Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

January 2015

Odds and ends – The EC regulation, new SIP 16 consultation, extent of S.236 powers and more

This article provides snapshot of some of the more incidental goings-on of which we believe practitioners should be aware. Amongst other things, it covers developments in the reform of the EC Regulation, the consultation on the new-look SIP 16, and the Comet decision on the extent of the court's S.236 powers.

EU Council adopts agreement on EC Insolvency Regulation reforms

First in the lineup, the Council of the EU agreed a compromise agreement with the EU Parliament on the proposed amendments to the EC Insolvency Regulation (Reg EC 1346/2000).

The process will continue by formal translation of the text, following which it will be approved by both the Council and the European Parliament. The first reading (by the Council) is due on 15 March 2015, with a second, uncontested, reading in May 2015. The amending regulation will come into force 24 months after its publication in the EU Official Journal.

As **previously reported**, amongst the main thrust of the reforms is a three month "look-back" test for establishing the Centre of Main Interests, for corporates as well individuals, which may well prove difficult for courts to interpret.

We will report further when the full text of the amending regulation becomes available. For further information in the meantime, please use **this link**.

JIC issues consultation on new-look SIP 16

On 5 January 215 the Joint Insolvency Committee issued a **revised version** of SIP 16 (the statement required to be issued by Insolvency Practitioners concerning pre-pack administration sales) for consultation purposes.

The new SIP 16 contains the following changes: (i) provisions in relation to the use (or not) of the "pre-pack pool", which will need to be included in the administrator's SIP 16 statement if the sale is to a connected party. The definition of "pre-pack pool" is not included in the current draft of SIP 16. The intention from Graham's report, however, is that this will be a pool of experienced business people who, if approached, will take on independent scrutiny of a pre-pack sale to a connected party; (ii) the requirement for a post-sale statement by the administrator providing creditors with such information that would enable a reasonable and informed third party to conclude that the pre-pack was appropriate and that the administrator has acted with due regard for creditors' interests – and an admonition that such information may need to be greater in a sale to a connected party; (iv) a statement that administrators' records of the reasoning behind the pre-pack sale should also include records of all alternatives considered; (vi) that any valuations of the sale assets should be conducted by appropriate independent valuers and/or advisors with adequate professional indemnity insurance (or else contain reasoning why this approach was not taken); and (vii) details of the marketing essentials drafted by the Graham review and a requirement to abide by these.

The consultation closes on 2 February and IPs are invited to feed back through their RPBs or email JIC directly at: **jic_sip_consultation@icaew.com**

Comet and the extent of the court's powers under S.236 IA 1986

The High Court decision in *Re Comet Group Limited (in liquidation) [2014] EWHC 3477* has issued guidance on the extent of the court's powers under Section 236 of the Insolvency Act 1986.

In this case the liquidators of the Comet Group sought information of Whirlpool and Embraco, who had supplied refrigerators to Comet, both of whom had been found guilty by the Competition Commission of operating a cartel in the supply of refrigeration compressors. Investigating, the liquidators sought papers relating to sales data, input cost data and pricing methodology from both parties.

Whirlpool and Embraco contested the application on the basis that (i) the court's power was limited to information about Comet itself; (ii) the court's power was limited to ordering the production of books, papers and records (not information); (iii) the true purpose of the application was to obtain an unfair advantage in litigation; and (iv) production of documents would be oppressive and place an unnecessary burden upon them.

The High Court disagreed with Whirpool and Abreco. Addressing the various points: (i) In the court's view, information about the cartel might well have a bearing on Comet's business and affairs - S.236 should not be construed too narrowly; (ii) Whilst S.236 was indeed limited to books, papers and records (which included electronic data), if a party did not know the identity of such records, they could use section 236 to identify them by reference to the subject matter. (iii) The liquidators had been truthful and fair about their need to see such records – whilst S.236 was not to be used to gain an unfair advantage in litigation, in this case Embraco had already admitted wrongdoing – the only advantage gained by a S.236

Continued overleaf

order in this case was to gain disclosure earlier than otherwise might have been the case; (iv) On balance, as the object of manufacturers' cartels was to profit at the expense of retailers and considering the other issues surrounding the request, it was appropriate to make the order sought.

This is a useful decision, highlighting as it does both the documentary scope of S.236, and how information requests might be phrased to best advantage, whilst serving as a reminder that it is not to be used as a "fishing expedition" for litigation material.

Section 75 liabilities can be assigned

A quick note that the *High Court in Trustee of Singer & Friedlander Ltd Pension and Assurance Scheme v Corbett [2014] EWHC 3038* has ruled that a pension scheme's section 75 debt can be assigned by scheme trustees, which allows scheme trustees to conclude scheme wind-up before the anticipated date for payment of the final dividend in an insolvency process. Care must still be taken, however, that the section 75 debt is not compromised in the process, which can makes schemes ineligible for PPF protection.

A cautionary tale – appointing administrators out of court when underlying debt demanded has been paid

In *Re Silentpride Limited [2014] EWHC (09/10//2014)*, the High Court ruled that a bank's appointment of joint administrators over a property development company had been invalid, as the sum alleged owing under the letter of demand had been paid at the date of demand.

The issue in question was whether commission payments in respect of a bank guarantee issued by Silentpride's bank had in fact been paid. When Silentpride failed to make such payments, the bank had transferred funds from a deposit account maintained by Silentpride with the bank in order to meet those payments. The court found that this had satisfied the debt due and that therefore the demand was invalid.

Particular care needs to be taken in this regard. Although it is well established that an overstated mis—stated demand will still be valid if an event of default existed at the time of its issue (see e.g. *Bunbury Foods Pty Ltd v National Bank of Australia Ltd (1984) 153 C.L.R. 491)*, if no grounds for enforcement exist at the time of demand, a consequent administration or receivership appointment will be entirely invalid.

Rent as an administration expense - Supreme Court refuses to hear Pillar Denton appeal

We have been made aware that on 31 October 2014, the Supreme Court refused to hear an appeal on the Court of Appeal's decision in *Pillar Denton Ltd and others v Jervis and others [2014]* EWCA Civ 180. This refusal effectively settles the law that rent must be paid for "pro rata" as an administration expense according to the office-holder's usage, rather than when rent for a future period falls due.

High Court orders compensation for S.423 claim

Finally, a rare example of a section 423 (transactions defrauding creditors) award has been made in *Re Husky Group Limited [2014]* EWHC 3003.

In this case, certain of Husky Group's trademarks were transferred to a parent entity, Jupiter Industries as part of a restructuring, the purpose of which was to put those assets beyond the reach of creditors. The transfer was for a nominal sum of £1, purportedly as part of a scheme under which Jupiter would take over Husky's domestic business operations. Evidence suggested that shortly prior to the transfer, the directors had written to the auditor concerning cashflow problems. There was also a letter on file from Husky's solicitor justifying the transfer on terms that the trademarks would be protected "should anything happen" to Husky.

The court however believed that the sole purpose of the restructure was to isolate unwelcome debts, the inference being that the transfer was made to disadvantage creditors of Husky. The court was not satisfied that Husky was solvent at the date of the transfer and, in fact, was non-trading. Compensation was granted under both sections 423 and 238 IA 1986, and costs awarded against Jupiter on an indemnity basis (as a Part 35 offer had been made merely to mitigate against adverse costs rather than as a genuine attempt at settlement).

This is a rare example of section 423 in action. Although the burden or proof is high (more akin to the criminal standard of "beyond all reasonable doubt" than the civil standard "on the balance of probabilities) it is nonetheless a powerful tool and benefits from both an extended time limit (six years rather than two) and the lack of a need to establish insolvency of the transferor as a precondition to taking action.

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