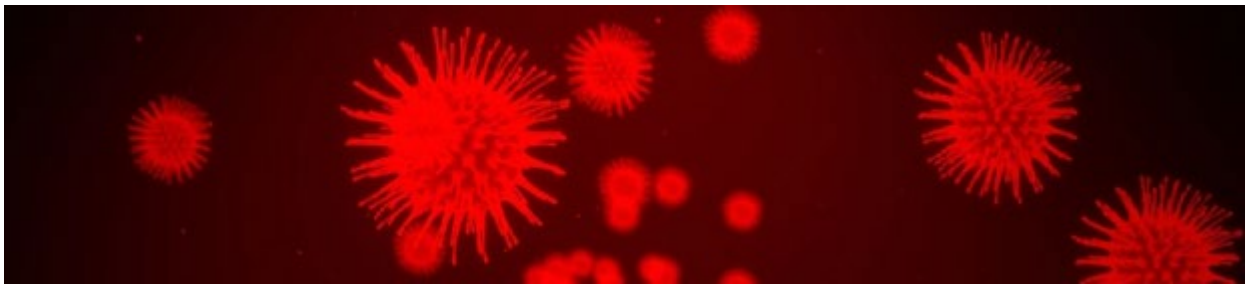
Summer newsletter - COVID-19 Edition

Similar to purchasing the latest bit of tech, where no sooner do you leave the shop (when at least they were open) a new model is released rendering yours almost obsolete, the same could be said of the ever changing landscape surrounding the response to the Covid-19 outbreak. Guidance notes on an array of issues, speculation on proposed law changes and approaches to virtual hearings seemed to change almost daily and you would be entirely forgiven if at times you were confused as to what the state of play was at any given time.

Practices and guidance have now fortunately steadied and have become the new 'norm' and thankfully, after some delay, the Government published the Corporate Insolvency and Governance Bill on 20 May, which proposes to introduce both temporary and permanent changes to insolvency laws. Whilst some of the permanent changes have been waiting in the wings for some time, namely the new standalone moratorium, the temporary restrictions on statutory demands and winding up petitions are undoubtedly a direct result of the significant financial implications which Covid 19 is expected to have on businesses and livelihoods in times ahead.

We understand that the Government is expecting to fast track this Bill through Parliament (at the time of this going to press it had already had its first reading) so it is likely that it will become law in the next few weeks. When it does, it would represent the most significant changes to insolvency laws in years.



What have we been up to?

Like with all our clients, the most notable challenge we have faced has been to ensure we continue to progress existing cases whilst adapting to the new ways of working and complying with the Court's evolving framework of guidance and protocols.

This is a period where we have seen businesses take stock of their position, and try to plot roadmaps of where they see themselves once the dust starts to settle after the lock down restrictions begin to ease. Once the effects of coronavirus become more digested in the business world, we expect there to be a sharp rise in businesses and management wanting advice on their options and duties going forward.

We have also been digesting the provisions contained within the aforementioned Bill…

Corporate insolvency and Governance Bill

The following is a summary of the two temporary changes which should be noted. We will provide commentary on the permanent changes to insolvency law introduced by the Bill as soon they have received royal assent:

Restrictions applicable to statutory demands and winding up petitions and orders

1. The restrictions on statutory demands and winding up petitions are only temporary and affect only those demands served from 1 March 2020 and winding up petitions presented after 27 April 2020, up to either 30 June 2020 or one month after the Bill becomes law (whichever is later)). They apply to all types of creditors, in all types of scenarios.
2. No statutory demand served on a company between 1 March 2020 and 30 June 2020 (or one month after the Bill becomes law, if later) can ever be used as a ground for presenting a winding up petition against that company.
3. A creditor can only present a winding up petition between 27 April 2020 – 30 June 2020 (or one month after the Bill becomes law if later) if they have reasonable grounds for believing that the debtor company's financial position has not been worsened in consequence of, or for reasons relating to, coronavirus or the ground on which the petition is based would have arisen irrespective of coronavirus' financial effect on that company. In such cases:

   a. Where a creditor presented a petition after 27 April 2020 but before the Bill comes into effect without having such grounds, the Court is likely to dismiss the petition with costs.

   b. If the creditor presented their petition on such grounds but it appears to the Court that the debtor's financial position worsened (only) in consequence of or for a reason relating to the coronavirus, it will only grant a winding up order if it is satisfied that the ground on which the petition is based would have arisen irrespective of coronavirus' financial effect on that company.

4. There are restrictions on advertising petitions presented between 27 April 2020 – 30 June 2020 (or one month after the Bill becomes law if later).
5. Specific wording must be inserted into petitions presented between 27 April 2020 – 30 June 2020 (or one month after the Bill becomes law if later) by the creditor.
6. Even if a winding up order has been made after 27 April 2020 but before the Bill becomes law, the Court has the power to retrospectively declare that winding up order void – this would mean that a liquidator's appointment is potentially **invalid** and an application to restore the company into its pre-liquidation position is required.
7. Where a company is wound up under these new provisions, the deemed date of the commencement of the winding up changes, from the date of the petition being presented (as is the current position), to the date the winding up order is made. This means a debtor company will **not** need to apply for a validation order in respect of property disposed of in the period between the date the petition was presented and a winding up order made under section 127 Insolvency Act 1986.
8. The Bill only applies in the corporate context – it does not provide the same restrictions against statutory demands against individuals or bankruptcy petitions.

Restrictions on wrongful trading provisons

The proposed section 10 of the Bill seeks to limit the amount a director is liable to contribute under section 214 of the Insolvency Act 1986 – i.e. for wrongful trading.

Under the Bill, the Court is to assume a director is not responsible for any worsening of the financial position of the company or its creditors during the period between 1 March 2020 and 30 June 2020 (or one month after the Bill becomes law if later) for the purposes of assessing any contribution a director is to make to the level of deficiency suffered by a company.

The objective with these provisions is to bring some comfort to directors who look to continue trading through the pandemic.

However, whilst some directors may feel emboldened with the laws on wrongful trading relaxing slightly, this may have come too late for others, who may have already taken steps to close down businesses at the outset of lockdown in March, with no such protection being available to them..

Further, these new provisions do not absolve directors from any of their other duties which they owe (both statutory and fiduciary) and a director's primary duty remains owing to the creditors if their company is insolvent or is on the verge of becoming insolvent. Claims for breach of duty can still be brought against directors, notwithstanding the changes to wrongful trading laws, and given that the former are more commonly brought than the latter by insolvency practitioners anyway, the changes on wrongful trading are unlikely to give directors as much comfort as first thought.

In the news - a summary of some (non-Covid related) cases that have caught our eye

Corporate insolvency

Yet another out of hours administration e-filing update

The In our previous newsletter we reported that, following the cases of Wright v HMV Ecommerce Limited and S.J. Henderson & Company Limited (in administration) and Triumph Furniture Limited (in administration), directors could not appoint administrators outside of the Court's usual counter hours. If a notice of appointment was filed outside of these hours, the appointment would take place from when the court counter reopened.

The decision in Re Keyworker Homes (North West) Limited changed the position with the Judge in that case holding that the directors of a company could file a notice of appointment outside of court hours, and that such an appointment would take effect from the time at which it was filed.

The decision in Re All Star Leisure (Group) Ltd moved the position again, stating that if a notice of appointment is filed at court after the court's published opening hours, the appointment does not take effect until the court next opens, but that the court may still determine that it took effect from a different time.

As a result of these contradictory cases the High Court has issued guidance on the subject. A copy of the guidance can be found **here**. In short, where the appointment is filed by the directors / company outside of Court hours, the notice will be referred to a High Court Judge at the first possible opportunity. The Judge will determine the validity and, if appropriate, the time at which the appointment takes effect. Given this, except in urgent circumstances, it seems the best course of action would be to avoid making the appointment outside of court hours.

Re Systems Building Services Group Ltd (in liquidation) - Director's duties survive insolvent liquidation

The liquidator of a company successfully sued the company's former director over a transfer of funds and the sale of company property at an undervalue after it entered insolvency.

In procuring the sale of the property without it being placed on the open market and at a substantial undervalue, the director had acted entirely out of self-interest and failed to have regard to the interests of the creditors as a whole. The Court found that the director was in breach of fiduciary duty and held the property on constructive trust for the company.

The Court ruled that the duties owed by a director to the company and its creditors, survive the company's entry into administration and voluntary liquidation.

Re Paul Flatman Ltd (In creditors' Voluntary Liquidation) - Definition of "desire" to bring about a preference

To set aside a transaction as a preference it must be shown that the company entering into the preference was influenced by a 'desire' to bring it about. The Court in this case clarified that what is required to show 'desire' goes beyond a mere intention.

The Court held that a desire to bring about a preference was present where a director set in motion a mechanism leading to an automatic payment out of the company account. As the director was aware of the mechanism, it was not an answer to say that the payment itself had been made automatically and that he had simply failed to prevent this.

Dewhurst v (1) Revisecatch Ltd t/a Ecourier (2) City Sprint (UK) - TUPE applies to all workers, not just employees

The claimants in this case were three cycle couriers who were employed by the second respondent. When the second respondent lost its contract to provide courier services to HCA Healthcare, the winners of the contract, the first respondent, took over the claimants' employment. The claimants brought claims against the respondents which included claims for failures to inform and consult on the transfer under TUPE.

The Employment Tribunal ruled in favour of the claimants, clarifying that the definition of 'employee' in TUPE covers not only employees in the traditional sense but also those who are 'workers' i.e. any person who works for another under a contract, with the specific exception of independent contractors who are genuinely in business on their own account.

In the matter of Biomethane (Castle Eaton) Ltd - Administration extensions

The company had entered administration in August 2017. Negotiations between the administrators and a third party stalled in July 2018 and the administrators sought to extend the administration for a further year by consent. They sought to obtain the consent of the company's secured and unsecured creditors to the extension by using the deemed consent procedure. However they overlooked the fact that the consent of each secured creditor had to be actual, rather than deemed. It became apparent that the original extension was not effective because of the inappropriate use of the deemed consent provision.

The Court ruled that although the extension of the administration had been ineffective, the Court had jurisdiction to make a new administration order with retrospective effect. The Court did however comment that it applied extreme caution in exercising that jurisdiction.

In the matter of London Bridge Entertainment Partners LLP (In Administration) - Rent Deposit Deeds

Prior to entering into administration, the company entered into a rent deposit deed which broadly stated that if the tenant company failed to meet its rent obligations, the landlord could resort to the deposit to make up the rent then owing. The deed also provided for a 'top up' obligation, by which the company was required to replenish the deposit if the landlord had drawn on the account to make up the unpaid rent.

The company was subsequently placed into administration, following which it failed to pay a rent instalment. The landlord made a withdrawal from the deposit in respect of that rent as per the deposit deed. The company failed to replenish the deposit.

The landlord argued that administrators were obliged to replenish the deposit as per the deed and that this should be considered an expense of the administration. The Court disagreed. It decided that the 'top up' obligation should not be given priority status in the administration, and that the landlord would be restricted to proving for that debt and ranking alongside the other unsecured creditors.

Personal insolvency

Re Bedborough - Waiver of Privilege

It is well-established that where a party defends and/or justifies their position by reference to legal advice, great care must be taken when drafting the relevant witness statement so as not to waive privilege. This case confirms that a mere reference to stating a party is "not waiving privilege" is in itself unlikely to be sufficient. Context, fairness, the level of detail provided and the extent of the party's reliance (if any) should all be considered in understanding whether privilege has been waived.

Re Roderick John Lynch - The High Court's jurisdiction in possession proceedings

Shortly after a bankruptcy order was made against the bankrupt, proceedings were commenced in the county court by a lender, naming the bankrupt only as defendant. The Court struck out the bankrupt's defence and counterclaim on the grounds that his interest had passed to the trustee. The trustee, having been given time to consider his position, confirmed he did not intend to oppose the lender's claim. The bankrupt sought to challenge the trustee's decision and direct him to adopt his defence. The Insolvency and Companies Court Judge (ICCJ) made an order that the case be transferred to the High Court, the possession claim in the County Court be stayed, and directed that the trustee make an application to determine the validity of the lender's charge.

The lender appealed the ICCJ's order. The appeal court set aside the ICCJ's order, holding that the enforcement of third-party proprietary interests are not proceedings within the bankruptcy. It is not open to judges (in this case an ICCJ) to interfere with the jurisdiction of the county court to determine possession proceedings.

Harrling and Steen v Midgley and others - Setting aside a statutory demand

In this case the Court held an alleged debt, arising from a personal guarantee liability relating to a company share sale agreement, and which formed the basis of a statutory demand, was disputed on grounds which appeared substantial. The guarantors (directors of the purchaser under the sale agreement) alleged that material misrepresentations were made to them by the vendor shareholders during the course of the negotiations of the share sale agreement, and that their personal guarantees were therefore arguably invalid. The statutory demands were subsequently set aside on grounds of a substantial dispute arising.

This case illustrates the potential range of the defences available to guarantors who give personal guarantees, especially where those guarantors alleged that they were misled by material misrepresentations.

And finally...

We were hoping to report that during this lock down all of the Business Support and Insolvency team had each mastered a new skill or talent. Sadly though the results were much less impressive, with Phil only just reacquainting himself with the guitar, Chris perfecting the art of alfresco working, Ollie putting up some pictures at home (almost straight), Becky project managing her other half to clear their garden and Yvonne mastering the mechanics of remote working Zoom calls.

Chris Branson
PARTNER
Email

Phil Smith
PARTNER
Email

Oliver Fitzpatrick
SENIOR ASSOCIATE - SOLICITOR
Email

Rebecca Nicholson
SOLICITOR
Email
