MOON BEEVER
SOLICITORS

NEWSLETTER WINTER 2018

FIRM NEWS

WE ARE PLEASED TO REPORT THAT WE GAINED FANTASTIC CLIENT AND PEER FEEDBACK IN THE CHAMBERS & PARTNERS AND LEGAL 500 DIRECTORIES. WE ALSO REPORT BELOW ON SIMON DUNCAN'S DPHIL STUDIES AT OXFORD UNIVERSITY ON INSOLVENCY SET-OFF. OTHER FIRM NEWS IS ALSO INCLUDED.

TO KEEP UP TO DATE WITH ALL THINGS MOON BEEVER, REMEMBER TO FOLLOW US ON TWITTER & OUR OTHER SOCIAL MEDIAS. **@MOONBEEVER**

LEGAL DIRECTORY RESULTS

Moon Beever is proud to be ranked among the top insolvency firms in the UK. Our fraud, private client and debt recovery departments all remain ranked highly in this year's legal directory results too.

In the Legal 500, Moon Beever is described as having a *'strong industry presence', 'good technical skills'* and is *'an excellent firm that provides highly technical advice in a concise manner.'* We remain ranked tier 2 for debt recovery, and tier 5 for private client and civil fraud.

Chambers & Partners said that the *"strongest point [for Moon Beever] is the breadth and depth of its team, which is second to none." They also award Frances Coulson as a notable practitioner who is "held in high regard for her litigation expertise and adept handling of contentious insolvency matters."* We remain ranked Band 1 for personal insolvency.

Senior Partner and Head of Insolvency and Litigation Frances Coulson says *"We are very proud to receive the news that Moon Beever has maintained its ranking in the Legal 500 and The Chambers & Partners. Our staff work extremely hard to ensure clients' needs are met and I'm glad that has been understood by the Legal Directory researchers."*

Thank you for all of your messages of support.

SIMON DUNCAN, DPHIL

Moon Beever is pleased to support the further research into insolvency set off being conducted by Simon Duncan, a Senior Associate at Moon Beever. Simon has accepted an offer from the University of Oxford and Brasenose College of a place on their new DPhil in Law (Part-time). Simon will continue to explore the limits of insolvency set-off, an area of expertise that he has been developing with Moon Beever over the last 18 months. Set-off has prevented many office-holders from recovering into insolvent estates and we hope to identify a way forward that will release funds that would otherwise bet set-off.

Frances Coulson, Senior Partner and Head of Insolvency and Litigation, said *'Simon has an excellent technical knowledge and is fast becoming the 'go to' person on all things set-off related.'*

Simon will be in Oxford one day a week from October 2018.

The LEGAL 500 UNITED KINGDOM LEADING FIRM 2019

TOP RANKED Chambers UK 2019 Leading Firm

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BUDGET SURPRISES: TIME TO DUST OFF YOUR OLD MANUALS?

Frances Coulson, Managing Partner and head of the Insolvency & Litigation department at Moon Beever.

Many of the initial report of the budget streaming into your inbox will have cheered small businesses, focused as they were on income tax, digital commerce tax and business rates cuts. However in the world of insolvency and therefore in the wider credit arena, two areas of the budget sent shockwaves through the finance and insolvency professions and will have a radical effect on credit, business start-ups and rescue as well as the very concept of limited liability.

First, the big announcement, in respect of which there was no prior warning or consultation (even, it seems within HMRC or BEIS) the resurrection of crown preference in insolvency. The view is that VAT, Employers' NIC, PAYE and CIS are all taxes collected on behalf of the Crown and therefore should not form part of the available funds for unsecured creditors in an insolvency. For example, Company A supplies Company B with widgets for £1,000 plus VAT. Company B pays Company A £1,200 – £1,000 is for the widgets and £200 is for Company B's VAT payment which Company A should pay over to HMRC. So far so logical.

However, in a real-life situation cash fluctuates and all the VAT, to take one example, is not sitting in a deposit account for HMRC but is used in the business of Company A. So long as Company A pays that VAT over to HMRC on the due date no problem, but if Company A is insolvent and the £200 is no longer there, the administrator or liquidator of Company A will realise its assets and, where appropriate, bring claims against directors to replenish the company pot for creditors. At present, aside limited preferential creditors such as employees, the company pot after payment of secured creditors is paid to the unsecured creditors – including HMRC – 'pari passu'.

In administration the Enterprise Act 2002 which abolished Crown preference also made provision for a 'prescribed part' carved out of floating charge realisations (as floating charge holders were getting a Crown windfall in the Crown no longer being preferential) of up to £600,000 for unsecured creditor then including the Crown. From 2020 it seems the prescribed part will change or go. In insolvent estates HMRC will rarely have trust money in the form of carefully preserved tax to recover so will eat into unsecured creditor returns generally.

At the time of the Enterprise Act arguments were made that the abolition of Crown preference was good for business and for UK plc. They were right. The old order meant that HMRC were far too quick to liquidate and make a grab for their cash when in fact business rescue was feasible.

This is a short-sighted move even if done in the name of the good of the taxpayer. What UK plc needs is a good flow of lending, a good rescue culture, and an efficient pursuit of those who trade at the expense of their creditors and fail. Instead lending and trade credit will tighten and the Crown might well find that its take goes down not up. All this at a time when businesses face the Brexit challenge. While the changes announced do not usurp the position of secured lenders with fixed charges, many of the challenger lenders who have proved so vital in SME lending do not have fixed charges and might look harder at their lending criteria.

BARRIER TO BUSINESS

As if this wasn't bad enough the other HMRC proposals, which were (briefly) consulted upon-and apparently universally condemned-in their 'Tax Abuse in Insolvency' paper, have also been adopted in the budget. These proposals allow HMRC – as Judge Jury and Executioner – to determine when a company is guilty of tax evasion or avoidance, or phoenixism, and look directly to directors for recovery. Again, this must tighten lending. The Treasury has previously been keen to resist any erosion of limited liability as a barrier to business, but it seems that this is all forgotten in a short-term land grab by HMRC.

Many now successful businesses have arisen from early failure. Would entrepreneurs try again so readily if their family home is on the line? Would a lender support them trying again or provide a distressed business with finance under the post 2020 regime? Less likely. Fewer and fewer businesses are built on fixed asset bases in the SME market. Floating charge and unsecured lending has enabled such business to thrive.

Time to tighten your credit policies?

This article was first published in Chartered Institute of Credit Management's The Recognised Standard, Dec. issue.

CICM Chartered Institute of Credit Management

Founder member of FECMA

EXCEPTIONAL CIRCUMSTANCES: THE CURRENT POSITION

Graham McPhie, Partner at Moon Beever. First published in Corporate Recovery & Insolvency, Issue 5, October 2018.

This article explores recent case law on the evidential burden of proof to establish exceptional circumstances under section 335A Insolvency Act 1986 in proceedings for possession and sale together with the consequences of having done so.

Key points of his article:

- This article explores recent case law in proceedings for possession and sale of a bankrupt's home.
- It looks at the evidential burden of proof to establish exceptional circumstances under s 335A of the Insolvency Act 1986.
- Having established that there are exceptional circumstances present, recent cases far more support a sale being delayed for a reasonable adjustment period rather than the creditors rights being suspended indefinitely.

A pdf version of the full article is available on our website.

ENVIRONMENTAL LIABILITY – WHAT HAPPENS WHEN THE POLLUTER CANNOT PAY?

Simon Duncan, Senior Associate at Moon Beever examines what happens after a breach of the Environmental Protection Act 1990 and highlights how to make the polluter pay.

Background

The Environmental Protection Act 1990 imposes obligations on companies that process waste. In particular, those companies must not deposit controlled waste on any land unless a waste management licence authorising the deposit is in force, and the deposit is in accordance with the licence terms.

Where a breach occurs, the Environment Protection Agency can complete the remedial work and recover the expense incurred from the company.

The provisions of the Act are intended to give effect to the Waste Framework Directive. This enunciates the principle that the 'polluter pays.' The problem that was not anticipated however by the legislation, is what happens when the polluter cannot pay because it's insolvent?

Doonin Plant Limited [2018] CSOH 89

This was an application for directions brought by the Joint Liquidators of a Scottish waste management company.

The company had a licence to deposit waste at a former colliery site. After the licence expired the company deposited waste at the site. Even if the licence had been in force, it would not have permitted this waste to be deposited there.

The Scottish Environmental Protection Agency ("SEPA") served a notice requiring the company to complete remediation work. The Joint Liquidators had monies in the estate of £634,000. SEPA estimated the remediation costs to be between £2.3 and £3.7 million. The notice was issued after the company entered liquidation.

The central question for determination was whether the remediation costs would be an expense of the liquidation, or a contingent debt.

Decision

The expenditure incurred by the Liquidators when complying with the notice was an expense of the liquidation. As such it outranked the unsecured creditors' claims.

Lord Doherty, having reviewed the authorities, summarised his reasoning as follows:

"Viewing the nature of the liability imposed by the notice through the prism of the directive… I conclude that it must reasonably have been intended by the legislature that expenditure by a liquidator

complying with a notice should be a litigation expense. Otherwise it is very likely that polluters who become insolvent would frequently escape paying for the damage to the environment that their conduct has caused.'

Essentially, for this reason, the third limb of the test handed down by Lord Neuberger in *Re Nortel Gmbh* [2014] AC 209 was not met, namely, it was inconsistent with the regime under which liability was imposed to regard this liability as a debt pursuant to IR 13.12(1)(b).

The Court noted that until or unless SEPA had done the remediation work, no debt was owed to SEPA. SEPA would not complete the remediation because there were no funds from which to recover all of the anticipated costs.

The difficulty for the Joint Liquidators in this case however is that there are insufficient monies in the estate to pay for all the required remediation. The company's funds would be exhausted.

The Court anticipated that the Joint Liquidators and SEPA would discuss what remediation work might be possible with the available funds. It was also suggested that the Court would look favourably on a further application from the Joint Liquidators, to ensure that they could be remunerated ahead of the remediation costs. However, a further point appears to have been overlooked.

How to make the polluter pay

Companies do not pollute anything. The directors caused the company to breach the provisions of the Environmental Protection Act. In doing this, they exposed the company to the liability of having to pay remediation costs that would otherwise not have been incurred. This conduct is a clear breach of the directors' duty to act in the best interests of the company. The Joint Liquidators could issue proceedings against the directors pursuant to Section 212 Insolvency Act 1986. If these resulted in a successful recovery, these funds could be used to pay for the remediation work. This would ensure that the polluter really does pay. It may also lead to a recovery for the unsecured creditors and ensure that the same directors are not considered fit and proper to be licensed to continue business in the next entity.

THE NEW DEATH TAX

Richard Boulding, Partner and head of the wills, trusts and probate department at Moon Beever.

We welcome Richard Boulding, who joined us in September, to the team. Here you can read his latest article which highlights the new banded structure of probate fees from April 2019. He pinpoints concerns over how beneficiaries will be able to fund the payment of the new fees.

At the beginning of 2017, the government announced it intended to introduce a huge increase in the probate application fees for estates in England and Wales. This plan was dropped when Theresa May called a snap general election in May 2017.

The Ministry of Justice announced earlier this month a plan to introduce a banded structure of probate fees from April 2019; the new death tax.

Currently there is flat probate fee of £215 in England and Wales, irrespective of the value of the deceased's estate, which is reduced to £155 if you use a solicitor. The proposed new probate fee charges will be linked to the size of the deceased's estate and will be as follows:-

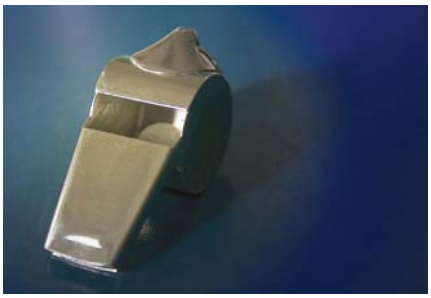
- **Up to £50,000 - no charge**
- **£50,000 to £300,000 - £250**
- **£300,000 to £500,000 - £750**
- **£500,000 to £1,000,000 - £2,500**
- **£1,000,000 to £1,600,000 - £4,000**
- **£1,600,000 to £2,000,000 - £5,000**
- **Above £2,000,000 - £6,000**

The proposed new charges bear no relation to the cost of providing the probate service. In 2017, the House of Commons joint committee on statutory instruments warned that the then proposed 2017 new structure might be unlawful, on the basis that it amounted to abuse of the parliamentary process. The junior justice minister, Lucy Frazer said in early November 2018 that the proposed new fees were necessary to fund a comprehensive reform of

the Courts and Tribunals system. However, this means that people with higher value estates will be paying disproportionately for the administrative work involved in obtaining a grant of probate, in addition to estate paying inheritance tax.

There is a very real concern about how beneficiaries will fund the payment of the new probate fees and the problems potentially faced by people who have most of their assets in property, but do not have much cash. For example, the widow where the property was in the sole name of the late husband. Whilst no inheritance tax would be payable, the widow would still need to pay the new higher fee in order to obtain a grant of probate and arrange for the property to be transferred into her sole name.

EMPLOYERS – HOW REASONABLE ARE YOUR DISCIPLINARY PROCESSES?



Workplace disciplinary proceedings are always tense and it is vital to remember that their reasonableness is likely to be examined in detail by Employment Tribunals (ETs) after the event. In a case on point, a carpenter who was sacked after being accused of describing gay people as his pet hate succeeded in unfair and wrongful dismissal claims.

The man enjoyed an unblemished disciplinary record during his 14 years working for a social housing provider. After a tenant complained that he had made homophobic comments, however, he was summarily dismissed for gross misconduct. His internal appeal was rejected but, after he contacted specialist solicitors, they launched proceedings on his behalf before an ET.

In upholding his claims, the ET noted that the tenants identity had been kept from him during the disciplinary process and and that neither of the managers who dealt with the matter had met her. There had been no attempt to look for inconsistencies in her complaint and the manager's acceptance of her word over that of the carpenter was unreasonable in the circumstances.

In the light of glowing character references, including from a gay friend, the ET found it highly unlikely that he would have made the comments alleged. The tenant had a motive for embellishing her account and it was probable that she had done so. She had not sought his dismissal and sacking him fell outside the band of reasonable responses open to the employer. His treatment also amounted to a repudiatory breach of his employment contact. The amount of his compensation has yet to be assessed but is bound to be substantial.

BOUNDARY DISPUTES: WHEN IS IT BEST TO SEEK LEGAL ADVICE?

Boundary disputes between neighbours have a habit of getting out of hand, but legal advice, taken at an early stage, can ultimately save a great deal of anguish and expense. In this case, a couple who cut back their neighbours hedge without permission were ordered to pay her substantial damages.

The neighbour had been shocked to find that the six-metre-high hedge that ran along her western boundary had been cut back to the earth bank. The couple accepted responsibility, but argued the hedge stood on their land and that they had been entitled to do what they liked with it. After the neighbour launched proceedings, expert witnesses were deployed on each side during a six-day trial. The judge, who made a site visit, analysed RAF aerial photographs of the hedge, together with legal documents and maps dating back to the Victorian era, ruled in the couples favour and the neighbours' claim was dismissed.

On appeal, however, the Court found it more probable than not that the boundary had once been marked by a stock-proof fence that had long since been removed. The evidence indicated that the fence had run along the west side of the bank and that the boundary was therefore where the neighbour said it was. The couple were ordered to pay £22,500 in damages to the neighbour.

Pollock v Oldfield & Anr.

Centre for Adults' Social Care - Advice, Information and Dispute Resolutio

CASCAIDr

Free Advice - for upholding adults' Health and Care Act rights

CASCAIDr is a new national advice charity, providing specialist legal advice about everyone's rights to have their needs for care and support decided **lawfully, reasonably and fairly.**

We aim to empower and support people, their carers and practitioners working in the health and care sector **to resolve disagreements about access to services.**

Most people only seek support or come to rely on social care services and funding, in times of crisis.

Family members and carers, exhausted by providing dedicated care, rarely have the energy required to navigate referral processes or complaints procedures to secure fair processes and lawful packages of care.

WHAT SORT OF PROBLEMS DO WE TAKE ON FOR FREE?

- Access to funded independent advocacy rights;
- Whether assessments are compliant with the law;
- Whether councils are following the statutory Guidance;
- Rights to funding for sufficient levels of care to avoid support needs escalating or sacrificing carers' wellbeing;
- The legality of proposed cuts to care plans.

For wider problems, complaints, more complex issues, etc, we charge a low cost fee of £125 ph.

WHAT DOES CASCAIDr's SERVICE INCLUDE?

- A telephone helpline - 4 days a week - for a booked half hour free 'steer' for people who are not sure if they've even got a legal problem.
- A referral form for people to fill in online.
- Volunteers to help people to express all the relevant detail of their predicament, if they are struggling.
- Expert advisers who will produce the checklist and letters that are the free output.
- Support and guidance for those who want to crowdfund to bring formal legal proceedings.

WHAT CAN PEOPLE EXPECT? CASCAIDr ADVISERS WILL:

- Analyse a situation for omissions to comply with the Care Act or public law principles.
- Give the client a checklist to take back to the council/CCG.
- Write a letter in the form of a pre-action protocol letter, setting out what's not been done correctly
- Seek advice on the client's behalf, from a direct access barrister.
- Consider helping the client crowdfund so that the council or CCG knows that the client can, if required, challenge unlawful decisions in Court.

Where issues can't be resolved through dialogue and a barrister has given a positive opinion on the merits of the case, CASCAIDr may support **crowdfunding** to secure legal challenges.

This not only strengthens an individual's position, but also supports widespread lawful decision-making by clarifying any areas of uncertainty in the current legal framework.

WAYS TO SUPPORT CASCAIDr

VISIT OUR WEBSITE

www.cascaidr.org.uk
for info and offering casework here
or volunteering here

GET ON SOCIAL MEDIA!

on **Twitter** @CASCAIDr
and **Facebook** here, and connect here to Belinda Schwehr on **LinkedIn**

HELP US FUNDRAISE

How to Donate
and get HMRC to pay
25% extra by way of GiftAid

- **MyDonate.BT.com DONATE**

GET IN TOUCH? Telephone: **01252 560 856** or email: **belinda@cascaidr.org.uk**

MOON BEEVER IN THE COMMUNITY

Moon Beever take their corporate social responsibility extremely seriously. In fact, it has always been at the heart of our culture long before it became a standard requirement. Here's a quick overview of how we have helped our chosen charities this quarter.

OUR ANNUAL INSOLVENCY QUIZ

On the 9th October we were joined by many clients and friends of the firm at our annual insolvency quiz which raised close to **£15,000** for our chosen charities; The Debbie Fund and Macmillan Cancer Support.

Money was raised through the quiz itself, a raffle and a rather brilliant auction which saw holidays to Majorca, Morocco and Norfolk get snapped up, as well as barrister Adrian Hyde, who kindly offered his time as a butler for the evening, for the bargain price of **£1300!**

A good time was had by all, and we are pleased to announce that 'The Fraud Stars' from RSM won overall. Congratulations to them. Next year's quiz is pencilled in for the 15th October, we hope you can join us and help to make it one to remember!

MACMILLAN BAKE SALE

What better way to raise money for charity, than by eating cake? On the 28th September, staff from both Moon Beever offices took part in successful bake sales which raised **£211** for Macmillan Cancer Support.

LONDON LEGAL WALK 2018

On 21 May 2018 a contingent of 13 keen walkers took part in the annual London Legal Walk. In perfect conditions (as always), the Moon Beever walkers and runners joined thousands of others for a 10km evening sponsored walk through the streets and parks of Central London leaving tourists rather bemused! Our team completed the course in under 2 hours and raised an impressive **£1,302.50** which was divided equally between our firm's chosen charity, Coram Children's Legal Centre, a local charity specialising in law and policy affecting children and young people, and the organiser's official charity providing much needed funding for legal advice centres. A huge thank you to all members of the Moon Beever team as well as everyone who generously sponsored our team. Next year's event is on 17 June 2019 so please look out for our Just Giving page in 2019 or speak to **Kirk Camrass** about either participating (yes, clients and friends of Moon Beever are welcome to join our team) or sponsorship.

debbie fund

coram better chances for children since 1739

The London Legal Support Trust

MACMILLAN CANCER SUPPORT

DATES FOR YOUR DIARY
Jan – June 2019

Regulation on Executive Pay Reporting – 1st January
Requiring UK companies with more than 250 employees to publish the pay ratio between their CEO and average employees.

Moon Beever's Insolvency seminar – 5th March
Speakers from the Insolvency Service, Portland Communications and Lexa Hilliard QC from Wilberforce Chambers.

Employment Law Changes – April
It is already noted that employers will be made liable to pay employer's national insurance contributions on termination payments above £30,000.

Probate fee changes 'The New Death Tax' – April
The proposed probate fee will, from April 2019, be linked to the size of the deceased's estate, rather than the current flat probate fee. Please see our article on page 4 for more details.

The R3 Annual Conference – 22-24th May
Some of our insolvency solicitors will be attending the R3 annual conference. Get in touch if you are too.

Moon Beever's Insolvency seminar – 4th June
Details to be provided closer to the time.

WISHING YOU A VERY MERRY CHRISTMAS AND A HAPPY NEW YEAR

STAY IN TOUCH

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