November 2020 Newsletter

What have we been up to?

Mid-way through lockdown version 2, the team continue to be as busy as ever. Amongst the recent highlights have been:

- Advising a leading private bank in respect of a complex LPA receivership.
- Working on various administrations in the leisure and hospitality sector.

In the news

Regulations proposed to 'tighten up on regulation of the pre-pack process'

The Insolvency Service has published the outcome of its review conducted into the impact of the voluntary industry measures introduced in November 2015, which aimed to improve the transparency of connected party pre-pack sales in administrations. Following the assessment, the Insolvency Service has published draft regulations which are intended to be laid before Parliament.

Key elements of the proposed regulations include:

- the regulations would apply 'where there is a disposal in administration of all or a substantial part of a company's assets'
- administrators will no longer be able to dispose of company property linked to a person in the company 'within the first eight weeks of the administration without either the approval of creditors or an independent written opinion' - removing the voluntary use of the Pre-Pack Pool
- a requirement that the provider of the opinion is to be independent of the connected party purchaser, the company and the administrator and meets eligibility requirements

- a requirement that the administrator has 'no reason to believe' the opinion provider is not independent and does not meet eligibility requirements
- a written report will be given by the opinion provider explaining whether the case is made for the disposal or will not be made
- more than one report can be obtained by the connected party purchaser
- a report must be considered by an administrator from an opinion provider
- if a report says a case is not made for disposal and an administrator proceeds with the disposal,
- there is a requirement to provide a statement of reasons for proceeding
- a copy of the report(s) must be sent to creditors of the company and Companies House by the administrator

Insolvency Service publishes monthly statistics for September 2020

The Insolvency Service has published its monthly insolvency statistics for September 2020. The overall numbers of company and individual insolvencies remained low in September 2020, when compared with the same month in the previous year. This was likely to be at least partly driven by government measures put in place in response to the coronavirus (COVID 19) pandemic.

The overall number of company insolvencies decreased by 39%, when compared to the same month last year. There were a total of 926 company insolvencies in England and Wales, comprised of:

- 742 creditors' voluntary liquidations
- 44 compulsory liquidations
- 109 administrations; and
- 31 company voluntary arrangements

There was also a decrease in personal insolvencies with a 37% reduction in DROs and a 24% reduction in bankruptcies, compared with the same month last year. There were 1,527 DROs and 1,036 bankruptcies in September 2020 in England and Wales (the latter was made up of 963 debtor applications and 73 creditor petitions).

R3 announces new standard form COVID-19 CVA proposal and standard conditions

The R3 standard form coronavirus CVA proposal and accompanying coronavirus standard conditions for CVAs are intended for use by small and medium-sized enterprise (SME) companies whose businesses have been affected by coronavirus. They are intended to save time and costs, and therefore make CVAs more accessible to the SME market.

R3's standard form CVA proposal is designed for use by companies whose businesses have been hit by coronavirus and which need some time to get their businesses fully operational. The terms provide for a (delayed) payment of 100% of the company's debts. It therefore creates a moratorium period when pre-CVA debts will not be paid and those creditors with pre-CVA debts are consequently prevented from enforcing their debts against the company while the CVA is in operation.

The following documents are available **here** on R3's website:

- R3 Standard Form COVID-19 CVA PROPOSAL (Version 1, September 2020, England and Wales)
- Standard Conditions for Company Voluntary Arrangements (Version 1)
- Explanatory Note for insolvency practitioners
- Explanatory note for Media

Cases that have caught our eye

Is a CVA a contract?
Re Rhino Enterprises Properties Ltd and another [2020] EWHC 2370 (Ch)

The High Court considered whether a CVA is a contract, and whether the Contract (Rights of Third Parties) Act 1999 applies so as to make CVAs enforceable by third parties. The applicants sought an order that would allow them to issue proceedings under para 75 Sch B1 IA86 for misfeasance and the former Administrators suggested the clause in the CVA prohibited action being brought against them. The judge gave leave for the proceedings to be issued.

Challenge to the appointment of administrators on grounds of improper purpose

Re Hat & Mitre (in administration) [2020] All ER (D) 42 (Oct)

The applicants argued that the company's administrators had been appointed for an improper purpose or motive (namely to give minority shareholders more control over the company). On the facts, there was no indication that the directors appointing the administrators had been motivated by an improper purpose. In any event, such improper purpose would not (as the applicants contended) have invalidated the appointment ab initio. The applicants also made an application under IA 1986, Sch B1, para 74 on the basis that the administrators' conduct had unfairly harmed their interests. It was held that the administrators had behaved properly and had been entitled to try to facilitate an agreement between conflicting factions of shareholders.

QFCHs and the notice requirement—invalidity gives way to pragmatism

Re Tokenhouse VB Ltd, Strategic Advantage SPC v Rutter [2020] All ER (D) 42 (Oct)

In another case grappling with the construction of IA 1986, Sch B1, para 26(1)(b) (and awaiting resolution by a higher court), Insolvency and Companies Court Judge Jones has decided that the failure to give the required notice to a qualifying floating charge holder (QFCH) does not mean the appointment of administrators by the directors is void. The limited prejudice to the QFCH of a court's refusal to invalidate should be contrasted with the potential danger that the main purposes of the administration may no longer be capable of being achieved at the time the breach is identified if the appointment is found automatically void, leading to a conclusion of irregularity. However, it remained the case that it should not have occurred. Having already ended the first administration on the Cayman Islands Segregated Portfolio Company's (SPC) application and under the court's inherent jurisdiction, he decided ultimately to remove the court appointed administrators and appoint the second of SPC's appointees.

The Court's discretion to adjourn a bankruptcy petition

Re Wojakovski [2020] All ER (D) 80 (Oct)

In deciding that the court had no jurisdiction to adjourn the bankruptcy petition in order to give the debtor time to pay the debt, the Chancery Division explored the issue of the extent to which jurisdiction is available to adjourn a hearing of the petition to afford time to the debtor to pay. The present case was one in which the judgment debt was part of a larger debt owed by the debtor and the court held that in order to justify an adjournment of the petition in the present case, the debtor would need to provide credible evidence of his ability to pay within a reasonable time both the petition debt and the debt due to the supporting creditors.

Issues of standing resolved to reverse transactions defrauding creditors

Re Peter Thomas Cartwright (a bankrupt) Rendle (trustee in bankruptcy of Peter Thomas Cartwright) v Panelform Ltd and others [2020] All ER (D) 50 (Oct)

The court held that a trustee in bankruptcy (trustee) could bring a claim under IA 1986, section 423 in his own capacity and as a 'victim' of a number of transactions entered into between a dissolved partnership, a company, and the bankrupt himself. The case will be of interest to practitioners because it demonstrates the treatment of partnerships in the insolvency context, the consideration given to the trustee's standing under IA 1986, s 424, and the breadth of relief ordered by His Honour Judge David Cooke. The case is a reminder to practitioners to ensure that, where there is uncertainty over the nature of these types of transaction, it will generally be preferable to err on the side of caution when it comes to identifying the respondents. The case is also an illustration that the court will be slow to allow bankrupts to take advantage of their own attempts to obscure matters.

And finally...

We're delighted to announce that the team has retained our top tier ranking in Chambers and Partners' 2021 solicitors directory, with Phil Smith being ranked as a "Band 1" lawyer and Ollie Fitzpatrick named as a Star Associate.

Boyes Turner has also been named in The Times & Sunday Times "Best Law Firms 2021" – with the insolvency team singled out with a commendation for our insolvency and restructuring work.

Thank you to all our clients and contacts for helping us achieve these accolades.

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