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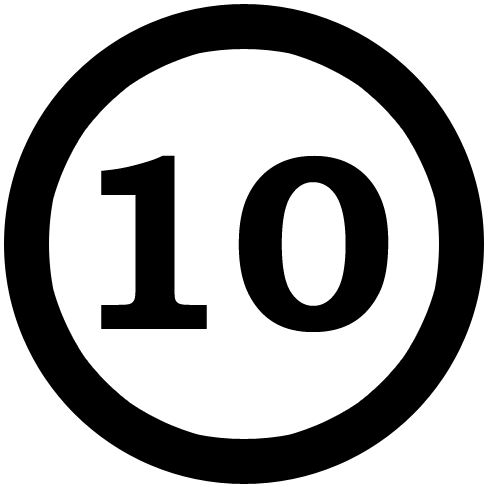

10 cases every insolvency practitioner should know

Andrew Cawkwell and Kelly Jordan

Welcome

Welcome to Muckle LLP's Banking & Restructuring Team Webinar

Please remember to mute your phones as you join the call!

Your hosts

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Member of R3, TMA and ILA

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1: Eurosail

- Company acquired portfolio of sub prime mortgages
- Purchase funded by issue of loan notes in various classes and currencies
- Majority of notes repayable in 2045
- Income from underlying mortgages was payable in sterling yet notes payable in US dollars, euros and sterling
- Eurosail entered into currency swaps with part of Lehman Bros - in event of default, notes would all become payable
- Eurosail lost currency swap protection

- The above, plus adverse moves in interest and currency rates, and poor performance of mortgage market notwithstanding, still able to perform and pay interest on notes and repay principal to extends funds where available

1: Eurosail

- Group of note holders who were subordinate trying to force the issue.
- They perceived they would suffer a shortfall - if default - they would rank pari passu
- Supreme Court considered three key imponderables:
  - currency movements
  - interest rates
  - general economy
- All over 30 year period
- Could only really speculate rather than calculate or predict on any scientific basis
- As such a 30 year deferred liability with company continuing to pay its debts as they fell due
- **Court should be very cautious in deciding a state of balance sheet insolvency**
- **“Point of no return" test should not become a paraphrase for balance sheet insolvency**

2: Nortel

- Supreme Court decision in the appeal against the decision in the Nortel and Lehman cases
- Key question court considered was **where in the order of priorities of payment was liabilities** arising under Pension Regulator moral hazard provisions:
- **Unanimous** decision - not expenses (as had previously been thought) but rather provable debts as per 13.12(1)(b) Insolvency Rules 1986

- Key focus was companies that entered into admin were already "obligated" to make a payment to pension fund - accordingly FSD was a liability arising under an obligation to which the companies were subject when they entered into administration

3: McDonagh & others and Pengelly & others

- CVA followed by compulsory liquidation
- Termination of employment on liquidation
- Arrears of pay and unpaid holiday pay
- NIF rejected claim
- Already insolvent by virtue of CVA
- ET upheld employees' claims
- SoS appealed
- S182 Employment Rights Act 1996
- Payment out of NIF if:
  - employer insolvent
  - employment terminated
  - at "appropriate date" employee due payment
- S183 ERA – insolvency includes a CVA

3: McDonagh & others and Pengelly & others

- S185 ERA – “appropriate date” for arrears of pay and holiday pay is date of insolvency
- EAT held:
  - only one insolvency event
  - liquidation only a separate event where not preceded by CVA
- Earliest insolvency process is relevant event for ERA
- “Appropriate date” is date of insolvency – single date
- Date CVA approved by the court
- Arrears of pay and holiday pay falling due between CVA and liquidation irrecoverable from NIF

4: I Lab Facilities Limited

- Sale of part of a business only
- Remaining part closed down
- Were employees employed in part closed down "affected employees" for TUPE purposes?
- Only employees "affected" by transfer need to be consulted
- Employer facing insolvency
- Intended sale of whole business but only part sold by liquidator
- Employees in remaining part dismissed
- Proceedings brought including claim for failure to inform and consult (Reg. 13 TUPE)
- Employer and transferee jointly liable (Reg. 15(9) TUPE)
- ET upheld claim:
  - dismissed employees were "affected employees"
  - excluded from transfer when originally intended to be included

4: I Lab Facilities Limited

- Transferee appealed. EAT held:
  - indirect impact of actual transfer did not render employees “affected employees”
  - no claim unless transfer actually takes place

5: AEI Cables

- Requirement to inform and consult (S188 Trade Union and Labour Relations (Consolidation) Act 1992)
- Protective awards
- Dismissal of 20 or more employees – requirement to collectively consult with representatives of affected employees
- Consultation needs to be timely
- Where proposal to dismiss 100 or more employees, consultation period of at least 45 days
- Insolvency not in itself a “special circumstance”
- Employer in financial difficulties
- Advised of risk of trading whilst insolvent
- Personal liability for directors
- Bank withdrew support
- Decision to close a plant immediately
- Union representative notified

5: AEI Cables

- 124 employees immediately dismissed as redundant
- ET held:
  - Complete failure to inform and consult
  - Maximum award of 90 days' pay for each employee
  - Company appealed amount of the award
  - Award penal not compensatory
  - Should consider reasons for breach
  - Start with max. award and reduce only if mitigating circumstances
  - Company not flouting its obligations
  - Unreasonable to expect employer to trade while insolvent to enable it to consult
  - Protective award should be reduced

6: Ethel Austin

- Further consideration of S188 Trade Union and Labour Relations (Consolidation) Act 1992
- Inform and consult affected employees under s188 "*Where an employer is proposing to dismiss as redundant 20 or more employees* ***at one establishment*** *within a period of 90 days or less"*
- Consideration of "at one establishment"
- Administration and liquidation of Ethel Austin and Woolworths
- Protective awards made only to employees at stores with 20 or more employees
- USDAW appealed
- EAT held "at one establishment" should be disregarded
- Employees at smaller stores also entitled to collective consultation and protective award

7: Data Power Systems Limited and others v Safehosts (London) Limited and another

- Company incorporated to set up and operate data centre
- Project failed quickly after commencement when company had few assets but significant liabilities to trade and other creditors
- No employees and no one had security over assets
- Some creditors came together and applied to court for admin
- Proposed administrator said "better return than would be case in liquidator"
- Another creditor sought to appoint a different IP
- Court said the company was clearly insolvent
- No evidence to suggest stat purpose could be achieved

7: Data Power Systems Limited and others v Safehosts (London) Limited and another

- High courts refusal of an application for an administration order instead appointing a provisional liquidator in a case where no substantive evidence of the fact that one of statutory
- Purposes could be achieved was produced to the court
  - serves as a reminder - real clarity and underlying evidence is required. Mere assertion is not enough even if the IP puts his name to it
- It is also noteworthy that a provisional liquidator was appointed by the court when no application was before it. Court using its powers under S125 to make such order

8: Bramston v Haut

- Suspension of automatic discharge from bankruptcy and s279 Insolvency Act 1986
- Punitive measure only
- Used to ensure assistance in relation to trustee's duties when dealing with bankruptcy estate
- Suspension not related to bankrupt's non-compliance with his obligations therefore beyond scope of s279
- Application for stay of proceedings/suspension of bankruptcy under s252 to 256 could potentially be used

9: Davis v Price

- Davis v Price [2013] EWHC 323 (cn) (21 February 2013)
- Suspension of approval or IVA
- Increase in creditor's claim after first meeting
- Creditor bound by IVA for full amount not just amount due at date of original meeting

10: Appleyard v Wewelwala

- Appleyard v Wewelwala [2012] EWHC 3302
- Bankruptcy order set aside
- Treatment of trustee in bankruptcy's expenses
- High Court held expenses incurred up until notification that bankruptcy order had been set aside were recoverable
- Charge over property re-vesting in the bankrupt as security

Questions

For further information

Further information, insolvency contacts and lively discussion can be found on our LinkedIn group – just search for **Insolvency and Turnaround Community**

Andrew Cawkwell is a regular industry tweeter and can be followed via **@companyrescue** – you can also follow **@mucklellp** for law updates and general news

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