Boyes Turner

Business Support & Insolvency

WHAT WE'VE BEEN UP TO

The team have been busy dealing with a wide range of instructions over the past few months.

Some of our recent highlights include:

- Dealing with the recovery of a number of businesses in the fashion industry.
- Advising directors of a property business in respect of a liquidator's alleged claims under the Companies Act 2006 and Insolvency Act 1986, made a matter of weeks before the expiry of the relevant limitation period.
- Succeeding with claims against directors of a company for breaches of duties and misfeasance pursuant to section 212 Insolvency Act.
- Advising administrators in settling claims against a company secretary for sums paid to them or used on their behalf which amounted to transactions at an undervalue pursuant to section 238 Insolvency Act 1986.

IN THE NEWS

Expiry of final "CIGA" provisions

As of 31 March 2022, the corporate insolvency regime returned (almost completely) to its pre-coronavirus position, with the expiry of the restrictions on the winding-up of companies introduced under the Corporate Insolvency and Governance Act 2020 (CIGA 2020).

From 1 October 2021, temporary measures had been introduced in respect of the winding-up process, which specified that creditors wishing to present a petition had to:

- have a claim for a liquidated amount of at least £10,000,
- have given the debtor written notice of the debt and an opportunity to provide repayment proposals, and
- await 21 days from the date of that notice before presenting a petition.

Those temporary measures are now gone, meaning that (save for certain protected rent debts arising from business tenancies – on which see below) the threshold required to present a winding-up petition has returned to a liquidated debt of more than £750.

We envisage a significant increase in the number of petitions presented against corporate debtors in the coming months, meaning that it will be as important as ever for business leaders to seek professional insolvency advice as early as possible if a threat of a petition is looming.

Commercial Rent (Coronavirus) Act 2022 now in force

The Commercial Rent (Coronavirus) Act 2022 ("the 2022 Act") which received Royal Assent on 24 March 2022 specifies how commercial landlords and their tenants resolve disputes concerning arrears of rent and service charges which have built up during the pandemic.

The most significant change under the 2022 Act is the introduction of a legally binding arbitration process, available for eligible commercial landlords and tenants, who have not already reached agreement in respect of certain pandemic-related debts. In essence, the 2022 Act overrides a landlord's contractual entitlement to certain rent where the business or premises were required to close because of Covid restrictions, by ring-fencing rent which accrued during a 'protected period' and allowing it to be referred to arbitration.

Both landlords and tenants should ensure that they are fully aware of what actions they are entitled to take and what their respective rights are in relation to 'protected rent' – to this end we would direct our readers to the very insightful blogs written by Richard Pulford of our property disputes team – Read here

Insolvencies on the increase

The latest published statistics from the Insolvency Service to the end of March 2022, containing data on company insolvencies, show that the numbers are (not unsurprisingly) mainly on the rise. The statistics reveal the following:

- there were 2,114 registered company insolvencies in March 2022, more than double the number registered in March 2021 (999).
- of those insolvencies, 1,844 were creditors' voluntary liquidations (CVLs) - more than double those in March 2021 and 62% higher than March 2019; and the number of administrations was 74% higher than a year ago.
- compulsory liquidations remained lower than before the pandemic, although there were almost four times as many compulsory liquidations in March 2022 compared to March 2021.

For individuals, 633 bankruptcies were registered in March 2022, which was 39% lower than in March 2021 and 59% lower than March 2019. Following changes however to the eligibility criteria in June 2021, the number of Debt Relief Orders was 2,512, an increase of 58% compared to March 2021.

CASES THAT HAVE CAUGHT OUR EYE

Re Brothers Produce Ltd (in liquidation) Brothers Produce Ltd (in liquidation) and another v Tydene (Western) Ltd and others [2022] EWHC 291 (Ch)

ICCJ Barber held that the defence of receipt in good faith, for value and without notice of the petition is unavailable in a corporate insolvency context. She stated further that while a change of position defence is available in relation to s.127 proceedings "its limits are now constrained to circumstances where the court would also be prepared to make a validation order".

Ion Science Ltd v Persons Unknown (unreported, 28 January 2022)

The High Court granted the first third-party debt order in relation to cryptocurrency in an application involving allegations of fraud related to a cryptocurrency initial coin offering.

This decision is the latest in a series of significant rulings from the English courts in relation to the status of cryptoassets. The ruling in this application follows an earlier interim order in the same case which indicated (among other things) that cryptoassets can be treated as property, with their legal standing at the place where the person or company who owned the coin or token is domiciled.

Re De Weyer Ltd (in liquidation); Kelmanson (liquidator of De Weyer Ltd) and another v Gallagher and another [2022] EWHC 3945 (Ch)

In this matter the court had to consider two primary issues: (1) whether payment being made to an intermediary would frustrate any claim for a preference, and (2) whether the director had a valid belief in the director loans being secured (albeit imperfectly) so as to displace any influence of preference.

The court considered that the transaction must be viewed as a whole and with commercial common sense. In this case, the payment to the intermediary was admitted as being intended to ultimately benefit the remaining sole director and former director. The court considered that by placing an intermediary in funds with permission to pay onwards to the Company's creditors in full knowledge of the situation, the Company passively 'suffered something to be done'.

While ultimately obiter, the court further held that a mistaken but sincere belief that a creditor had security for their debts would operate to displace the desire to prefer. This is due to the director not being influenced by a desire to prefer that creditor, but rather being influenced by a belief that creditor should be paid as a secured creditor. On the facts in this case, the applicants disproved in cross-examination that the director had any valid belief in the debts being secured.

Howlader v Moore and another [2021] EWHC 3708 (Ch)

This case offers many "takeaways" in respect of applications for possession and sale in bankruptcy.

The main takeaway is that the court will not be persuaded that an order postponing possession until after exchange of contracts will necessarily prejudice the trustee's ability to achieve the best sale price without evidence supporting that point. The court will not take it as fact that a property with vacant possession will always sell at a higher price than if it were occupied. The trustee's attempt to make that argument here was firmly rejected, with the Appeal Judge drawing on her personal experience of such applications in concluding that whether vacant possession would lead to an improved sales price depended on the context. If a trustee has concrete reasons for arguing that vacant possession is likely to lead to an improved sales price, it would be wise to set these out comprehensively in the evidence in support of the application.

Another significant takeaway is that this case serves as a useful reminder that although costs will always be in the discretion of the trial judge, an occupier who does not expressly oppose an application for sale and possession can legitimately argue that no costs order should be made against them. The occupier does not need to actively consent to the sale; the trial judge will be entitled to not order costs against them even if they simply adopt a neutral role.

AND FINALLY...

Following the recent introduction of Boyes Turner's new "Dogs in the Office" policy, the team have welcomed a new member, Oscar (pictured) who attends the office on average one day a week. Reports of an early breach of section 47(a)(ii) of the policy ("Don't make a mess on the carpet") turned out to be unfounded following an inquiry which confirmed that it was his owner (Phil Smith) not the dog.

Speak to us

If you need advice, an overview or simply a conversation about this update or any other legal issue please contact us on +44 (0)118 959 7711 or click to submit an enquiry.

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