KEMP & KEMP PRACTICE NOTES: INSOLVENT DEFENDANTS PART II

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1. In the September issue of Kemp News I dealt with the mechanics of starting or continuing proceedings against an insolvent defendant. Since then, there have been 2 cases that neatly illustrate the complexities that can arise in relation to limitation where the potential defendant has become insolvent. One was Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd (In Creditors' Voluntary Liquidation) (2005) (2005) EWCA Civ 1408, the other (an asbestos case that did not directly consider limitation issues) Re T&N Ltd & Ors (2005) (2005) EWHC 2870 (Ch). The purpose of these notes is to try to summarise how these cases leave the issue of limitation when a potential defendant is insolvent.

2. One common situation that arises, touched on in my previous notes, is the discovery that the potential defendant, being a company, has been struck off the register of companies for failing to file returns or on the application of the company itself pursuant to section 652 or 652A Companies Act 1985. This does not necessarily mean that the company is insolvent, although it commonly is and there is no administration of its assets and liabilities as occurs, for example, in cases where there is a winding up.

3. The company, from the date of its dissolution, ceases to exist and any proceedings brought against it before restoration are a nullity, see re Workvale Ltd (In Dissolution) (1992) 1 WLR 416. As previously noted, on an application to restore such a company to the register, the court has the power, pursuant to

section 652(3) to direct that the period between dissolution and restoration shall not count for the purposes of any statute of limitations, see Re Donald Kenyon Ltd (1956) 1 WLR 1397.

4. The situation is, in those circumstances, straight forward, no proceedings can validly be issued whilst the company does not exist and the court has a discretion to disapply the running of the limitation period during the time when the company did not exist when it orders the restoration of the company. The Kenyon case (brought by shareholders who wanted the company restored to realise an asset) proceeded on the basis that, as the purpose of restoration was to put everyone in the position they would have been in had the dissolution not taken place, the limitation period should be disapplied almost automatically.

5. It is possible to envisage circumstances, however, where an insurer, potentially liable under the Third Party (Rights Against Insurers) Act !930, will want to argue that a potential claimant in a personal injury claim seeking restoration of a company in these circumstances should be forced to rely on section 33 Limitation Act 1980 in the contemplated proceedings, rather than being given relief on the restoration of the company. This is particularly in the light of the fact that a creditor has 20 years from dissolution to seek restoration.

6. This was argued in Workvale (a case that concerned the rather different provisions in section 651 that apply after dissolution following winding up). In that case, the court held that an order that the limitation period should not run during the period of dissolution should be made if an application under section 33 would succeed. As I have said, however, the provisions are not identical, in particular there is no limit in section 651 on the time for an application to

declare the dissolution void where the applicant is a potential claimant in a personal injury or fatal accident claim. Thus it would be open to a court to hold that Workvale is no guidance to the courts' approach under section 653.

7. As regards companies that have been wound up, the Larnell case considered the question whether the limitation period ran against a claimant after the voluntary liquidation of a company where the claimant was seeking to sue the company in order to avail itself of the Third Party (Rights Against Insurers) Act 1930. The claim was a professional negligence claim, but the principles would apply to a personal injury claim.

8. The Court of Appeal, reversing the decision of David Steel J, held that the principle in Re General Rolling Stock Co (1872) LR 7 Ch App 646 applied. That was a case involving the compulsory winding up of a company and it held that so long as a debt was owing at the commencement of the liquidation, the passage of further time thereafter did not bar that debt from proof in the liquidation.

9. The Court of Appeal in Larnell held that the proceedings that were contemplated were not within the established exceptions to the rule (for example the enforcement of security outside the liquidation) and, therefore, the limitation period did not run against a claimant whose claim was not statute barred at the commencement of the liquidation.

10. Workvale had proceeded on the assumption that the limitation period had continued to run after the liquidation. This was no doubt because at the time when the company went into liquidation, unliquidated claims for damages in

tort could not be proved in an insolvent liquidation (that has now been reversed).

11. It could have been argued, however, that the claimant had an unliquidated-provable- claim in contract as he was suing his former employer, the point does not appear to have been taken. As the liquidation of the company commenced less than 1 year after the accident, it would have been open to the claimant to say, along the lines of the Larnell case, that, on the principles of Re General Rolling Stock, there was no question of his claim being statute barred as he had a provable contract claim. Workvale was not cited in Larnell, but Re General Rolling Stock was not cited in Workvale. Pending any clarification, it would seem that Larnell ought to prevail and where there is a liquidation, limitation is suspended at least until the company is dissolved.

12. So far as company voluntary arrangements (CVAs) are concerned, the T&N case held that claims for damages for personal injury cases are potentially included in the ambit of a CVA, indeed the judge held that asbestos exposure cases where the claimant had not at the date of the CVA suffered injury were so included. On the other hand, he held that such cases where the claimant had suffered no injury at the date of commencement of liquidation could not be admitted to proof in a liquidation.

13. So far as limitation is concerned, the effect of a claim coming within the ambit of a CVA appears to be that limitation is, again, suspended, see Tanner v Everitt (2004) EWHC 1130 (Ch) at paragraph 76. The “declaration” in that case to that effect was per curiam but follows the principle that limitation should not run

where the claimant is prevented (in this case by deemed agreement) from pursuing his claim against the defendant personally.

14. So far as a company in administration is concerned, the issue of the running of the limitation period does not appear to have arisen. Whilst a company is in administration, no proceedings may be proceeded with or commenced against the company except with the leave of the court or permission of the administrator. A company adminstrator is appointed either by the court or by the holder of a floating charge or by the company itself.

15. Unlike winding up, however, administration does not necessarily lead to the extinction of the company itself as one of the purposes of administration is to rescue the company as a going concern. Frequently, therefore, an administration is followed by a CVA. It would seem unfair to creditors of a company in administration and contrary to the purposes of an administration if the limitation period ran during administration.

16. The provisions regarding individual voluntary arrangements are similar to those of CVAs and, therefore, if Tanner is right on this point, the result would be the same. The upshot would appear to be that where an individual enters into a voluntary arrangement that covers personal injury claims, the limitation period is suspended by implied agreement. As noted previously, and confirmed in the T&N case, a voluntary arrangement, unless it provides to the contrary, will cover such claims.

17. Where a potential defendant is made bankrupt, however, the position is different. In such a case, the limitation period is not suspended at all. That is because, pursuant to section 281(5)(a) Insolvency Act 1986, a bankrupt is not

discharged from liability for claims for personal injury on his discharge from his bankruptcy (now normally after 1 year). This appears from Anglo Manx Bank Ltd v Aitken LTL 3/10/2001 where the court held that the bankruptcy of a potential defendant does not suspend limitation in respect of claims for fraud that similarly are not discharged by the bankrupt's discharge.

18. That case was referred to without criticism, although distinguished as to the result, in the Larnell case. Thus if a potential defendant is made bankrupt the claimant in a personal injury action must still issue proceedings within the usual limitation period.

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