Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

Stay summary judgment to allow scheme of arrangement proposal

The recent decision of *Re Bluecrest Mercantile BV* saw the High Court stay proceedings for summary judgment in respect of contract debts to allow the formulation of proposals for a scheme of arrangement - is this likely to be become common practice, or is it a one-off?

The background

Schemes of arrangement (SofAs) are another mechanism (aside from CVAs) by which companies can compromise their liabilities. Although the process involves court sanction, as with CVAs the proposition of a SofA will not cause a moratorium to arise which protects the company from further action until the SofA is either approved or discharged. As such, they are rarely used in isolation in insolvency situations due to the potential for "rogue" creditors to disrupt the process with court action.

In *Re Bluecrest Mercantile BV ([2013] EWCH (Comm) 22/04/2013)*, Credit Suisse, together with other lenders, had lent $600 million to the Vietnam Shipbuilding Industry Group (VSIG), a state owned entity which built and repaired ships.

VSIG later ran into financial difficultes and opened negotiations for a debt restructuring with several of its lenders. Those negotiations lasted some two years from 2010. Two of the lenders later started court proceedings to recover the money owing to them, and applied for summary judgment for payment of the debts. As so much progress had been made with the negotiations, VSIG applied to the court under Civil Procedure Rule 3.1(2)(f) to stay the legal proceedings until some specified future event. Their argument was that - although there was no defence to the debt - the action would subvert the attempted restructuring, and that VSIG believed it had a sufficient body of support to vote through a SofA. A court hearing for the SofA had been scheduled for June 2013, which would allow approval by August 2013.

The issues

The major issue for the court was whether it could use its jurisdiction to allow a SofA to be proposed. Several authorities were cited by the bank which contended that the court had no authority to allow hearings to be delayed pending resolution of other issues. One analogy used was the inability of a court to stay winding up petition under Section 126 of the Insolvency Act 1986 pending a meeting of creditors.

What did the court decide?

Referring to other authorities under the old Rules of the Supreme Court (the "White Book") under which stays of judgments had been allowed specifically to allow consideration of SofAs, the High Court allowed the application and stayed the summary judgment proceedings. Given that the SofA had a reasonable prospect of being approved, this constituted "special circumstances" which justified a stay under CPR 3.1(2)(f). If the stay was not granted, there was a risk that not all creditors would be treated equally and a "free for all" would ensue in which the supportive lenders would no doubt back out of a restructuring.

What does this mean for practitioners?

This decision is to be welcomed, especially in those marginal cases where a consensual restructuring is sought outside the protection of administration or a formal insolvency process. No doubt many practitioners have experienced the frustration of having proceedings disrupted by the precipitous actions of a rogue disgruntled creditor. This provides confirmation of the court's jurisdiction to stay action where a SofA or other restructuring appears to be a viable option. The case also serves as a valuable reminder of when the court will sanction SofA in respect of overseas companies (the primary test being whether they are able to be wound up by the English courts). It also represents a cautionary tale for junior lenders and may affect their enthusiasm to participate in clubs or syndicates.

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