA is to rescue entities rather than simply ensuring creditors get paid. On the other hand, it may simply reflect a drafting anomaly and/or the speed at which the legislation was rushed through Parliament.

Duration of the moratorium

If obtaining a moratorium is simply a paper exercise, the moratorium, including the appointment of the monitor, comes into effect when the relevant documents are filed at court. Otherwise, it comes into effect when the relevant order is made: IA s.A7.

The directors must notify the monitor as soon as reasonably practicable that the moratorium has come into effect, and the monitor must notify Companies House, every company creditor of whose claim the monitor is aware, and if the company is an employer in respect of a pension scheme further to s.126 of the Pensions Act 2004, the Board of the Pension Protection Fund: IA s.A8.

A moratorium lasts for an initial period of 20 business days beginning on the business day after the moratorium came into effect: IA s.A9. There are three ways in which the period may be extended.

The directors can extend the moratorium for 20 business days after the initial period ends without creditor consent. The directors must file further statements from themselves and the monitor with the court to obtain this type of extension, and the company must have paid its moratorium debts and pre-moratorium debts that are not subject to a payment holiday (see below): IA s.10.

The moratorium can be extended with creditor consent. Creditor consent means a majority by value of secured and unsecured pre-moratorium creditors (CIGA Sched 4, para 28). The moratorium may be extended in this way more than once, but the overall extension cannot be for more than 12 months from the first day of the initial period: IA ss.A11-12.

It can be extended by the court on the application of the directors. The court will consider the interests of pre-moratorium creditors and the likelihood that an extension will result in the rescue of the company as a going concern: IA s.A13.

Effects of the moratorium

One of the defining features of the new moratorium is that it gives the company a payment holiday in respect of certain 'pre-moratorium debts'.

A 'pre-moratorium debt' is defined at IA s.53(1) as follows:

> '(a) any debt or other liability to which the company becomes subject before the moratorium comes into force; or (b) any debt or other liability to which the company has become or may become subject during the moratorium by reason of any obligation incurred before the moratorium comes into force.'

It stands in contrast to a 'moratorium debt', which is defined at IA s.A53(2) as:

> '(a) any debt or other liability that the company becomes subject to during the moratorium other than by reason of an obligation incurred before the moratorium came into force; or (b) any debt or other liability to which the company has become or may become subject after the end of the moratorium by reason of an obligation incurred during the moratorium.'

There are six exceptions to the payment holiday for pre-moratorium debts. The pre-moratorium debts that a company must continue to pay during the moratorium are as follows:

- The monitor's remuneration or expenses
- Goods or services supplied during the moratorium
- Rent in respect of a period during the moratorium

© 2020 Chase Cambria Publishing

- Wages or salary arising under a contract of employment
- Redundancy payments
- Liabilities arising under a 'contract or other instrument involving financial services', a phrase defined in IA Schedule ZA2.

In addition, the company must continue to pay its moratorium debts.

CIGA provides an incentive for those who continue to extend credit to a company in a moratorium: debtors and pre-moratorium debtors who are not subject to the payment holiday are given priority if the company enters into liquidation or administration within 12 weeks after the end of the moratorium: IA s.174A. Those creditors rank below fixed charge holders, but above the expenses of the subsequent insolvency procedure, floating charge holders and preferential creditors.

As one would expect, a moratorium also restricts the ability of creditors to start insolvency proceedings. Further, floating charge holders are precluded from giving any notice that would cause the floating charge to crystallise, although there are certain financial market exceptions: IA s.A22.

Additionally, a landlord cannot exercise a right of forfeiture; no steps may be taken to enforce security over company property (subject to a number of exceptions); goods subject to hire-purchase may not be repossessed without the court's permission; and no legal process may be instituted or continued, unless it involves an employment claim, or the court gives permission: s.A21 IA.

Role of the monitor

The monitor is an officer of the court: IA s.34. He or she must monitor the company's affairs throughout the moratorium to form a view as to whether it remains likely that the moratorium will result in the rescue of the company as a going concern: IA s.A35.

The monitor must bring the moratorium to an end if, among other matters, he or she thinks that the company is unable to pay any of its moratorium debts that have fallen due, or any of the pre-moratorium debts for which it does not have a payment holiday: IA s.A38.

If a creditor under a moratorium debt or pre-moratorium debt that is not subject to the payment holiday is not paid, its primary recourse therefore appears to be a complaint to the monitor, which in most cases is presumably likely to result in the end of the moratorium.

Creditors, directors or company members may challenge the actions of the monitor and/or the directors (IA ss.42-43), and CIGA creates a number of offences in respect of the behaviour of company officers before a moratorium is obtained and concerning the way in which a moratorium is obtained: IA ss.A46-47.

The end of the moratorium

The moratorium can be brought to an end if the company enters into a consensual debt restructuring or a relevant insolvency procedure, which includes a voluntary arrangement, administration or liquidation. It can also be brought to an end by the monitor or the court, or simply by reason of the time limit for the moratorium expiring.

Conclusion

It will take time to assess whether the UK's new moratorium provisions genuinely help viable companies survive or whether the effect is more akin to a sticking plaster on a gaping wound. But given that the provisions allow the directors to remain in control in the short term at least, it appears likely that they will become a common feature of UK corporate rescue.

© 2020 Chase Cambria Publishing

A Reach Too Far? A Review of the Extra-Territorial Scope of the Court's Powers to Support Office-Holder's Investigations

William Mitchell, Barrister, Quadrant Chambers, London, UK

Table 1

Power	Extra-territorial scope?	Authority
Public examination (s.133)	Full	*In re Seagull Manufacturing Co Ltd*[1]
Fraudulent trading (s.213)	Full	*Bilta (UK) Ltd v Nazir (No 2)*[2]
Private examination (s.236(2))	Undecided	
Account of dealing and/or books, papers or records (s.236(3))	Full	*Wallace* (although divergent High Court authority)[3]
Private examination abroad (s.237(3))	Partial	Express
Transactions at an undervalue (s.238)	Full	*In re Paramount Airways*[4]

Synopsis

This article considers whether, following the case of *Wallace (as liquidator of Carna Meats (UK) Ltd) v Wallace*, the power to summon persons for private examination under section 236(2) of the Insolvency Act 1986[5] ('the IA') also has full extra-territorial effect. In addressing that open question, it reviews judicial comment to date and the extra-territorial reach of the IA more generally. The current position is found to be incoherent and ripe for review at the highest level, although on the present authorities the s.236(2) power appears likely to be territorially limited.

The current position

Successive cases have found that many of the office-holder's investigatory powers, and the court's supportive powers, were intended by the IA to have full extra-territorial scope. This reflects the intention of Parliament in 1986 that, given the strong public interest in ensuring that a company's failure is properly investigated including by holding those responsible to account, the office-holder's task ought not be stymied by either papers or persons being located in a foreign jurisdictions. A summary of some of the major powers is given in Table 1.

It is clear from the above that, at least at first glance, the power to order private examination under s.236 would be a significant outlier were it to be territorially limited.

Obiter consideration of the territorial scope of section 236(2)

One might detect a certain degree of judicial relief thus far in cases referring to this issue. In each case, the judge has not ultimately had to determine whether

Notes

1 [1993] Ch 325.
2 [2016] AC 1.
3 [2019] EWHC 2503 (Ch).
4 [1993] Ch 223.
5 S.236(2) states that 'the court may, on the application of the office-holder, summon to appear before it- (a) any officer of the company, (b) any person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or (c) any person whom the court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company.'

Parliament intended section 236(2) of the Insolvency Act 1986 to have full extra-territorial scope.

Most recently, in *Wallace*, Adam Johnson QC, sitting as a judge of the High Court, differentiated the power under s.236(3) and said at §54:

> 'whatever may be the correct position under section 236(2), I am concerned in this case only with section 236(3), and even if it is correct that the power to issue a summons under section 236(2) should be confined to persons within the jurisdiction, it seems to me that the power to require the production of documents and information is different. It is less invasive, and does not involve the exercise of anything akin to the Court's subpoena power. In the modern world of cross-border business practices, it is natural to construe that power as extending to any of the categories of person identified, whether within or outside the jurisdiction.'

The issue could have fallen for determination by Burton J in 2001 in *Re Casterbridge Properties Ltd (in liq.) Jeeves v Official Receiver*[6] where the Receiver sought in the alternative an order for private examination of the applicant if the order for public examination under s.133 was set aside. However, having heard full argument on the point, Burton J did not set aside the s.133 order and concluded that he 'need not and [would] not resolve the interesting issue between the parties as to whether there would be jurisdiction to make such an order' (§51).

So how might this 'interesting issue' be determined?

The intended jurisdictional scope of s.236(2) – the position in *Re Tucker*

The scope of a statutory provision will turn on who was within the legislative grasp or intendment of s.263(2) – a principle of statutory interpretation most recently restated by the House of Lords in *Masri v Consolidated Contractors (UK) Ltd and others (no 4)*.[7] Further, in considering such intendment, absent express enactment or plain implication, English legislation will only apply to British subjects or to foreigners within the jurisdiction: *Ex parte Blain; In re Sawers.*[8]

The main difficulty facing an argument that s.236(2) was not intended to be territorially limited is the earlier House of Lords case *In Re Tucker (R.C.) (A Bankrupt), Ex parte Tucker (K.R.)*.[9] In *Re Tucker*, the trustee in bankruptcy applied for the issue of a summons under s.25 of the Bankruptcy Act 1914 requiring the bankrupt's brother (living in Belgium) to attend court (in England) for examination. It was held that the power was territorially limited.

As it is a principle of construction that absent a different context, a re-enactment is intended to carry the same meaning as its predecessor, it is necessary to revisit this case in some detail, as well as the context to the IA generally, to assess *Re Tucker*'s continued impact on s.236.

Section 25 of the Bankruptcy Act 1914 provided that:

> '(1) the court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor or any person whom the court may deem capable of giving information respect the debtor, his dealings or property, and the court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property. [...]
>
> (6) the court many, if it thinks fit, order that any person who if in England would be liable to be brought before it under this section shall be examined in Scotland or Ireland, or in any other place out of England.'

Dillon LJ noted that at the time s.25 had been enacted, and until 1962 and an amendment to the Bankruptcy Rules, there was no power to serve process in bankruptcy proceedings on any person other than the debtor who was not in England.[10] In 1962, however, the rules were amended such that any process or order of the court could be served on any person who was not in England in such a manner as the court saw fit (rule 86 of the Bankruptcy Rules 1952).

Counsel for the trustee suggested that s.25 ought to apply to a person anywhere in the world, being the natural meaning of the words 'any person'. It was accepted, however, the 'eyebrows might be raised at the notion that Parliament had in 1914 or 1883 given jurisdiction to any bankruptcy court, which might well be a county court, to summon anyone in the world before it to be examined and produce documents'[11] and in consequence the trustee conceded that jurisdiction instead extended at least to any British subject anywhere in the world.

Notes

6 [2002] BCC 453.
7 [2010] 1 AC 90.
8 [1879] 12 Ch.D 522.
9 [1990] Ch. 148.
10 Ibid, p. 153 at [H].
11 p. 157.

© 2020 Chase Cambria Publishing

Dillon LJ held that s.25(1) did not have extra-territorial effect, relying on, as background, (1) the general practice being that the courts of a country only have power to summon before them persons who accept service or are present within the territory; (2) the English court had never had a general power to serve a *subpoena ad testificandum* or *subpoena duces tecum* out of the jurisdiction on a British subject and, conclusively, on the fact that s.25(6) gave the power to order examination out of England of any person who if in England would be liable to be brought before it under this section. Those words, he said, inevitably carried the connotation that if the person is not in England, he is not liable to be brought before the English court under the section.[12]

Before we can consider whether the court would likely be bound by that case in relation to s.236(2), it is necessary to also explore more widely the intended scope and purpose of the IA.

The scope of the IA more widely

Turning to other powers under the IA, *In re Seagull*,[13] Peter Gibson J had to consider whether s.133 of the IA (public examination) had extra-territorial scope. He remarked that it must be construed 'in the light of circumstances existing in the mid-1980s when the legislation was enacted. By use of the telephone, telex and fax machines English companies can be managed perfectly well by persons who need not set foot within the jurisdiction' and that relevant background was the 'public worry and concern over company failures on a large scale, and the need to safeguard the public against such failures' (pp. 354). Arguably, he did regard the context as *significantly different* then that present in 1914 or 1883.

Further, and importantly for present purposes, he remarked that the legislative intention had been that 'there should be a proper and effective investigation through public and private examination' (p. 356). Leaving open the question as to whether s.236 was intended to be territorially limited, he held that whatever was the case there, s.133 could be distinguished by reason of the absence of any provision corresponding to s.25(6), and that it was 'plain' that s.133 applied to 'any person' notwithstanding their absence from the jurisdiction.

As I explained above, the issue was also left open in *Re Casterbridge*. In that case, counsel for the Receiver in submitted that there was no justification for any differentiation either between s.236 or s.238 and s.133, both of which had by that time been held to have extra-territorial scope. In particular, that given the words 'any person' in s.238 had been held to mean any person anywhere, a similar construction should be given to those words in s.236. It was further suggested that s.237 was merely facilitative and did not imply a territorial limit to s.236.

Finally, as to the relevance of context when considering legislative intention, it is useful to review the 2009 case of *Masri v Consolidated Contractors International (UK) Ltd and other (No 4)*.[14] There, the House of Lords considered the scope of Part 71 of the Civil Procedure Rules, which relates to the examination of judgment debtors in court. *Re Tucker*, *Re Casterbridge*, and *Re Seagull* were all before the House. In determining that Part 71 did not have extra-territorial scope in relation to officers outside the jurisdiction, Lord Mance held the intention of Part 71 lacked the 'critical considerations which enabled the Court of Appeal in In re Seagull to hold that the presumption of territoriality was displaced.'

Lord Mance reflected that Peter Gibson J in *Re Seagull* had distinguished *Re Tucker* because s.25 related to private examination and a wider class of persons. As to the 'critical considerations', Lord Mance referred to Peter Gibson J's articulation of the public interest in seeing that those responsible for the company's affairs are subject to investigation, that public examination was necessary to obtain material information for the administration of the estate, to form the basis of reports for submission to the department, and to give publicity for creditors and the community at large.[15]

Could the context of the IA and the interpretation of other sections as set out above be sufficient to displace the findings of *Re Tucker* in relation to s.236(2)? To reach a conclusion, it is also important to review the consideration of s.236 specifically.

The scope of the s.236 powers

The scope of s.236 in its entirety appeared to be an issue resolved by David Richards J in *In Re MF Global UK Limited (in special administration) (No. 7)*[16] when he held that *Re Tucker* was an authoritative decision on the lack of extraterritorial effect of s.25 of the Bankruptcy Act 1914 and must be taken to apply equally to the successor sections in the Insolvency Act 1986 (including s.236). That was because, as I set out above, it is a principle of statutory construction that where a statutory provision is re-enacted in substantially the same

Notes

12 p. 158.
13 [1993] Ch. 345.
14 [2010] 1 AC 90.
15 p. 139.
16 [2015] EWHC 2319 (Ch) [2016] Ch 325.

© 2020 Chase Cambria Publishing

terms, it is intended to carry the same meaning as its predecessor unless the context of the new legislation shows that the meaning must be taken to have changed (§23). Unlike Peter Gibson J in *Re Seagull*, however, he did not appear to have considered at any length the potentially different context surrounding the IA.

However, two subsequent decisions in the High Court in relation to s.236(3), *Norriss* followed by *Wallace*, have both declined to follow *MF Global*, albeit that both have done so by way of finding that because s.236 conveyed a free-standing power in relation to production of documents whereas, in the earlier s.25 of the Bankruptcy Act 1914 that power had merely been ancillary to, and dependent on, the principal power of summons, the structure was materially different. Because of that different structure, the intended scope of the power under s.236(3) fell to be considered separately, and it was natural to construe that power to have extra-territorial effect.

Thus the scope of s.236(2) remains uncertain, and I turn to that now.

Where does this leave s.236(2)?

It is arguable that the power to summon a person for private examination under s.236(2) ought to be consider *sui generis* rather than akin to the Court's subpoena power. As Megarry J said of private examination generally *in Re Rolls Razor Ltd (no 2)*[17], 'the examinees are not in any ordinary sense witnesses, and the ordinary standard of procedure do not apply. There is here an extraordinary and secret mode of obtaining information necessary for the proper conduct of the winding up. The process, borrowed from the law of bankruptcy, can only be described as being sui generis.' Given that, it could be said that the starting point is a context much closer to that relating to public examination then to the court's wider powers in relation to witness summons or Part 71.

Additionally, since *Re Tucker*, an increasing weight of authority has held that the words '*any person*' in other sections of the IA are intended to bear their literal, natural meaning and refer to any person, anywhere. There is, perhaps, less concern about eyebrow raising than in 1914. The most recent statement to this effect being that of Lord Toulson and Lord Hodge in *Bilta* who said that the words 'any person' did have extra-territorial effect for the same reasons as had been given in relation to those words in *Re Seagull*.

Finally, given the significant overlap between persons falling within the material scope of s.133 and s.236 (e.g. officers of the company) it might seem odd if Parliament had intended that a person residing abroad can be summoned for public, but not private, examination. In *Re Seagull* this appears have been explained by pointing to the fact s.236 is wider in scope, but set against that it was stated that the legislative intention to ensure proper and effective investigation extended to *both* public and private investigation.[18]

Accordingly, in my view, many of the contextual reasons given by Peter Gibson J ought to also apply to private examination and hence s.236(2) is rather closer to *Re Seagull* than *Masri* in relation to determining Parliament's intention. It is possible that the context is sufficiently different such that the court would not consider itself bound by *Re Tucker* despite the similar wordin.

However, even if the court was not bound, could a different intention really be found given the continued presence of the wording in s.237(3) that was held to be so decisive in *Re Tu*cker: 'the court may, if it thinks fit, order that any person *who if within the jurisdiction of the court would be* liable to be summoned to appear before it under section 236 or this section shall be examined ... in a place outside the United Kingdom' (emphasis added)?

As Counsel in *Re Casterbridge* suggested, one view is that the intention of s.237(3) was that it simply gave an express discretionary power to, instead of summoning a person to appear in England, instead order a private examination in the place they are. The advantage of such a construction would be that it would allow for a more consistent interpretation of the words 'any person' throughout the IA and it would arguably give effect to the purposes considered in Re Seagull that also apply to private examinations.

Standing against that though, and in my view likely to be decisive, despite the tension with the wider interpretation of the IA, is the plain meaning of the words used in s.237(3). It is hard to see beyond those words implying the same limitation as in *Re Tucker* – i.e. that persons not within the territorial jurisdiction of the court were impliedly considered to be outside of the scope of s.236(2).

On balance, whilst there is doubt, it seems to me that *Wallace* is likely the high-water mark of the court's retreat from *Re Tucker* and that the directly equivalent power to the one considered in that case – to summon for private examination – is likely to remain territorially limited in scope.

Summary

Many of the statutory powers available to support the office-holder's investigation have been found to have extra-territorial scope. Following *Wallace*, it seems

Notes

17 [1970] Ch 576 at §§591.
18 p. 356 at [B].

© 2020 Chase Cambria Publishing

likely s.236(3) will be amongst that group of powers and that the *Norriss – Wallace* line will be preferred in future cases. It is possible that Parliament also intended to extend the scope of private examination under s.236 extra-territorially, and, if so, this would produce a more consistent interpretation of similar wording throughout the IA. However, until the matter is considered at the highest level it may be that the continued retreat from *Re Tucker* will not extend further and a summons for private examination will remain territorially limited.

© 2020 Chase Cambria Publishing

Quadrant CHAMBERS

Cross-Border Insolvency Specialists
Solving Global Problems

www.quadrantchambers.com
+44(0)20 7583 4444

'great for international commercial disputes'
'the set is strong throughout'

(Legal 500, 2021)

Gary Ventura, Senior Clerk
gary.ventura@quadrantchambers.com

Simon Slattery, Senior Clerk
simon.slattery@quadrantchambers.com

ORDER FORM – Please complete

I wish to subscribe to *International Corporate Rescue* from 1 January 2021 – 31 December 2021.

Hardcopy ☐ Online ☐ Hardcopy + Online ☐ (please tick)

I wish to have online access to all Special Issues ☐

I wish to have online access to back catalogue (Volumes 1–17) ☐

My preferred method of payment is:

Cheque ☐ Credit Card ☐ Bank Transfer ☐ Please invoice me ☐ (please tick)

Name . . . .

Address . . . .

. . . .

Postcode / Zip . . . .

For payment by credit card please complete the following details:

American Express ☐ Discover ☐ MasterCard ☐ Visa ☐ (please tick)

Name as it appears on the card: . . . .

Card no. . . . .

Issue Date: . . . . Expiry Date: . . . .

Security Code: . . . .

Signed . . . . ***Date*** . . . .

Payment notes / Cancellation

Returning this form constitutes the subscriber's agreement to subscribe to *International Corporate Rescue* for one year, on the following terms and conditions. Payment is due from each subscriber annually in advance by cheque, credit card (through PayPal), or bank transfer. Although any subscription may be cancelled at any time no refunds are made in any circumstances. A hardcopy subscription is EUR 730 / USD 890 / GBP 520; online: EUR 730 / USD 890 / GBP 520; and hardcopy + online: EUR 840 / USD 1045 / GBP 625. Rates per additional hardcopy or online user are: EUR 165 / USD 220 / GBP 145. If applicable, VAT is charged on online and hardcopy + online subscriptions. Hardcopy-only is zero-rated for VAT purposes. For package subscriptions, VAT is charged on the entire package.

Special Issues. Price for individual Special Issues for subscribers: EUR 125 / USD 175 / GBP 105; for non-subscribers: EUR 165 / USD 225 / GBP 135. Online access to all Special Issues for subscribers: EUR 375 / USD 535 / GBP 315; for non-subscribers: EUR 495 / USD 695 / GBP 420. Online subscription plus access to all Special Issues: EUR 995 / USD 1250 / GBP 740. Hardcopy + online subscription plus access to all Special Issues: EUR 1150 / USD 1450 / GBP 875.

Back Catalogue (Volumes 1–17). Price for single user online access to back catalogue: EUR 815_/ USD 975_/ GBP 750; Online subscription plus access to back catalogue EUR 1545 / USD 1865 / GBP 1270. Hardcopy + online subscription plus access to back catalogue EUR 1655 / USD 2020 / GBP 1375

Please complete and return this form to:
Chase Cambria Company (Publishing) Limited
4 Winifred Close
Arkley
Barnet EN5 3LR
United Kingdom