INSOLVENT DEFENDANTS AND CLAIMANTS

Insolvent Defendants

Corporate Insolvency

Dissolution

1. Corporate bodies (limited companies or LLPs) have a separate legal identity that ceases to exist upon dissolution. Dissolution can occur, broadly speaking, in two ways, one is at the end of the process of winding up (whether voluntary or compulsory) and the other is by the process of striking off the Register of Companies or limited liability partnerships. The latter occurs either as a result of the company's or LLP's failure to file accounts, returns etc. or by a process of voluntary striking off.

2. In any of these cases, the company or LLP once dissolved ceases to exist. This gives rise to the problem of what to do if the company or LLP is a necessary party to personal injury litigation. Matters have been made much easier since the coming into effect of the Companies Act 2006. The provisions of that Act in relation to restoration of companies to the Register apply equally in modified form to LLPs by virtue of the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009.

3. Under the old regime, there were cases where until the company (or LLP) was restored to the Register, it was not possible to issue proceedings. Any proceedings that were issued against a company or LLP that had been dissolved were held to be a

nullity and would not be retrospectively validated by the subsequent restoration of the company or LLP to the Register.

4. That is no longer the case. The effect of sections 1028 and 1032 Companies Act 2006 as applied to companies and LLPs is that the subsequent restoration of a company or LLP to the Register will retrospectively validate any proceedings issued against that company or LLP whilst dissolved.

5. That was established in *Goddrell v. Peakstone Limited* (2012) EWCA Civ. 1035 (2013) 1 AER 13. In that case the Court of Appeal further held that service of the claim form on the former registered office of the dissolved company would be validated by the order for restoration as well as the issue of the proceedings.

6. Where a company (or LLP) has been struck off the Register and dissolved for failing to file accounts or returns, the application is made under section 1024 Companies Act 2006, but that application can only be made by a former director or former member and there is a time limit of 6 years from the date of dissolution. The application is an administrative process in comparison to an application to court under section 1029, where the class of applicants is much wider and includes anyone who has a claim against the company or LLP and pursuant to section 1030(1), the application can be brought at any time for the purpose of bringing proceedings against the company (or LLP) for damages for personal injury.

7. Section 1030(2) goes on to provide that the court shall not make an order on such an application if it appears to the court that the proceedings would fail by virtue of any

enactment as to the time within which proceedings must be brought. It is clear, however, that in relation to that subsection, the court may take into account its power to extend time under section 33 Limitation Act 1980 (see *In Re Workvale Limited* (1992) 1 WLR 416).

8. It is worth noting that pursuant to section 1030(3) the court has the power to direct that the period between dissolution or striking off of the company and the making of the order is not to count for the purposes of limitation. In *Smith v. White Knight Laundry Limited* (2001) EWCA Civ. 660 (2002) 1 WLR 616, the Court of Appeal held that a direction in favour of a claimant suspending the limitation period between dissolution and restoration, should only be made where notice had been given to those parties who could expect to oppose the application, where the court was satisfied it had all the evidence available to it that would be before a court on an application under section 33 and that a section 33 application would have been bound to succeed.

9. Finally in this context, it is worth noting that although once a company or LLP has been restored to the Register, limitation will run from dissolution to restoration, if the dissolution was as a result of a winding up order, limitation will not have run from the order for winding up until dissolution. This was established as long ago as 1872 in *Re General Rolling Stock Company* (1872) 7 Ch. App. 646.

Barriers to Litigation

10. Where a company (or LLP) is wound up pursuant to an order of the court (compulsory winding up), then section 130(2) Insolvency Act 1986 provides that no

action or proceedings shall be proceeded with or commenced against the company (or LLP) or its property, except by leave of the court and subject to such terms as the court may impose.

11. There are similar provisions in relation to companies in administration. They are found in Schedule B1 Insolvency Act 1986 at paragraph 43. These provisions do not apply where the company is in voluntary liquidation, nor do they apply if there simply has been the appointment of an administrative receiver. In the case of administration, the administrator can give consent to the legal proceedings as well as the court giving permission.

12. It was once thought that proceedings begun whilst a company was in liquidation pursuant to an order of the court were a nullity and could not be validated retrospectively. This suggestion was finally laid to rest (albeit only at first instance) in *The Governor and Company of the Bank of Ireland and Another v. Colliers International UK Plc* (2012) EWHC 2942 (Ch.) (2013) Ch. 422. It is a usual term in an order giving permission in relation to a personal injury claim that the claimant may not enforce any judgment against the company's assets without the court's permission (such a term would ordinarily appear in the consent given by an administrator).

Company Voluntary Arrangements

13. A company voluntary arrangement (CVA) is an arrangement made under Part 1 Insolvency Act 1986 between a company and its creditors whereby, in effect, creditors agree that the company should not be wound up and that the creditors should

receive a dividend pursuant to an arrangement rather than being able to pursue their debts. (They are available also to LLPs). There is a limited moratorium facility in section 1A Insolvency Act and if a moratorium is imposed whilst a CVA is being considered, then the situation is the same as discussed above, namely permission is required from the court for proceedings to be continued or commenced.

14. A company voluntary arrangement is approved where three quarters or more in value of creditors vote in favour of the proposal. Thus the proposal can be forced on a minority of dissenting creditors.

15. Where the proposal is approved, then it takes effect as if made by the company at the creditor's meeting and binds every person who in accordance with the Insolvency Rules was either entitled to vote at that meeting or would have been entitled if he had notice of it as if he were a party to the voluntary arrangement.

16. In one of the many cases arising from the administration of T&N Limited (manufacturers of asbestos), the court held that not only would a person who had an existing claim for personal injuries be counted as a creditor the purposes of a CVA, but also anyone who had a potential claim having been exposed, as in that case, to dangerous quantities of asbestos dust, but who had, by the time of the CVA, not suffered any damage. The case is *Re T&N Limited* (2005) EWHC 2870 (Ch.) (2006) 1 WLR 1728.

17. A CVA, therefore, may well bind a personal injury litigant even though that claimant had no notice of a meeting and will not be interested in pursuing the company's assets but, rather, its insurance.

18. Unless the claim arises out of a road traffic accident and there is, therefore, a direct right of action against the insurance company, the claimant will need to rely on the Third Parties (Rights Against Insurers) Act 1930. If, however, there has been a CVA that binds a creditor such as a claimant with a claim for damages for personal injury, then the rights of that claimant against the company are limited to the rights that are granted by the CVA and it is to that extent only that any rights under insurance can be enforced.

19. A well drawn CVA may well exclude from its ambit creditors who are claimants for damages for personal injuries. If, however, the CVA does not contain such a provision, then, unless the insurer were to take a pragmatic approach, it would be necessary to apply under section 6 Insolvency Act on the grounds that the arrangement unfairly prejudices the interests of the claimant/creditor for an order revoking or suspending the arrangement. The application has to be made quickly because subsection (3) of section 6 gives only a period of 28 days to make the application and that runs from the day on which the applicant became aware that the meeting had taken place. The court has power to extend that time but, as we all know, extensions of time are not so easy to get these days.

20. In a non-personal injury context, the court held that a creditor in relation to an individual voluntary arrangement (where the provisions are similar) would be unfairly

prejudiced if an arrangement interfered with his rights to bring proceedings against insurers under the Third Parties (Rights Against Insurers) Act 1930, see *Sea Voyager Maritime Inc. v. Bielecki* (1999) 1 AER 628. In those circumstances, the court could revoke the arrangement although, as happened in the *Sea Voyager* the parties having received the court's ruling would probably amend the CVA so as to exclude creditors who had personal injury claims.

Individual Insolvency

21. Most of the issues set out above apply equally in relation to individual insolvency. Section 285(3) Insolvency Act 1986 prevents proceedings against a bankrupt from the making of a bankruptcy order until the bankrupt's discharge except with the leave of the court. The *Governor and Company of the Bank of Ireland* case, although it did not apply to bankruptcy, made it clear that permission can be given retrospectively to validate proceedings commenced during that period without permission.

22. Where, in a case not involving a road traffic accident, a claimant wants to proceed against an individual defendant who has entered into an individual voluntary arrangement (IVA), then, again, similar considerations apply as with CVAs. There are, however, some important differences.

23. It is more common to have a moratorium (an interim order) in relation to individual voluntary arrangements. If an interim order is made, then pursuant to section 254(2) Insolvency Act 1986, the court can stay pending proceedings. That does not prevent the commencement of the proceedings.

24. The effect of approval of an IVA under section 260 is the same as a CVA. This gives rise to the same potential problem concerning a claimant's rights against the insurers under the Third Parties (Rights Against Insurers) Act 1930.

25. The remedy of challenge is similarly available, under section 262. Again it would be hoped that an insurer would not take a technical point that a claimant against an individual who has an IVA that potentially covers a personal injury claim is bound by the IVA.

26. One further point to note about IVAs as opposed to CVAs, is that an IVA is not an event that triggers a claimant's rights under the Third Parties (Rights Against Insurers) Act 1930. Technically, therefore, to invoke that Act, the claimant would have to make the defendant bankrupt. That would be very unfortunate for a defendant who had thought that he was protected by a perfectly reasonable and valid IVA. Again it would be hoped that an insurance company would not insist on such a technicality.

Insolvent Claimants

Bankruptcy

27. By section 306 Insolvency Act 1986, upon the appointment of a trustee, the bamkrupt's estate vests in the trustee. The trustee will be either an insolvency practitioner or, where no insolvency practitioner is appointed, the official receiver.

28. Section 283 defines the bankrupt's estate and that includes all property vested in him at the commencement of the bankruptcy (the day on which the bankruptcy order is made). There are various types of property excluded but choses in action are in general included.

29. In *Ord v Upton* (2000) Ch 352, the Court of Appeal held that that included a claim for damages for personal injuries. The trustee would, however, hold on trust for the bankrupt that part of the damages that related to pain suffering and loss of amenity.

30. If the bankrupt wants to proceed with such a claim, then he will have to persuade his trustee to bring or continue the claim in the name of the trustee or assign the cause of action to the bankrupt. In either case, the trustee would keep all damages save those that relate to PSLA.

31. So far as procedure is concerned, if, before he is made bankrupt, the bankrupt has brought a claim, then that claim will be stayed until and unless the trustee assigns the cause of action to the bankrupt or agrees to be substituted as claimant (see *Heath v Tang* (1993) 1 WLR 1421. If the bankrupt wants to start a claim after he has been made bankrupt and does so before he gets an assignment, then he risks the claim being struck out as a nullity incapable of remedy by a subsequent assignment (see *Pickthall v Hill Dickinson LLP* (2009) EWCA Civ 543 (2009) BPIR 1467).

32. That case, though, concerned a professional negligence claim where no part of damages was held on trust for the bankrupt. A claim by a beneficiary of a trust is possible where the trustee refuses to bring the claim (see *Lewin on Trusts* 18th Ed. 43.01-43.04). Such claims are by no means straight forward and may not be possible where, as in these circumstances, only part of the cause of action is held on trust for the bankrupt. An alternative would be to seek a direction under section 303 that the trustee assigns the cause of action or takes proceedings.

IVAs

33. The position of a claimant who has entered into an IVA is rather different. What assets are the subject of the IVA is a matter for the terms of the arrangement.

34. A claimant should always disclose to his creditors the fact that he has a personal injury claim as, plainly, that is an asset much (or most) of which would form part of his estate for distribution to his creditors were he made bankrupt.

35. If a bankrupt failed to disclose such an asset, he would risk the arrangement being later revoked due to a material irregularity and a bankruptcy order being made instead under section 276.