

JOH Consultancy LLP

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Does TUPE apply?

In Ward Brothers (Malton) Ltd v Middleton & Ors UKEAT/0249/13/RN, Bulmers, a haulage company, were the subject of a petition made in December. The company decided to cease trading in February and had prior to this contacted insolvency practitioners to review their options. Bulmers, as part of the ceasing to trade process, arranged for Ward Brothers to take over their major contracts and some of their employees. Some employees did not agree to the terms and conditions offered and chose redundancy. The company was subsequently placed into administration by a QFC. The employment tribunal determined that the use of insolvency practitioners did not constitute supervision by an IP and TUPE therefore applied.

Court considers interest of the creditors where debtor fails to comply with an IVA

In the case of Masters v Furber [2013] EWHC 3023 (Ch) a 75 year old man entered into an IVA and gave power of attorney to the Supervisor to deal with his assets which were part of the IVA. The Debtor then resisted the attempts of the supervisor to realise assets, specifically motor vehicles, and the supervisor made an application to court. The Debtor stated he had been under pressure to enter into the IVA but the court held that they needed to consider the best interests of the creditors and maintain the authority of the supervisor who were effectively, if not in

law, officers of the court. The debtor was required to co-operate.

Rights of the landlord v rights of the creditors in Administration

In the case of Bristol Alliance Nominee No. 1 Ltd and others v Bennett and others [2013] EWCA Civ 1626 a company was in the process of surrendering two leases and money had been placed in an escrow account for this purpose, when the company was placed into administration. The landlord sought specific performance and the release of the funds held in escrow. The administrators opposed this on the basis of the pari passu principle and the possibility that they might make a claim on the funds held in escrow. The court held that the landlord was entitled to specific performance and therefore the funds held in escrow. Furthermore the judge stated that if he accepted the pari passu point it would "...promote the interests of the company's creditors over those of [the landlord] in circumstances in which there was no sound basis for doing so".

Bankrupt liable for trustee's costs on r6.206(1)(a) Annulment

In the case of Oraki and another v Dean & Dean (a firm) and another [2013] EWCA Civ 1629 the court held that even though they had found the bankruptcy order ought never to have been made, the debtor was still liable for the trustee's costs.

TR 6

I am continuing my review of the SIPs and TRs and I thought I would tackle the contentious issue of the director's claim as detailed in TR 6 'Treatment of Directors' Claims as 'Employees' in Insolvencies'.

A commercial approach is expected from your RPB and remember to document your reasoning for the approach taken in accordance with SIP 1.

Is the director an employee?

The first question to determine is whether the director is an employee. There are two cases which have provided a suggested list of questions to determine this issue and they are listed below:

"(a) Did the director have a descriptive title (e.g. managing director or technical director)?

(b) Was there an express contract of employment? If not, was there a board minute or memorandum in writing constituting an agreement to employ the director as an employee as required by section 318 of the Companies Act 1985? (NB now covered under s227-229 CA2006)

(c) Was remuneration paid by way of salary or director's fees?

(d) Was remuneration fixed in advance or paid on an 'ad hoc' basis?

(e) Was remuneration by way of entitlement or, in effect, gratuitous?

(f) Did the director merely act in a directorial capacity or was he/she under the control of the board of directors in respect of the management of his/her work?"

The second case suggested the following questions should be asked:

(a) Is the director under the control of another?

(b) Is the director an integral part of another's organisation?

(c) Is the director in effect in business on his own account?

(d) What is the economic reality of the relationship between the director and the 'employer'?

(e) Is there mutuality of obligation between them?

(f) What is their respective bargaining power?

Rights of debtors where there are OFT breaches

In the case of *Re London Scottish Finance Ltd* (in administration) [2013] EWHC 4047 (Ch) the administrators had been appointed over a company that had provided or acquired secured loans under the Consumer Credit Act. The loans were rendered unenforceable due to an error with the loan documentation. The administrators applied for directions in respect of various issues about the money held, the money owing and the rights of the debtors. The court held that the enforceability of the secured loans would turn on the facts of each case. More importantly the court held that the administrators had an obligation to notify any individual who had taken out a loan, of the potential claim they may have, by drawing their attention to this judgment.

Liquidators of Scottish companies may not disclaim

In the case *Re Scottish Coal* the liquidators sought to disclaim onerous property and a statutory licence. The Inner House of the Court of Session decision on appeal was that 'heritable' property with a registrable right could not be disclaimed and neither could the statutory licence. The issue of how this would potentially effect an English company with property in Scotland was reviewed in an article on Lexology, see <http://goo.gl/vQImO>, which I would recommend reading. The case may be subject to appeal in the Supreme Court.

Administration rules for Postal Service Providers

The Postal Administration Rules 2013 SI 2013/3208 will come into force on 31 January 2014. These rules mostly match the existing insolvency rules and only differ where the circumstances of a postal administration require a different approach.

Social fund debts excluded in NI

The Insolvency (Amendment) Rules (Northern Ireland) 2013 SR 2013/278 introduces exemption of debts in relation to the Social Fund from being included in a Debt Relief Order (DRO) or being provable in bankruptcy proceedings. The statutory instrument was effective from 24 December 2013.

New FSB guidance

The FSB has issued guidance to assist supervisors in strengthening risk management practices at financial institutions. Further information may be found here <http://goo.gl/VDYFgA>.

Change to the Code of Ethics

The Code of Ethics has been changed, effective from 1 January 2014. The following has been deleted: "Failure to observe this Code may not, of itself, constitute professional misconduct, but will be taken into account in assessing the conduct of an Insolvency practitioner". This change together with the JIC's comments in its recent newsletter seems to be sending a clear message to IPs.

Licensing of IPs

The draft legislation to issue licences for either personal or corporate insolvency has been referred for further consultation after representation was made to parliament about the limited consultation undertaken prior to their proposal.

CPI, CPPI, CPCI Sunday Courses 2014

I am offering additional courses on Sundays which will start in February 2014. The revision part of the course will be during the week. Further information may be found at www.insolvencyexamtraining.co.uk.

TR 6 CTD

Directors with Controlling

Shareholdings

The second issue in respect of a director is where he is also the controlling shareholder and again case law has provided suggested questions to help determine this:

- he paid tax and NIC on that basis;
- he had no other employment;
- his contract of employment was signed and dated and indicated that he was an employee;
- he was entitled to holidays and sick pay;
- he worked every day from 8.30 am to 5.30 pm;
- he was paid by salary and not director's fees;
- his theoretical control over the company;
- the fact that he has taken only 8 out of 16 days' holiday in the last year;
- he had not received pay for the last month (because the cheque book was not available).

In practice you will probably rely on the RPO's assessment although the RPO's decision does not bind an IP, just as the IP's decision will not bind the RPO.

On a practical note, I would suggest making sure your list of documents includes contracts of employment for directors, together with any supporting evidence, i.e. minutes of the company's meetings.

If you decide to pay a director's claim then again document why and on what basis his claim was admitted as part of the adjudication process.

Author

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