Technical Bulletin

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Technical Bulletin 102

102.1 Registration of Company charges

- A new regime for the registration of charges created by companies and limited liability partnerships came into effect on 6 April 2013.

A new regime for the registration of company charges came into effect on 6 April 2013. The changes are introduced by the Companies Act 2006 (Amendment of Part 25) Regulations 2013 (2013/600). There is a useful summary on the Companies House website at:

http://www.companieshouse.gov.uk/pressDesk/news/part25CompaniesAct.shtml

The principal changes are:

- The new regime applies across the UK. There is no longer a separate regime for Scotland.
- In place of the current list of registrable charges, the new regime applies to all charges created by the company except those excluded as specified in the Companies Act itself or any other legislation.
- At present, the only charges specifically excluded are:
  - a charge in favour of a landlord on a cash deposit given as security in connection with the lease of land, and
  - a charge created by a member of Lloyd's to secure its obligations in connection with its underwriting business.
- The criminal offence for failure to register a charge is removed. However, charges must continue to be registered within 21 days, failing which they will be void against a liquidator, administrator, or creditor.
- The court may extend the period allowed for delivery in specified circumstances.
- The 21 day limit for filing particulars of an existing charge on acquired property is removed.
- On registration, a certified copy of the instrument of charge must be submitted to the registrar. For those who file electronically the copy will need to be in PDF format, with a maximum file size of 10 MB. Sensitive information can be redacted.
- A lender authorisation code will be required for electronic filing.
- Unique reference codes will be allocated to each charge registered, to make it easier to link charges to related filings.
- There will be new forms for companies and LLPs. For the first time there will be separate forms for the registration of charges created by an instrument and those created where there is no instrument.

'Charge' is not a term of art in Scots law, but the Companies Act 1986 now defines it as including any right in security constituted under the law of Scotland other than a pledge (i.e. a security over corporeal moveable property which, in Scots law, must be constituted by actual or constructive delivery). The list of registrable charges contained in the repealed section 878 is not re-enacted, so that a charge over property not listed there (e.g. shares) is registrable under the new provisions, as is a charge constituted under a law other than that of Scotland.

As noted in *Dear IP* 57, there will be changes to the forms used to notify the registrar of a receiver's appointment and ceasing to act. Old forms LQ01 and LQ02 are replaced by forms RM01 and RM02, which require similar information. However, if the charge was created before 6 April 2013, the person appointing the receiver or manager needs to provide the date of the creation of the charge, the description of the instrument (if any) creating or evidencing the charge, and the short particulars of the property or undertaking charged. If the charge was created on or after 6 April 2013, the person appointing the receiver or manager needs to provide the unique reference code referred to above and a short description of the property over which the receiver or manager was appointed.

Forms RM01 or RM02 are available from the Companies House website and on the Forms section of the R3 website. These changes only apply in England, Wales and Northern Ireland. Notice of the appointment, or cessation, of a receiver in Scotland remains unchanged.

Separate legislation has also been passed to amend the charge registration regime for limited liability partnerships in the same way, see the Limited Liability Partnerships (Application of Companies Act 2006) (Amendment) Regulations 2013 (2013/618).

102.2 Consultation on Collective Redundancies

- Changes to the minimum consultation period in cases of collective redundancies came into effect on 6 April 2013.

From 6 April 2013, where 100 or more employees are affected, the minimum consultation period before the first redundancy can be made is reduced from 90 days to 45 days. A further change is that employees with fixed-term contracts 'which have reached their agreed termination point' will be exempt from the collective redundancy consultation requirements. In addition, the time period for submitting an HR1 form has been reduced to 45 days before the first dismissal takes effect.

There has been no change to the consultation period where an employer proposes to make 20 or more (but fewer than 100) employees redundant at one establishment within a 90 day period – the minimum consultation period remains 30 days and the HR1 form is to be lodged at least 30 days before the first dismissal takes effect.

However, although the minimum period for consultation has been reduced, the upper limit for which protective awards can be made remains unchanged at 90 days' pay.

The changes are introduced by the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013 (SI 2013/763).

In conjunction with the changes made to the statutory rules on collective redundancy consultation, ACAS has published a guidance booklet aimed at employers entitled 'How to manage collective redundancies'. The guidance is available on the ACAS website at:

http://www.acas.org.uk/media/pdf/p/s/How_to_manage_collective_redundanciesAPRIL_2013%28FINAL%29.pdf

102.3 Threshold Introduced for Charging Orders

- An order for sale to enforce a charging order made to secure a debt due under Consumer Credit legislation may not be made where the amount of the debt is less than £1,000.

With effect from 6 April 2013, a threshold of £1,000 has been introduced for obtaining an order for sale of property under a charging order where the order has been made to secure a debt due under a regulated agreement under the Consumer Credit Act 1974. (A threshold of £25,000 had initially been mooted by the Government in 2010.)

If the amount of the debt remaining unpaid at the date of the application is less than £1,000, no order may be made.

See The Charging Orders (Order for Sale: Financial Thresholds) Regulations 2013 (SI 2013/491), which is available on the Legislation website at:

http://www.legislation.gov.uk/uksi/2013/491/contents/made

102.4 The Supreme Court Rules on 'Balance Sheet Insolvency'

- The Supreme Court has upheld the decision of the Court of Appeal in the *Eurosail* case, and set out guidance on the interpretation of the balance sheet test of insolvency under section 123(2) of the Insolvency Act 1986.

On 9 May 2013 the Supreme Court handed down its judgment in the case of *BNY Corporate Trustees Limited and Ors v Neuberger Berman Europe Ltd & Ors; BNY Corporate Trustees Limited and Ors v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28. This was an appeal from the decision of the Court of Appeal given in March 2011 ([2011] EWCA Civ 227; [2011] 2 BCLC 1 – see Technical Bulletin 95.1).

The appeal concerned the interpretation of the so-called 'balance sheet' test of insolvency under section 123(2) of the Insolvency Act 1986. Section 123(2) states:

> 'A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.'

This formulation is often incorporated into contractual arrangements (without the reference to the court) as a trigger for one party to exercise a right to terminate or to enforce other rights against the other party.

The Supreme Court held that:

- The statutory test for a company being unable to pay its debts is materially different from the position under the Companies Act 2006. There is no statutory provision to link section 123(2) of the Insolvency Act 1986 with Companies Act provisions regarding the form and content of a company's financial statements.
- The balance sheet test requires the court to be satisfied that, on the balance of probabilities, the company has insufficient assets to meet all its liabilities, including prospective and contingent liabilities.
- The more distant the liabilities, the harder this will be to establish.
- There is no need to have recourse to the concept of 'the point of no return', as alluded to in the Court of Appeal judgment, and the expression should not pass into common usage as a paraphrase of the effect of section 123(2).

Eurosail-UK 2007-3BL Plc ('Eurosail') acquired a portfolio of sub-prime mortgage loans. The purchase was funded by the issue of loan notes in various classes and currencies. The majority of the notes were not finally repayable until 2045. Because the income from the underlying mortgages was denominated in sterling, and the loan notes were payable in US$, euro and sterling, Eurosail entered into various currency swaps with an entity in the Lehman Brothers group. In the case of an event of default, the notes would all become due and payable. An event of default included the inability of Eurosail to pay its debts within the meaning of section 123(2) (but without the reference to the court).

Because of the collapse of the Lehman Brothers group, Eurosail lost the protection of the currency swaps (leaving it with only a claim in the Lehman's insolvency). As a result of this, together with adverse moves in both interest and currency rates and the poor performance of the domestic mortgage market, Eurosail's audited accounts showed liabilities substantially higher than its assets. However, Eurosail was able to continue to pay interest on the notes, and to repay principal to the extent that funds were available.

A group of subordinated noteholders began litigation to determine whether there was a basis on which to declare an event of default. They perceived that if Eurosail was permitted to carry on paying interest on all the notes and principal on the higher ranking notes, they would face a shortfall. On the other hand, if an event of default was declared, their position would be improved because they would then rank pari passu with other noteholders.

In considering the balance sheet test in the case of Eurosail, Lord Walker drew attention to three imponderable factors – currency movements, interest rates and the United Kingdom economy and housing market. Over the period of more than 30 years until the final redemption date in 2045, these factors were a matter of speculation rather than calculation and prediction on any scientific basis. As such, where a company's liabilities were deferred for over 30 years, and where the company is continuing to pay its debts as they fall due, it was held that the court should proceed with the greatest caution in deciding whether the company is in a state of balance-sheet insolvency under section 123(2).

The full text of the judgment is available on the British and Irish Legal Information Institute website at:

http//www.bailii.org/uk/cases/UKSC/2013/28.html

102.5 Administrator Personally Liable for Legal Costs Under Conditional Fee Agreement

- The inclusion of the words 'as administrator' in an action for recovery of debts did not mean that the office holder was sued as agent of the companies rather than in his personal capacity.
- The administrator was found to be personally liable where judgment was obtained and he was the only named party to the recovery action.

In *Wright Hassall LLP v Morris* [2012] EWCA Civ 1472 (15 November 2012), an administrator was found to be personally liable for a judgment debt in relation to legal costs incurred under a conditional fee agreement (CFA). The Court of Appeal rejected the argument that the inclusion of the words 'as administrator' showed that he was merely acting as agent of the companies.

The appellant firm of solicitors had been instructed to act for two companies under a CFA to which the respondent insolvency practitioner had been appointed administrator. The fees had gone unpaid and so the appellants had first obtained judgment and then applied for directions within insolvency proceedings when payment had still not been forthcoming.

At first instance, the trial judge had been of the opinion that the use of the words 'as administrator' recognised that Mr Morris had been sued as an agent rather than in his personal capacity and therefore refused to find him personally liable under the judgment.

The Court of Appeal however, did not agree with the trial judge's direction, as neither of the companies in administration were party to the initial action (for non-payment under the CFA). It followed that judgment would only have been possible against the administrator as the only named defendant to the action and therefore the subsequent direction that liability be attached to the companies in administration could not stand. The Court held that there was no authority to support the assertion that use of the words 'as administrator' in an action, indicated that the administrator was sued as agent of the companies rather than in his personal capacity.

The full text of the judgment is available on the British and Irish Legal Information Institute website at:

http://www.bailii.org/ew/cases/EWCA/Civ/2012/1472.html

102.6 Application for Suspension of Discharge – Proper and Improper Use

- Suspension of the automatic discharge from bankruptcy under s279 is a punitive measure only to be used to ensure assistance in relation to a trustee's duties when dealing with the bankruptcy estate.
- An application for a stay of proceedings or suspension of bankruptcy under ss252 to 256 to suspend the bankruptcy can potentially be used where use of s279 would not be appropriate.

In *Bramston v Haut [2012]* EWCA Civ 1637, the Court of Appeal considered the use of the power to suspend the automatic discharge of a bankrupt under section 279 of the Insolvency Act 1986.

The appellant trustee in bankruptcy sought to overturn a decision suspending the bankrupt's automatic discharge for six weeks to allow him to seek approval of an IVA proposal and to apply for annulment of the bankruptcy if necessary.

The bankrupt had made an IVA proposal (which he claimed would be supported by the majority of his creditors) shortly before his automatic discharge was due. The trustee opposed the application because he believed the bankrupt had misled creditors, that he had hidden assets, and that the proposed IVA was an attempt to prevent a thorough investigation of his affairs. On the application of the bankrupt, the judge at first instance had ordered the suspension of discharge under section 279 believing that it would be in the best interests of the creditors to do so. It was also ordered that the trustee personally pay the bankrupt's costs in relation to the application.

The Court of Appeal held that the power conferred under section 279 was to ensure the debtor's compliance with his obligations under the Act. The extension of the period during which the bankrupt suffered disabilities was a penal measure to be used where the bankrupt's assistance was not forthcoming.

In the present case, the suspension was not related to the bankrupt's non-compliance with his obligations, but was intended to give him time to put an IVA proposal to his creditors and secure an annulment of his bankruptcy. The use of the section 279 power in this manner was unsuitable and beyond the scope of the section. Kitchen LJ commented that a more appropriate application could have been made under sections 252-256 where a stay of proceedings was potentially available. Also mentioned was the fact that the trial judge had erred in concluding that the trustee's actions had been unreasonable as the trustee does not have a duty to respond affirmatively to a bankrupt's request that he co-operate in the promotion of a proposal for an IVA.

Accordingly the trustee's appeal was allowed and the costs order was not allowed to stand.

The full text of the judgment is available on the British and Irish Legal Information Institute website at:

http://www.bailii.org/ew/cases/EWCA/Civ/2012/1637.html

102.7 Cross Border Assistance Under section 426 Insolvency Act 1986 - Court of Appeal Decision

- The Court of Appeal held that UK courts have jurisdiction to grant assistance to a foreign court under s426 IA 1986 even where formal insolvency proceedings have not been opened in the foreign jurisdiction.

Tambrook Jersey Limited ('Tambrook') was incorporated in Jersey, but had assets in England. Following default of the terms of a loan agreement between Tambrook and HSBC, it was agreed that the most favourable outcome would be achieved by the sale of the company's properties through an English administration. As Tambrook's centre of main interests was in Jersey it was unable to apply directly to the English Courts for an administration order, and therefore applied to the Royal Court of Jersey for a Letter of Request asking the English court to make an order.

At first instance, Mann J was of the opinion that concurrent local proceedings in Jersey were required for assistance under s426 IA1986 to be granted. In view of the fact that foreign insolvency proceedings had neither been opened nor contemplated in Jersey, the Court lacked the requisite jurisdiction to grant such an order as there were no proceedings to which it could provide assistance.

The Court of Appeal overturned that decision. It was held that to be able to provide assistance, the court seeking assistance under s426 did not need to be exercising its jurisdiction; it was sufficient that the court had insolvency jurisdiction. In this case the Jersey court had jurisdiction and there was no reason to deny assistance. Administrators were therefore appointed.

HSBC Bank plc v Tambrook Jersey Limited

The Court of Appeal judgment is available on the British and Irish Legal Information Institute website at:

http://www.bailii.org/ew/cases/EWCA/Civ/2013/576.html

102.8 Employment Rights Act – No Entitlement to Claim in Second Consecutive Insolvency

- The Employment Appeals Tribunal held that employees who were employed by companies which had entered company voluntary arrangements were not entitled to payments out of the National Insurance Fund when the companies subsequently went into liquidation.

Two separate tribunal cases involved claims by employees who had been employed by companies which had entered company voluntary arrangements and subsequently went into liquidation. Their employment ended when the companies went into liquidation, and they claimed against the National Insurance Fund for arrears of pay and unpaid holiday pay. The Fund refused to pay, saying that the claimants had no entitlement because, although none of them had known it at the time, the company was already insolvent having entered a company voluntary arrangement. On application by the claimants, two Employment Tribunals upheld their claims. The Secretary of State appealed against these decisions, and the EAT allowed the appeal.

The EAT examined the provisions of section 182 of the Employment Rights Act 1996 (ERA 1996), which provides that the Secretary of State shall make payment out of the National Insurance Fund if –

(a) the employee's employer has become insolvent
(b) the employee's employment has been terminated and
(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this part applies.

Under section 183, insolvency is defined as including company voluntary arrangements, and section 185 defines 'appropriate date', which for arrears of pay and holiday pay is the date on which the employer became insolvent.

The EAT held that:

- The statute permits of only one insolvency event.

- Liquidation would be a separate insolvency event if there were no CVA, but when it is preceded by a CVA, it is the earlier of the processes which is relevant for the purposes of the ERA 1996.
- The appropriate date under section 185 ERA 1996is defined by reference to the date on which the company became insolvent. This is a reference to a single date, and the language does not permit alternatives.

The EAT considered relevant European legislation in some detail, and took the view that it supported its conclusions. Whilst it was recognised that this would lead to the regrettable result that the employees would not benefit from the state guarantee, the EAT concluded that it was beyond their judicial powers to plug the gap in the protection of employees.

Secretary of State for Business Enterprise and Skills McDonagh & Ors UKEAT/0287/12/ LA; Secretary of State for Business Enterprise and Skills v Pengelly & Ors, UKEAT/0312/12/ LA.

The full text of the judgment is available on the British and Irish Legal Information Institute website at:

http://www.bailii.org/uk/cases/UKEAT/2013/0312_12_1402.html

102.9 'Affected Employees' in a TUPE Transfer

- The Employment Appeals Tribunal held that the sale of one part of a business will not render those employed in another part of the business that did not transfer 'affected employees' for the purposes of TUPE.
- There can be no claim for breach of the TUPE information and consultation obligations unless a relevant transfer actually takes place.

In *I Lab Facilities Ltd v Metcalf & Ors*, UKEAT/0224/12/RN, an employer facing insolvency had contemplated transferring both parts of his undertaking to a single transferee, but eventually the liquidator transferred only one part, the other being closed down. The claimants, who were employed in the part which was closed down, were dismissed and brought proceedings for, inter alia, breach of the information and consultation obligations under regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). The claim was brought against the transferee as well as the employer by reason of the joint liability provisions of regulation 15(9). The Employment Tribunal had upheld the claim on the basis that the employees were 'affected employees' by reason of having been excluded from the eventual transfer notwithstanding the original intention that they would be included.

The transferee appealed. The EAT allowed the appeal, and held that the claimants were not 'affected employees' because:

- As regards the transfer as it eventually proceeded, i.e. of the part of the business in which the claimants were not employed, such indirect impact as that may have had on the part in which they were employed did not make them 'affected employees'.
- As regards the earlier intended transfer of both parts of the business, no claim could be brought in respect of a transfer which had not in fact, taken place.

The claimants were employed by I Lab (UK) Limited ('ILUK') which provided services to the film and television industries, specialising in 'rushes' work. In 2009 it merged with a company called RKT Post Production Limited, which specialised in post-production work. The merger reflected the fact that there was a degree of overlap between the two businesses and some scope for the pooling of resources, but the core activities of the two previous businesses remained distinct, with the staff working in different premises and doing different kinds of work at different hours.

ILUK got into financial difficulties, and on 30 July 2011 it went into liquidation. On 11 August the rushes business was sold, and the post-production business was closed down by the liquidator. The claimants (with one exception) were all employed in the post-production business.

The claimants brought proceedings in the Employment Tribunal for unfair dismissal and various liquidated sums against the transferee. However, the Tribunal held that the claimants were all assigned to a part of ILUK's undertaking that had not transferred and that their claims were accordingly against ILUK only. However, the claimants also alleged that ILUK was in breach of the obligations to inform and consult under regulation 15. That part of their claim was upheld and a protective award made. Regulation 15(9) provides that where there is a breach of the consultation obligation by the transferor, the transferee is jointly and severally liable with the transferor. The Tribunal made an order to that effect, and the transferee appealed.

The essential issue was whether ILUK was under any obligation under regulation 13 to inform or consult with its post-production employees. The EAT rejected the Tribunal's reasoning that the claimants were affected by the transfer because they were excluded from it having been informed that they would be part of it. The EAT accepted the arguments put forward for the transferee, that the only transfer which occurred was the transfer of the rushes part of ILUK's undertaking. The claimants would not transfer and were not affected by that transfer. Nor were their jobs placed in jeopardy by it: the reason why those jobs were at risk, and were in due course lost, was the closure of the other, post-production, part of the business. Accordingly they were not 'affected employees' and there had never been any obligation to inform or consult as regards them. The appeal would therefore be allowed.

The EAT was careful to point out that this did not necessarily mean that employees dismissed in such circumstances had no right to be consulted. Any proposal to dismiss them if they numbered more than twenty would attract the collective redundancy consultation obligations under the Trade Union and Labour Relations (Consolidation) Act 1992.

The EAT considered how the information and consultation provisions would operate where an employer envisages a transfer but does not in the event proceed. The EAT concluded that there can be no complaint of a breach of the obligations unless a relevant transfer actually takes place.

The full text of the judgment is available on the British and Irish Legal Information Institute website at:

http://www.bailii.org/uk/cases/UKEAT/2013/0224_12_2504.html

102.10 Protective Awards and Insolvency as a Mitigating Factor

- The Employment Appeals Tribunal held that it was unreasonable to expect an employer to trade while insolvent to enable it to provide information and consult in accordance with its obligations under the Trade Union and Labour Relations (Consolidation) Act 1992.

In *AEI Cables Ltd v GMB & Ors*, UKEAT/0375/12/LA, the Employment Appeals Tribunal held that in making a protective award against an employer for the maximum period for failure to comply with its statutory obligations to consult and provide information to employees under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA'), the Employment Tribunal had failed to take account of the fact that the employer was insolvent and could not lawfully carry on trading to enable it to consult for a period of more than 10 days or so. In the circumstances the EAT reduced the protective award from 90 to 60 days.

Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment, it must collectively consult with representatives of the affected employees. Where an employer proposes to make 100 or more redundancies, the collective consultation must begin at least 45 days before the first dismissal (section 188, TULRCA). Before 6 April 2013, this period was 90 days. Where an employer fails to comply with these obligations an employment tribunal may make a protective award. The maximum protective award is up to 90 days' pay for each dismissed employee (both before and after 6 April 2013).

If special circumstances render it not reasonably practicable for the employer to comply, he must take all steps towards compliance as are reasonably practicable in the circumstances. However, the courts have held that insolvency is not in itself a 'special circumstance' for these purposes.

AEI Cables Limited ran into financial difficulties and took professional advice. A firm of accountants advised that unless it reduced costs or acquired additional funding there was a risk that the company would be trading while insolvent, and the directors would be at risk of being held personally liable for wrongful trading. When the company's bank refused to provide further funding, the directors took the decision to close one of the company's plants immediately. On the day following the meeting with the bank at which this decision was taken, a representative of the company informed a union official at the plant that the company had to make immediate redundancies, and the following day 124 employees were made redundant with immediate effect.

The dismissed employees brought a claim before the Employment Tribunal, which held that there had been a complete failure to consult and made a protective award for the maximum period of 90 days. The company appealed.

There was no dispute as to the fact that the company had failed to consult and that the Tribunal had been right to make a protective award. There was also no attempt to argue that the insolvency of the company was a special circumstance. The question at issue was the amount of the award.

The EAT stressed that the purpose of making an award is penal, not compensatory. It is intended to encourage employers to comply with their obligations. The principles to be adopted by tribunals when making awards was set out by the Court of Appeal in *Susie Radin v GMB* [2004] ICR 893. The Court of Appeal said that where there has been no consultation, the proper approach is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the tribunal consider appropriate.

In the present case, the EAT held that the Tribunal had failed to consider the reason for the employer's breach, and what explanation it had given for carrying out the dismissals when it did rather than at a later date. The employer's actions in arranging a meeting with the union official were not those of an employer deliberately flouting its obligations to consult, but those of an honest employer doing its best to inform the trade union.

Employment Tribunals are bound to take account of mitigating factors and are bound to ask the important question why did the respondent act as it did. Had the Employment Tribunal asked this question it could not possibly have ignored the fact and the conclusion that the company simply was unable to trade lawfully after the advice it had received from the accountants. In those circumstances, it was clearly wrong for the Employment Tribunal to have anticipated that a 90 day consultation period could have started. Because the Employment Tribunal had failed to have sufficient regard to the insolvency and the consequences of trading and that a consultation period of 90 days was simply not possible, the award of 90 days could not stand.

The full text of the decision is available on the British and Irish Legal Information Institute website at:

http://www.bailii.org/uk/cases/UKEAT/2013/0375_12_0504.html