Summer newsletter - Part 2

Corporate Insolvency and Governance Act 2020

Since our last Newsletter, the Corporate Insolvency and Governance Act 2020 ("CIGA") has been given Royal Assent and came into force on 26 June 2020. To coincide with this, a new practice direction, Insolvency Practice Direction relating to the CIGA 2020 has also been brought into force.

So what changes have occurred since our last Newsletter regarding CIGA, that are different from the Corporate Insolvency and Governance Bill ("CIGB")?

Temporary provisions

Firstly, the temporary provisions that were laid out in CIGB, relating to Statutory Demands, Winding-Up Petitions and Wrongful Trading have been extended from the end of June to 30 September 2020.

Accordingly, Statutory Demands which were served between 1 March 2020 and 30 September 2020 cannot be relied upon as the basis for a petition. Therefore, no winding-up petition may be presented based upon a statutory demand served between 1 March 2020 and 30 September 2020. This even applies to petitions issued after 30 September 2020, if the Demand was served during the relevant period.

There is also a retrospective effect going back to 27 April 2020, so any petition issued post 27 April 2020 relying upon a Statutory Demand served since 1 March 2020 is also invalid, as too is any winding up order made between 27 April 2020 and before the CIGA came into force if the petitioning creditor would not have been able to show the basis of the winding up would have arisen even if Covid-19 had not had a financial effect on the debtor company

If a creditor presents a petition on any other ground (i.e. not relying upon a Statutory Demand) before 30 September 2020, they will have to produce evidence that they have reasonable grounds to show that the Covid-19 pandemic was not the cause of the financial failure. A two stage process is in place for a Judge to consider the evidence relied upon before allowing the petition to be issued.

There are already reported cases where the Court has granted an injunction to prevent advertisement of a petition in Covid-19 related circumstances. As regards wrongful trading, there will be an assumption in favour of directors (and shadow directors) that their actions are not responsible for the deterioration of the company's financial position between 1 March 2020 and 30 September 2020, and are therefore not liable to contribute for any deficiencies which may have been incurred during that period. These restrictions do not however make the directors immune from the consequences arising from any breaches of the other duties they owe as directors or any other infringements of fraudulent trading laws.

Permanent provisions

We said that we would report in this Newsletter on the other provisions introduced by CIGA, which have brought about permanent changes to UK insolvency law. These are as follows:

- **Termination clauses**

One of the most fundamental changes relates to termination clauses in contracts. The extensive provisions, subject to a few exceptions, prohibit a supplier's right to terminate a supply contract, or do anything else to prevent supply, for instance demanding outstanding sums are paid to continue supplies. The provisions will apply when a company enters into "an insolvency procedure" - namely administration, administrative receivership, liquidation or voluntary arrangement, or also the newly introduced procedures of a restructuring plan or moratorium (on which see below). A pre-insolvency breach of contact for failure to pay cannot be enforced once the company has entered into an insolvency procedure.

Some safeguards exist for suppliers, namely if the insolvency practitioner or customer consents to the termination, or if the supplier can show that being forced to continue to supply would cause the supplier hardship. Also, clauses which permit suppliers to terminate contracts on the ground of non-payment for goods or services already provided remain unaffected and the supplier is entitled to exercise such termination clauses.

New insolvency procedures

Moratorium

A new moratorium procedure is available for the majority of (but not all) companies which will allow time to formulate a rescue plan. Initially, the moratorium will last for 20 business days but may be extended for a further 20 business days without consent from creditors, but if creditors give consent the moratorium may last for up to one year.

The procedure will allow directors to remain in control of the company but it must be monitored by an Insolvency Practitioner, whose role is to confirm that the moratorium will lead to a rescue of the business. If not the moratorium must be terminated.

The moratorium provides a payment holiday for pre-moratorium debts (but excluding debts due under a contract for financial services), so action cannot be taken to recover them. However, post moratorium debts are payable, providing protection for employees and suppliers.

Restructuring plan

This is similar to a Scheme of Arrangement. In essence, the Court can sanction a plan which binds a dissenting class of creditors, if that class would be in no worse position than the most likely alternative.

In the news - a summary of some cases that have caught our eye

Corporate insolvency

Re A Company (Application to restrain advertisement of a winding up petition)

This case was heard before CIGA came into force but the provisions of the CIG Bill were known. Statutory demands were served on 27 March 2020 on the company in respect of debts due under loan agreements and a winding up petition had been presented. The company applied for an injunction to restrain the advertisement of the petition, claiming that although it was insolvent it had been prevented from obtaining funding, to enable it to propose a scheme of arrangement to its unsecured creditors, as a result of the pandemic. The petitioner argued that the company's insolvency was not related to Covid-19. The court considered that the threshold in the Bill was low enough to allow the company's application. The CIGA would now prevent a winding up order being made.

In the matter of African Minerals Ltd

In this case the court was asked to allow the convening of a meeting of creditors to consider and approve a scheme of arrangement by telephone and video conference in view of the Covid-19 pandemic. The meeting was proposed to take place on 20 July 2020 when there was likely to be an easing of the lockdown measure. The court approved the application and made the necessary order.

A similar order was made in a more recent case: Re ColourOz Investment 2 LLC and other companies.

In the matter of Akkurate Ltd (In Liquidation)

The joint liquidators of a company, which had been compulsorily wound up in England and Wales, sought orders under section 236 of the Insolvency Act 1986 ("IA86") for production of documents and an account of dealings with the company, in respect of companies in Italy. The question for the Court was whether s236 IA86 had extraterritorial effect. The problem for the court was that there was competing first instance decisions both for and against. The matter was further complicated by the fact that the Court of Appeal in an earlier case (Re Seagull Manufacturing) had decided that section 133 IA86 concerning public examination did have extraterritorial effect. However, in another case (Re Tucker) which concerned s25 of the Bankruptcy Act 1914 (some of us were in practice when this was in force!) the court held that that section did not have extraterritorial effect. The court in the present case preferred that decision (as also confirmed by the Court of Appeal in the MF Global case). However, Regulation 1346/2000, which came into play after the MF Global case did give extraterritorial effect to s236 IA86 when it applied to companies with the Centre of Main Interest in Member States (in this case Italy). Accordingly, the necessary orders for production were granted.

Bresco Electrical Services Limited (In Liquidation)

The long running question of whether a contractual dispute relating to a breach of a construction contract can be the subject of Adjudication, if one of the parties is in Liquidation, and there are cross claims for insolvency set off was settled by The Supreme Court. Needless to say the two parties both claimed breach of contract and damages. The contract allowed for a dispute to be resolved by Arbitration which the sub-contractor Bresco wished to pursue. This was opposed on the basis of incompatibility between insolvency set-off, and an argument that the adjudicator lacked jurisdiction. On the basis that there was a contractual right in the contact to allow adjudication, the court held that it was not fettered by a subsequent liquidation, and the right to seek that form of dispute resolution would be allowed even if problems of enforcement could occur.

Personal insolvency

Agba v Luton Borough Council

In this case the court considered a debtor's application to set aside a bankruptcy order made in her absence (due to self-isolation in accordance with Covid-19 guidelines). It was held that the fact that the debtor was bankrupt meant she had no standing to apply to set the order aside. The court accepted that the debtor had a good reason not to attend court, and had acted promptly to set the order aside, however legal precedent going back to the 1990's meant that only a trustee in bankruptcy could challenge the liability orders.

Go Capital Limited v Jagdeep Singh Phull

A bankruptcy petition was dismissed on the application of the debtor, who claimed that a guarantee document was not a valid deed, the transaction which was purported to be guaranteed was a sham and that the debtor's signature had been forged. Whilst the court accepted that there was a substantial dispute as regards the transaction (payment of fees of US$500 billion!) and that the form of guarantee was invalid, as no evidence had been called to show that the debtor's signature had been forged, the bankruptcy petition hearing was not the right forum to decide the matter.

As a point of interest both Chris Branson and Phil Smith have acted for Trustees in Bankruptcy where forged documents have been produced by the bankrupt. In both of those cases forensic evidence proved that the documents were fakes.

Moorgate Industries UK Ltd v Pramod Mittal

The court held in this case that a costs order in favour of the debtor, in respect of a discontinued bankruptcy petition for the same debt, due to the petitioner, could be set off against the sums due in respect of a second bankruptcy petition brought against the debtor by the same petitioner. The debtor had argued that the petition should be stayed until the previous costs order had been paid. The court disagreed and concluded not only that the petitioner had the right to issue a second petition, and allow the set off, but there was no prospect of the debtor paying the debt within a reasonable time, which is always a matter to be considered before making a bankruptcy order.

Block transfers

Hunt & Goldfarb v Down, Harding and Others

The case concerned an insolvency practice which had been placed into compulsory liquidation. The Applicants had been appointed liquidators. However, between the presentation of the petition and the winding up order, the assets of the insolvency practice were transferred to another practice, resulting in a claim under section 127 IA86 to declare the transfer void. In addition, the liquidators sought to have transferred to themselves the insolvency cases of the two practitioners of the former practice. The application was by way of the block transfer procedure. The Court refused to make the necessary transfers on the basis that the liquidators had no standing to bring the application, as they were not parties entitled to bring such an application under section 108 IA86.

And finally…

The team are thrilled to announce that they are growing, with the recruitment this month of Lizzie Peck, who joins us as a paralegal. Lizzie brings with her a wealth of property experience, having worked for the firm's residential property team since 2018; she previously held similar roles for over six years, at Withy King and Blake Morgan.

Lizzie will be working alongside all members of the team and has already built up a very busy caseload (plus an ever growing file of articles/commentary on the recent changes to insolvency law and practice!).

Outside of work, Lizzie is an instructor at "BOUNCE" – a trampoline fitness group exercise class. Sadly, due to Covid-19 restrictions we were unable to upload video footage of Lizzie putting the team through its paces, but we hope to upload footage of Phil, Ollie and Chris falling off a trampette in the very near future.

Chris Branson
PARTNER
cbranson@boyesturner.com

Phil Smith
PARTNER
psmith@boyesturner.com

Oliver Fitzpatrick
SENIOR ASSOCIATE - SOLICITOR
ofitzpatrick@boyesturner.com

Rebecca Nicholson
SOLICITOR
rnicholson@boyesturner.com

Lizzie Peck
PARALEGAL
lpeck@boyesturner.com