

INSOLVENCY NEWSFLASH

October 2008



In this update we report briefly on 3 recent cases of interest to insolvency and restructuring professionals:

- *In the matter of Courts Plc (in liquidation)*
- *Horsham Properties Group Ltd v Clark & Beech, G-Mac RFC Ltd and The Secretary of State for Justice*
- *Svenska v Anders Holmqvist*

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The Prescribed Part - Section 176A of the Insolvency Act 1986

In the matter of Courts Plc (in liquidation)

[Judgment given on 9 October 2008](#)

This case referred to an application by the liquidators of Courts Plc to dis-apply the prescribed part in part under s176A(5) of the Insolvency Act 1986.

This is an important and useful decision when considering an application to the court to dis-apply the prescribed part where there are a small number of unsecured creditors with large claims. The court has clarified for office holders that it has no jurisdiction to dis-apply the prescribed part in a qualified manner. Either all creditors receive a distribution under s176A or none do.

We are all aware of the ability to make an application to court to dis-apply the prescribed part if the cost of making a distribution to unsecured creditors would be disproportionate to the benefit. However, in some instances the court has been unwilling to do so where the general body of unsecured creditors includes a small number of creditors with large claims, who it felt might be unfairly prejudiced by the application. In those circumstances the court has been minded to make an order dis-applying the prescribed part only in relation to creditors whose claims are below a threshold level.

In *Courts Plc* Mr Justice Blackburne reviewed s176A and came to the conclusion that there was no power for the court to dis-apply the prescribed part in part. To do so would breach the pari passu rule which underlies the treatment of unsecured creditors in an insolvency. The effect of a partial disapplication of the prescribed part would enable the largest creditors to take the majority of the available funds whereas the smaller creditors took nothing. That would give them an unfair advantage.

In the event that the court found that it could only dis-apply the whole of the prescribed part, the liquidators had also invited the court to sanction their undertaking to make a distribution to the largest unsecured creditors as if they were still entitled to participate in the prescribed part (but the creditors with smaller claims were not). The court rejected this approach, finding there was no power in the court's inherent jurisdiction to enable it to make an order departing from the pari passu approach to distributing money amongst unsecured creditors.

LPA Receivers

Horsham Properties Group Limited -v- Clark & Beech, G-Mac RFC Limited and The Secretary of State for Justice

Judgment given on 8 October 2008

This case considered whether or not the European Convention on Human Rights was relevant in relation to the enforcement of a legal charge over property by way of the appointment of LPA receivers.

It is good news for secured lenders who wish to enforce and realise security by appointing LPA receivers. A possession order may be required in some instances in order to contract to sell with vacant possession, but the court has confirmed that a lender is not bound to make an application to court for a possession order in all circumstances, and that the borrower cannot invoke the European Convention on Human Rights or the Human Rights Act 1998 to require the lender to do so.

The owners of the property charged it to a lender, and subsequently fell into arrears with repayments. The lender appointed LPA receivers to sell the property under the terms of its security. The LPA receivers agreed and completed a sale without recourse to the court, and without first obtaining an order for possession as against the original owners. The owners asked the court to consider whether or not the terms of the Law of Property Act 1925 which permitted a mortgage to include terms providing for a sale without a possession order were incompatible with the provisions of the European Convention on Human Rights. In the absence of an application to court there is no forum for the provisions of the Administration of Justice Act 1970 to be invoked, which gives the court a power to suspend a possession order or enforcement of it on application by the borrower. One of the owners argued this enabled the receivers to deprive her of one of her possessions in breach of her convention rights.

The court considered the issues, and looked back at the consequences of granting a legal mortgage that had arisen since the Law of Property Act 1925 came into force. The court found that the owner's rights in relation to the property were all capable of being overridden by the lender as a matter of contract. Her right to redeem the mortgage had been lost when the receivers contracted to sell it. The court found that the Law of Property Act 1925 implemented rather than overrode the agreement made between the borrower and lender. There was no state intervention into a private individual's rights, and no conflict between the statutory provisions and the ECHR. The court also found that the policy behind the Administration of Justice Act 1970 was to give the court a discretion to adjourn proceedings for possession only where the lender made an application to the court in the first place. There were no grounds to invoke it where no court application was necessary.

Cross Border Enterprises

Svenska v Anders Holmqvist

The European Court of Justice has recently handed down a judgment in relation to an employee redundancy claim which gives some clarity to the meaning of the word "activities" in a European context.

This case is important as it reaffirms the need for a company seeking to establish an overseas presence for the purposes of pan-European insolvency that it must have a presence in another Member State which includes people carrying out economic activity.

The employee was a lorry driver working for a Swedish company. He delivered goods to Italy, crossing Germany and Austria in the course of his work. The company's only place of business was in Sweden and it had no branches overseas. When the employer became insolvent the state body which guarantees payments to Swedish employees disputed the employee's entitlement to a wage guarantee. It asserted that the employer carried out activities in other Member States and that the employee carried out his work in other Member States. Accordingly, the Swedish state was not liable for payment.

This argument might have succeeded if the Swedish company had been found to have "activities" in the territories of other Member States. The ECJ felt that in order to carry out activities in other Member States the employer did not need to have a branch or fixed establishment there. It must however have a stable economic presence in the other states, featuring human resources, which enable it to perform its activities there. The mere fact that a worker delivered goods between Member States did not demonstrate that the employer had a stable economic presence overseas. Accordingly, the application of the Swedish guarantee institution failed.

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This Newsflash is issued by the Insolvency and Corporate Recovery Department. Should you require further help and advice please contact Ian Grier (email iang@sghlaw.com or telephone 0207 264 4450). This newsflash summarises complex case law and should not be relied upon in any way as a definitive statement of the law.

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