

C/M/S/ Cameron McKenna



# Insolvency

Coverage of this month's insolvency law

January 2007

## Law Now

### Articles on our free information website this month

Date	Item	Significance
2 January 2007	<b>Guarantees: the risks of unclear documents and "Entire Agreement" clauses</b>	<b>The court decided an assurance by a director that he would pay the fees the company owed was not a guarantee of those fees, despite a letter signed at the same time that included a term that the directors would be liable if the company failed to pay.</b>
8 January 2007	<b>Companies' details on websites and in electronic communications</b>	<b>From 1 January 2007, the statutory requirement for companies to state particulars on stationery has been extended to websites and electronic communications.</b>
12 January 2007	<b>Financial Collateral Arrangements - European Commission report</b>	<b>The Directive on financial collateral arrangements might be extended to include credit claims as eligible collateral.</b>
23 January 2007	<b>Court does not validate payments made from frozen bank account</b>	<b>Reminds banks of need to spot winding-up petitions against their customers.</b>
30 January 2007	<b>Secured creditor can intervene in charged property before enforcement</b>	<b>The first time the Court of Appeal has analysed the rights of parties to a securitisation. And a reminder of how extensive a secured creditor's rights are in charged property, even before the right to enforce arises.</b>

# Table of Contents

<b>Insolvency .....</b>	<b>4</b>
<b>Cases .....</b>	<b>4</b>
Appointment of administrators – what does “presentation of the petition” mean? .....	4
Re Blights Builders Ltd .....	4
Contested administration application .....	5
Quality Kebab Ltd v Danbury Foods Ltd [2006] EWHC 1764 (Ch) .....	5
Insurer with a subrogated interest had no proprietary interest in assured’s legal claim.....	6
Re Ballast Plc Sub Nom St Paul Travellers Insurance Co Ltd v (1) Nicholas James Dargan & Nicholas Guy Edwards (As Joint Liquidators Of Ballast Plc) (2) Mott Macdonald Ltd .....	6
Relevant accounts to assess dividend payments .....	6
Re Logic Alliance Ltd (In Liquidation) sub nom the Joint Liquidators v (1) J A Taylor (2) J Puresevic .....	6
Reviving insolvent company – Hong Kong .....	6
Re Legend International Resorts Ltd.....	6
<b>Articles .....</b>	<b>7</b>
Deepening insolvency – is the newest tort dead? .....	7
Mystery of the Sphinx – COMI in the US .....	7
Administration costs: some welcome news.....	7
Administrators abroad – when in Rome do as the Romans? .....	7
All the appropriate solutions.....	8
<b>BLOG .....</b>	<b>9</b>
Current updates on banking law issues .....	9

# Insolvency

## Cases

### Appointment of administrators – what does “presentation of the petition” mean?

#### Re Blights Builders Ltd

*Chancery Division, Birmingham Judge Norris Qc Sitting As A Judge Of The High Court 2 October 2006 (Reported 24 January 2007)*

Company – Administration order – Administrator – Restrictions on power to appoint – Winding up petition presented and not disposed of – Meaning of ‘presentation of the petition – Whether appointment of administrators valid – Insolvency Act 1986, Sch B1, paras 22, 25, Insolvency Rules 1986, SI 1986/1925, r 4. 7.

Insolvency Act 1986, Sch B1, para 25 provides: ‘An administrator of a company may not be appointed under paragraph 22 if - (a) a petition for the winding up of the company has been presented and is not yet disposed of’.

The company was effectively a one-man building company. On B’s death, the company lost its management, ceased operations and was discovered to be insolvent. On 5 July 2006 one of its creditors presented a petition for the winding up of the company. On 20 July B’s executors exercised the votes attaching to his shares and appointed joint administrators (the applicants) of the

company under para 22 of Sch B1 to the Insolvency Act 1986. By para 25 of that schedule an administrator might not be appointed under para 22 if a petition for the winding up of the company had been presented and not disposed of. The executors were unaware of the petition and accordingly gave notice of their intention to make the appointment on 21 July, obtained the consent of the charge holder to the appointment on 24 July, and filed notice of their appointment at court. On 25 July 2006 the court sealed and issued the winding up petition presented on 5 July, and it was served on the registered office of the company. The applicants sought directions as to the validity of their appointment. The petitioning creditor applied for the making of an administration order in place of the winding up order.

The applicants contended that the petition was presented on 5 July 2006.

The question arose as to the meaning of ‘presentation of the petition’.

HELD: Presentation of the petition took place when the petition was delivered to the court for issue, not when issued.

Rule 4.7 of the Insolvency Rules 1986, SI 1925/1986, made it clear that two stages were involved. The first was the presentation or the filing or the delivery of the petition to the court. The second was the issue of the petition by the court for

service. When para 25 of Sch B1 referred to the presentation of a petition, it meant its delivery to the court or its filing notwithstanding that that date might be well in advance of the date when the petition was sealed and issued. Moreover, that was reflected in the practice of the court.

Accordingly the appointment of the joint administrators was invalid since the company had no power to appoint them by reason of the existence of a winding up petition that had not been disposed of.

The court would make a declaration that the joint administrators' appointment was invalid, an indemnity in respect of the actions taken by them whilst acting as administrators and a declaration under para 104 of the schedule that their acts as joint administrators were valid. Further, the court would make the administration order sought by the petitioning creditor and dismiss the winding up petition.

## Contested administration application

### Quality Kebab Ltd v Danbury Foods Ltd [2006] EWHC 1764 (Ch)

This is a helpful example of the approach adopted by the court to a contested administration application where it is alleged that the conduct of the company's directors deserves to be investigated.

The company in this case manufactured doner kebabs for sale to kebab restaurants (as might be guessed from its name). A winding up petition had been presented against it by its main supplier, Danbury Foods Ltd. Danbury Foods was owed

around £720,000 and the company was hopelessly insolvent.

The administration proposal envisaged the sale of the company's trading name, goodwill, residual stock and fixed assets to a connected company, Quality Kebab Properties Ltd. The sale price was to be £25,000. The major benefit of the proposal was that the company's liabilities to its employees were also to be taken on by Quality Kebab Properties.

Danbury opposed the making of an administration order on two grounds. First, it said that the court could not be satisfied that the administration was likely to achieve its purpose and provide a better return to the creditors as a whole. Second, it said that the demise of the Company was such that it called for investigation, which could only be done by a liquidator. Accordingly it said that the more appropriate course of action would be to wind the company up.

The deterioration in the Company's financial position had been dramatic. In 2003/2004 its profits had been £207,000 on a turnover of about £4.5m. In 2004/2005 its profits had increased to £437,000 on a turnover of about £6.4m.

However in 2005/2006 its fortunes had taken a significant turn for the worse, and a loss of £380,000 was incurred. Moreover since January 2006 the company's assets had decreased still more.

As for whether the administration was likely to achieve its purpose, Danbury argued that the company's assets were all held on leases from the connected company, with the result that the connected company could effectively veto any sale to a third party.

The judge did not consider this to be a reason why the administration would not achieve its purpose. On the other hand the judge did agree that the affairs of the company did merit investigation. However he concluded that this was not a reason for not making an administration order. On the contrary, he thought it would be wrong to decline to make the order sought given the conclusion he had reached that the administration was most likely to achieve the best result for the Company's creditors. He also considered that the directors' conduct would be adequately investigated by a liquidator appointed after the conclusion of the administration.

With thanks to 11 Stone Buildings  
Newsletter Spring 2007 for this summary

### Insurer with a subrogated interest had no proprietary interest in assured's legal claim

Re Ballast Plc Sub Nom St Paul Travellers Insurance Co Ltd v (1) Nicholas James Dargan & Nicholas Guy Edwards (As Joint Liquidators Of Ballast Plc) (2) Mott Macdonald Ltd

[2006] EWHC 3189 (Ch) Ch D (Lawrence Collins J) 15/12/2006

Where the property disclaimed by liquidators in respect of which an insurer sought a vesting order was an assured's legal claim, that vesting order was refused because the insurer's subrogated right to the claim was not a proprietary interest.

### Relevant accounts to assess dividend payments

Re Logic Alliance Ltd (In Liquidation) sub nom the Joint Liquidators v (1) J A Taylor (2) J Puresevic

Ch D (Bristol) (Bernard Livesey QC)  
24/11/2006

There was no realistic prospect that a trial judge would accept an interpretation of the Companies Act 1985 s.270(3) that "relevant accounts" for determining if dividends were justified meant the last annual accounts that had been filed, even if a further accounting period had passed in respect of which no accounts were laid before the making of the distribution.

### Reviving insolvent company – Hong Kong

Re Legend International Resorts Ltd

CA CV 223/2006 24 NOVEMBER 2006  
Hon Rogers VP, Le Pichon JA and Stone J

Companies and Corporations - Winding up - Company insolvent - Proposal to re-structure company in foreign proceedings - Way in which company may be revived

In this case, the Hong Kong Court of Appeal disapproved of using provisional liquidators to get a moratorium when a rescue, not a liquidation, was intended. This is what used to be done for insurance companies, before administration was possible. In Hong Kong, there is no rescue mechanism and the case should be borne in mind when lending to a Hong Kong company or when looking at options in a distressed situation for a Hong Kong company.

# Articles

## Deepening insolvency – is the newest tort dead?

The US theory of ‘deepening insolvency’ has been described as the ‘fraudulent prolongation of a corporation’s life beyond insolvency, resulting in damage to the corporation caused by increased debt’. While its case law has developed gradually over the past few decades, courts in the United States have addressed deepening insolvency with increasing frequency over the past five years. Courts have been deeply divided in interpreting deepening insolvency as either an independent tort or cause of action deserving of its own remedies, or merely a measure of damages for other related claims such as fraud, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and professional malpractice or negligence.

(L. A. Larose and S. S. Kohn and A. B. Feldman: *ICR*, 3(6), 352) 07.03.30

## Mystery of the Sphinx – COMI in the US

The judgment of Judge Drain in *Re Sphinx Ltd*, a case in the Southern District Court of New York on September 6, 2002 appears to be the first in relation to a contest over the location of the “centre of main interests” of a debtor in the context of Ch.15 of the US Bankruptcy Code, the US enactment of the UNCITRAL Model Law.

(G. Moss: *Insol Int*, 1.07, 4) 07.02.018

## Administration costs: some welcome news

Two recent decisions of the High Court may provide some welcome relief to those concerned in the administration of insolvent trading companies and seeking to be paid for their efforts. Since the coming into force of the Enterprise Act 2002 there have been two significant questions in relation to costs that hitherto have remained unanswered: the first relates to the issue of monies provided to an administrator in order to fund his trading of the business in administration and the second is in respect of costs incurred by an IP prior to the commencement of the administration and his appointment.

(A. Bacon: *Insol Int*, 1.07, 1) 07.02.017

## Administrators abroad – when in Rome do as the Romans?

The EC Insolvency Regulation (1346/2000) (the ‘regulation’) has caused considerable debate since it came into force across the EU (with the exception of Denmark) in May 2002. This debate has primarily concerned the interpretation of the centre of main interests concept and the recognition of insolvency proceedings commenced in one EU member state by other EU member states. However, as the regulation has now been in force for some time, its impact on other issues is now being seen, in particular the choice of law

rules regarding certain matters arising in insolvency proceedings.

(J. Marshall and N. Herrod: JIBFL, 12.06, 490) 07.02.014

## All the appropriate solutions

Discusses the Court of Appeal ruling in *Thomas v Ken Thomas Ltd* on whether:

- (1) a landlord had waived his right to forfeit the lease of an insolvent tenant by accepting a payment of rent;
- (2) the right to forfeit had been lost when a company voluntary arrangement was concluded; and

- (3) had forfeiture been possible, the terms of relief should not have included payment of VAT.

Considers whether a debtor was permitted to appropriate payments to a specific debt.

Cases: *Thomas v Ken Thomas Ltd* (2006) EWCA Civ 1504; (2006) 42 EGCS 244 (CA (Civ Div))

*Estates Gazette E.G. (2007) No.0701 Page 91 6/1/2007 Sandi Murdoch*

# BLOG

## Current updates on banking law issues

Have you tried out the Bank Lawyers' Blog? Updated with topical information every few days.

You can discuss items of interest with fellow bank lawyers or research it for banking information.

These are some topics in the last month:

- First securitised debt case? Citibank v MBIA
- World-wide freezing order
- House of Lords' appeal reform - and no more wigs
- New money laundering regulations
- Dormant bank accounts
- Small business banking competition
- Rome 1 - "damaging" changes to contract law
- Funding leveraged acquisitions
- Financial Collateral Arrangements - an evaluation

Do try it!

[www.banklawyersnetwork.wordpress.com](http://www.banklawyersnetwork.wordpress.com)

Ask for a helpful guide to signing up –  
[ruth.pedley@cms-cmck.com](mailto:ruth.pedley@cms-cmck.com)

Editor: Ruth Pedley, Professional Support Lawyer, Banking and Corporate Recovery Teams, CMS Cameron McKenna LLP.

Please contact Ruth for further information or feedback on this bulletin: [Ruth.Pedley@cms-cmck.com](mailto:Ruth.Pedley@cms-cmck.com)

020 7367 2098

You are entitled to sign up to our free electronic information service, Law Now [www.law-now.com](http://www.law-now.com)

This bulletin is the property of the firm and must not be reproduced without consent.

© CMS Cameron McKenna LLP

## Law-Now™

**CMS Cameron McKenna's free on-line information service**

To register for Law-Now on-line go to our home page [www.law-now.com](http://www.law-now.com)

CMS Cameron McKenna LLP  
Mitre House  
160 Aldersgate Street  
London EC1A 4DD

T +44 (0)20 7367 3000

F +44 (0)20 7367 2000

**CMS Cameron McKenna LLP is a limited liability partnership registered in England and Wales. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices and/or member firms of the CMS alliance.**

The associated international offices of CMS Cameron McKenna LLP are separate and distinct from it.

**CMS Cameron McKenna LLP and its associated offices are members of CMS, the alliance of independent European law firms. Alliance firms are legal entities which are separate and distinct from CMS Cameron McKenna LLP and its associated international offices.**

CMS offices and associated offices worldwide: Berlin, Brussels, London, Madrid, Paris, Rome, Utrecht, Vienna, Zürich, Aberdeen, Amsterdam, Antwerp, Arnhem, Beijing, Belgrade, Bratislava, Bristol, Bucharest, Budapest, Buenos Aires, Casablanca, Chemnitz, Cologne, Dresden, Düsseldorf, Edinburgh, Frankfurt, Hamburg, Hilversum, Hong Kong, Leipzig, Lyon, Marbella, Milan, Montevideo, Moscow, Munich, New York, Prague, Sao Paolo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Warsaw and Zagreb.