TRAVERS SMITH

# *Finance Monthly*

## *February 2014*

Welcome to the monthly finance bulletin from our banking and corporate recovery department. This issue contains our usual overview of some recent market developments and trends in the finance sector, including a further spotlight on the European Insolvency Regulation. Please get in touch if it raises any issues that you would like to discuss.

*Jeremy Walsh, Head of Banking and Corporate Recovery Department*

### Goldacre and Luminar overturned

*Leisure (Norwich) II Limited v Luminar Lava Ignite Limited and others [2012]* established that where an instalment of rent payable in advance falls due immediately before a company goes into administration and remains unpaid, that rent does not constitute a prioritised administration expense. The case of *Goldacre (Offices) Limited v Nortel Networks UK Limited [2009]* established that the whole of a rental instalment falling due during the administration would constitute an administration expense, regardless of the actual period of use of the property. The cases created an arbitrary cut-off, resulting in the transparent appointment of administrators soon after a traditional rent quarter date. This permitted a period of effectively rent-free use of premises enjoyed by the company in administration, redounding to the benefit of its creditors at the expense of its landlord.

In *Re Games Station Limited and others [2013]* the High Court followed *Luminar* and maintained the status quo, but in *Jervis v Pillar Denton Re: Games Station [2014]* the Court of Appeal overruled both *Luminar* and *Goldacre* on 24 February and concluded that landlords should be entitled to recover rent as an expense of the administration for the period during which the property is used for the purpose of an administration. The Court concluded that regardless of whether rent is payable in arrears or in advance, rent should be treated as accruing on a daily basis during an administration and the actual date on which a quarter's rent is payable must be ignored as a determinant. The *Goldacre* and *Luminar* decisions resulted from the difficulty of apportioning rent payable in advance (as opposed to arrears) under the Apportionment Act 1870. The Court of Appeal, applying the equitable principle of salvage to an administration in the same way as it was applied in a liquidation, concluded that such part of the rent payable under a lease that relates to a period of use for the purposes of the administration should in fact be treated as a debt incurred by the administrator and was therefore payable as an expense of the administration. *Goldacre* and *Luminar* have attracted judicial criticism and the Court of Appeal case responds to that criticism, to the relief of landlords. Game is apparently considering an appeal to the Supreme Court.

### Lambert & Bankers

Sir Richard Lambert, in response to a request from the Chairmen of Barclays, HSBC, Lloyds, RBS, Santander, Standard Chartered and Nationwide, issued a consultation paper on 10 February 2014 raising 19 questions and proposing to publish final recommendations following feedback at the end of March. The consultation paper focuses on the creation of a new organisation acting as "an independent champion for better banking standards in the UK". The standards will relate to good conduct and competence and the new organisation will require institutions to report on progress on an annual basis. Over time, the aim is to encourage the development of banking as a profession, along the lines of law and accountancy.

The new organisation will be independent of the banks but funded by them. It will have no statutory powers and its role will be completely separate from the British Bankers Association, which the paper likens to a trade body.

### Insolvency Service and IP Fees

On 17 February, the Insolvency Service issued a consultation paper entitled "Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners". The consultation, which requests responses by 28 March 2014 is in response to a report by the OFT in 2010 into the market for Insolvency Practitioners (IPs) and a subsequent review by Eileen Kempson of IPs' fees. The perceived mischief identified by the Insolvency Service is that where unsecured creditors control office-holders' fees and remuneration (in just over one third of insolvency cases) "the market does not work sufficiently", leading to an increase in fees and a consequent reduction in insolvency distributions.

The preferred option in the consultation

### Spotlight on… the European Insolvency Regulation...Further Developments

The EU Insolvency Regulation (the "**Regulation**") came into effect on 31 May 2002. The principal feature of the Regulation was the introduction of the concept that the member state in which a debtor has its centre of main interests (COMI) should be the place where insolvency proceedings are commenced. In December 2012, the European Commission proposed amendments to the Regulation, following identification of a number of shortcomings. These included the perceived trend towards COMI relocation and "forum shopping"; the difficulty in determining whether insolvency proceedings have been initiated within member states; the problems presented by multiple insolvency proceedings affecting a multi-national group; and the occasional obstruction of main proceedings by secondary proceedings. An early preoccupation of UK lawyers, however, was with the Commission's explicit targeting of Schemes of Arrangement which under English law, are not "insolvency proceedings" and therefore fall outside the COMI test. The jurisdiction of the English courts to entertain Schemes of Arrangement is based on the Companies Act 2006 requiring a "sufficient connection" with England which has been held to accommodate the presence of assets within the jurisdiction, the choice of English law to govern the debt instruments to which creditors were party and the carrying on of activities in England. The early concerns of English jurists seem misplaced. The Commission has confirmed that the types of insolvency proceeding identified in Annex A of the Regulation are definitive and will continue to be determined by individual member states.

Preparatory to the recent consideration of the proposed amendments by the European Parliament, the Legal Affairs Committee proposed three new concepts on 23 January. First that the COMI of a company should be determined by reference to the place of administration of its interests on a regular basis at least three months prior to the opening of insolvency proceedings; and second that the new kind of "group coordination proceeding" should accommodate a coordination plan emerging from an insolvency representative appointed in the member state where the relevant group has its "most crucial function". Unresolved issues include whether the three month test will seriously impede forum shopping and whether the concept of a "crucial function" is sufficiently specific. The third proposal, that only insolvency proceedings commenced with a court order would preclude the opening of main proceedings in another member state (thus seriously devaluing the worth of voluntary arrangements and out of court administration appointments in the UK) was not adopted by the European Parliament. Discussions on the Regulation will continue at the Council and Commission level.

document is a package of measures to address fee structures and a slightly strengthened regulatory regime. Proposals within the document include the provision of an estimate of fees at the start of each case in order to stimulate engagement by unsecured creditors and changing the basis of IP remuneration by introducing fixed fees for statutory work and, where a realisation percentage is proposed, requiring majority sanction of creditors or (where the secured creditors are paid in full) the unsecured creditors. If majority sanction is not achieved the fall-back position would be the realisation based fee regime which currently applies to compulsory liquidations and bankruptcies. It is also proposed to increase the powers of the Secretary of State for Business as an "oversight regulator". The Insolvency Service does not seek to appoint an independent regulator in substitution for the current self-regulation regime exercised by the recognised professional bodies (RPBs). Their recommendation is to proceed in a more "evolutionary" way by increasing the powers of the Secretary of State to obtain information and sanction RPBs. It is proposed that the Secretary will also have reserved powers to appoint a single regulator for IPs should it be appropriate to do so in the future.

## Phased FTT Lite

Notwithstanding the institution by the UK in April 2013 of a legal challenge to the use of the enhanced cooperation process in respect of the Financial Transaction Tax (FTT) and the issue of an opinion by the EU Council Legal Service expressing the unqualified view that the FTT proposals are not compliant with EU law, Angela Merkel and François Hollande both expressed unbridled enthusiasm for an EU FTT at a press conference on 19 February, the form of which they ambitiously hope to resolve before the European elections in May. Prior to the German elections in September 2013, the FTT project appeared to be languishing, but the post-election political coalition eventually formed in Germany in October 2013 appears to have given the process added impetus. There is, however, considerable lack of consensus on the form which the FTT is to take, even between the two principal protagonists. France, for example supports an exemption for derivatives whilst Germany does not and there is general uncertainty about the extent to which positions have softened amongst the remaining nine members of the enhanced cooperation block with respect to the treatment of market makers providing liquidity; government bonds; pension funds; securities lending; and repos. This combination of political will and policy prevarication may promote a staggered introduction of the FTT, a possibility recently conceded by the EU Taxation Commissioner. A phased introduction of the FTT with staged start dates was not something envisaged within the original enhanced cooperation framework, however. President Hollande has stated that he would "prefer an imperfect tax to no tax at all" but the introduction of an imperfect tax on a phased basis may give rise to further opportunities for legal challenge.

## In the courts

### *Clark v In Focus Asset Management & Tax Solutions Ltd [2014] EWCA Civ 118*

Until recently, it had long been accepted (as affirmed in *Andrew's v SBJ Benefit Consultants Limited [2010]*, where the High Court applied the doctrine of merger) that the acceptance of an award following a determination by the Financial Ombudsman Service (FOS) would preclude further proceedings to recover an amount above that award (which is currently set at a maximum of £150,000). The High Court overturned that principle in *Clark v In Focus Asset Management & Tax Solutions Limited [2012]* where the Clarks had accepted an FOS award based on the provision of inappropriate financial advice for the full statutory amount, but then instituted proceedings for the recovery of the balance of their losses, which apparently exceeded £500,000. The High Court was persuaded that the doctrine of merger did not apply to FOS decisions, which the court concluded were a response to complaints and not a cause of action determined by a judicial body. The High Court decision caused considerable disquietude within the financial services sector, which was concerned that FOS awards would merely be used as seed corn to fund further litigation. The Court of Appeal has recently overturned the High Court decision, holding that an FOS determination was in fact judicial in nature and that the FOS was intended by Parliament to provide low cost resolution of disputes in a conclusive and final manner. Accordingly, the doctrine of *res judicata* would operate to preclude the institution of proceedings relating to the same cause of action in respect of which an FOS award had been made. Significantly, however, the Court of Appeal was prepared to accept the possibility of a claimant in possession of an FOS award bringing separate legal proceedings on the basis of a different cause of action or where, potentially, a different type of loss was alleged.


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