

Recent case summaries

Latest insolvency update from **Daniel Lewis**.

***Hosking v. Slaughter and May* [2014] EWHC 1390 (Ch)**

The essential issue in this case was whether it was open to a subsequent liquidator to seek an assessment of the fees of solicitors instructed by a previous administrator, where the fees had been agreed by the previous administrator. It might apply equally in any case where any previous officer holder has reached agreement as to the fees of solicitors instructed by him and a subsequent office-holder has sought to challenge that decision.

Facts: The facts were straightforward. A motivated informal committee of creditors had pressed the administrators to investigate the claims available to them, to which end they had instructed the

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respondent firm of solicitors and to which end legal fees of £2.5 million had been incurred, agreed and paid. On this advice, the administrators decided that there were no claims that could be pursued and the administration was brought to an end and a compulsory winding up order made.

The liquidators that were as a result appointed sought to challenge the fees paid to the solicitors and made an application for their assessment under: (a) the Solicitors Act 1974, (b) rule 7.34 or (c) the court's inherent jurisdiction. The first ground was not pursued. Mr Registrar Jones at first instance held that the power to order assessment was not available where the fees had been agreed by the administrators and that, although the court retained an inherent jurisdiction to order the assessment of fees where the power to agree fees had been accorded to the responsible insolvency practitioner the court should not usurp that function. On appeal His Honour Judge David Cooke upheld that conclusion, with one minor refinement.

Rule 7.34 (as in force at the relevant time) provided that the costs, charges or expenses of any person are payable in relation to a company insolvency shall be subject to detailed assessment unless agreed between the 'responsible insolvency practitioner'. The same principle, albeit in different form, is now found in rule 7.34A.

As the judge noted, the breadth of the words 'costs, charges or expenses of any person' are broad and liable to include a broad range of persons who might provide

services to an insolvency practitioner (for instance, an agent instructed by an administrator to advise and assist in the sale of a company asset).

Held: Both the Registrar and the judge on appeal took account of the fact that the legislation has changed so that the previous position, which required all fees to be subject to assessment, no longer applied. The Act and the Rules no longer required taxation in every case: insolvency practitioners were trusted to judge for themselves whether such an assessment was in the interest of creditors. The Registrar's interpretation on this point was upheld. There would be no point in the power to agree appropriate fees if such an agreement did not have a binding effect. The relevant insolvency practitioner with the power to agree costs was the office-holder that was in office at the time.

The Registrar had held that the court retained the power to require the assessment of costs under rule 7.34(4) in relation to any legal proceedings. The respondent solicitors challenged the Registrar's conclusion that the use of that power was available in this case, since it applies to 'proceedings before the court' and at the conclusion of previous proceedings no costs order had been made. The judge held that the power was only available to the court seized of the proceedings, as otherwise the power would confer a general power to order retrospective assessment.

The Registrar had accepted (correctly in the judge's assessment) that the court retained an inherent jurisdiction to direct an assessment of an office-holder's expenses. The Registrar had been correct in the exercise of his discretion in choosing not to exercise this power in this case. Notwithstanding criticisms of the manner in which the solicitors had been instructed, these factors did not outweigh the fact that the Insolvency Rules provided for a responsible insolvency practitioner to agree fees.

Practice points:

The decision of a previous office-holder to agree expenses will bind a subsequent appointee except that...

The court retains an inherent jurisdiction to require detailed assessment. It would need to be a clear case to displace the principle that an office-holder can agree fees.

The power under rule 7.34(4) to order the detailed assessment of the costs of legal proceedings cannot be exercised retrospectively: the power is to be exercised by the court hearing the proceedings at the time that they are heard.

***Patel v. Mirza* [2014] EWCA Civ 1047**

While there is no honour among thieves, the judgment of the Court of Appeal in *Patel v. Mirza* represents an interesting expansion in the circumstances in which the court will come to the aid of a party to an illegal transaction.

Facts: Mr Patel brought a claim against Mr Mirza for the recovery of £600,000, which he had paid as part of a spread-betting arrangement. Mr Mirza claimed to have contacts within RBS who would be able to supply advance information about a statement that the Chancellor of the Exchequer was expected to give about the government's investment in the bank. In

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fact the expected statement was never made, and Mr Patel sought repayment from Mr Mirza. Mr Mirza claimed to have paid the money to a third party who was now bankrupt and denied any obligation to repay Mr Patel. At trial at first instance, Mr Mirza raised (somewhat belatedly) the argument that the money had been paid under an illegal contract and was therefore irrecoverable.

Held: The Court of Appeal accepted that Mr Patel was relying upon an illegal agreement in order to bring his claim. It was well established that if Mr Patel had withdrawn from the scheme *before* it became clear that the agreement would not be performed, he would have been entitled to repayment. The Court of Appeal went further: there was no distinction to be made between cases where the withdrawal from the illegal arrangement took place voluntarily before it was performed and where withdrawal took place because the illegal arrangement *could not* be performed. Mr Patel was therefore entitled to his money back, despite his preparedness to engage in an illegal arrangement. □



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