Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

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When are a judge's findings admissible in ACCA disciplinary proceedings?

The findings of a judge in court proceedings concerning the behaviour of an ACCA member may give rise to, or at least be relevant to, subsequent disciplinary proceedings. To what extent can judicial findings be relied upon by the Disciplinary Committee?

The recent decision of *R (Hollis) v ACCA* should be of interest to insolvency practitioners and those involved in accountants' practice protection. The High Court's decision:

- provides clarification of the extent to which the ACCA's Disciplinary Committee can admit as evidence in disciplinary proceedings findings made by civil and criminal courts; and
- highlights the potential risks insolvency practitioners face if they choose not to appear in civil proceedings that challenge actions they took in the course of their official appointments.

Mr Hollis' appointment as administrator of Sixty

Mr Hollis had been appointed as one of the joint administrators of Sixty UK Limited ("**Sixty**"), which was the tenant of two retail units. Sixty's obligations under the relevant leases were guaranteed by Sixty's parent company. The joint administrators proposed a CVA which would take advantage of the decision in *Prudential v PRG Powerhouse*, which established that, in certain circumstances, a CVA could be structured so as to deprive a creditor landlord of the benefit of the tenant's guarantee.

The CVA proposed by the joint administrators had the effect of depriving Sixty's landlord, Mourant, of the benefit of the guarantee provided by Sixty's parent upon payment of £300,000. The CVA was approved at a creditors' meeting, despite Mourant's opposition to it on the basis that it significantly undervalued the parent company guarantee and was therefore unfairly prejudicial. Mourant subsequently applied to Court under the Insolvency Act to have the CVA set aside.

A damning indictment

The Court set aside the CVA following a trial at which the administrators opted not to be separately represented. The judgment found, among other things, that the joint administrators had been advised that Sixty's parent company guarantee was worth £1 million but presented its value to the creditors as being £300,000. The judge was deeply critical of the administrators' conduct in relation to the presentation and implementation of the CVA, which he described variously as *"deliberate misrepresentation"; an "unwilling[ness] to disclose the truth"; "shameless"; and, a "dereliction of duty"*.

Perhaps unsurprisingly, in light of these comments, the ACCA's Disciplinary Committee brought seven charges of professional misconduct against Mr Hollis. The most serious charge was engaging in dishonest behaviour (which can result in being struck off the ACCA's register of members).

At a case management hearing the Disciplinary Committee decided to admit certain aspects of Henderson J's judgment as 'prima facie evidence in the proceedings', on the basis that they were 'findings of fact' under Reg. 11(2) of the Chartered Certified Accountants Complaints Regulations 2014 (the "**Regulations**"). Mr Hollis challenged that decision by way of judicial review.

Regulation 11(2)

After a detailed discussion of the Regulations the judicial review Court provided the following guidance on how Regulation 11, which governs the admissibility of judicial findings in ACCA disciplinary proceedings, operates.

Reg. 11(2)(a)

- The Disciplinary Committee has a broad discretion to admit oral or documentary evidence of *any kind*.
- The Disciplinary Committee must take into account the overriding requirements of fairness and justice when deciding whether to admit any such evidence.

Reg. 11(2)(c)

- If evidence admitted under Reg. 11(2)(a) is: (i) a criminal conviction, court judgment or finding of fact in court proceedings; and (ii) falls within the ambit of the version of Byelaw 8 in force at the time, it must been given the status accorded to it Byelaw 8.

Reg. 11(2)(d)

- If evidence admitted under Reg. 11(2)(a) does not fall with Reg. 11(2)(c) and Byelaw 8, then the status to be given to that evidence is a matter for determination by the Disciplinary Committee at the substantive hearing, on the basis of evidence and submissions at that stage.

continued overleaf

Byelaw 8

The judge's findings were within Reg. 11(2)(c) so the Court addressed whether they fell within the relevant category of evidence in Byelaw 8 (2009); namely, had the defendant *"been found to have acted fraudulently or dishonestly in any civil proceeding"* [etc.]?

The Court considered that this concept should be construed narrowly due to: (i) the severe consequences - if evidence does fall within this category the Disciplinary Committee must treat it as conclusive proof of fraud or dishonesty; and, (ii) it effectively operates as a civil law equivalent of a criminal finding of guilt.

As a result, the Court held that for a civil finding of fact to satisfy the requirement in Byelaw 8 that the defendant had *"been found to have acted fraudulently or dishonestly in any civil proceeding"*, that finding must have been made as a necessary part of determining the civil proceedings in which it was made.

The Judge's findings in respect of Mr Hollis' honesty were not made as a necessary part of deciding whether to strike down the CVA and, therefore, were not within Reg. 11(2)(c) and Byelaw 8. They were nonetheless admissible under Reg. 11(2)(a) and the weight to be accorded to them fell to be determined at Mr Hollis' substantive disciplinary hearing in accordance with Reg. 11(2)(d).

To attend or not to attend

Mr Hollis' judicial review challenge failed and the Court upheld the Disciplinary Committees' decision to admit the Judge's findings as evidence in the disciplinary proceedings.

It is important to note that one of Mr Hollis' chief objections to admitting the judgment in the disciplinary proceedings was that Mr Hollis had not been represented in those proceedings and, therefore, had not had the opportunity to put forward an alternative version of events. Mr Hollis had opted against representation on the basis of legal advice, a decision for which he argued he should not be penalised.

The Court in the judicial review proceedings rejected this as a basis for denying admissibility, stating that this only affected the weight that should be accorded to the findings:

"…the more a finding of fact represents the considered view of a judge after hearing detailed argument and evidence, with full notice to the ACCA member involved and an opportunity for them to participate in the hearing, the greater weight it is likely to carry. This may place a practical onus on the member to be willing to come forward before the Disciplinary Committee to give their own exculpatory version of events."

As Mr Hollis' circumstances fit these criteria, it appears that the Disciplinary Committee is entitled to place weight on the Judge's comments and Mr Hollis must now work hard before the Disciplinary Committee to exculpate himself.

Given that Mr Hollis' charges before the Disciplinary Committee appear to have come about as a result of the original judgment, it appears that the decision not to be separately represented was an unfortunate one.

In light of this judgment, administrators should consider carefully whether they should take separate representation and put forward evidence when third parties challenge the actions they have taken. This may help to: (i) minimise the risk of disciplinary proceedings; and, (ii) if proceedings are brought, not have to start their defence from within the trenches.

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