Briefing

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A trio of liquidation decisions – overseas application of s.213, costs of compliance with s.236 and effects of arbitration clause on debt recovery actions

Recent weeks have seen a number of decisions concerning liquidations – in this article we explore three of the more interesting ones.

1) Overseas application of s.213 - Jetivia SA and another v Bilta (UK) Ltd (in liquidation) and others [2015] UKSC 23

In the Court of Appeal's decision in Jetivia, the Court ruled on the ability of English courts to order persons to contribute to a company's assets for fraudulent trading, related to a VAT carousel fraud. The targets of the action were a company domiciled and trading in Switzerland and a former director resident in France. In reaching its decision, the Court noted that previous decisions on s.238 (transactions at an undervalue) and 423 (transactions defrauding creditors) had been construed to have extraterritorial effect, and that the reference in s.213 to "any persons" should likewise be given extraterritorial application.

The Supreme Court has now upheld the Court of Appeal's decision. In doing so, the Court rejected the idea that its jurisdiction depended on the interpretation of the SC Insolvency Regulation in the decision in *Schmid v Hertel.* It decided that the English courts had power to make a decision based purely on English domestic law and confirmed the comments made in Re Paramount Airways concerning principles for the construction and application of English insolvency legislation to persons located overseas.

What does this mean for practitioners?

The Court of Appeal's and Supreme Court's apparent willingness to give extraterritorial effect to s.213 (and endorsing that approach in relation to other statutory actions) gives a great deal of utility to officeholder claims under IA 1986, and opens up the way to action without having to resort to foreign law insolvency proceedings under the EC Insolvency Regulation or the Cross-Border Insolvency Regulations.

2) Recipients of s.236 orders cannot recover costs of compliance from the insolvent estate - Harvest Finance Ltd (in liquidation) v Cannons Law Practice LLP and another [2014] EWHC 4327

The *Harvest* decision provides useful authority to officeholders concerning the costs of compliance with orders under s.326 (and, arguably, requests under s.235) IA 1986. In *Harvest*, the liquidators of a company obtained a s.236 order against a firm of solicitors which had acted for the company. The firm applied for an order that their costs of providing the requisite files be met as an expense of the insolvent estate.

Whilst the court considered (although not definitively) that it had jurisdiction to make such an order, it decided on the facts that this was not appropriate here. The obligation to provide information under s.236 was in the nature of a public duty, for which parties should not receive payment in the absence of exceptional circumstances.

What does this mean for practitioners?

It is not unusual for parties receiving requests under s.235 or s.236 to request that their expenses of providing the information are met. This decision provides a useful means of resisting such requests, thus obtaining the information requested without having to pay for a party's disbursements (or time costs in doing so). In effect, thwwe decision confirms the purist position under s.236 in the face of what has become an irksome practice from third parties.

3) Can debt actions by a liquidator be stayed by an arbitration clause? *Philpott and another v Lycee Francais Charles De Gaulle School [2015] EWHC 1065*

This decision concerned a disputed debt under a standard form construction contract, which contained a clause which required that disputes between the parties be resolved by arbitration. The liquidators believed that as the debt was not disputed, the clause could be avoided by applying to court for directions and

an account for Rule 4.90 set-off (with a balancing payment from the set-off becoming due from the debtor). This was disputed by the debtor, who argued that the arbitration provision was binding event after the commencement of liquidation.

The Court agreed with the debtor. The clause survived liquidation, and was not inoperative or incapable of being observed, which are the exceptions stated in s.9(4) of the Arbitration Act 1996. The effect of the clause was therefore to stay the liquidator's proceedings upon a dispute of the sums claimed by either party. Nor, additionally, did the submission of a proof of debt form by the debtor prevent it from applying for a stay of proceedings under the Arbitration Act.

What does this mean in practice?

Arbitration clauses are particularly common in the construction industry. This decision will only serve to complicate the claims resolution process in any cases where quantum of claim is in dispute. Whilst it does not affect undisputed claims, one can see why it would avail a debtor of an insolvent entity to claim a dispute on quantum if only to drag out the debt collection process with a view to reducing eventual quantum.

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