



Office Of Fair Trading recommends Corporate Insolvency Reforms

The Office of Fair Trading (OFT) this month concluded an investigation into the corporate insolvency regime in the UK prompted by concerns raised within government, the Insolvency Service and the industry itself.

The purpose of the investigation was to identify potential problems in the insolvency market to ensure free competition and a market that worked well for “end consumers”.

The OFT concluded that whilst the market often works well it may not work in the best interests of all creditors.

A particular area of concern was the inability of unsecured creditors to influence insolvency procedures. In 63% of the cases considered by the OFT there were insufficient funds for secured creditors to recover all their debts. In those cases the OFT found that secured creditors were motivated to control fees and direct the activities of Insolvency Practitioners.

In the other 37% of cases (where secured creditors were paid in full) their interest in Insolvency Practitioners’ fees was minimal yet the OFT found that unsecured creditors were often unable to influence the activities of the approved Insolvency Practitioner.

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The OFT discovered that Insolvency Practitioners’ fees are around 9% higher where secured creditors are paid in full. This reinforces government concerns that

unsecured creditors have little or no control over the corporate insolvency regime.

In order to address these concerns the OFT has recommended fundamental changes. These include:

- an (industry funded) independent complaints handling body with powers to review Insolvency Practitioners’ fees and actions, impose fines, and return over-charged fees to creditors;
- reforming the regulatory system by repositioning the Insolvency Service as the regulator of the recognised professional bodies and withdrawing its role as direct regulator of Insolvency Practitioners;
- providing objectives for the regulatory regime against which its performance can be measured; and
- streamlining the way in which the regime makes decisions.

Whilst the OFT has recommended some radical reforms to the regime, to date there is no indication of when such reforms will be implemented or whether they will have any practical effect on the corporate insolvency regime.

For further information please contact Keith Mahoney on 0117 926 4121 or by email at kwm@meadeking.co.uk



Company administration checklist



The Companies Act 2006 affects the day-to-day management and administration of **all private limited companies**.

This checklist highlights key points that your company needs to consider:

- Ensure that your company complies with the requirements for directors and ensure that, where a company has corporate directors, there is at least one natural person who is a director.
- Consider making amendments to your company's articles of association to be consistent with the Companies Act 2006.
- Consider the following further changes to the articles of association:
 - Remove the objects clause to permit unrestricted objects. This will ensure that the company's activities are not *ultra vires*.
 - Remove references to authorised share capital so that the company is not limited as to the number of shares it can issue (subject of course to the requisite allotment authority and compliance with or disapplication of pre-emption rights).
 - Remove the requirement for shareholder approval for an allotment of shares (where the company has only one class of shares).
 - Permitting a change of company name otherwise than by way of a special resolution (for example, by way of board resolution).
- Remove restrictions (if any) on share capital so as to permit the issue of redeemable shares, reductions of capital and share buybacks.
- Remove the directors power not to give reasons for their refusal to register a share transfer as the Act requires them to give reasons for that refusal.
- Remove the requirement for a company secretary.
- Adapt articles to allow for alternate directors and appointment of company secretary if you choose to have one.
- If your company chooses not to have a company secretary, decide who is responsible for statutory filings and maintaining company records.
- Ensure that all your company's procedures on company meetings and resolutions are updated for the Companies Act 2006. In particular, be aware that any written resolutions should be passed in accordance with the procedures prescribed in the Act.
- Review the signing procedures and any standard documents to ensure that, if desired, they permit one of your company directors to execute deeds.
- Familiarise your company secretarial team and other relevant personnel with the new Companies House forms and procedures. In particular remember that all companies must now maintain a separate register of each director's residential address.
- Ensure that your company directors review the authorisation and procedures for directors' conflicts.
- Make sure that your company's statutory details are included on all hard copy documents, e-mails and company websites.
- Review all your company register and record requirements and ensure that registers comply with the Companies Act 2006. In most cases there are relaxations, but there are also some new requirements.

For a nominal charge, we will be glad to undertake a review of your existing articles to highlight any changes that may need to be made to comply with Companies Act 2006.

For further information please contact James Hawkins on 0117 926 4121 or by email at jnh@meadeking.co.uk

Adjudication: Tread Carefully

The scheme, which came into force in 1998, is contained in the Housing Grants, Construction and Regeneration Act 1996 (“the Act”).

As the adjudication process has evolved it has been accepted that the issues in dispute for resolution are determined by the contents of the Notice of Adjudication served by the referring party.

Differences between the items identified in the Notice of Adjudication and the referral documents led many parties to challenge the jurisdiction of the adjudicator.

Challenges to jurisdiction may be fine if the parties to the adjudication have agreed to be bound by the adjudicator’s determination of his own jurisdiction.

However, if the parties have not agreed then any ruling of the adjudicator on his own jurisdiction may be subject to challenge.

The case of *Pilon Ltd –v- Breyer Group Plc (2010) EWAC 337 (TCC)* highlights the risks where parties have not agreed to be bound by the result of an adjudicator’s decision on his own jurisdiction and where an adjudicator does not properly appreciate what is being sought in the Notice of Adjudication.

Pilon carried out work for Breyer. The work was divided into two separate tranches, referred to as batches 1-25 and batches 26-62.

Pilon made an interim application for payment in respect of batches 26-62; Breyer did not pay and Pilon referred the dispute to adjudication.

The Notice of Adjudication which Pilon issued was confined to batches 26-62. It did not encompass the first 25 batches.

In the Notice Pilon stated that it was entitled to the sum claimed without any deduction. Following service of the Referral Document and in its subsequent response Breyer submitted that it was entitled to set off money in respect of an alleged overpayment made to Pilon in connection with the first 25 batches.

The adjudicator decided that he had no jurisdiction to consider the defence put in by Breyer because his view was that the dispute referred to adjudication was confined to batches 26-62 and not 1-25. The adjudicator awarded Pilon a sum of money together with interest.

Breyer refused to pay the sum awarded so Pilon brought proceedings through the courts to enforce the adjudicator’s decision. Breyer resisted the application principally on the ground that the adjudicator had breached the principles of natural justice as he had declined to give consideration to its defence.

The judge rejected Pilon’s argument that the adjudicator was correct in saying that he did not have jurisdiction to consider the alleged overpayment on batches 1-25 was correct.

He found that the adjudicator had erred by failing to take account of Breyer’s argument in relation to the overpayment on batches 1-25. Whilst the Notice of Adjudication had set the boundaries of the adjudicator’s jurisdiction, the adjudicator had failed to appreciate that Pilon was seeking not only an interim valuation on batches 26-62 but also an interim payment of any sum considered to be owed to it.

That claim required the adjudicator to consider whether the amount to be paid to Pilon should be reduced because of any

Adjudication as a form of dispute resolution in construction disputes has been around for over 10 years...

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overpayment in relation to the first 25 batches. The court found that the adjudicator had jurisdiction to decide the sum, if any, to be paid to Pilon by way of interim payment. This necessarily involved a consideration of Breyer’s defence.

Lessons

In his judgment the judge said that *“Adjudicators should be aware that the Notice of Adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices alike the responding party is entitled to defend itself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the Notice of Adjudication”*.

Adjudicators therefore should pause before ruling out defences merely because there is no mention of a particular defence in the referring party’s Notice of Adjudication.

Parties to adjudication should think again in situations where there is no agreement for the adjudicator to determine his jurisdiction. If you seek to limit the adjudicator’s jurisdiction by confining the dispute to what is in the Notice of Adjudication (as Pilon attempted to do) and so maintain there is no jurisdiction to consider matters on which the other party may rely, you run the risk that the adjudicator will make an award in your favour only to find that the court could conclude that that adjudicator had erred in his decision and so deprive the original decision of its validity.

For a referring party what may have started out as a decision in its favour could prove to be a disaster should the court find that the adjudicator was in error. The enforcement proceedings will then fail and the party that was ‘successful’ in the adjudication could be liable for costs.

For further information please contact
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Shine together



Meade King's private client team have recently helped local charity *Shine together* in compiling a free guide on the importance of making a will. *Shine together* is the charity for Southmead and Frenchay hospitals and is the working title for North Bristol NHS Trust Charitable Funds.

Shine together recently launched the leaflet to help demystify the complexities of writing a will and leaving a gift to charity. The leaflets will be placed in local hospitals and GP waiting rooms.

As part of the launch Meade King's private client team held will clinics at both Southmead and Frenchay hospitals giving NHS staff the opportunity to discuss making wills and related documents.

Meade King is making a donation to *Shine together* for each will written as a result of enquiries generated by this leaflet.

For further information please contact Sam Piper on 0117 926 4121 or by email at sjp@meadeking.co.uk



Health and Safety *Review*



Which is the UK industry sector with the highest rate of fatal injury to workers? Most people would guess construction, but they would be wrong. For the year 2008/2009, agriculture recorded 26 fatalities equivalent to 5.7 fatal accidents per 100,000 workers, with 53 fatal injuries in the construction industry equivalent to a rate of 2.4 deaths per 100,000 workers.

The total number of deaths for the year is historically low at 233, although proper risk assessment and active health and safety management would probably have avoided many of these early deaths. Employers have a legal duty to ensure the health and safety at work of all of their employees, and this duty can only be discharged by showing a pro-active, well organised and documented approach to the management of health and safety.

If you are concerned that your health and safety procedures do not meet these standards, we will be pleased to review your policy and organisation arrangements and advise on further steps which can be taken to protect you and your employees.

For further information please contact Judith H Kelly on 0117 923 4033 or by email at jhk@meadeking.co.uk