

2022 in Review: 5 Key Cases to Remember

8 December 2022
James Fagan



5 Key Insolvency Cases

- S.127 Insolvency Act 1986 - *Re Changetel Solutions UK Limited* [2022] EWHC 694 (Ch)
- Service Out (Personal Bankruptcy) - *Al Saud v Mobile Telecommunications Company KSCP* [2022] EWHC 744 (Ch)
- COMI - *East-West Logistics Llp v Melars Group Ltd* [2022] EWCA Civ 1419
- Liquidator Decision Making - *Re Edengate Homes (Butely Hall) Ltd* [2022] EWCA Civ 626
- Directors' Duties - *BTI 2014 LLC v Sequana SA* [2022] UKSC 25

S.127 Insolvency Act 1986 - *Re Changetel Solutions UK Limited* [2022] EWHC 694 (Ch)

- Liquidators applied to recover sums paid by company in the period between presentation of a winding up petition and the making of a winding up order.
- Application resisted on three grounds: limitation period, validation and/or a change of position defence.
- Limitation Argument:
 - Statute barred because claim issued more than six years after the company made the payments?
 - S.127's purpose (pari passu preservation) is only triggered by the winding-up order. Cause of action only completes once order made.
 - Limitation argument rejected.
- Change of Position Defence:
 - Available in principle.
 - Constrained in the same way and for same reasons as discretion to validate. *Express Electrical Distributors Ltd. v Beavis* [2016] 1 WLR 4783
 - Defence failed on the facts for same reason as validation defence.

Service Out - *Al Saud v Mobile Telecommunications Company KSCP* [2022] EWHC 744 (Ch)

- Section 265(2)(b)(i) of the Insolvency Act 1986, a bankruptcy petition may be served on a debtor who is not domiciled in England and Wales if the debtor had a ‘place of residence’ in England and Wales in the three years prior to the petition being served.
- Standard of proof on application: good arguable case.
- “Resident in E&W” different from “place of residence in E&W”
- “place of residence in England and Wales” – No single legal test. Give the phrase its ordinary meaning.
- Having Legal and Equitable Title not required, nor is de facto control of property a necessary condition.
- Broad range of factual considerations
 - Settled or usual place of abode or home, some degree of permanence, continuity or expectation thereof
 - Consider nature of presence
 - Factors include length of time, right to reside, periods of absence, non de minimis visits, reasons for using alternative accommodation, council tax, whether debtor has given evidence personally.

COMI - *East-West Logistics Llp v Melars Group Ltd* [2022] EWCA Civ 1419

- Appeal granted against winding up order where Deputy ICCJ had concluded that COMI of Melers was in England and Wales and not in Malta where its registered office was located. Second appeal to Court of Appeal.
- Melers originally registered in BVI until 10 December 2015, then moved to Malta. Business was entirely virtual with no physical presence.
- The starting presumption in every case is that the COMI of a corporate debtor is the same place as the debtor's registered office.
- The question that follows is whether that is rebutted by evidence of factors which are both objective and ascertainable by third parties and which show that the debtor actually conducts the administration of its interests on a regular basis in a different location from the location of its registered office.
- A lack of evidence that the debtor actually carries out any activities at the place of its registered office does not allow the court to ignore or disregard the legal presumption
- Ascertainability:
 - Matters known or ascertainable to creditors, even if not generally known to public at large.
 - Contractual terms known to one creditor but not others may be relevant.
 - Whether facts are indicative of dealings with creditors more generally is a matter of weight, not admissibility.
- Appeal dismissed. Use of English language, English law governed contracts with English law arbitration in London and litigation conducted by English lawyers were not indicative of COMI in England. Creditor domicile is not connected with where interests administered.

Liquidator Decision Making: *Re Edengate Homes (Butely Hall) Ltd* [2022] EWCA Civ 626

- Director (who was a creditor due to company indebtedness on directors' loans) applied under s168(5) to set aside a liquidator's decision to assign a claim to a litigation funder.
- Claim was sole asset of the company and was a misconduct claim against the director and members of the director's family (transactions at an undervalue, unjust enrichment and preference).
- Challenge dismissed and upheld on appeal.
- Standing to challenge is a two stage test: (1) was the applicant a person aggrieved by an act or decision of the liquidator; and (2) does the applicant have a legitimate interest in obtaining the relief.
- No legitimate interest where interests were adverse to litigation or general creditors' interests.
- Director's challenge was not for benefit of creditors generally. While a defendant could have a legitimate interest in acquiring a claim, in this case there was no suggestion the director would match or beat the litigation funder's offer.
- Test on merits is one of perversity: Court interferes if act is so utterly unreasonable and absurd that no reasonable man would have done it.
- Failure to offer a defendant an opportunity to acquire or settle a claim pre-assignment is not perverse.

Directors' Duties - *BTI 2014 LLC v Sequana SA* [2022] UKSC 25

- S172 Companies Act 2006 is expressly subject to any enactment or rule of law requiring directors in certain circumstances to consider or act in the interests of creditors of the company (section 172(3), CA 2006).
- So-called “creditor duty” or “the rule in *West Mercia*” – Duty of directors of an insolvent company to have regard to the interests of creditors.
- Supreme Court confirmed the existence of the duty, when it arises and provided obiter guidance on its operation.
- The duty arises when directors know or ought to know that either:
 - the company is insolvent or bordering on insolvency (also referred to as imminent insolvency); or
 - an insolvent administration or liquidation is probable.
- Is the duty paramount or a factor to be considered?
 - Majority adopted a sliding scale approach:
 - If a company is insolvent or bordering on insolvency but not faced with inevitable liquidation or administration, consider the interests with appropriate weight.
 - If liquidation or administration inevitable interest are paramount
- *MI Squared Ltd v King* [2022] EWHC 331 (Comm) – Primary creditor interest is being paid in full and on time.

Radcliffe Chambers

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com

