

CASE LAW

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TECHNICAL UPDATE

Challenges to IVAs

In the case of *Narandas-Girdhar and another v Bradstock* [2016] EWCA Civ 88 an IVA approved in 1999 was challenged in 2010 on the basis of an invalid proxy being used to vote for the arrangement. The proxy submitted by HMRC did not initially vote for the proposal but ratification was obtained from HMRC in respect of the vote. The court held and the court of appeal confirmed that challenges for material irregularity, which this would have fallen under S262, should be made within 28 days.

Service outside the jurisdiction

In the case of *Hosking v Apax Partners LLP* 16 March 2016 [2016] EWHC 558 (Ch) the court reviewed its decision to allow service outside the jurisdiction. The judge held that for an application for service outside the jurisdiction to be given the following criteria must be met: (1) a serious issue to be tried; (2) a good arguable case that the claim falls within one or more classes of case in which permission will be given; and (3) that England is clearly or distinctly the appropriate forum for trial and that the discretion should be exercised. The court was satisfied in this case that the criteria had been met even though there had been material non-disclosure.

Void dispositions to spouse

In the case of *Re Elichaooff; Robert v Woodall* 15 March 2016 [2016]

EWHC 538 (Ch) the trustee in bankruptcy of a deceased person challenged the matrimonial consent order, the automatic transfer of the property to the wife upon the debtor's death, and cash paid to the wife by the husband. The judge held the consent order was void, but did not believe the trustee could challenge the automatic transfer of the property and said that the transactions at an undervalue and preference claims would need to go to trial. The judge also encouraged the Trustee to take steps to adjudicate the respondent's proof of debt and that the Trustee's refusal to consider the proof was contrary to the overriding objective and good practice.

Privilege and what a Trustee is entitled to

In the case of *Shlosberg v Avonwick Holdings Ltd and others* [2016] EWHC 1001 (Ch) a bankrupt sought an injunction stopping the petitioning creditor's solicitors from acting for the Trustee in bankruptcy and also that the trustee was not entitled to certain documents which he claimed privilege applied. The documents were broken down into three categories: (a) litigation in the county court regarding an attack on the Bankrupt's cat; (b) the statutory demands issued by Avonwick against the Bankrupt and Webinvest and the subsequent applications dated 30 May 2014 to restrain Avonwick from petitioning for the bankruptcy of the Bankrupt and to wind up Webinvest; and (c) the claim brought by Avonwick against the Bankrupt and Webinvest in July 2014. The judge

A Review of the Corporate Insolvency Framework

The Insolvency Service (IS) have issued a consultation on the Corporate Insolvency Framework and this may be found [here](#). Comments must be submitted by 6 July 2016 to policy.Unit@insolvency.gsi.gov.uk

The main thrust of the proposal is to create a 3 month moratorium period for a company during which the director would remain in control and would be supervised without entering a formal insolvency process to allow time for the company to restructure.

The proposal is seeking to provide the same moratorium protection as that currently set out in Schedule A1 Insolvency Act 1986.

The application is made by the company and the company needs to demonstrate that :

- it is insolvent or will become insolvent;
- has not entered into a moratorium in the previous 12 months;
- it has sufficient funds to carry on business and not worsen the position;
- it has a reasonable prospect that a compromise or arrangement can be agreed with its creditors.

held that the solicitors were able to continue acting for the Trustee and that the Trustee was only entitled to category (a) documents.

Number of creditors' meetings required

In the case of *Re Metinvest BV* [2016] EWHC 79 (Ch) the court was asked to determine whether a scheme of arrangement could be proposed under the Companies Act 2006 in England and how many meetings needed to be called in respect of the classes of creditors. The court held that the three classes of creditors could be viewed as one class since "It is the rights of creditors, not their commercial or other interests which determine whether they form a single class or separate classes." The court also held that since the Netherlands did not have this process available and that there were 12 beneficial owners in the UK, the scheme could be proposed in England.

Conversion of IVA to bankruptcy not dependent on IP's behaviour but debtor's

In the case of *Varden Nuttal Ltd v Michelle Louise Baker* (2016) (link to article [here](#)) the court at first instance used its discretion to not make a bankruptcy order based on the supervisor's conduct. On appeal the court held that it was the debtor's conduct which should be considered and the interests of the creditors. In this case the debtor failed to disclose the existence of a creditor when entering into the IVA and was in breach of the terms of the arrangement. On appeal the bankruptcy order was given.

Protective awards and insolvency still unreconciled

The recent employment tribunal award to the the employees of SSI for protective awards seems to

reinforce the problem inherent in insolvent situation. To notify staff at an early stage will put the business and assets at risk but directors now have to consider their own personal liability if they do not give notice to employees, making rescue processes harder to achieve.

R3 proposes Moratorium for struggling companies

R3 has published a proposal for introducing a moratorium for struggling companies and it may be found [here](#). The Insolvency Service proposal on this issue may be found proposal [here](#).

Tax from mis-selling claims

HMRC have advised that any tax arising on compensation from mis-selling claims is an unsecured debt and not a disbursement. Although they have cautioned that each case must be reviewed specifically as that may change tax treatment.

SIP 16

A reminder to IPs was made by the ICAEW that the SIP 16 disclosure must now be made to the RPB of the lead partner only.

D reports

The Insolvency Service have now enhanced their online reporting system so that the IP's staff may register and draft the report. The guidance notes on how to do this may be found [here](#).

@InsolvencyHour

Insolvency hour on twitter is moving to 1-2pm on Thursdays. I hope you will join in some lively lunchtime debates. I shall be hosting on 9th June.

A Review of the Corporate Insolvency Framework - ctd

I think my main concern is section 7.24 which states "...circumstances change such that the company no longer meets the qualifying conditions, the supervisor will terminate the moratorium".

The onus being on the supervisor to terminate the moratorium seems onerous. However, there is some comfort at section 7.31 about the directors committing an offence by not supplying relevant information to the supervisor during the moratorium. The responsibility will be with the supervisor to set up reporting criteria during the moratorium and to act promptly when that information is not supplied or the information indicates the criteria for the moratorium is no longer able to be met.

The more controversial proposal by the IS is that supervision may be conducted by an accountant or solicitor and not just an IP.

I am not sure how supervisors will deal with the creditor's right to request information proposed at section 7.48.

More interesting is that a supervisor may not be the appointed IP if the company enters a formal insolvency process. So one would assume from this that the actions of the supervisor will be challengeable.

Whilst the intention is to make the costs of trading including supervision to be an expense, I think this will be a headache for an IP appointed over the company if it enters a formal insolvency process.

I am not sure I understand how essential goods and services will be redefined and how in practice this will work. Litigating to ensure the continuation of supply will have a huge negative impact.



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