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This edition of the Insolvency Bulletin covers a wide range of cases including cross-border, pension and employment cases.

Although it is a personal rather than a corporate insolvency case, *Kemsley* provides a useful consideration of the circumstances in which the court will grant an injunction to prevent proceedings being brought against a British citizen in a foreign jurisdiction. The *ARM* case dealt with an issue of COMI whilst leaving open the question as to whether the Insolvency Regulation applies only where a company is wound up by reasons of insolvency and, in the *Grontimmo* case, the ECJ considered the scope of Article 24 of the Insolvency Regulation.

The end of the year has brought resolution to a couple of outstanding questions. First, the question as to whether the liability imposed on a company in administration under a Financial Support Direction is an expense of the administration or a provable debt has finally been resolved by the Supreme Court (it is a provable debt). Second, the slightly unsatisfactory outcome of the Crystal Palace case (see the Sumer 2013 Bulletin) has now been resolved: it is clear that a "fact intensive analysis" will always be required when determining the "sole or principal reason" for dismissal under Regulation 7 of TUPE 2006 and that the administrator must distinguish between his or her reasons for the dismissal and the ultimate objective of the administration.

Many thanks to those of you who attended NTU's International Insolvency Conference on 11 September. The slides from the papers are [available on our website].

With all good wishes for the festive season and for 2014.

Paula

Paula Moffatt

In this Bulletin...

CROSS-BORDER

Kemsley v Barclays Bank Plc (1) Fry (2) and Provan (3) [2013] EWHC 1274 (Ch)
Executive summary

An application to restrain proceedings against the applicant brought in New York and Florida was rejected by the court on the grounds that it would be "wholly inappropriate" to grant it.

Facts
Mr Kemsley, a British citizen, applied to the court to restrain two sets of proceedings brought against him by Barclays Bank Plc (the "Bank") in the United States.

In 2008, Mr Kemsley was a high net worth individual who was granted an unsecured personal loan of £5 million by the Bank which was repayable at the end of one year, although the loan period was subsequently extended.

In 2009, Mr Kemsley experienced financial difficulties. His business failed and a claim of £6.5 million was brought against him by Spreadex Ltd ("Spreadex"). He settled the claim, but failed to pay a due instalment, so Spreadex served a statutory demand for £6.8 million in February 2012. At around the same time he was also served with a demand for £5.1 million from the Bank for failure to make payments due under the loan.

In 2009, he moved from England to the United States.

In 2011 HM Revenue & Customs, which was owed £3 million, presented a bankruptcy petition. In January 2012, Mr Kemsley presented his own bankruptcy petition to the High Court which stated that he was present in England on the date of its presentation and had had a place of residence in England within three years of its presentation. In March 2012, Mr Kemsley was judged bankrupt on the basis of his own petition.

Shortly before Mr Kemsley was judged bankrupt in England, the Bank brought proceedings against him in New York. The second respondent, who was the joint trustee in bankruptcy (the "Trustee"), applied to the New York court for recognition of the English bankruptcy as a foreign main proceeding under Chapter 15 of the UNCITRAL Model Law on insolvency. The Trustee's petition stated his belief that Mr Kemsley's primary assets and creditors were in England. The Bank objected to the Trustee's petition. The Bank also subsequently commenced proceedings against Mr Kemsley in the Florida state court.
It was common ground that if the New York court granted the Trustee's petition for recognition under Chapter 15, then the New York court would stay the New York proceedings. If that happened, the Bank would not be able to pursue the proceedings in Florida.

At the time of the English hearing, the New York hearing on jurisdiction had not yet been conducted.

Decision
The judge held that if Mr Kemsley's COMI was found to be in England, an anti-suit injunction would be unnecessary. If his COMI was found to be in the United States, then he rejected the application on the grounds that such an injunction would be wholly inappropriate.
Comment
Although this is a case of personal bankruptcy rather than corporate insolvency, it has been reported here because of the cross-border aspects and the discussion as to when it is appropriate (or not) for the English court to grant an injunction to prevent proceedings being brought against a British citizen in a foreign jurisdiction.

The judge considered two, relatively recent cases. The first was *Barclays Bank v Homan* [1993] BCLC 680. In that case, Lord Hoffmann (then Mr Justice Hoffmann) had concluded (at 691) that "the normal assumption is that the foreign judge is the best person to decide whether an action in his own court should proceed. Comity requires a policy of non-intervention…" and this reasoning was effectively approved by the Court of Appeal (where an appeal against his decision was rejected).

In *Bloom v Harms Offshore GmbH & Co* [2009] EWCA Civ 632, an anti-suit injunction had been allowed by the court, but the facts of that case were unusual. Recognising that (at para 27) "the comity owed by the courts of different jurisdictions to each other will normally make it inappropriate for the court to grant injunctive relief affecting procedures in a court of foreign jurisdiction", Stanley Burnton LJ nonetheless granted injunctive relief. This was on the grounds that the creditors' conduct in the case had been "exceptional". The conduct in question was described by Sir John Chadwick as having the effect of "set[ting] a trap for the administrators which, when sprung, obstructed the proper discharge of the functions for which the High Court had appointed them."

The right not to be sued abroad is an equitable right and the jurisprudence is clear that the English court will only intervene to prevent injustice. Examples would be where, for example, a creditor exhibited conduct that was "oppressive or vexatious… or otherwise unfair or improper" (per Stanley Burnton LJ). On the facts of Mr Kemsley's case, the judge held that there was nothing oppressive or unfair or improper about the Bank being allowed to maintain its action in the New York court.

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Christian Van Buggenhout and Isle Van de Mierop (Liquidators of Grontimmo SA) v Banque Internationale à Luxembourg SA [2013] EUECJ C-251/12

Executive summary
A payment made at the behest of a debtor subject to insolvency proceedings to one of its creditors does not fall within the scope of Article 24(1) of the EC Regulation on Insolvency Proceedings

Facts
Grontimmo (the "Company") was a property development company with its registered office in Belgium. An application to open insolvency proceedings in respect of the Company was made in the Tribunal de Commerce in Brussels (the "Tribunal") in May 2006. Later that month, it received two cheques to the value of EUR 1.4 million. On 29 May 2006, the directors of the Company resigned at the Company's annual general meeting and new directors, who were all domiciled in South Africa, were appointed. On the same date, the Company acquired a purchase option, valued at EUR 1.4 million, from Kostner Development Inc. ("Kostner"), a Panamanian company.

The Company opened two accounts with Dexia Banque International à Luxembourg (now Banque Internationale à Luxembourg, the "Bank") and the cheques were paid in. On 2 June 2006, the Company's new directors instructed BIL to issue a cheque to Kostner for EUR 1.4 million for the option. The Company was declared insolvent on 4 July 2006 and the Company was divested of its assets. The judgment of the Tribunal was published in the relevant Belgian press, but not in the relevant Luxembourg press.

On 5 July 2006, the cheque for EUR 1.4 million in favour of Kostner was cashed.

In September 2006, the Company's liquidators demanded that the Bank repay the EUR 1.4 million on the grounds that the payment had been made in contravention of the rules preventing the divestment of the Company's assets on its insolvency as it had been made after the insolvency proceedings had been opened.

The Bank refused to repay the sum on the basis that it had not known of the Company's insolvency proceedings and could therefore rely upon Article 24 of EC Regulation 1346/2000 (the "Insolvency Regulation").

The liquidators brought proceedings against the Bank. The Tribunal was uncertain as to whether the Bank could rely on Article 24, but recognised that it could not reasonably be expected of a bank in one Member State to check each day whether its clients in other Member States had been the subject of insolvency proceedings. The Tribunal therefore stayed the proceedings and referred the matter to the European Court of Justice for a preliminary ruling.

The question for the court was whether Article 24(1) of the Regulation must be interpreted as meaning that a payment made on the order of a debtor subject to insolvency proceedings to one of its creditors fell within the scope of that provision.

Held
Having considered the wording and the purpose of Article 24(1), the context of the provision and the objectives of the legislation, it was held that where an insolvent debtor has, indirectly, honoured an obligation to one of its creditors, this will not fall within the scope of that provision.
The issue as to whether the bank was obliged to reimburse the disputed sum to the general body of creditors was governed by the applicable national law.

Comment
Article 24(1) of the Regulation provides that "Where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation shall be deemed to have discharged it if he was unaware of the opening of proceedings".

Clearly the liquidator wanted to get hold of the EUR 1.4 million paid to Kostner for the option, whereas the bank in Luxembourg took the view that it had it had paid Kostner in good faith.

The court cited C-533/08 *TNT Express Nederland* [2010] ECR I-4107 as authority for the method of interpreting a provision of EU law: it is necessary to consider not only the wording of the provision but also the context in which it occurs and the objectives pursued by the legislation of which it forms a part. In addition, to ensure that EU regulations are uniformly interpreted, the court is required to interpret and apply the provision in the light of the versions of the regulation existing in other languages (C-199/08 *Eschig* [2009] ECR I-8295).

The court considered the ordinary meaning of the expression "for the benefit of" in the context of honouring an obligation for the benefit of a person subject to insolvency proceedings and concluded that it does not, on the face of it, cover the situation in which an obligation is honoured on the order of that person for the benefit of one of its creditors.

In the main proceedings, the bank made the payment at the request of and on behalf of the insolvent debtor. Even if the bank had fulfilled an obligation to the debtor, it was not honoured "for the benefit" of the debtor within the meaning of Article 24(1) as the debtor was not the recipient of the payment.

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In the matter of ARM Asset Backed Securities SA and in the matter of the Insolvency Act 1986 [2013] EWHC 3351 (Ch)

Executive summary
The presumption that a company whose registered office was in Luxembourg had its COMI in Luxembourg was rebutted on the facts. No conclusion was reached as to whether the EC Regulation on Insolvency Proceedings applies in circumstances where a company is wound up for reasons other than its insolvency.

Facts
ARM Asset Backed Securities SA (the "Company") was incorporated in Luxembourg. It raised funds through bond issues governed by Luxembourg law from 2005. The funds were invested in US insurance policies. The policies were held in a trust governed by Delaware law which paid the premiums and collected sums due under the policies. The proceeds from the policies were paid to the Company to enable it to repay the bonds issued.

The Company did not think it required recognition and regulation by the relevant Luxembourg regulator. It transpired, however, that it did and in 2009 the Company applied for recognition and the appropriate licence from the regulator. The licence was refused and this decision was affirmed on appeal in August 2013.

The Company had not made any further bond issues since 2009, but had continued to receive funds. The issue remained as to whom the £22 million it held should be paid. The UK Financial Conduct Authority took the view that it should be repaid to investors. The day to day conduct of the Company's business was carried out by agents based in England. The Company's directors were based in England, Northern Ireland and the Republic of Ireland. Telephone meetings were generally held and some meetings were held in Luxembourg.

After the Company's appeal for a licence failed, the Luxembourg regulator requested the Luxembourg public prosecutor to dissolve the Company. At the time of the hearing, no steps had been made to effect the request.

The directors of the Company had applied to the court for an order that the Company could be put into provisional liquidation in England.

Although the Company was unlikely to have sufficient funds to be able to repay its bondholders in full, the terms of the bonds provided only for limited recourse for the bondholders, so that they were only entitled to recover sums due to the extent that the Company had available funds. Nonetheless, the directors were of the view that it would be beneficial for the Company to be put into the hands of third party office holders to ensure an orderly realisation of assets and distribution to creditors.

The winding up petition was therefore sought on the grounds that it was just and equitable for the Company to be wound up rather than on the grounds of the Company's inability to pay its debts.

Decision
The judge first considered whether the English court had jurisdiction to open main winding up proceedings rather than the Luxembourg court, bearing in mind that the Company's registered office was in Luxembourg. On the evidence available, he was satisfied that the Company's COMI was in England and that the presumption in favour of Luxembourg (being the location of its registered office) was rebutted for the purposes of the EC Regulation on Insolvency Proceedings.

He then went on to consider whether the EC Regulation applied only where the company in question was insolvent or where the application to the court was based on a company's actual or apparent insolvency. In view of the urgency of the application, he did not have the time to reach a conclusion on this point. He held that the Company was, in any event, insolvent due to an inability to pay its debts since any bondholder would prove in the liquidation for the full value of their debt and the Company would not be able to meet the payment.

Comment
This case is interesting because it left open the question as to whether the EC Regulation on Insolvency Proceedings applies only where a company is wound up by reasons of insolvency. In this case, there were practical reasons for appointing a liquidator and so the petition had been drafted on the grounds that it was just and equitable for the company to be wound up, rather than on the grounds of insolvency. As it happened, the judge was happy to apply the Regulation as he took the view that, on the facts, the company was insolvent.

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ADMINISTRATION: PENSIONS
In the matter of the Nortel Companies; in the matter of the Lehman companies; in the matter of the Lehman Companies (No.2) [2013] UKSC 52

Executive summary
Where a Target company's liability under the FSD regime arose from an FSD issued after the company had gone into administration, the company's liability would rank as a provable debt and not as an expense of the administration.

Facts
Both the Nortel group of companies and the Lehman group of companies ran final salary pension schemes (the "Schemes"). All the UK registered Nortel companies and many of the UK registered Lehman companies had gone into insolvent administration. Both Schemes were in deficit. The Pensions Regulator had required other group members, (the "Target companies") to provide financial support for their respective Schemes in accordance with its powers under the Pensions Act 2004 (the "2004 Act"). The financial support had not been given as the direction had not been made until after the Target companies had gone into administration and so raising the question as to the ranking of the Target companies' liability to their respective Schemes.

At first instance and in the Court of Appeal, it had been held that the preferred option was that the Target companies' liability to the Schemes was an expense of the administration and therefore ranked ahead of their liabilities to unsecured creditors (option "(a)"). The other options were that the liability to the Schemes ranked *pari passu* with the Target companies' other unsecured creditors (option "(b)") or that it was neither (a) nor (b) (option "(c)"). If option (b) applied, liability to the Schemes would rank equally with other creditors and if option (c) applied, liability to the Schemes would rank behind that of the other unsecured creditors and would probably be worthless. Briggs J and the Court of Appeal concluded that option (b) was not open to them.

Although the Pensions Act 1995 (the "1995 Act") had introduced a minimum funding requirement for pensions, this was considered to be inadequate and so the 2004 Act had introduced a Financial Support Direction ("FSD") regime.

Under section 75 of the 1995 Act, if certain "insolvency events" occurred, an amount equivalent to any shortfall in the assets of an occupational pension scheme (as set against its liabilities) would be classified as a debt (a "section 75 debt") which would be due from the employer to the scheme trustees. The insolvency events for this purpose are administration and liquidation. Under section 75(8), a section 75 debt is not to be regarded as a preferential debt for the purposes of the Insolvency Act 1986 (the "Insolvency Act") and section 75(4A) states that a section 75 debt is to be taken, for the purposes of an employer's insolvency, as having arisen immediately before the occurrence of the insolvency event.

The FSD regime operated on the basis that if the pensions regulator considered that a pension scheme was underfunded it would, in certain circumstances, be able to issue an FSD requiring additional funding from other group companies. Under section 43(9) of the FSD Regulations, the regulator has a "look back" time of up to two years. If the FSD was not complied with, a contribution notice ("CN") could be issued requiring a specific monetary amount to be payable by the target companies to the scheme trustees.

Decision
The decision of the Supreme Court was unanimous. The appeals were allowed to the extent of declaring that a Target company's liability under the FSD regime which arose under an FSD issued after the company had gone into administration, would rank as a provable debt of the company and not as an expense of the administration.

Comment
In his overview, Lord Neuberger (who delivered the leading judgment) observed that both the court at first instance and the Court of Appeal had felt constrained by authority from holding that the potential liability arising from an FSD issued after the commencement of an insolvent liquidation or administration could constitute a "provable debt" with Rule 12.3 of the Insolvency Rules (the "Rules"). He considered that, on the face of it, the "sensible and fair" answer (para 58) would be that the potential liability of a Target in this case should be treated as a provable debt. Had the CN been issued before an insolvency event, it would give rise to a provable debt. It was also the case that if an FSD was issued before an insolvency event, a CN issued after it would still give rise to a provable debt. If the decisions in the lower courts (i.e. that the liability was an expense of the administration) were correct, then it would be in the interests of the Regulator to wait for a company to go into insolvency proceedings before issuing an FSD. On this analysis, the amount recoverable under a CN issued after the insolvency event would be greater than the amount recoverable had the FSD been issued before the insolvency event.

The definition of "provable debt" under Rule 12.3 is wide when read in conjunction with Rule 13.12 which defines "debt". The issue was whether the potential liability under an FSD served post insolvency fell within the definition of "debt". Lord Neuberger considered that it did and that it fell under the second limb of the definition (13.12(1)(b)) as a "liability… to which the company may become subject after that date by reason of any obligation incurred before that date". He considered that the reasoning of Lords Reid and Guest in *Winter v Inland Revenue Commissioners, In Re Sutherland (dec'd)* [1963] AC 235 supported this conclusion.

Lord Neuberger considered that in order for a company to have incurred an "obligation" under Rule 13.12(1)(b), it must have "taken or been subjected to some step or combination of steps which (a) had some legal effect… and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred." He went on to say that if these two requirements were satisfied, it was also relevant consider "(c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)" (para 77). He considered that the Target companies satisfied these requirements and that *R (Steele) v Birmingham City Council* [2006] 1 WLR 2380 (on which the Court of Appeal had felt constrained to rely) was wrongly decided. Although he did not have to consider whether the liability fell to be an expense of the administration, he did so to clarify the law. Lord Hoffmann's remarks in *In re Toshoku Finance UK plc* [2002] 1 WLR 671 did not establish a general rule on liability as Briggs J had suggested at first instance: the general guidance given by Lord Hoffmann was to be found at para 46 where he had said "the question of whether [any particular] liabilities should be imposed upon companies in liquidation is a legislative decision which will depend upon the particular liability in question". On this basis, he concluded that even if the liability of the Target companies did not rank as a provable debt, it would not count as an expense of the administration.

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LIQUIDATION: TRANSACTIONS AT AN UNDERVALUE

Hunt (Liquidator of Ovenden Colbert Printers Ltd) v Hosking & Others [2013] EWCA Civ 1408

Executive summary
An appeal against a decision that a transaction was not a transaction at an undervalue for the purposes of sections 238 and 241 of the Insolvency Act 1986 (the "1986 Act") was dismissed on the grounds that the transaction was not one which the company itself had entered into.

Facts
Mr Hosking was a licensed insolvency practitioner who had previously been a partner at Grant Thornton LLP. In 2002, he was appointed joint liquidator for two connected companies, the "CSM Companies". The CSM Companies owed Ovenden Colbert Printers Ltd ("Ovenden") £1.3 million. Ovenden was therefore entitled to a substantial dividend in the liquidation.

In December 2003, Ovenden entered into a fee agreement with its accountant (the "Accountant" and the "2003 Agreement"). Mr Hosking claimed that this was done to reward the Accountant for his help in preparing Ovenden's claim in the liquidation of the CSM Companies, which included the provision of information to Mr Hosking to enable him to pursue claims against former directors.

Under the 2003 Agreement, the Accountant was authorised to receive distributions from the liquidation of Ovenden and hold them to the order of Ovenden, subject to the deduction of his agreed fees. The money was paid into a client account held by the accountant. The Accountant was to receive 25% of any distribution above £250,000.

The 2003 Agreement was purportedly varied in January 2005 to enable the Accountant to receive a fee that was £300,000 higher than the fee that would have been received under the 2003 Agreement. Between December 2004 and October 2005, a number of payments were made by the Accountant to Mr Hosking, or persons on his behalf, in excess of £200,000.

Mr Hosking claimed that the payments made to him by the Accountant were simply the repayments of certain personal loans that Mr Hosking had made to him as they were personal friends. In April 2006, Ovenden filed a notice of intention to appoint an administrator. Mr Hosking and one of his partners were appointed administrators. Ovenden subsequently went into creditors' voluntary liquidation. Mr Hosking was one of the liquidators.

At a final meeting of creditors in January 2009, Ovenden should have been dissolved. Instead, an application was made to the court by a former director and creditor of Ovenden to defer the dissolution and Mr Hunt was appointed liquidator (the "Liquidator").

The Liquidator claimed that the Accountant was never entitled to any fees and had provided no consideration for either the 2003 Agreement or the 2005 variation and that these agreements had been entered into on the basis of fraudulent misrepresentations as the amount of work that the Accountant had undertaken or needed to undertake. The Liquidator also claimed that the signature of the Ovenden representative purportedly authorising the 2005 variation was a forgery and that Mr Hosking knew that the Accountant was not entitled to the monies paid to him.

The Liquidator claimed that Mr Hosking had received or benefited from payments made by Ovenden which constituted transactions at an undervalue for the purposes of sections 238 and 241 of the Insolvency Act 1986 (the "1986 Act") as they had been entered into by Ovenden within a period of two years ending with the commencement of its insolvency.

The Liquidator claimed two possible analyses (Route 1 and Route 2). Route 1 was that the payments were transactions between Ovenden and Mr Hosking. Route 2 was that the payments were transactions between Ovenden and the Accountant and that the court had the power to make an order against Mr Hosking on the grounds that he was a third party who had received benefits from the transactions. The Liquidator also contended that the relevant transactions for the purposes of section 238(2) as being the payments rather than the 2003 Agreement (entered into more than two years before the onset of insolvency) or the 2005 variation (which was entered into within that two year window). No application had been made to set the 2003 Agreement and its variation aside and it did not form part of the case before the court.

Decision at first instance
At first instance, the judge held that both Route 1 and Route 2 were unarguable on the basis that the payments were not transactions which Ovenden had entered into. Either the Accountant had been authorised to make the payments or he had not. The question of his authorisation could not be challenged unless the 2003 Agreement and its variation were challenged. If he were not authorised, the payments would have constituted a breach of trust and so could not be attributable to Ovenden.

Decision in the Court of Appeal
The appeal was unanimously dismissed on the grounds that the transaction was not one that the company had entered into for the purposes of section 238 of the 1986 Act. Any relevant transaction would have had to be the underlying agreement by which the authority to make the payments was conferred (either the 2003 Agreement or the 2005 variation) but neither of these agreements had been relied upon.

Comment
This case serves to illustrate the importance of establishing first, that there is a transaction and second, that the transaction was something that the *company* had entered into. A transaction for the purposes of section 436 of the 1986 Act is widely defined and includes a gift or arrangement. Lord Justice Kitchin considered that this definition was probably sufficiently wide to cover a payment made by a company or the agent of a company, acting within the scope of his authority and so the existence of a "transaction" could probably have been established in this case. However, the difficulty arose in establishing that the transaction had been entered into by the company itself – something that had clearly not been established on the facts.

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LIQUIDATION: EXPENSES

Neumans LLP (a firm) v A Andronikou, P Kubik and M Keily (as Joint Administrators of Portsmouth City Football Club Limited) and G Carton-Kelly and D Hudson (Joint Liquidators of Portsmouth City Football Club Limited) [2013] EWCA Civ 916

Executive summary
Certain fees and disbursements incurred by a firm of solicitors in challenging a winding up petition that was presented prior to that company going into administration could be treated as expenses of the company's ultimate liquidation, but not as expenses of its earlier administration.

Facts
Portsmouth City Football Club Limited (the "Club") appointed Neumans LLP as solicitors (the "Solicitors") on 15 December 2009 to contest a winding up petition threatened, and ultimately presented, by HM Revenue & Customs ("HMRC"). The petition was challenged on the grounds of being an abuse of process and was dismissed in January 2010, although HMRC were given leave to appeal and pursued the appeal. The appeal was overtaken by other events. In February 2010, the Club withdrew its instructions to the Solicitors.

In February 2010, a qualifying floating charge holder appointed administrators, resulting in the suspension of the winding up petition. HMRC contested the validity of the administrators' appointment, although later accepted that the appointment was validly made.

The administrators proposed a company voluntary arrangement ("CVA") which was implemented. In November 2010, they revised their proposals and proposed that the administration move to a compulsory liquidation. The original HMRC winding up petition was restored and liquidators appointed in February 2011 when the administrators left office.

The Solicitors claimed fees and disbursements (together "fees") in the sum of approximately £270,000 for the work they had done between December 2009 and February 2010 as an expense of the administration or the liquidation or the CVA. During the administration, the administrators had realised certain assets of the Club. If the Solicitors' fees were to be determined as an expense of the administration, funds would have been available to pay them. The administrators argued that the Solicitors' fees could not be an expense of the administration since there was no statutory provision which would produce that result. In view of this, they contended that the court had no jurisdiction to determine that the Solicitors' fees would be an expense of the administration.

No funds had been passed from the administrator to the liquidator at the end of the administration. This meant that, if the Solicitors' fees were not accepted as being an expense of the administration, then they would not be paid as there were no funds available to pay them.

Counsel for the Solicitors contended that section 51 of the Senior Courts Act 1981 ("section 51") gave the court the power to order the administrators to pay all the costs incurred by solicitors where a company moved from administration to liquidation: the sum of the costs of both sets of proceedings could be considered to be the expenses in the insolvency process as a whole. If the court made such an order, the fees would be "necessary disbursements" within the Rule 2.67(1)(f) of the Insolvency Rules 1986 (the "1986 Rules") and therefore expenses of the administration.

Held

It was not open to the court to make an order under section 51 that the Club or the administrators should pay the Solicitors' fees. The Solicitors were, in fact, seeking an order that the Club's costs in relation to the Solicitors' fees should be added to the permissible list of administration expenses under Rule 2.67, but section 51 did not give the court power to make such an order. The judge would not, therefore, direct the administrators to pay the Solicitors' fees as if they were an expense of the administration.

As the Club had been in administration before the CVA, and as the Solicitors' fees were not expenses of the administration, they could not, therefore, be a "relevant sum" due to the administrators which the CVA supervisors would be obliged to pay under Rule 1.32 of the 1986 Rules.

The judge held that the costs of the Club in applying to strike out the winding up petition was an expense of the liquidation under Rule 4.218(3)(h) of the 1986 Rules.

Comment

One of the main arguments raised in this case was to consider the impact for public policy if the Solicitors' fees were not paid; as a general matter, why would solicitors take on insolvency cases if they had no assurance that they would be paid for their services? As a matter of public policy, it was argued, the court ought not to deprive solicitors of their fees or disbursements unless they had behaved inappropriately.

The judge, however sympathetic he may have been to such an argument, was not able to make a decision on the basis that the expenses incurred by the Solicitors were an expense of the administration. The particular expenses that had been incurred by the Solicitors did not fall within the list of permitted expenses of the administration that the legislation allowed and there was no statutory authority for the judge to make an order that they did.

The judge went through the particular fees and expenses incurred by the Solicitors in determining which ones did and did not fall to be liquidation expenses. In reaching his decision he was clear that the Solicitors' conduct could not be criticised in any way. He was satisfied that they had been properly instructed; that the directors of the Club at the time had considered the opposition of the winding up petition to be in the best interests of the Club; that the work done by the Solicitors was in the Club's best interests; and that there was nothing which would justify the court in refusing to allow these costs to be an expense of the liquidation.

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EMPLOYMENT

Crystal Palace FC Limited (1) CPFC 2010 (2) v Mrs L Kavanagh & Others [2013] EWCA Civ 1410

Restoring the decision of the Employment Tribunal, the Court of Appeal unanimously held that the employees had been dismissed for an ETO reason under Regulation 7 of TUPE.

Facts

The Claimants had been employees of Crystal Palace Football Club (2000) Ltd ("CP 2000"). CP 2000 was put into administration by one of its lenders, Agilo, in January 2010. It was the intention of the administrator of CP 2000 (the "Administrator") to sell the club as a going concern. The second respondent, CPFC Ltd, owned the club's grounds and went into administration in February 2010. The main, secured creditor of CPFC Ltd was Lloyds Banking Group plc ("Lloyds") which effectively owned the grounds.

A consortium was identified as a potential buyer for both the club and the grounds. The buyer was incorporated as CPFC 2010 Ltd, but negotiations were difficult due to the fact that both the club and its grounds were owned separately and were in separate sets of administration proceedings.

In May 2010, the Administrator realised that the club was running into severe cash flow difficulties and approached the consortium for a loan, but this did not materialise as Agilo objected.

In the absence of imminent funding, the Administrator decided to identify staff for redundancy with a view to "moth balling" the club so that its basic functions could be maintained whilst a buyer was found. Twenty nine members of staff, including the four claimants, were made redundant on 28 May 2010. The Administrator gave a press release in which he explained that he had made staff redundant and had to consider selling players.

A public protest followed the Administrator's statement and pressure was put on Lloyds, in particular, to support a deal to enable the consortium to buy both the club and the grounds. As a result, the club and the grounds were sold to CPFC Ltd in August 2010. The claimants contended that the transfer was a TUPE transfer and that they had been unfairly dismissed; they contended that liability for their dismissal passed to CPFC Ltd on the basis that the reason for their dismissal was not an economic, technical or organisational ("ETO") reason under Reg 7 of TUPE.

The Employment Tribunal (the "ET") concluded that the reason for the dismissals was connected with the transfer and that it was an ETO reason. This meant that any liability arising out of the dismissals remained with CP 2000 and did not pass to CPFC Ltd. The claimants appealed to the Employment Appeal Tribunal ("EAT").

At the EAT, the appeal was upheld. It found that the employment tribunal had erred in law in concluding that the claimants had been made redundant for an ETO reason since the Administrator had had no intention of continuing to conduct the business: on the contrary, his decision to moth ball the club was effectively a decision not to conduct any business, but to preserve it so that, if a new buyer came along it could resume the conduct of the business.

CPFC Ltd appealed.

Held

The court unanimously held that the EAT was wrong to hold that the ET had fallen into legal error. The appeal was allowed and the judgment of the ET restored.

Comment

As the Court of Appeal noted there is, inevitably, a tension between the legislative regime governing the position of employees on transfers of the undertakings of their employers and the regime governing companies in serious financial difficulties which have been put into administration. Care has to be taken not to enable those administering a company to so arrange matters as to artificially contrive an ETO reason and so illegitimately avoid the TUPE regime (para 11).

Mr Justice Briggs described Regulation 7 of the 2006 TUPE Regulations as the "tie-breaker" between the two regimes. He referred to the remarks of Jonathan Parker J in *Whitehouse v CA Blatchford Ltd* [2000] ICR 542 at 555 where, having reviewed relevant ECJ authority he stated that the purpose of the Directive was "to safeguard the rights of employees vis-à-vis their employers where an undertaking or business is transferred, but not to place employees in any better position vis-à-vis their employers by virtue of such a transfer" (para 24).

Regulation 7 requires a fact-intensive analysis of the 'sole or principal reason' for the relevant dismissal. In this case, the ET had carefully considered and rejected the employees' case and so had concluded that the reason for the dismissal was genuine. The ET had been correct to distinguish between the Administrator's reasons for the dismissals and his ultimate objective. The *Spaceright* case had to be understood on its facts: the CEO had been dismissed, not because the money had run out, but to make the business more attractive to a purchaser. In the instant case, negotiations had dragged on and the administrators had run out of money and so had to dismiss staff they could no longer afford to pay.