September 2020 Newsletter

What have we been up to?

The days and nights may well be getting noticeably cooler, but as a team we remain very much at simmer point in terms of the demands of newly-acquired business support and insolvency work and staying on top of recent legislative changes.

Amongst this month's work highlights have been:

- Advising the administrator of an FCA regulated corporate finance firm.
- Advising the security trustee for senior lenders to an energy company, which recently fell into administration.
- Acting for a property investment group in respect of fixed charge receivership appointments.
- Advising the administrators of a financial services company in respect of the company's c.£40m debtor book.

In the news

Needless to say, COVID-19 continues to dominate all the headlines and its impact on insolvency law and practice continues to loom very large.

Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020

The Corporate Insolvency and Governance Act 2020 (Coronavirus) (Extension of the Relevant Period) Regulations 2020 (coming into force on 29 September 2020) amend a number of the provisions contained in the Corporate Insolvency and Governance Act 2020 ("CIGA") (see our summaries of the insolvency provisions introduced by CIGA in our Summer newsletters, **part 1** and **part 2**).

The main insolvency-related amendments to CIGA are:

- The restrictions on statutory demands and winding-up petitions which were due to cease on 30 September 2020 will continue until 31 December 2020.
- Termination clauses in supply contracts remain prohibited, however the exemption for small suppliers is being extended to 30 March 2021.
- The modifications to the new moratorium procedure (which relax the entry requirements to it) are also being extended to 30 March 2021. A company may now enter into a moratorium even if they have been subject to an insolvency procedure in the previous 12 months.

In the context of statutory demands, the new Regulations mean that no winding up petition can be presented on a statutory demand served between 1 March 2020 and 31 December 2020.

It still remains possible to present a winding-up petition on other grounds that the company is unable to pay its debts (remember, a statutory demand is not a pre-requisite to a winding-up petition) but, if the petition is presented between the period 27 April 2020 and 31 December 2020, the creditor must be able to demonstrate either that COVID-19 hasn't had a financial effect on the debtor business, or it would have been unable to pay its debts regardless of COVID-19.

Noticeably, the provisions relating to the temporary suspension of liability for wrongful trading introduced by CIGA have **not** been extended by the new Regulations and will therefore come to an end on 30 September 2020. This is a clear warning sign for directors to take appropriate advice as early as possible, should they find that their business is encountering financial difficulties.

Extension to the eviction ban and restriction on landlords using Commercial Rent Arrears Recovery (CRAR) for commercial tenants

The Coronavirus Act 2020 which came into force on 25 March 2020 placed a temporary ban on landlords from terminating certain business tenancies by forfeiture for non-payment of rent until 30 June 2020. This date was initially extended to 30 September 2020.

This temporary protection for eviction is now being extended further, until 31 December 2020 under The Business Tenancies (Protection from Forfeiture: Relevant Period) (Coronavirus) (England) (No 2) Regulations 2020, which come into force on 29 September 2020.

The government is also extending the restriction on landlords using CRAR as an enforcement tool to recover unpaid rent on commercial leases until 31 December 2020, by means of The Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020. The new Regulations (which also come into force on 29 September 2020) specify new minimum amounts of outstanding rent required for CRAR to be invoked - namely 276 days' rent where enforcement takes place on or before 24 December 2020, and 366 days' rent where it takes place on or after 25 December 2020.

Cases that have caught our eye

Misfeasance claim against former administrators
Rhino Enterprises Holdings Ltd [2020] EWHC 2370 (Ch)

In opposition to an application to the Court by shareholders for permission to commence misfeasance proceedings against them, former joint administrators relied on a clause in the company's CVA releasing them from liability. As the applicants weren't parties to the CVA, the administrators argued that the CVA was a contract for the purposes of the Contract (Rights of Third Parties) Act 1999 and/or that the applicants' votes in favour of the CVA as creditors bound them as shareholders. The Court disagreed and granted permission for the misfeasance proceedings to be brought, stating that the 1999 Act wasn't applicable to CVAs and that voting as a creditor did not bind a person who is also a contributory to a company.

Restoration of formerly liquidated companies
Fakhry v Pagden [2020] EWCA Civ 1207

The Court of Appeal held that a company dissolved following a members' voluntary liquidation (MVL) should not be restored to the register on the application of a minority shareholder, without first considering the wishes of the majority. This is one of the first decisions concerning the rarely litigated issue of the control of solvent companies during and after the MVL process. From a practical point of view, the decision provides useful guidance to those advising applicants wishing to restore formerly liquidated companies to the register. The Court of Appeal has helpfully clarified that a company's former liquidators must be joined as respondents to (and given notice of) restoration applications.

Court refuses to direct meeting that would serve no useful purpose
Re Fortuna Fix Ltd [2020] EWHC 2369 (Ch)

The administrators of Fortuna Fix Ltd sought directions from the Court, in circumstances where a majority creditor had rejected their proposals and was seeking to have the company placed into liquidation or, alternatively, a meeting for the appointment of new administrators. The Court held that there was insufficient evidence showing that the purpose of the administration could be achieved, either by the current or proposed new administrators, and directed that a hearing take place to determine whether a winding-up order should be made – illustrating firstly that the Court remains final arbiter, and secondly that, absent the ability to fulfil certain criteria, the insolvency framework dictates that companies such as the one in question need to be placed into liquidation.

Lack of service of insolvency proceedings
Re Trueword Ltd (unreported)

An application was successfully made under the predecessor to rule 12.59 of the Insolvency (England and Wales) Rules 2016, to set aside a judgment made within misfeasance proceedings, the applicants contending that they had not been served with those proceeding by the liquidator. The liquidator's case was that postal service at the last known address has been relied upon, however it was held that no proper service had been effected and that it should not be authorised retrospectively. The applicants were also found to have an arguable defence to the misfeasance claim.

Enforcement of an adjudicator's decision in favour of an insolvent company
John Doyle Construction v Erith Contractors [2020] EWHC 2451 (TCC)

Following the Supreme Court decision in Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in liquidation) [2020] UKSC 25 (see our **Summer 2 newsletter**) there has been much speculation as to the likely impact of construction adjudications sought by insolvent companies. In Bresco, the Supreme Court held that adjudicators have jurisdiction to determine construction disputes brought by insolvent companies. In this recent decision of the Technology and Construction Court ("TCC") however, enforcement of an adjudicator's decision where the claimant was in insolvent liquidation was refused, with the TCC setting down a number of principles to be applied when an insolvent party seeks to enforce an adjudicator's award, including whether the liquidator is prepared to offer undertakings, such as ring-fencing the enforcement proceeds, and/or where there is other security available.

And finally…

The Business Support & Insolvency team at Boyes Turner reach the end of a very significant era on 30 September 2020, with the retirement of their "founding father" Chris Branson who began working in insolvency cases in 1981 (at the tender age of 25). Throughout his career at Boyes Turner (who he joined as a partner in 1988) Chris has been involved in some of the most high-profile insolvency cases and is rightfully listed in The Legal 500's "Hall of Fame" in recognition of his many achievements in insolvency law and practice. We have no doubt that all of our readers will join us in wishing Chris many congratulations on his retirement.

Chris Branson
PARTNER
Email

Phil Smith
PARTNER
Email

Oliver Fitzpatrick
SENIOR ASSOCIATE - SOLICITOR
Email

Rebecca Nicholson
SOLICITOR
Email

Lizzie Peck
PARALEGAL
Email