# Recent case summaries

The latest insolvency update from **Tara Taylor**.

## PERSONAL INSOLVENCY

***Lasytsya* v. *Koumettou and Anor (trustees in bankruptcy of Ms Lasytsya)* [2020] EWHC 660 (Ch)**

A bankrupt applied, *inter alia*, to set aside two search and seizure orders obtained by her trustees in bankruptcy under s365 Insolvency Act 1986 (IA86) on grounds of misrepresentation, non-disclosure and unfair procedure. The judgment comprehensively addresses (i) the relevant factors to consider when granting a s365 order and (ii) the appropriate safeguards where such an order is made *ex parte*.

Firstly, a warrant for seizure is a remedy of 'last resort' only to be obtained where there is: (i) a real risk that property may otherwise be dissipated or disposed of; (ii) the value of the property is proportionate to the remedy; (iii) a balance will be achieved between protecting the rights of affected third parties and the need to recover property for the bankruptcy.

Secondly, on a without notice application, the applicant bears a duty of full and frank disclosure and fair presentation; the court's attention must be drawn to potential weaknesses in the applicant's case, alternative remedies and matters of fact or law that oppose the making of the order.

> The judge highlighted that the trustees' failure to fulfil their duty of fair presentation may ultimately result in costs consequences.

Thirdly, the order must incorporate a penal notice and case-specific safeguards, for example: terms ensuring that items are listed and photographed before being seized; the proposed procedure in the event of dispute over seizure; identification of the supervising solicitor who must be present throughout execution; and a provision that the order be served with a note of the hearing.

The judge dismissed the bankrupt's allegations of misrepresentation and non-disclosure but found considerable cause for concern as to procedural fairness including the trustees' failure to do more than identify the merits of their application. The orders also exhibited an almost total absence of safeguards.

Although those factors supported rescinding the orders, the judge refused the application given that: (i) fair presentation would have supported making the s365 order; (ii) the seized items that should have been delivered to the trustees under the bankrupt's statutory duty should be retained pursuant to the trustees' statutory right to keep them; and (iii) the orders had been executed so the real issue was what should happen to the seized property, which could be addressed in a new order. However, the judge highlighted that the trustees' failure to fulfil their duty of fair presentation may ultimately result in costs consequences.

## CORPORATE INSOLVENCY

***Carluccio's Ltd (In Administration)* [2020] EWHC 886 (Ch)**

Within 14 days of their appointment, the joint administrators of a restaurant chain wrote to employees offering to retain their employment in the administration but on varied terms such that they would be furloughed under the coronavirus job retention scheme (CJRS), with wages reduced to the maximum amount allowable under the CJRS – ie 80% of their regular salary, up to £2,500 per month, payable only when the company received the government grant. The majority accepted, with the remainder either refusing or failing to respond.

The problem arose that, while compliance with the CJRS requires the employer to pay the full amount received to the employee, those monies are initially to be paid to the employer and treated as income. Any payments received would therefore constitute company assets and *prima facie* fall to be distributed among all creditors pursuant to the payment priority rules under the IA86. The administrators applied for directions regarding how CJRS payments could properly be paid to employees under insolvency legislation.

The relevant legislation is paragraph 99(5) schedule B1 IA86, which (i) gives priority to liabilities arising under employment contracts that have been adopted by the administrators and (ii) provides that no action taken by an administrator within 14 days of his appointment (the period) shall be taken to amount to such adoption.

> Acceptance of the administrators' offer to place employees in the CJRS constituted a variation but not adoption of the relevant contract

Neither a failure to terminate an employment contract within the period nor termination following the expiry of the period would, without more, constitute adoption. The administrators thereby avoided having to make those who had not responded to their offer redundant within the period merely to avoid liabilities that would otherwise have arisen. Further, acceptance of the administrators' offer (made within the period) to place employees in the CJRS constituted a variation but not adoption of the relevant contract. This analysis applied to all employees who accepted the variation terms, whether before or after expiry of the period; the date of acceptance did not correlate to the date of adoption of the contract in circumstances where acceptance was not an act of the administrators.

The varied contract would be adopted by administrators when they acted upon it by (i) making an application under the CJRS in respect of the employee or (ii) paying the employee's wages. Adoption meant that the CJRS payments would attract priority under paragraph 99 over the administrators' remuneration and expenses, floating charge creditors and unsecured creditors, allowing super-priority payment of the grant monies to the relevant employees. □

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