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Newman & Partners

Licensed Insolvency Practitioners

RECOVERY & REVIVAL BULLETIN

Welcome to the latest issue of our Recovery and Revival Bulletin, designed to keep you up-to-date on insolvency matters that may be of interest to you. If you have any feedback on this bulletin, or would like to know more about our services or how we can help you, please contact us on **020 8357 2727** or at **insolvency@newmanandpartners.co.uk**

Small Business, Enterprise and Employment Act: What you need to know

Last month the Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) was given approval by Parliament.

This new Act aims to remedy a wide range of issues that affect small businesses, including late payments, bank finance and 'red tape'. However, it also goes into some detail about new insolvency rules, which could have a significant impact on businesses when they are introduced.

The first significant change under the Act is to director disqualifications. Under the SBEEA 2015, a new approach to the reporting of director misconduct by liquidators, administrators and administrative receivers will be introduced and two new grounds for disqualifying a director in the UK will come into force. These include disqualification orders against a person convicted of a company-related offence overseas and a person who has instructed a disqualified director.

The Act has also broadened the range of matters a court must consider when disqualifying a director, to include consideration of the nature and extent of harm the misconduct has had and the director's track record in running failed companies. In serious cases the Secretary of State may seek a compensation order against a disqualified director, where misconduct for which they have been disqualified, has caused identifiable loss to their creditors.

The Act has also introduced new changes designed to improve relations between creditors and officeholders, which allow new forms of engagement through the use of modern communication methods.

As part of the amendment to the rules, the current requirement to hold physical meetings in every case will be abolished and replaced with alternative methods, such as virtual meetings, electronic voting, meetings by correspondence or deemed consent where appropriate. However, creditors must still be able to ask for a physical meeting should they prefer this method.

A reserve power has been taken, making it possible in future to create regulations to either prohibit administration sales to connected parties or impose conditions or requirements to allow a connected party administration sale to proceed, which would include connected 'pre-pack' sales. This power, which lapses five years after commencement, would only be used if the voluntary measures arising from the Graham Review into pre-pack administration prove unsuccessful.

The rules governing the appointment of administrators have also been changed by clarifying that winding-up petitions, presented during the interim moratorium preceding administration, do not prevent the appointment of an administrator. There have also been changes to the rules governing 'after-acquired property' in bankruptcy, meaning that the British Banking Association must act to improve

access to bank accounts for bankrupts. If account holders withdraw funds, banks will be protected from recovery action by trustees in bankruptcy if they had not received specific notice that the funds had been claimed as part of the bankrupt person's estate.

These new amendments to a number of existing laws represent a significant change to how insolvency proceedings may be handled in future. It is important that any business currently facing the prospect of insolvency or any creditor pursuing outstanding funds understands what these changes mean for them. If you would like further advice on any of these issues, please contact us.

Landmark Woolworths case signals rule change for redundancy

The nature of redundancy in the UK is set to change following a decision by the European Court of Justice (ECJ) to rule in favour of the UK Government in a landmark case against former employees of defunct retailer Woolworths.

This decision will be welcomed by business leaders, who will no longer face the significant red tape or high costs associated with the current redundancy process. The judgement from the court relates to a specific case involving former Woolworths and Ethel Austin employees who were made redundant in 2008 and 2010 respectively.

Staff, with the help from the Union of Shop, Distributive and Allied Workers (USDAW), brought claims in the Employment Tribunal for protective awards of up to 90 days' pay per employee. Staff at larger stores were granted these awards, but over 4,000 employees at smaller stores, where there were fewer than 20 employees, were excluded from the collective consultation requirements and so were not entitled to protective awards.

The union, acting on behalf of these staff, launched an appeal against this decision at the Employment Appeal Tribunal (EAT), which decided in 2013 that UK legislation should be re-written in line with EU principles, so that the establishment where employees worked became irrelevant to their entitlement to protective awards.

The result was that employers had to collectively consult whenever there were 20 or more redundancies across their entire business. This increased both the financial and administrative cost of redundancy for large businesses and made it difficult for large employers to comply with their obligations to carry out headcount reductions quickly and efficiently.

However, the UK Government subsequently brought an appeal against the court's decision, which has led the ECJ to reach the following conclusions. These are that the term "establishment" in a collective redundancy context means "the entity to which the workers made redundant are assigned to carry out their duties", referring to each workplace rather than the employer. This means that employers are only required to engage in collective consultation if 20 or more redundancies are proposed at a particular establishment within a 90-day period, meaning that Woolworths was not required to engage in collective consultation in those stores where fewer than 20 redundancies were proposed.

Redundancy can be a difficult process for any business, either big or small, and the implications of this case could leave you unsure of your position. At Newman and Partners we are experienced in assisting businesses with all forms of redundancy and can make the process easier for you. For more information about our services, please contact us.

Insolvent company permitted to sue fraudulent directors

The Supreme Court has ruled that directors who commit a crime in the name of a company cannot blame it on the company and avoid litigation in the civil courts.

The decision comes from a recent case in which seven Supreme Court judges dismissed an appeal by Swiss transportation company Jetivia SA against Bilta; a company that was compulsorily wound up in November 2009.

The case was brought to the courts by the liquidators, Grant Thornton, who alleged that Bilta's own directors were party to an "unlawful means conspiracy" to injure Bilta through a VAT fraud, known as a "carousel fraud" scheme, involving carbon credits, and that Jetivia, the appellants, had dishonestly helped them. Grant Thornton, in Bilta's name, claimed damages from Bilta's two directors and Jetivia SA and its Chief Executive, based on constructive trust and a contribution under Section 213 of the Insolvency Act 1986.

At the Supreme Court Jetivia sought to strike out Bilta's claim on the basis of illegality applied – i.e. the principle that a party cannot bring a claim that relies on its own illegal act – and that the claims for contribution were based on Section 213 of the Insolvency Act 1986, which could not be invoked for it does not have extra-territorial effect.

It was argued that because Bilta's function was to allegedly serve as a vehicle for defrauding HM Revenue & Customs, the doctrine of illegality barred Bilta from litigating against the directors as a means of recovering the company's loss for the benefit of its creditors.

The Supreme Court found that under normal circumstances, the acts and state of mind of a company's directors and agents could be attributed to the company. This means that the illegality defence could not bar Bilta's claims against the directors on the basis that the conduct of the directors could not be attributed to the company in the context of a claim against the directors for a breach of their duties. The court also dismissed the appellants' appeal that section 213 of Insolvency Act 1986 did not apply because they were based in Switzerland, on the grounds that the section does have extra-territorial effect.

If you are concerned about the impact of this ruling or would like to know more about the service Newman and Partners provide, please contact us.

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