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In This Update:

Contact Us:

02037358070

Clerks@forumchambers.com

www.forumchambers.com/

3 KEY DEVELOPMENTS

April 2022: This month's edition will discuss the Corporate Insolvency and Governance Act 2020, a Court of Appeal case and abusive applications for interlocutory relief.

Have corporate liquidations increased since the removal of the restrictions in Schedule 10 of the Corporate Insolvency and Governance Act 2020?

As many practitioners will be aware, the restrictions on the presentation of winding up petitions imposed by Schedule 10 of the Corporate Insolvency and Governance Act 2020 came to an end on 31 March 2022. Where they applied those rules required, among other things:

1. The delivery of a notice on the debtor company which was akin to a statutory demand; and
2. A petition debt of £10,000 or more.

The latter was perhaps the most notable restriction, as it raised the minimum threshold significantly higher than the £750 threshold which is in place for statutory demands (see section 123(1)(a) of the Insolvency Act 1986 ("IA 1986")).

Since 1 April 2022, subject to some remaining restrictions in the context of arrears of commercial rent (which are contained in the Commercial Rent (Coronavirus) Act 2022), the position has largely reverted to the pre-pandemic position set out in the IA 1986 and Insolvency (England and Wales) Rules 2016.

On 22 April 2022, the Insolvency Service released its monthly corporate insolvency statistics for March 2022[1]. It is interesting to note that there were more than double the number of corporate insolvencies than there had been in the same month of 2021 and that the number in March 2022 was 34% higher than the number in March 2019 (i.e. prior to the Covid-19 pandemic). The number of CVLs in March 2022 was more than double those a year ago, and the number of administrations was 74% higher than a year ago. Specifically with regard to compulsory liquidations, these were almost four times higher than in March 2021, though remained lower than before the Covid-19 pandemic.

On 28 April 2022, the Insolvency Service released its quarterly corporate insolvency statistics for the period to the end of March 2022[2]. In this period the number of compulsory liquidations increased from that in the previous quarter to the end of 2021, but remained lower than those before the Covid-19 pandemic. It is notable that in terms of corporate insolvencies as a whole, the figure after seasonal adjustment for the quarter ending in March 2022 was up 6%

1 https://www.gov.uk/government/statistics/monthly-insolvency-statistics-march-2022/commentary-monthly-insolvency-statistics-march-2022.

2 https://www.gov.uk/government/statistics/company-insolvency-statistics-january-to-march-2022/commentary-company-insolvency-statistics-january-to-march-2022.

from the previous quarter, and up by 112% from the same quarter last year.

The data suggests that the winding down of the Government's various Covid-19 related assistance schemes and market pressures are causing increasing financial difficulties for firms which is leading to increasing recourse to insolvency processes, but that this has not (yet) led to particularly significant increases in the numbers of compulsory liquidations. It is anticipated that the statistics for April 2022 and further ahead will involve significant increases, as the more relaxed environment for presenting winding up petitions translates into more winding up orders being made.

NATHAN WEBB (2012 Call)
Nathan is a member of Forum Chambers' commercial litigation and insolvency teams.

For more information about Nathan Webb see his profile here: https://forumchambers.com/our-people/nathan-webb/

Contributions after settlements– The Court of Appeal clarifies s.1(4) of the Civil Liability (Contribution) Act 1978 in *Percy v Merriman White* [2022] EWCA Civ 493

In *Percy v Merriman White* [2022] EWCA Civ 493, the Court of Appeal has recently confirmed the proper interpretation and effect of s.1(4) of the Civil Liability (Contribution) Act 1978 (the **"Contribution Act"**).

Section 1(4) provides as follows:

> *"(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established."*

Section 1(4) therefore applies where a defendant (**"D1"**) reaches a bona fide settlement with the claimant (**"C"**), and thereafter claims a contribution towards that settlement from another person (**"D2"**). It protects D1 against D2 arguing that D1 ought to have defended the matter and should not have settled.

However, in this case, the High Court had held (based on previous Court of Appeal authority, *WH Newson Holding Limited v IMI Plc & Delta Limited* [2016] EWCA Civ 773) that the effect of s.1(4) went further, and that once D1 had proved (i) a reasonable cause of action against it, and (ii) a bona fide settlement had been reached, it *"follows, without more"* that D2 was liable for a contribution. And therefore, D2 was prevented from denying liability for a contribution on the basis that it denied its own liability to C.

The Court of Appeal rejected this and confirmed that s.1(4) is only directed at D1's liability to C. It has no bearing on whether D2 is also liable to C for *"the same damage"*, such that a contribution claim arises under s.1(1). As a result, it will still be necessary for D1 to prove that D2 is liable to C before a contribution claim under the Contribution Act is available.

In the 'ordinary' case where C sues both D1 and D2, and both are held to be liable, they will both be bound by that finding. However, where a claimant does not sue both defendants, and their liability is not co-extensive, matters are not as simple.

In this case, C had initially sued D1 (his former solicitor) and D2 (a barrister) for professional negligence, arising from their advice to pursue a derivative claim rather than apply to have a company wound up. Unfortunately, however, the court then refused the preliminary step of granting permission for a derivative claim, with a substantial adverse costs order against C.

C thereafter discontinued his claim against D2 as it was perceived that his case was stronger against D1, and he wished to avoid the risk of an adverse costs order if he failed in his claim against D2. The reason for the difference was that although D1's and D2's duties of care in the main matter were similar, their alleged breaches of care and causation were not identical. Of particular relevance, one of C's primary complaints was that the defendant in the main matter had made a settlement offer at an early mediation, which he had rejected on the advice of D1 who was in attendance, when he should have been advised to accept it. Because D2 was not in attendance at the mediation, proving negligence and causation against him was not as straightforward as against D1.

C's claim against D1 was then settled, and D1 sought a contribution from D2.

The Court of Appeal, overturning the High Court's judgment, held that it was necessary for D1 to prove both negligence and causation on the part of D2 before a contribution claim under s.1(1) would be available. And on the facts of this case, it had failed to do so.

The Court of Appeal's judgment confirms the correct interpretation of s.1(4), and highlights the dangers of assuming that a co-defendant (or potential co-defendant) will be liable for a contribution where their liability is not completely co-extensive and/or no findings have been made against them. One therefore needs to be careful before advising a co-defendant to make a settlement offer, to ensure that if a contribution is sought from the other co-defendants (or potential co-defendants) that the liability of those persons is clear, to avoid a situation where D1 is required to effectively re-litigate C's case against them in order to sustain the contribution claim.

IAIN SHIPLEY (2019 Call)
Iain is a member of Forum Chambers' commercial litigation and insolvency teams.

For more information about Iain Shipley see his profile here:
https://forumchambers.com/our-people/iain-shipley/

Abusive applications for interlocutory relief following the recent High Court Decision in Discovery Land Company, LLC v Axis Speciality Europe SE [2022] EWHC 585 (Comm)

This case concerned an application by the Claimants for summary judgment on the basis that the Claimant's case was 'unanswerable' on the basis of the correct construction of clause 2.8 of the Defendant's professional

indemnity insurance policy. According to the Claimants, that construction meant that on a proper construction of clause 2.8, the Defendant could only succeed with its defence that the director of the insured entity had condoned the relevant acts/omissions if he had actual knowledge of those acts/omissions.

At the CCMC in this matter, the Defendant sought permission to amend their Defence to include what was referred to as the condonation case. This permission was granted by Mr David Railton QC, and the Claimants did not raise any points regarding the construction of clause 2.8 during the permission hearing.

The Defendant opposed the application on the basis that it was an abuse of process and that summary judgment should be granted on the merits of the application.

The Honourable Mrs Justice Moulder first considered the question of whether the application for summary judgment constituted an abuse of process. The application was treated as a second application given that it was essentially seeking the same relief as disallowing the amendments to the Defence. In applying the legal principles established by the cases of ***Henderson v Henderson* (1843) 3 Hare 100**, ***Johnson v Gore Wood & Co (No.1)* [2002] 2 AC 1**, ***Woodhouse v Consignia Plc* (CA) [2002] 1 WLR 2558**, ***Koza Ltd v Koza Altin Isletmeleri AS* [2022] 1 WLR 170**, it was found that there was no general principle that applicants in interlocutory hearings are entitled to a greater indulgence of the Court and the argument that awarding summary judgment would save the costs of trial 'runs contrary to the principle in *Koza* that the application of the *Henderson* principles will often mean that if a point is open and not pursued, the party cannot take the point at a subsequent interlocutory hearing absent a significant and material change of circumstances or the party becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing'.

The Claimants failed to establish that the case was *"unanswerable"* as Brooke LJ had envisaged in ***Woodhouse*** and had not advanced any new material or new authority which had been previously overlooked. As highlighted in paragraph 49 of the judgment, it was not a case where the legal analysis which the Claimants alleged provided a complete answer to the condonation case had not previously been put before the Court. In reality, it was just that the Claimants had not thought of the construction point. The impact on the efficacy of the judicial process was considered in detail and it was found that if the Claimants' application were to succeed, it would obstruct that efficacy.

The Claimants also failed in their arguments that the issue of construction would have to be dealt with at trial or that a decision might assist settlement. In paragraph 55 of the judgment, it is stated that *'to accept such a submission would be to allow every "second bite of the cherry" irrespective of whether there has been any material change of circumstances'.*

The Claimants application was found to be an abuse of process and was accordingly refused. In the event that the Claimants were able to show a material change in circumstances, there is a good chance that the application would have succeeded notwithstanding that it would have been a *"second bite at the cherry".* In the absence of

that in this case, it is somewhat surprising that such an application was made.

The decision serves as a useful reminder that prior to making an application for summary judgment or any other interlocutory relief where any such application would be based on a point which was open but not pursued, parties must seriously consider whether there has been a material change in circumstances. This is because it is clear from this decision that the Court will not shy away from finding interlocutory applications to be abusive if there is no such change and that granting the relief would disrupt judicial efficacy.

RUHI SETHI-SMITH (2012 Call)

Ruhi is a member of Forum Chambers' commercial litigation, financial services, and insolvency teams.

For more information about Ruhi Sethi- Smith see her profile here: https://forumchambers.com/our-people/ruhi-sethi-smith/