RECENT ISSUES IN PERSONAL AND CORPORATE INSOLVENCY

Holly Doyle & Simon Passfield, Guildhall Chambers

1. On 25 April 2012, the Office for National Statistics published its Preliminary Estimate for Q1 2012 showing a decrease in GDP of 0.2% and confirming that the UK economy has returned to recession, the first double-dip downturn since the 1970s. The announcement marked another year of wide ranging development in insolvency law and practice.

2. On 23 February 2012, the Chancellor of the High Court issued a new Practice Direction on Insolvency Proceedings, replacing all previous Practice Notes and Practice Directions relating to insolvency proceedings. Of particular note is the enshrining of the practice developed by Registrars in relation to applications for the extension of an administration, which should normally be made not less than one month before the end of administration in the absence of special circumstances (para 10) and of the Practice Statement: The Fixing and Approval of Remuneration of Appointees (para 20), as well as the removal of the specialist rules and procedure applying to insolvency appeals and their replacement with the general provisions of the CPR (para 19).

3. Meanwhile, the courts have continued to be busy considering the morass of issues, both factual and technical, thrown up by insolvency law. In this paper, we consider some of the more interesting and important.

A Personal Insolvency

Presenting the Bankruptcy Petition: Liquidated Debt?

4. Whilst the categories of creditors capable of proving in the bankruptcy of an individual are comparatively wide, including, as they do, those whose claims are future, contingent and unliquidated (s 383 IA), it is only debts for a liquidated sums which are capable of forming the subject of a bankruptcy petition (s 267(2)(b) IA), namely for a specific amount which has been fully and finally ascertained (*Re Broadhurst ex p Broadhurst* (1852) 22 LJ Bcy 21).

5. In *Hope v Premierpace (Europe) Ltd* [1999] BPIR 695, Rimer J considered that a claim in damages or for an account is not a claim for a liquidated sum even though the amount of the alleged liability is readily quantifiable “down to the last penny”.

6. In *McGuinness v Norwich & Peterborough Building Society* [2010] EWHC 2989 (Ch), [2011] BPIR 213, Briggs J considered the implications of this decision on a bankruptcy petition presented in respect of a debt due under a guarantee entered into in respect of a mortgage loan made by the petitioning creditor to the debtor’s brother. Having concluded that the petition debt was a liquidated sum (considered further below), the learned Judge went on to cast doubt upon the correctness of the decision in *Premierpace* for three principal reasons:

   (1) On its face, a person from whom £1,000 has simply been stolen is unable to present a bankruptcy petition even where the debtor has no genuine defence but a person with a £1,000 contract debt may do;

   (2) Distinctions based on different causes of action (i.e. debt, account and payment, damages) do not satisfactorily address the purpose behind s 267(2)(b) IA (i.e to distinguish between cases where there is no issue as to the amount of a liability, and cases where some process of assessment by the court is necessary, before the amount can be identified).

   (3) Even in cases involving guarantees of the 'see to it' type (i.e. damages claims), it is frequently the case that the quantum of the claim may involve no uncertainty or need for the application of the court's opinion. It was absurd to require the creditor first to issue a claim and obtain an inevitable summary judgment upon it, before beginning bankruptcy proceedings.

7. In the recent appeal [2011] EWCA Civ 1286, [2012] BPIR 1286, the Court of Appeal has had the opportunity to provide further guidance in the matter.

8. Patten LJ, giving the leading judgment (with which Ward and Moses LJJ agreed), identified four types of liability which may be imposed on a guarantor by a guarantee of a loan:

   (1) An undertaking by the guarantor that the principal debtor will perform his own contract with the creditor (a 'see to it' obligation);

   (2) A promise by the guarantor to pay the instalments of principal and interest which fall due if the principal debtor fails to make those payments (a 'conditional payment' obligation);

   (3) An indemnity;

   (4) A concurrent liability with the debtor for what is due under the contract of loan.

9. It was common ground that obligations in classes (2) and (4) create a liability in debt and that obligations in class (3) are enforceable by way of action in unliquidated damages.

10. The key issue before the court was whether an obligation in class (1) constituted a debt for a liquidated sum notwithstanding that it creates a liability in damages (*Moschi v Lep Air Services and Others* [1973] AC 331), albeit one which is readily ascertainable by reference to the state of account between the creditor and the principal debtor.

11. Having conducted an exhaustive examination of the relevant authorities under previous legislation including the Bankruptcy Acts 1849, 1861, 1869 and 1914, Patten LJ concluded that a debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it (which can include a contractual claim for liquidated damages). For this reason, *Premierpace* was correctly decided on its facts.

12. Turning to the application of the relevant principle to guarantees, the key issue is whether the liability of the guarantor can be treated as one which is reduced to and specified and agreed *by the guarantee itself*. Since a 'see to' it obligation gives rise to a claim for unliquidated damages, although the measure of liability is the amount of the principal's debt, that is not the same as an obligation to pay a sum of money under the contract whether as debt or agreed damages (which does arise in relation to a conditional payment obligation).

13. In the instant case, it was accepted that clause 2.4 of the guarantee amounted to an indemnity giving rise to a claim for unliquidated damages and not a debt for a liquidated sum. However, it was necessary to determine whether, on a proper analysis, clauses 2.2-2.3 and/or 4.2 imposed an additional obligation in classes (2) or (4), and hence a debt for a liquidated sum:

   Cl 2.2 Provided that the guarantor guaranteed all money and liabilities owing by the principal debtor would be paid and satisfied when due;

   Cl 2.3 Provided that any amount claimed under the Guarantee was payable by the guarantor immediately on demand by the creditor.

   Cl 4.2 Provided that the guarantor's obligations under the guarantor were those of principal and not just as surety. The creditor was not obliged to make demand on, or take any steps against, the principal debtor or any other person before enforcing the guarantee.

14. Patten LJ concluded on balance that clause 2.2 gave rise to a conditional payment obligation on the basis that:

   (1) The admitted damages obligation under clause 2.4 was stated to be a separate obligation and extended to any shortfall in the payment by the principal of the mortgage debt, therefore overlapping with the liabilities covered by cl 2.2. Clause 2.4 would be unnecessary if the primary liability under cl 2.2 was simply a 'see to it' obligation;

(2) Cl 2.3 makes the sums due under the guarantee payable on demand. Notice is not a pre-requisite to the enforcement of a liability in damages. Cl 2.3 is more consistent with cl 2.2. being read as a direct promise to pay the mortgage liabilities as they fall due.

15. Though strictly unnecessary, Patten LJ went on to consider Briggs J's conclusion that the effect if cl 4.2 was to make the mortgage debt that of the guarantor, holding that the provisions of cl 4.2 merely operated to confirm that where any of the obligations of clause 2 are capable of taking effect as a liability in debt, the liability of the guarantor is concurrent with that of the principal and not contingent upon it.

16. The cumulative effect of these findings was that cl 2.2 created an obligation in class (4) and was therefore a debt for a liquidated sum capable of forming the subject of a bankruptcy petition.

17. This decision is also likely to have an impact on the voting rights of lenders in IVAs and CVAs, since a debt for an unliquidated amount his debt will be valued at £1 unless the chairman agrees to put a higher value on it (r 1.17(3); r 5.21(3) IR). Nevertheless, given that the damages to which a creditor is entitled in respect of a 'see to it' obligation is readily ascertainable, it is likely that it will be appropriate in all the circumstances for the supervisor to permit the creditor to vote for full value (where the debt is not disputed on substantial grounds and there is no counterclaim, cross demand or set-off).

Dismissal of the Petition: further guidance on when the rejection of an offer of security is unreasonable.

18. In *HM Revenue and Customs and Steven Garwood* (not yet reported) Mr Registrar Baister conducted a thorough review of the authorities on section 271(3) and the question of when an offer to secure a petition debt is unreasonably refused, and gave a very helpful summary of the principle propositions that emerge.

19. The case concerned a petition presented by HMRC on 2 August 2010 against G for an undisputed debt of £58,432.

20. On the 9 September 2010 G's solicitors wrote to HMRC confirming that G was a joint owner of a property with Miss Thompson, giving approximate redemption figures for the existing charges and calculating G had equity in the region of £113,000 - 118,000 in the property. The letter stated G was prepared to offer a charge to secure the petition debt over his beneficial interest. The letter included office copy entries of the title and a valuation. The redemption figures were updated and confirmed in a letter dated 13 September 2010

21. The first hearing of the petition took place 20 September 2010. G's solicitor produced a witness statement which explained that the property was worth £390,000 - 400,000, that after taking account of charges G's share of the equity would be in the region of £114,000 and as a result of a dispute between himself and Miss Thompson there was already an order for sale dated 14 December 2009. The petition was adjourned for G to raise a loan against the property or for its sale and for the petition debt to be settled.

22. The second hearing took place on 1 November 2010. G's solicitor produced a second witness statement reporting that Miss Thompson had been ordered to give vacant possession of the property by 27 October 2010 and the property was on the market. The petition was again adjourned.

23. On 17 February G gave formal notice of opposition referring to the offer of security. On 18 February 2011 the third hearing of the petition was further adjourned. G's solicitor filed a witness statement stating that the asking price had been reduced to £385,000. At this stage it had emerged that Miss Thompson was bankrupt.

24. On 4 March 2011 the fourth hearing of the petition was adjourned to enable the petitioning creditor to consider the offer of security and for sale of the property. On 11 March 2011 HMRC wrote a letter rejecting the offer of security and asserting that a creditor was not obliged to take security offered by a debtor "however good it may be".

25. On 10 May 2011 the sixth hearing was adjourned for sale on a final basis.

26. On 5 July 2011 the seventh hearing as used as a directions hearing. G's solicitor filed a witness statement stating that the court had determined that the debtor had a 50% interest in the property and the debtor offered to pay £200 per week reduction in the balance pending sale. On 2 August 2011 the petitioning creditor filed their evidence in response. The evidence submitted refusal of the offer was not unreasonable because G had had a considerable amount of time to sell his property and the offer proposed would merely see HMRC rank alongside other charges pending sale.

27. On 5 October 2011 further directions were given at the eighth hearing, but which time Miss Thompson had been ordered to vacate the property within 14 days of service of the order and the price of the property had gone down to £365,000.

28. On 20 February 2012 the G's solicitor put in a final (eighth!) witness statement stating that the asking price had been reduced to a guide price of £300,000 - 350,000, that 3 offers had been made, the highest being £300,000, and that G could expect to receive £72,000 on sale.

29. At the final hearing HMRC submitted that (1) there was a history of delay (2) there was a history of disorder in G's tax affairs (3) G had had plenty of time to finance his tax debts and to sell his property but there was no guarantee as to when a sale would take place (4) HMRC had a statutory obligation to collect tax and was entitled to have regard to its own interests in how it did so and (5) HMRC did not have the resources to act as mortgagee and oversee a sale - its task was to collect tax and not act as lender.

30. Counsel for G relied upon the adequacy of the security, the fact that there was already an order for sale and the property was vacant and the fact that the duty to collect tax would be better served by a charge and sale since the recovery would be quicker and greater without the involvement of a trustee.

31. Mr Registrar Baister reviewed the authorities on section 127(3) IA 1986 including *Re a Debtor (No 32 of 1993)* [1994] 1 WLR 899), *HM Customs & Excise v Dougall* [2001] BPIR and *Ross v Revenue and Customs Commissioners* [2010] 2 All ER 126 and gave the principle propositions that emerged (non exhaustively) as (at para 23):

    (1) The starting point is to ask whether a reasonable hypothetical creditor in the position of the petitioning creditor would accept or refuse the offer, bearing in mind, however, that there could be a range of reasonable positions which such a creditor could adopt;
    (2) The test is objective;
    (3) It is necessary to consider the extent to which the reasonable hypothetical creditor may be taken to have the characteristics of the petitioning creditor;
    (4) The court must look at the position at the date of the hearing;
    (5) The court is not limited to considering the matters taken into account by the petitioning creditor when the offer of security was refused; it must look at all the relevant factors and their impact of the reasonable hypothetical creditor;
    (6) That includes the history;
    (7) The debtor must be full, frank and open in providing the necessary information to enable the creditor to make an informed decision;
    (8) A rigid institutional policy of rejecting offers to secure could be a relevant consideration, since the reasonable hypothetical creditor was obliged to consider an offer on its merits. "Coherent in-house policies" however, are not necessarily wrong.
    (9) A creditor is entitled to have regard to his own interests and is not obliged to "take a chance, or to show patience or generosity".
    (10) The costs and resources implications for the creditor are a "highly material consideration".

32. The Registrar then applied these principles. He found that HMRC's written rejection on 11 March 2011 was wrong on the law and appeared to have been a galvanic reaction reflecting "thoughtless bureaucratic inflexibility" with no thought having been applied to the merits of the proposal. It was therefore unreasonable in and of itself.

33. However, the Registrar accepted he should not look only at the reasons the petitioner gave for rejecting the offer but at the history and the present position.

    (1) He agreed that there had been history of delay and the number of adjournments was unusual but there was no indication of prevarication by G. On the contrary G had taken active steps through the courts and otherwise to sell the property and the most he could be criticised for was holding out at too high an asking price for too long. Further the offer of security in this case was different from that in Dougall and Ross because the offer was for an immediate sale and neither G nor any other person would be able to make any difficulty about an order for sale.

    (2) A history of disorder in G's tax affairs was not set out in the evidence but even if true it was a sign of incompetence and a far cry from the sort of fraud perpetrated in Dougall which the Registrar could readily accept would be a factor which a petitioner would be entitled to take into account in assessing a debtor's offer.

    (3) It was hard to see how HMRC would be put to any or any serious cost or would have to divert resources or act as mortgagee or administer the sale of the mortgaged property. Further the recent offers of purchase indicate that HMRC would not have to put up with the inconvenience of taking security for long, and if it appeared the sale would be protracted, it could exercise its right to seek an order for sale as well as its costs of the order and overseeing the sale all of which could be provided for in the charge together with any interest due.

    (4) While it is relevant that HMRC's primary function is to collect tax and it has a statutory obligation to do so, these considerations do not trump everything else, they are merely factors to be weighed in the balance: otherwise there would be no discretion to exercise.

    (5) The alternative to taking security is by making G bankrupt. If a bankruptcy order is made (a) A trustee would be appointed whose fees are likely to be not insignificant, (b) Ad valorem fees would have to be paid (c) the trustee might not seek a sale until one year after the vesting of the estate and (d) HMRC would be unsecured.

34. It was fairly certain that the bankruptcy costs would be greater than those attendant on the alternative and there was no countervailing benefit to bankruptcy because there was no indication HMRC sought an investigation of G's affairs or any antecedent transactions.

35. Applying the objective test the reasonable hypothetical creditor could have no basis for refusing the offer of security and pressing for a bankruptcy order, and subject to the terms of the charge being agreed and the charge being entered into (for which the petition was adjourned for a final time) the Registrar would dismiss the petition.

Income Payments Orders (IPOs): Is a bankrupt's undrawn pension entitlement 'income'?

36. The trustee's rights in relation to a bankrupt's pension schemes have undergone significant change in the last 15 years. First came the decision in *re Landau (A bankrupt)* [1998] Ch 223, in which Ferris J considered the question whether benefits under a pension policy which became payable after the bankrupt's discharge are payable to the bankrupt or to the trustee. He ruled that:

    (1) the bankrupt's bundle of contractual rights under a pension policy was a chose in action at the time of the bankruptcy order and therefore constituted "property" within section 436 IA 1986 which vested automatically in the trustee on his appointment pursuant to section 306 IA 1986. It did not matter that at the commencement of the bankruptcy nothing was immediately payable/recoverable by action, because at the time of the bankruptcy order the bankrupt had a

present right to compel the trustees of his pension to make payments under the policy in the future;
(2) Section 310 IA 1986 (as it then stood) does not apply to property or income which already vests in the trustee pursuant to section 306 IA 1986;
(3) Therefore the right to payment of the annuity payable under the policy vested in the trustee on his appointment and section 310 IA 1986 had no application to it when it became payable. Further, after the right to receive the annuity under the policy vested in the trustee he was the only person entitled to exercise the options conferred by the policy on the annuitant and could therefore exercise the option to commute part of the annuity into a lump sum.

37. Following this decision it became the practice of trustees to lay claim to a bankrupt's right in his pension and to exercise the rights of the bankrupt under the policy as they saw fit.

38. The decision prompted a legislative response in Section 11 of the Welfare Reform and Pensions Act 1999, which provides that (where a bankruptcy order is made against a person on a petition presented after the coming into force of the section) the bankrupt's rights under an approved pension arrangement are excluded from his estate. The "bundle of contractual rights" and benefits of the bankrupt's pension policy therefore no longer vests in a trustee upon his appointment but remains vested in the bankrupt.

39. At the same time the partial definition of the bankrupt's "income" in section 310(7) of the IA 1986 (dealing with IPOs) was amended to include:

" every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including…(despite anything in s 11 or 12 of the welfare Reform and Pensions Act 1999) any payment under a pension scheme…" .

40. It appears clear therefore that where a bankrupt has given notice to the pension fund of his election to take up his rights under the pension scheme, any lump sum or periodic payment he receives remains his property save to the extent that the trustee has obtained an IPO pursuant to section 310 IA 1986. Further, the right to elect when and how to draw his pension remains vested in the bankrupt.

41. However, the Chancery Division has recently considered the question of whether a debtor who had not yet elected to draw his pension could nevertheless be compelled to elect to do so for the benefit of his creditors in two decisions: *Blight, Meredith and Lewis v Brewster* [2012] EWHC 165 (Ch) (outside the insolvency regime) and *Raithatha v Williamson* [2012] EWHC 909 (Ch) (within the insolvency regime).

42. In *Blight, Meredith and Lewis v Brewster* [2012] EWHC 165 (Ch) the Court was called on to consider the question whether a judgment creditor (C) could execute against the judgment's debtor (D)'s right to draw down 25% of his pension as a tax free sum.

43. At first instance the District Judge had held that:

    (1) C could not apply for a third party debt order unless D had made the election to draw down the lump sum, because until that point there was no debt, and

    (2) there was no jurisdiction in the Court to force D to make an election to take his lump sum which was not in his financial interest.

44. On C's appeal, Gabriel Moss QC reversed the decision in the court below, ordering D to delegate to C's solicitor the power to make the election to draw the lump sum payment up to the amount needed to repay the balance of the judgment debt in D's name and restoring the third party debt order discharged below, to take effect from the moment that the debt created by the election to take the lump sum became effective.

45. The Judge started his reasoning from his impression that the contrary result would work a substantial injustice to C, and that the idea that D (a fraudster and forgerer) could enjoy an enhanced standard of living at his retirement instead of paying a judgment debt, where he had

the means of paying the debt simply by giving notice to his pension trustees, would be a very unattractive conclusion.

46. He relied heavily on the decision of the Privy Council in *Tarasarruf Mevduatii Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] KPC 17 concerning the analogous question whether the court had jurisdiction to order a debtor to exercise his power to revoke a trust so that he would recover from the trust substantial assets over which receivers appointed by way of equitable execution could take possession. The Privy Council considered that the jurisdiction to appoint a receiver by way of equitable execution was not limited to a chose in action presently available for legal execution but extended to whatever was considered in equity to be assets. The powers of revocation were such that in equity the debtor could be regarded as having rights tantamount to ownership over the trust assets. Further an injunction could be granted for the purpose of vesting the right of revocation in the receiver.

47. Gabriel Moss QC considered that, by analogy with this reasoning, D's ability to elect to take a cash payment from his pension was such that in equity he could be regarded as having a right to that lump sum tantamount to ownership of it and that a receiver could therefore be appointed over the right by way of equitable execution. In all the circumstances, it was not necessary to go to the disproportionate trouble and expense of appointing a receiver by way of equitable execution and force D to delegate his power of election to draw his lump sum to the receiver - instead the power could simply be delegated to C's solicitor.

48. In coming to this conclusion, the Judge refused to follow the decision in *Field v Field* [2003] 1 FLR 376, where the court had dismissed an application to enforce an order that a husband pay the wife a lump sum payment by an injunction or through a Receiver by way of equitable execution (remedies aimed at requiring the husband to elect to take a lump sum entitlement under a personal pension scheme) on the basis that (1) there was no income or property belonging to the debtor to "receive" and (2) such an injunction would be "a free standing enforcement procedure in its own right" not permitted by section 37 of the Supreme Courts Act 1981. Although the Privy Council in *Tarasarruf* had sought to distinguish *Field* (stating that the basis for characterisation of the injunction as "freestanding" in that case was not clear, but in the case before them such an order would be ancillary to the right of C as judgment creditors) in fact the two decisions were inconsistent and *Field* created a substantial injustice and should not be followed.

49. Further, the Judge considered that there was a strong principle and policy of justice to the effect that debtors should not be allowed to hide their assets in pension funds when they had the right to withdraw monies needed to pay their creditors.

50. D's counsel had urged the judge to the view that public policy requires pensions to be treated as exceptional when it comes to the execution of judgments in general. In support of this submission he pointed out that Parliament had seen fit in the area of bankruptcy to create special statutory protection for pensions. The judge rejected any such general policy relating to pensions, and said (at paragraph 72):

51. *"In my judgment, that suggestion is erroneous. A person who files successfully for bankruptcy surrenders all his assets, save those protected by law, to a trustee in bankruptcy for the payment of his debts. Filing for bankruptcy is a relief from the ability of creditors individually to execute upon the debtor's assets, in favour of collective execution. But this relief comes at a significant price. Bankruptcy carries very important disadvantages in terms of obtaining credit and acting as a director of a limited liability company, such restrictions being designed to protect the public. A judgment debtor in my view cannot have the benefits of bankruptcy without its burdens. If he chooses the advantage of not being bankrupt, for example because he considers himself to be solvent, then he must pay his debts or his assets (including contingent assets subject to some act on his part) will be amenable to the enforcement of judgments by individual creditors."*

52. The decision in this case implicitly acknowledged that in the bankruptcy context, a bankrupt's pension entitlement was not an asset which formed part of the bankruptcy estate available to creditors, and the answer would have been different had D been a bankrupt.

53. Shortly thereafter, in *Raithatha v Williamson* [2012] EWHC 909 (Ch) (4 April 2012), the court was called upon to determine whether an IPO could be made where the bankrupt had an entitlement to elect to draw a pension but had not exercised it at the date of the application i.e. could the court compel a bankrupt to make his election or authorise the trustee to exercise that power for him? *Brewster* does not appear to have been cited to the court, or was at least not considered in the judgment.

54. The facts were as follows: a bankruptcy order was made against Mr Raithatha (R) on 9 November 2010 (when he was 58 years old) and a trustee appointed the following day. The bankruptcy debts were in the order of £1,249,653.

55. R's most valuable asset was a bundle of pension policies and entitlements amounting to a fund estimated at between £900,000 and £990,000. Most of the policies were aggregated in a scheme run by the Berkely Burke Private Pension Plan. The rules of the scheme provided that the minimum age at which the pension could be taken was 55.

56. The trustee in bankruptcy made enquiries of the trustees of the pension fund and was informed R was entitled to a tax free lump sum of up to £248,708 (at the maximum level of 25% of the overall funds) and a pension from the residual fund which, depending on the type of pension selected, could be an annuity ranging from £23,000 - 43,000.

57. R had not exercised his right to draw his pension: he was still in work and had no intention to take his pension in the foreseeable future.

58. On 23 September 2011, 6 weeks before the date R was discharged from his bankruptcy, the trustee applied to the court for an IPO and an ex parte injunction restraining R from "taking any steps to activate, draw down, dispose of or otherwise howsoever exercise or deal with any of his rights, interests or entitlements whether to the payment of a lump sum and/or income, arising under any pension scheme of which he is a member or in which he has an interest". The injunction was granted by Norris J and continued by consent until the hearing.

59. Bernard Livesey QC (sitting as a Deputy Judge of the Chancery Division) was called on to consider whether pension entitlements which a bankrupt is entitled to receive but has not yet elected to receive constitute a payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled.

60. The trustee argued that R is properly to be regarded as having an entitlement to payment under the pension scheme when according to its rules he qualifies to draw payment and is entitled to receive it on demand.

61. R made six arguments in response as follows:

    (1) The decision of when and how to exercise the various options under his pension arrangement is a contractual right which forms part of the bundle of contractual rights which remains vested in the bankrupt. The trustee therefore has no right to interfere with those rights.

    (2) To constitute income payments must either have been received by the bankrupt or he must have become entitled to receive them during the period of his bankruptcy – the trustee cannot assert a claim where the entitlement to actual payment had not crystallised prior to discharge.

    (3) A bankrupt has no entitlement to receive a payment from his pension scheme until he has actually made the election to draw his pension.

    (4) The powers of the court under section 310(3) do not include a power to order a mandatory injunction to compel the bankrupt to make his election in a particular manner.

(5) The exercise of such a power would represent a wholly unwarranted interference with the bankrupt's property contrary to his rights under the European Convention on Human Rights 1950, particularly Article 1 of the first protocol.

(6) A lump sum payment under a pension scheme does not constitute a payment in the nature of income because it is a one of payment and not made 'from time to time' on a repeat or periodical basis.

62. The Court dealt swiftly with argument number (6), rejecting the submission that a one of payment cannot be income on the basis that it begs the question what it might be called otherwise, and also argument (5), finding there was no unjustifiable interference with his rights to property for the same reasons expressed by Chadwick LJ for rejecting an analogous submission in relation to the effect of section 310 generally in *re Malcolm* [2005] I WLR 1238.

63. As to the remaining submissions, the judge first indicated that there was no authority on the issue and no analogous authority from which a clear guide could be found. The answer therefore depended on the proper interpretation of the words in the context of the statute and what it could be deduced was the intention of the legislature.

64. He rejected argument (1) on the basis that, while pursuant to section 11 the whole bundle of contractual rights including the right to make an election vested in the bankrupt, section 310(7) gave the Court of the power to make an IPO in respect of a pension entitlement "despite anything in section 11…", which could not be read as "despite anything except the right of the bankrupt to make an election".

65. The judge then applied an extremely purposive approach to construction of the statute. He accepted that the submission that there was no entitlement to payment because there had been no express election appeared initially to be attractive, but the question has to be asked whether the intention of the legislature was to preserve a technical difference between a person whose election had preceded his bankruptcy and who would be brought into the section 310 regime, and the person who had not yet elected to draw his pension, who would not.

66. He was puzzled as to why the legislature should want to preserve a distinction which would provide an anomaly which is difficult to justify. He could think of no reason of policy, nor was one suggested to him, that a person who elected on the day preceding his bankruptcy should be in a position where his entitlement to enjoy the fruits of his pension is liable for it to be subject to the right of the trustee to apply for it to go to his creditors under section 10 whereas the person who has not yet done so is immune from the impact of the section and can enjoy the full fruits of his pension to the detriment of his creditors. The creation of such an anomaly would be to discriminate in favour of a class of bankrupts those who happened not to have made an election) without any reason or justification.

67. The judge was therefore driven to the view that the trustee's contentions were correct and that the proper interpretation of section 310(7) is that **a bankrupt does have an entitlement to a payment under a pension scheme not merely where the scheme is in payment of benefit but also where, under the rules of the scheme, he would be entitled to payment merely by asking for payment.**

68. The remaining question for determination was whether the ex parte injunction should be discharged on the basis that it should never have been ordered in the first place. The judge considered that the trustee had adduced sufficient evidence of behaviour by R to demonstrate a risk of dissipation of some part of the pension rights by some act of ingenuity on the part of R and that the behaviour was sufficiently devious and contrived to demonstrate urgency of sufficient seriousness to justify the ex parte application. The injunction was continued until the proceedings were finally determined.

69. As a matter of statutory interpretation, it is not entirely clear that the result in *Raithatha* was intended by the legislature. One might legitimately ask what was the point of deliberately enacting section 11 to ensure that the contractual rights under a pension remained in the bankrupt if the bankrupt could nonetheless be compelled to exercise them in a particular way by

the Court at the behest of his trustee? The obvious possibility is to ensure that the question of how much of the bankrupt's pension entitlement falls to be divided among his creditors will be decided by the Court as part of the balancing exercise required under section 310 IA 1986 rather than by the trustee as was the case when it was considered that those rights actually vested in him from his appointment.

70. As a matter of fairness it is suggested that a debtor, whether bankrupt or not, should not be entitled to "hide" assets to which he was immediately entitled in a pension scheme to the detriment of his creditors. Indeed, as a matter of principle this seems little different from hiding assets by placing them in the name of another or in an off shore bank account or behind a loose brick in the chimney breast.

71. However, the two scenarios differ at least to this degree: in the latter the debtor is deliberately taking an asset which would be otherwise available to creditors and putting it beyond their reach, whereas in the former the debtor is choosing when and how to realise a future asset in the most beneficial way for their retirement - the creditor position may have no bearing at all on this decision: in this situation the concept of "hiding" assets from creditors is not particularly apt.

72. While it might be considered that the distinction between the person who happens to have begun to draw his pension and the person who has not is arbitrary, the law is of practical necessity full of such arbitrary cut off lines e.g. the "relevant time" in preference and undervalue claims. It is arguably equally arbitrary that the pension entitlement of a bankrupt who turns pensionable age the day after his discharge is not treated as income whereas if he just happened to be one year older it would be. Further, once the entitlement to elect to receive a payment is treated as income, there are difficult questions of degree, for instance: many pensions can be cashed in at any point - but would anyone suggest that because a bankrupt is entitled to realise the value of his pension at anytime should he wish that the 'entitlement' to this 'cash in value' should be treated as income?

73. There are at least two possible policy reasons to treat a pension entitlement differently from a pension which is actually being drawn: the first is autonomy. Being forced to exercise rights under a pension in a certain way, which will affect a person significantly for the remainder of their life, is a significant invasion to their general autonomy to plan their affairs, whereas if a person is already in receipt of their pension there is no such issue.

74. A second possible policy reason is the desirability of encouraging financial independence in the elderly. A pension is carefully built up over many years of work in order to place a person in the best possible financial position for his dotage, a time of financial vulnerability. Many people have pension schemes which can be drawn from 55 but either chose to or have work until the age of 65+ in order to be in a financial position to retire. Arguably, continuing to work and contribute to one's pension rather than to retire and draw one's pension is responsible behaviour which society should encourage: it means more years of tax contributions and less concern that an aging population won't have the resources to support itself.

75. The decision is being appealed.

Can an IPO be made in the absence of tangible benefit to creditors?

76. In *Official Receiver v Negus* (Chancery Division, Newey J, 16 December 2011) the Official Receiver sought an income payments order against the bankrupt for £40 pcm, being half of the difference between his income and expenses.

77. At first instance an order was refused, because the entirety of the sums generated would go to discharge bankruptcy expenses, and the creditors would receive nothing.

78. Newey J allowed the Official Receiver's appeal. The fact that the sums would discharge expenses only was not a ground to refuse to make the order, as

    (1) The foundation of the order under s.310 of the Insolvency Act 1986 made no reference to a benefit to creditors,

(2) it was as impotent to discharge the expenses as well as debts, since the expenses had priority; and

(3) public policy was that a bankrupt should not be discharged from his debts without some obligations.

Realising the Assets: Possession and Sale Applications and Human Rights

79. Those with a minimal experience of dealing with applications for an order for possession and sale of the bankrupt's matrimonial home made more than one year after the Trustee's appointment (and hence where the interests of creditors will be deemed to prevail in the absence of exceptional circumstances by virtue of s 335A(3) IA) will be more than familiar with the frequent complaint that such order is incompatible with the non-bankrupt spouses rights under Article 8 of the European Convention on Human Rights.

80. In *Ford v Alexander* [2012] EWHC 266 (Ch), following the making of a suspended possession order of 6 weeks, Peter Smith J had recourse to reconsider the compatibility of these provisions in the context of a review of his own decision to grant permission to appeal listed on his own motion, having discovered that the appellants not only had a Civil Proceedings Order made against them by the Court of Appeal but had had any application for stay refused by Mann J the previous day.

81. The case concerned an application by the Trustee for an order of possession and sale of the bankrupt's matrimonial home, a garage/outbuilding which had been converted into a studio flat and which had the benefit of retrospective planning permission for use as a dwelling, conditional upon the property being occupied by at least one of the Appellants.

82. The property was the Bankrupt's sole asset and, if sold, was anticipated to enable a distribution to be made to creditors in the region of 20p in the £. The Trustee therefore sought immediate possession.

83. In opposition, the Appellants submitted that s 335A(3) IA required to be read in line with Art 8 ECHR, contended that the sale of the property was disproportionate and sought to remain indefinitely, arguing with reference to their medical conditions that they would lose their only home, would not be accepted as homeless and not meet the definition of priority as they were childless and not vulnerable, and would have difficulty finding private rental accommodation (particularly in the area) due to the need to house their fish and terrapins. However, the Appellants had made no attempts to find alternative property.

84. At first instance, District Judge Lambert held that:

(1) s 335A IA was not disproportionate or incompatible with Article 8 ECHR and did not require her to operate a different exercise from the wording of that section;

(2) the evidence of the Appellants did not demonstrate any exceptional circumstances for the purposes of s 335A(3) IA. Accordingly, the interests of creditors required a sale;

(3) if she was wrong on the alternative argument put forward by the Appellants in that s 335A needs to be modified to apply a proportionality test for the order for sale, it was not disproportionate to order a sale on the facts.

85. The Appellants sought to appeal the decision on three grounds:

(1) DJ Lambert failed to read and apply s 335A in compliance with s 3 and 6 of the Human Rights Act 1998;

(2) DJ Lambert failed to find that "unless the circumstances of the case were exceptional" should be read "unless the circumstances of the case were such that it would be disproportionate to do so";

(3) DJ Lambert failed to find the Appellants' circumstances 'exceptional' in the sense that it was disproportionate to order a sale;

(4) Insofar as DJ Lambert purported to apply the proportionality principle, she failed to do so because:

(i) she wrongly concluded that applying the principle would mean that the Trustee would never be able to realise the interest in a bankrupt's home; and

(ii) she failed to balance the serious harm caused to the Appellants by the making of the order against a slight potential gain to the creditors.

86. Peter Smith J considered that these grounds of appeal were based on a misunderstanding of the District Judge's judgment; she firstly considered the facts of the case on the basis that the proportionality test did not require Article 8 to be read into s 335A and then reconsidered all the facts as if it did. On both bases, it was concluded that the interests of the creditors should prevail. On the facts of the case there were no grounds for interfering with that conclusion.

87. Though not strictly necessary to do so, the learned Judge went on to express a view on the application of Article 8 ECHR and the jurisprudence in relation thereto to s 335A IA.

88. Firstly, he noted that the decision of the Supreme Court in *Manchester City Council v Pinnock* [2010] UKSC 45 (in which it was held that on the application of a local housing authority for a possession order against the secure tenant of a dwelling house of which it was the landlord pursuant to s 143D of the Housing Act 1996, the court had to have the power to assess the proportionality of making the order and determine any issues of fact relevant for the purpose of that exercise) did not apply to possession proceedings brought by a private landowner, as expressly stated in the judgment of Lord Neuberger.

89. Secondly, he considered the decision of the European Court of Human Rights in *Zehentner v Austria* (app no 2008/02 16 July 2009) in which an order had been made evicting the Applicant from her home following a judicial sale carried out after the making of the Austrian equivalent of a charging order. The judicial sale of the applicant's apartment was authorised on the basis of a payment order which had been issued in summary proceedings. At the date of the sale, the Applicant lacked legal capacity. Section 187 of the Enforcement Act provided that only persons who had been present at the judicial sale or had erroneously not been summoned had a right to appeal within 14 days from the date of the auction. In contrast to the views expressed by legal writers, it was the Supreme Court's established case-law that this time-limit was absolute and, therefore, also binding in a case like the present one where the debtor had not been capable of participating in the proceedings and had not been represented.

90. On the facts, it was held that there had been a violation of Article 8 because there was a lack of procedural safeguards. The Austrian government's arguments that the time-limit served to protect the bona fide purchaser and the general interests of an efficient administration of justice and of preserving legal certainty were deemed insufficient to outweigh the consideration that the Applicant, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts.

91. Peter Smith J concluded that *Zehentner* could be distinguished from the position under English law because the circumstances of that case were extremely unusual. Section 335A (2) and (3) provide a necessary balance between the rights of creditors and the respect for privacy and the home of the debtor which serves the legitimate aim of protecting the rights and freedoms of the others. Accordingly, the provisions satisfied the test under Art 8(2) of being necessary in a democratic society and are proportionate.

92. Finally, the Judge considered the application of s 89 of the Housing Act 1980, which provides as follows:

(1) Where a court makes an order for the possession of any land in a case not falling within the exceptions mentioned in subsection (2) below, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order.

(2) The restrictions in subsection (1) above do not apply if—
(a) the order is made in an action by a mortgagee for possession; or
(b) the order is made in an action for forfeiture of a lease; or
(c) the court had power to make the order only if it considered it reasonable to make it; or
(d) the order relates to a dwelling-house which is the subject of a restricted contract (within the meaning of section 19 of the 1977 Act); or
(e) the order is made in proceedings brought as mentioned in section 88(1) above.

93. It was suggested by the Judge that this provision would apply to the possession application of a trustee in bankruptcy, although that question (together with whether Art 8 could be relied upon to extend the 6 week period) was not ultimately determined.

94. On a literal interpretation, given that s 89 is expressed to apply to an order for the possession of any land other than those specifically exempted by subsection (2), which generally includes claims governed by other legislation, it would appear that an application under s 335A would equally be caught.

95. Nevertheless, given that the 1980 Act was primarily directed at public sector housing, as well as the numerous reported bankruptcy cases in which the court has suspended possession for significant periods (in particular where exceptional circumstances have been found), the better view is probably that the court's discretion on any application where s 335A is engaged is unfettered.

B Corporate Insolvency

Presenting the Winding Up Petition: Disputed Debt

96. The test applied by the Companies Court on the application of a debtor company to restrain the presentation or advertisement of a winding up petition has been expressed in a variety of different ways by the court (cf *Re a Company (No 10656 of 1990)* [1991] BCLC 464, *Re a Company (No 6685 of 1996)* [1997] 1 BCLC 639). However, it is generally accepted that a winding up petition is inappropriate where the petition debt is genuinely disputed on substantial grounds. In practice, the exercise for the court has been considered as being akin to that adopted on an application for summary judgment under CPR 24.

97. However, in two recent decisions of the Court of Appeal has appeared to suggest that the relevant test may be somewhat lower than first considered.

98. In *Argentum Lex Wealth Management Limited v Giannotti* [2011] EWCA Civ 1341, Longmore LJ sought to identify "the appropriate test for the Companies Court to apply when an application is made either to set aside a statutory demand or for an injunction to restrain a presentation of a petition for winding up."

99. The reference to setting aside a statutory demand is somewhat curious, given that there is no provision comparative to r6.5 IR (application in bankruptcy proceedings to set aside statutory demand) in the context of compulsory winding up.

100. The learned Judge considered the decisions of Harman J in *Re A Company* [1991] BCLC 737 and Sir Andrew Morritt C in *Abbey National v JSF Finance* [2006] EWCA Civ 328, in seeking to ascertain the distinction between raising a substantial dispute and the test for summary judgment, and concluded that it was:

"not very different from the test for granting judicial review applications in the administrative court or granting permission to appeal to this court from a court of first instance, viz that there should be a realistic prospect of success."

101. It is unclear whether the court was made aware of its earlier decisions in *Ashworth v Newnote Ltd* [2007] EWCA Civ 793 and *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643, in which it was held that the difference between the test under r 6.5(4) IR (genuine triable issue) and CPR 24 (real prospect of success) involved "a sterile and largely verbal question", and that there is no practical or material difference between the two.

102. More curious is the reference to the test applicable on applications for permission to apply for judicial review, which requires that the court considers, on the material then available, that there is an arguable case for granting the relief sought by the claimant (*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617), although it may be that this test nonetheless requires a realistic prospect of success (*Antoine v Sharma* [2006] UKPC 57, [2007] 1 WLR 780).

103. In any event, in granting an injunction, the Court concluded that the points of dispute advanced by the applicant were "susceptible of argument" and should be "matters for proper argument in front of a chancery judge at the appropriate time and should not be dealt with by the kind of side wind that the Companies Court operates by way of its jurisdiction in setting aside statutory demands or granting injunctions to restrain petitions for winding up."

104. In all the circumstances, it is not immediately clear whether the court was advocating a lower threshold test be applied in respect of arguments that are arguable though fanciful.

105. In *Tallington Lakes Ltd v South Kesteven District Council* [2012] EWCA Civ 443, Etherton LJ revisited the matter on an oral renewal of an application for permission to appeal the decision of Norris J refusing dismissing an application for an injunction to restrain the presentation of a winding up petition.

106. A council threatened to present a winding up petition against a company in respect of a liability under a costs order in the sum of £9,433 made in previous winding up proceedings relating to non-payment of non-domestic rates. On 18 January 2010, the company applied for an injunction to restrain presentation of a winding-up petition. On 1 February 2010 Briggs J ordered that provided that the company had paid its outstanding liability in cleared funds by 5 February 2010 and upon the council's undertaking not to petition until the return date, the application should be listed for a final determination as an application by order.

107. The evidence of the company was that a cheque in that sum of £9,433.07 was sent to the council on 4 February 2010. The evidence of the council was that the cheques was not received until 8 February 2010 and banked on 9 February 2010. It was not in dispute that interest on that sum remained outstanding at the date of the hearing of application before Norris J on 14 January 2011, by which date judicial review proceedings in respect of certain liability orders made in 2009 had been concluded in favour of the company.

108. At the hearing of the company's application to restrain presentation of the winding up petition Norris J was required to deal with the issue whether there (1) there was a real prospect of the company successfully challenging liability orders made in 2008; and (2) whether there was a bona fide dispute over the amount of interest due under the costs order.

109. Norris J concluded that there was no real prospect of challenging the 2008 orders by reason of lapse of time and that the company was therefore a creditor of the council.

110. As to the interest point, the company argued that interest ceased to run on the day on which the cheque was posted to the council (i.e. 4 February 2010). The Judge rejected that argument, holding that a judgment debt was not paid or satisfied until the judgment creditor was in possession of cleared funds; and there was no suggestion that the cheque cleared through the company's account on any date earlier than 11 February 2010 by which date the

interest due on the costs liability exceeded £750. Were it necessary to do so, he would have held that the interest liability was also a debt in respect of which the Council was a creditor and which was not subject to any bona fide dispute on substantial grounds.

111. Etherton LJ refused permission to appeal that decision, holding that Norris J's decision on the interest point was correct. However, he noted that he would have been minded to hold that the company had a real prospect of successfully challenging the 2008 orders, stating:

"I have to emphasise, however, in this context that it is well established that the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one for restraining the presentation of the winding-up petition, and may be reached even if, on an application for summary judgment, the defence could be regarded "shadowy"."

112. At first blush, it is tempting to conclude that the test applicable on an application to restrain a winding up petition is lower than that applied on a summary judgment. However, it is suggested that the better view is that the decision merely reaffirms that where the substance of the debt is genuinely disputed, procedural difficulties in resolving the dispute should not prevent the debtor from avoiding the draconian consequences of insolvency proceedings.

113. It should also be noted that a judgment on an application for permission to appeal may be cited as authority only may be cited only if it contains an express statement that it either establishes a new principle or extends the present law (*Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001). Nevertheless, Etherton LJ's opinion is likely to be highly persuasive.

Administration to Voluntary Liquidation: a seamless transition?

114. Under the pre-Enterprise Act regime it was possible for a company to move easily from an administration into a compulsory winding up but oddly difficult to move into a voluntary winding up (this involved a conditional discharge order pending the winding up resolution being brought back to court and either the setting up of a trust to pay preferential creditors or a judicial direction to the liquidator to pay them on the same basis as would apply on a compulsory liquidation) The advent of the Enterprise Act was supposed to herald a new regime eliminating these obstacles and laying down a straightforward procedure for the move from administration into a CVL.

115. This is effected by Para 83 of Schedule B1 IS 1986 which provides (in so far as relevant):

"(3) The administrator may send to the registrar of companies a notice that this paragraph applies.

(4) On receipt of a notice under sub-paragraph (3) the registrar shall register it.

…..
6) On the registration of a notice under sub-paragraph (3) –
(a) the appointment of an administrator in respect of the company shall cease to have effect, and
(b) the company shall be wound up as if a resolution for voluntary winding up under section 84 were passed on the day on which the notice is registered."

116. In *Re E Squared* [2006] EWHC 532 (Ch), David Richards J held that a para 83 notice was effective to bring about a CVL provided only that the administrators were still in office when they sent the notice, and it mattered not that it was either received or acted upon by the Registrar after the administrators' period of office had come to an end. However, David Richards J was not asked to decide whether, in such circumstances, there was a gap between the end of the administration and the commencement of the liquidation (the "gap problem"). He did express his opinion (obiter) that paragraph 83 envisaged a smooth transition between administration and CVL with no hiatus and the effect of paragraph 83 might

be to extend the administrators powers of office to a point co-incident with the onset of the liquidation.

117. The gap problem is relevant because important consequences flow where a CVL immediately follows an administration namely:

(1) There is continuity in control of the company's affairs by office holders, rather than control reverting to any officers of the company who have not by then resigned.

(2) The relevant time (as defined) for the purposes of transaction avoidance provisions in relation to the subsequent liquidation is computed backwards from the date of the commencement of the administration rather than the liquidation (s240(3)(d) IA 1986).

(3) The relevant date (as defined) for the determination of the existence and amount of preferential debts is, in respect of the subsequent liquidation, the date when the company entered administration (s387 (3) (ba) IA 1986).

(4) The cut off date for the identification and quantification of provable debts for the purposes of the liquidation is the date upon which the company entered administration (r13.12 IR 1986).

(5) The relevant date for the calculation of interest is identified in the same way (r4.93 (A1) IR 1986).

118. The gap problem was considered head on by Briggs J in Cartwright and Oakley Smith (joint liquidators of *Globespan Airways Ltd) v The Registrar of Companies* [2012] EWHC 359 (Ch).

119. The facts were somewhat unusual: Globespan Airways Ltd (the Company) was placed in administration by court order with effect from 17 December 2009. The administration was therefore due to end on 16 December 2010. On 13 December 2010, the three joint administrators, Messers Cartright, (C) Smith (S) and Frost (F), signed a para 83 notice (in form 2.34B) stating that para 83 applied and proposing that C and S be liquidators of the company. The notice was hand-delivered to the Registrar on 14 December.

120. However, by a letter dated 16 December 2010 (which was received by the administrators only on 29 December), the Registrar rejected the notice on the grounds that it was incomplete because the addresses of the proposed liquidators had been omitted (although they were the same as the administrator's addresses which had been included).

121. The former administrators filed a second notice on 6 January 2011, which was also rejected by the Registrar on the erroneous grounds that he had no record of the Company's administration. Eventually, a third identical notice was submitted, and was finally registered on 4 February 2011 and the records at Companies House purported to show that the administration ended, and the CVL began on 4 February 2011.

122. The former administrators applied for directions.

123. Briggs J first considered as a preliminary issue whether the omission of the liquidator's addresses in section (e) the notice meant it was not duly delivered at all. He concluded it did not since the addresses were elsewhere on the notice.

124. On the gap problem, Briggs J noted (without criticism) that it took on average 3 working days from receipt of a para 83 notice for the Registrar to process the registration. Three alternatives were suggested to the court:

(6) Read references to the day on which the notice is registered as being a reference to the date of the receipt of the notice because that is that date with effect from which the notice is required to be registered (ignoring any administrative delay);

(7) Alternatively, if the date of registration cannot be read as being earlier than the date when the administrative process of registration is complete, treat the paragraph as extending the terms of the appointment of the administrators until that date; or

(8) Accept that the day on which the notice is registered is the date when the administrative process is complete and if that creates a gap, it cannot be avoided.

125. The Judge took a purposive approach to the interpretation of para 83. In view of the important consequences that flow from a "gapless" progression from administration to liquidation, the Judge considered that the primary objective of para 83 was to provide a simple and inexpensive means whereby administrators may, in the prescribed circumstances, move the company seamlessly from administration into CVL. A subordinate purpose is that this important change in the company's status should be recorded at Companies House when the change occurs, maintaining the transparency of the register.

126. Alternative (3) did not fulfil the primary purpose. Alternative (2) (treating paragraph 83 as extending the administration) would fulfil the primary purpose but runs contrary to the scheme of the act which requires an administrator's term of appointment to be extended by court order (and once by the consent of the company's stakeholders). It would also fulfil the secondary purpose in that the CVL would not commence until the entry of the notice on the searchable register, but certainty as to the company's status during the gap would be undermined because the public would think that the administration had terminated by effluxion of time.

127. Alternative (1) was preferable. To give effect to the primary purpose and regardless of when the administrative steps necessary for registration were completed, para 83(4) should be interpreted as requiring registration of the notice with effect from the day of receipt, so that the phrases in para 83(6) "*on the registration of a notice" and "on the day on which the notice is registered*" are treated as references to the effective date of registration, i.e. the date of receipt of the notice. This is similar to the position under the Land Registration Act 2002 which provides that the registration of a disposition takes effect from the date the application reached the Land Registry and not the date the formalities to the register are completed.

128. Briggs J ordered the Registrar to remove from the register the entries referring to the invalid notice showing the date of 4 February 2011 (invalid because it was sent after the administrator's appointment had ended), and require the registration of the first notice, with effect from 14th December 2010, with permission for any person wishing to argue against such registration to apply within six months. He sounded a note of caution that the solution in this case should be considered on its own facts, and may not be appropriate in every case where registration of a duly delivered notice has wrongly been refused (in particular in this case ironically the public had had some notice that the company had gone into CVL from 4 February 2011 because of the registration of the invalid later notices, but there may be harder cases where no such even partial notice has been given);

129. This decision has already been followed in Principle Leisure Midlands Limited on 13 April 2012.

130. The Registrar has issued an appellant's notice in relation to the interpretation of para 83, and this is before the CA, with a decision on permission currently awaited

131. Companies House have issued a notice on their website to the effect that, pending the appeal in this case on the interpretation of para 83, it will continue to process new para 83 notices in accordance with it pre-existing policy (i.e. the registration dates and the liquidation commencement dates showing on Companies House search products will continue to be the date on which a Form 2.34B was actually registered and not the date on which it was received). Anyone wishing to know the date of receipt of the Form 2.34B can find it in the document's barcode once the image is purchased. However, pending clarification by the CA, consequential forms and filings (e.g. Form 600 (Notice of Appointment of Liquidator)) that refer to either the date of receipt or of registration as the commencement of the liquidation will be accepted.

Secured Creditor Claims: Surrender of Security & the Prescribed Part

132. A major reform brought about by the Enterprise Act 2002 was to improve the position of unsecured creditors of insolvent companies by abolishing the Crown preference and directing that a fund be set aside from the net realisations of property subject to a floating charge for the benefit of unsecured creditors.

133. In consequence, by s 176A(2) IA, where a company enters administration or liquidation the office holder must make a prescribed part of the company's net property available for the satisfaction of unsecured debts, and must not distribute that prescribed part to the proprietor of a floating charge except in so far as it exceeds the amount required for the satisfaction of unsecured debts.

134. It is well established that the prescribed part is only available to unsecured creditors as such and therefore is unavailable to secured creditors even in respect of the unsecured portions of their debts (*Re Airbase (UK) Ltd* [2008] EWHC 124 (Ch), [2008] 1 WLR 1516).

135. However, it is accepted that it is accepted that a secured creditor who voluntarily surrenders his security for the general benefit of creditors is thereafter entitled to prove for his whole debt as if he were unsecured and hence to participate in the prescribed part (Re *PAL SC Realisations 2007 Ltd* [2010] EWHC 2850 (Ch), [2011] BCC 93; r 4.88(2) IR). In *Re J T Frith Ltd* [2012] EWHC 196 (Ch), the court considered the steps that would be sufficient to constitute surrender for this purpose.

136. The case arose out of the finance by Bank of Scotland, a private equity company (Graphite) and a number of individual investors (the Individual Investors) of the purchase of the shares in J T Frith Limited (the Company) by J T Frith Group Limited (Group).

137. The Individual Investors provided funding by purchasing loan notes issued by Group. The loan notes were secured by way of Guarantee and Debenture given by the Company to Graphite as security trustee for itself and the Individual Investors.

138. The Company also granted a debenture to Bank of Scotland. By an Intercreditor Deed, Bank of Scotland's debenture took priority over Graphite and the Individual Investors' security interests.

139. The Company entered administration and the administrators sold its assets to a third party. After the administrators set aside the prescribed part there were insufficient net sale proceeds to discharge the Bank of Scotland's debenture. Accordingly, there was no distribution made to Graphite. The Company was thereafter placed into creditors' voluntary liquidation.

140. The Applicant was one of the Individual Investors. He submitted a proof of debt in the liquidation in which he failed to disclose that he held any security in respect of the loan notes. The administrators rejected the proof of debt on the basis that the Applicant was a secured creditor and thus prohibited by s 176A(2) IA from sharing in the prescribed part, the Company's only remaining asset.

141. The Applicant applied to the court to participate in the prescribed part. In substance, his application was an appeal against the rejection of his proof. He argued that he had voluntarily surrendered his security in three ways:

    (1) By r 4.96(1) IR, if a secured creditor submits a proof of debt and omits to disclose his security "he shall surrender his security for the general benefit of creditors," subject to his right to apply to the court for relief from the effect of the rule on the ground that the omission was inadvertent or the result of an honest mistake. The effect of the Applicant's proof of debt was that his security was automatically surrendered.

    (2) The Applicant's witness statement in support of his application, in which it was stated "I have relinquished my status as a secured creditor" amounted to a release and surrender of security;

(3) The Applicant had in any event surrendered his security by a Deed of Release.

142. HHJ Keyser QC noted that there were two potential constructions of r 4.96(1), namely that where a creditor fails to disclose his security in his proof of debt he *must* surrender it, or that he *thereby* surrenders it. Whilst both were consistent with the express wording, having considered the equivalent provision in the Companies (Winding-up) Act 1890, the Judge preferred the latter construction, such that the effect of r 4.96 is automatic. Accordingly, the Applicant was no longer a secured creditor and was entitled to participate in the prescribed part. The Judge rejected the suggestion that this infringed the requirement that any surrender of a security interest must be in accordance with s 53(1)(c) of the Law of Property Act 1925 requiring the disposition to be made in signed writing, but considered in any event that a signed proof of debt which did not disclose a security interest would be sufficient for the purposes of that section.

143. Whilst, the judge rejected the submission that the witness statement was sufficient to comply with s 53(1)(c) of the Law of Property Act 1925 because it was merely a statement of past fact. However, he noted that the requirements of that section were not onerous and that it was not too late to comply with them if necessary. Unless the security had already been partially enforced, it was inappropriate to refuse the proof of debt.

144. Finally, the judge also found that the Deed of Release was also sufficient to effect a surrender of the Applicant's security interests.

145. The administrators raised one further concern. Under the Intercreditor Deed, which subordinated the rights of those interested under Graphite's charge to those interested under the Bank of Scotland charge, it appeared that any recoveries made by the Individual Investors had to be paid to the Bank of Scotland. As the Bank of Scotland had already relied on its security, it was not entitled to prove as an unsecured creditor for the balance and participate in the prescribed part. Accordingly, it was argued that permitting the Individual Investors to participate in the prescribed part would be both contrary to the policy of the Insolvency Act 1986 and the specific terms of s 176A(2)(b).

146. However, the Judge held that the subordination agreement between the Individual Investors and the Bank of Scotland was simply a matter of contract as between those parties and did not affect the Applicant's right to participate. Properly construed, the Intercreditor Deed did not require sums to be paid directly by the administrators to Bank of Scotland and in any event, to permit a right of subrogation to short-circuit a sequence of payments would offend neither against the terms nor the policy of the Insolvency Act 1986.

Misfeasant Directors

147. Section 212 of the Insolvency Act 1986 provides to liquidators a summary method of attacking those responsible for the misapplication of corporate property or causing a loss to the company through a breach of duty, irrespective of the solvency of the company at that time. This is frequently a useful tool to recover sums for the benefit of creditors, in particular in the context of solely owned companies where the director(s) have treated the company as their own personal business. In *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), Newey J grappled with a number of factual allegations against the former directors of the company and gave some guidance in respect thereof of particular use to office holders.

Directors' loan account

148. The substantive claim against the former directors (Mr and Mrs Maroo) concerned their use of the directors' loan account (DLA) which, it was alleged, contained considerably more transactions than would typically be expected to be accounted for through that account for a business of that size and nature. In the relevant period, debit entries totalling approximately £1.3m were made to the DLA, representing in particular cash withdrawn and the directors' receipt of sums owing to the company. At the same time, credit entries in the sum of approximately £1.29m were made to the account. The company challenged many of the credit entries.

149. Considering the relevant burden of proof, having regard to the recent decisions in *Burke (Liquidator of Idessa (UK) Ltd) v Morrison* [2011] EWHC 804 (Ch), [2011] BPIR 957 and *Re Mumtaz Properties Ltd, Wetton v Ahmed* [2011] EWCA Civ 610 (both decisions concerning applications by liquidators), Newey J noted that, whilst the burden is on the liquidator to prove that a company director has received company money, it was for him to show that the payment was proper. Accordingly, where debit entries have correctly been made to a directors' loan account, the burden is on the director to justify credit entries on the account.

150. On the facts, the director substantially failed to discharge the evidential burden of satisfactorily justifying the credit entries on the DLA.

Preference Payments

151. The directors were also directors and shareholders of Brocade International Ltd (Brocade), to which it was alleged that the company was indebted in the sum of £412,000. The directors caused the company to enter into an agreement with Brocade for the sale of stock on the basis that the purchase price would be set off against the sum owed to Brocade.

152. The company contended that the directors and Broacde were liable in damages and/or to compensate the company and/or to account for the value of the misappropriated stock and/or the sale was liable to be set aside, on the grounds that:

    (1) in causing it to sell stock to Brocade, the directors acted to advance their own interests in breach of fiduciary duty;

    (2) the company was at the relevant times insolvent (or at least of doubtful solvency or on the verge of insolvency), with the result that the company's interests fell to be identified with those of its creditors (*West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250; *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCLC 153).

    (3) the directors improperly exploited for their own benefit an opportunity which they ought to have pursued, if at all, for the benefit of the company.

153. The court noted that, whilst in *West Mercia* the Court of Appeal had held that a director responsible for a fraudulent preference was guilty of misfeasance, the courts have been less ready to impose a liability on a director if the circumstances are such that no statutory remedy would be available, for example because the preferential payment was not made at a relevant time for the purposes of s 239 IA (cf *Knight v Frost* [1999] 1 BCLC 364, *Re Continental Assurance Co of London plc (No 4)* [2007] 2 BCLC 287).

154. Newey J considered that in this context it is necessary to distinguish the questions of breach and remedy. Since a director has a statutory duty to promote the success of the company for the benefit of its members as a whole (s 172 Companies Act 2006), where creditors interests are relevant, it will be a breach of that duty to advance the interests of a particular creditor without believing the action to be in the interests of the creditors as a class. Whether or not s 239 IA is in point cannot be determinative since a director responsible for a fraudulent preference will not necessarily commit a breach of duty (cf *Re Brian D Pierson (Contractors) Ltd* [2001] BCLC 275) and the fact that the conditions laid down by s 239 IA are not all met should not, of itself, preclude a finding of breach of duty.

155. Conversely, the applicability of s 239 IA may have a bearing on what, if any, remedy is available in respect of the breach of duty. Accordingly, where a factual preference is not caught by s 239 IA, it will be necessary to demonstrate that:

    (1) the company has suffered loss;
    (2) the director has profited (so that the "no profit" rule operates); or
    (3) the transaction in question is not binding on the company.

156. In a typical case, it may be impossible to establish that the company has suffered any loss as a result of a preferential payment since the company's balance sheet position is likely to be unaffected.

157. Moreover, it may be problematic to establish breach of the no profit rule where the company has not entered an insolvency regime. If the preference involved the discharge of a debt owed to a director, it could be hard to say whether or to what extent the director was better off than he would have been if he had still been owed the money by the company.

158. Finally, where a director has caused a company to enter into a contract in pursuit of his own interests, and not in the interests of the company, its members or (where appropriate) its creditors as a class, and the other contracting party had notice of that fact, the better view was that that contract was void (and not merely voidable). In consequence, the requirements of s 239 are irrelevant.

159. On the facts, the court concluded that the directors acted in breach of fiduciary duty in causing the preference to be given and that Brocade had the requisite notice of the breach. Whilst the company had failed to make out the case for compensation or a profit-based award (for the reasons set out above), the contract was held to be void with the effect that Brocade was liable to account for the sums it had received by selling the stock but was entitled to resurrect whatever claims it had earlier had against the company.

Remuneration

160. The directors counterclaimed against the company seeking payment of outstanding remuneration owed to them. In opposition, the company argued that not only was it not liable to pay any further salary but was also entitled to recover sums already paid by way of remuneration. The basis for this claim was that the directors, in breach of their fiduciary duties, failed to disclose wrongdoing and in consequence received remuneration which they would not otherwise have received.

161. It was well established that it can be incumbent on a director to reveal his own wrongdoing as part of his "fundamental duty to act in what he in good faith considers to be the best interests of his company" *(Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91).

162. However, Newey J concluded that, given that the duty imposed on directors to act bona fide in the interests of the company is a subjective one (*Regentcrest plc v Cohen* [2001] 2 BCLC 80), the complainant must establish that the director subjectively concluded that disclosure of his wrongdoing was in his company's interests or, at least, the director would have so concluded had he been acting in good faith.

163. More generally, there was no reason to restrict the necessary disclosure to the directors' misconduct. Were a director subjectively to consider that it was in the company's interests for something other than misconduct to be disclosed, he would, it appears, commit a breach of his duty of good faith if he failed to do so.

164. On the facts, the company failed to make out its case on wrongful non-disclosure. It appears that the company failed to put the allegations of dishonesty to the directors in cross-examination, nor was it ultimately clear to whom the requisite disclosure should have been made (given that the directors were also the shareholders of the company).

Holly Doyle
Simon Passfield
Guildhall Chambers
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