



Welcome to the Spring Edition of the Restructuring and Insolvency Legal Update

As we all know, events of the last year or so have had a resounding impact on the local economy. Both global and national pressures continue to impact upon an already shaky economy.

As Northern Ireland's largest commercial law firm, we have been involved in a number of significant developments that we thought you may be interested to hear more about.

This edition of the Restructuring & Insolvency Update focuses on a landmark case in relation to the appointment of administrators, as well as highlighting information that we feel you may find useful in the course of your work.

We would be keen to know if you find this information useful, or if you have relevant topics that you would like to see covered in future editions.

Tughans Involved in Landmark Case on Administrator Appointments

Head of Insolvency, Toby McMurray, has recently been successful advising a company on the removal from office of an administrator who had been appointed by the holder of a qualifying floating charge (the "QFCH") in a remarkable case which highlights the guidelines on formal appointments.

The company in question was engaged on a large scale engineering project and cash flow was a constant concern owing to the employer on the project not making the contractual staged payments. The company had granted a floating charge to the QFCH to secure various letters of credit. These letters of credit had been provided by the QFCH, at the request of the company, to a number of creditors to ensure they would remain on site to finish the job. Notwithstanding the fact that none of the letters of credit had been presented within their terms (and therefore no funds had been drawn down from the QFCH under the letters of credit) the QFCH issued a letter of demand under the

terms of the floating charge.

The QFCH, without cause, used the letter of demand as leverage with the company. They threatened that they would move to appoint an administrator unless the company paid the debts due to its creditors which were the subject of the letters of credit, a move which would have negated the QFCH's liability to the various creditors under the letters of credit. The company, which was by now in a perilous state, could not pay its creditors as the QFCH was demanding and the QFCH appointed an administrator.

The company immediately wrote to the administrator indicating that no monies were due under the floating charge and, accordingly, that the appointment of the administrator was void. The administrator was adamant that his appointment was correct and dismissed, without regard, the company's warnings that the appointment was void and that the administrator should apply for his own removal.

The company was unable to mount a challenge to the appointment as the costs of doing so would have been prohibitive (especially since the company's bank accounts and facilities were now controlled by the administrator). Fortunately one of the creditors of the company ("Creditor A") recognised the irregularity in the purported appointment of the administrator and Creditor A began a challenge against the validity of the administrator's appointment. Creditor A's challenge was mounted on the same grounds as those the company had raised on the day of the purported appointment, namely that there can be no appointment on foot of a contingent debt and that an actual debt needs to be due and owing and to have been demanded for a QFCH to appoint an administrator. The company joined Creditor A's challenge and, despite resistance by the administrator, the administrator eventually stepped down and admitted that their appointment was invalid. Following the court's order, the company's status was restored.

This case is an important reminder to lenders and insolvency officeholders to ensure that there is no procedural impropriety or irregularity in the appointment of an administrator as the courts will not overlook such matters.

DID YOU KNOW?

- It is well known that a winding up petition will generally be dismissed if the debt on which it is founded is being contested by the debtor as not being properly due and owing however the recent case of *Vertex Trading SARL v Infinity Holdings Ltd* suggests that the courts may be minded to permit a petition to proceed even in cases where the underlying debt is disputed if the petitioner can establish that the debtor company was insolvent. In such cases, the court may be prepared to accept that the disputed existence or quantum of the debt in question could be satisfactorily addressed through the proof of debt process on liquidation.
- The Companies (Trading Disclosures) (Amendment) Regulations 2009 are expected to come into force on 1 October 2009 and will introduce

exceptions to the requirements placed on a company to display its registered name at all its premises. In particular, where a liquidator, administrator or administrative receiver has been appointed, a company will no longer have to display its registered name at any premises which is also the place of business of that insolvency officeholder.

- In the recent case of *Lewis v Metropolitan Property Realizations Ltd* the principles concerning the 'use it or lose it' period (being the time within which a Trustee in Bankruptcy has to realise the Bankrupt's home) were scrutinised. Most notably the court found that a sale for a deferred consideration is a realisation so long as the Trustee assigns the interest of the Bankrupt's estate absolutely. In the *Lewis* case, the Trustee sold the property for £1.00 with a condition that if the property was subsequently sold the Trustee would be entitled to 25% of the sale proceeds.

RECENT HIGHLIGHTS OF THE TEAM

- Acting for the Administrators of Edwards & Edwards Ltd in Northern Irish legal matters occurring both pre and post appointment.
- Advising the Administrator of Regency Spinning Limited in an action brought by the company employees seeking the removal of the Administrator. We secured the Administrator's status - the court dismissed the employees' application and awarded the Administrator his costs.
- Advising Mobile Cohesion Limited on its insolvent liquidation.

- Advising Company directors as to their legal obligations and liabilities under the Companies' and Insolvency legislation.
- Advising Ulster Bank on the establishment of the framework structure of the Momentum mortgage product.
- Advising the venture capital buyer on the acquisition and subsequent disposal of the business and assets from the administrators of Anderson Manning Limited.
- Advising the trade purchaser on the acquisition of the business and assets from the administrators of Marston Mills Ltd.

AND ON A LIGHTER NOTE . . .

Regardless of what language you speak, the headline in the *Berliner Zeitung* (one of Germany's leading daily newspapers) in October last year says it all: "Das globale Bankensystem wankt".



Fearghal heads the Restructuring Team at Tughans and acts for financial institutions, insolvency officeholders, corporates and directors. His practice encompasses advising clients prior to encountering financial difficulties with a view to avoiding the need for restructuring and insolvency advice and working with clients seeking to protect their interests or to turnaround and rescue ailing businesses. This will involve advice to lenders and directors on their liabilities and best practice for corporate governance in times of financial distress, formal restructuring of the liabilities attaching to the business, standstill arrangements with creditors, disposals and alternative funding arrangements.

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As Head of Insolvency, Toby advises insolvency practitioners, financial institutions, businesses, directors and creditors on all issues relating to corporate and personal insolvency situations. He has been instructed by office holders in many contentious liquidations, administrations and bankruptcies and advises directors in relation to their duties and rights when their companies are in distress.

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