A newsletter from NIFA
APPROVED EXPERT FINANCIAL WITNESSES

NIFA NEWS

ISSUE 21

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NIFA FOR RICHER, OR FOR POORER, TILL DEBT DO US PART

No one is immune from the effects of the current crisis in the world financial markets but family lawyers are amongst the less obvious casualties.

Recent indications are that there is likely to be a noticeable drop in the numbers of couples applying for ancillary relief as people begin to recognise the pointlessness of applying for a sale and division of the family assets only to see a sharing out of negative equity and low company valuations.

Conversely, some cannier litigants may perceive a unique opportunity for a cheap divorce at a time when asset values are severely depressed.

Certainly we, forensic accountants, are finding it increasingly difficult to advise on issues of liquidity in relation to family businesses in an economic climate in which commercial credit is not just tight but almost non-existent.

If the family company cannot afford to raise capital or even to repay directors' loans, then lateral thinking is called for.

Husbands are typically reluctant to offer their wives shares in a divorce arguing that doing so removes the incentive for them to make the business a success. Similarly wives are typically mistrustful of the husbands and keen to achieve certainty, finality and financial separation.

That said, extreme times call for extreme measures so, if the parties are reluctant to sell the business and if cash cannot be raised to buy-out existing shareholders then it may be necessary to consider a restructuring of capital. By issuing loan stock or perhaps new classes of shares with different rights, such as non-voting shares or redeemable preference shares, it can sometimes be possible to suggest compromises that are acceptable to both husband and wife.

Times such as these call for creative solutions but care also has to be given to the tax consequences of imaginative settlements.

NIFA continued from cover.

Ultimately, there will inevitably be a trade-off for the non-working spouse between accepting a hefty discount in return for the certainty of cash and a clean break, on the one hand, and the prospect of a higher but longer term and more risky payout based on shares or loan stock, on the other.

One thing is for certain and that is that the days when the family business could tap up the bank for a few thousand pounds to grease the wheels of a divorce are well and truly in the past and are unlikely to return for some time to come.

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TOUGH ON CRIME, TOUGH ON THE PROCEEDS OF CRIME

As forensic accountants we are seeing an unprecedented number of confiscation order cases and a significant proportion now involve bankrupts and divorcing spouses. However the interaction between confiscation legislation, ancillary relief legislation and insolvency legislation is far from straightforward.

Confiscation and Bankruptcy

On first reading the legislation it might appear that, if bankruptcy precedes confiscation, then creditors have a prior claim on any assets but if confiscation comes first then the Crown has priority.

It is certainly the case that, if a restraint order is in force as at the date of the making of the bankruptcy order then any property subject to the restraint order will be excluded from the bankrupt's estate. Conversely, where a bankruptcy order is already in force, a restraint order cannot be made in respect of property that already forms part of a bankrupt's estate, nor can a receiver be appointed over property comprised in the bankrupt's estate.

Problems arise however in relation to the priority and status of confiscation orders because once made they do not impose any restriction on the assets of the defendant, which has not already been caused. They are simply an order to pay a sum of money.

Consider an individual who has been made bankrupt and is facing confiscation proceedings.

1. **Under the Proceeds of Crime Act ("POCA"), the bankrupt's assets are "held" by the defendant and therefore form part of his free property, even though they vest in the trustee in bankruptcy;**

2. **Therefore they can be included within the Available Amount**

BUT

3. **Under the provisions of the Insolvency Act:**

    a. **They cannot be made subject to a restraint order;**
    b. **A receiver cannot be appointed over them;**
    c. **The defendant cannot realise them without committing a bankruptcy offence**

Thus one could envisage a situation in which a defendant was facing an order to pay a sum of money that presumed that he had available to him assets which were, in reality, not available at all because they vested in his bankruptcy estate. In those circumstances one might think that the Court would use its discretion to relieve the defendant of the apparently invidious position of being caught between the proverbial rock and a hard place.

However, it may well not do so. Consider, for example the defendant who withdrew large sums of cash from his bank accounts prior to his bankruptcy and now faces the allegation that these sums represent a "Hidden Asset".

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However, it may well not do so. Consider, for example the defendant who withdrew large sums of cash from his bank accounts prior to his bankruptcy and now faces the allegation that these sums represent a "Hidden Asset".

In those circumstances, the trustee in bankruptcy is likely to find if very difficult, if not impossible, to find and realise these funds, assuming that they even exist.

By contrast, in the confiscation proceedings, the defendant may decide that it is expedient for him to surrender them simply to avoid the penalties that could otherwise be applied to him for failure to do so. No such penalties apply in bankruptcy.

Presumably it would then be for the trustee to attempt to lay claim to any funds that were disclosed and for the Court to weigh up the competing interests of creditors and the State.

What will be in key importance in all these cases are the underlying facts and, in particular, the "Money Trail". Only by tracing the funds and analysing the timing of transactions in relation insolvency events, will the Court be able to

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THE DIFFERENCE BETWEEN PREGNANCY AND DISABILITY

It is often said that you cannot be slightly pregnant. Either you are pregnant or you are not. According to a recent Court ruling, the same cannot be said of disability.

The case in question (Conner v Bradman & Company Limited [2007] EWHC 2789 (QB) (HHJ Coulson QC)) concerned, inter alia, a claim for loss of future earnings of a motor mechanic.

As a result of a motorcycle accident the claimant sustained injuries to his knee that left him in constant pain; unable to squat; being able only to kneel with difficulty and able only to climb stairs slowly. His prognosis was that he required a full knee replacement within a year of the trial.

The Court was asked to address the question as to whether or not the claimant was disabled for the purposes of applying a discount to the multiplier for future loss for the risk of contingencies other than mortality. This is a matter that was raised as being of key importance in an earlier edition of this newsletter and has now come to the fore.

The notes to the Sixth edition of the Ogden Tables states (at paragraph 35) that an individual is classified as being disabled if all three of the following conditions are met:

he has either a progressive illness or an illness which has lasted or is expected to last for over a year,

he satisfies the Disability Discrimination Act definition that the impact of the disability substantially limits the person's ability to carry out normal day-to-day activities; and

his condition affects either the kind or the amount of paid work he can do.

In the Conner case, it was not disputed that the claimant satisfied the first and third conditions and the Court concluded that he also satisfied the second. However, the defendants argued that the claimant's disability was not sufficient to justify the application of a discount in accordance with Table B of the Ogden Tables (discounts applicable for disabled claimants).

The Court was mindful of the fact that the notes to the Ogden Tables say (at paragraph 31) that "*in many cases it will be appropriate to increase or reduce the discount in the tables to take account of the nature of a particular claimant's disabilities*" and (at paragraph 32) that "*it may be appropriate to argue for higher or lower adjustments in particular cases*".

Accordingly, the Court held that, on the strength of the facts of the case, the just result was to apply a multiplier that was the mid-point of the "disabled" multiplier of 0.49 and the "non-disabled" multiplier of 0.82, that being 0.655.

Of course the choice of multiplier is a matter for the Court and not for forensic accountants. That said, instructing solicitors should bear in mind the significance of the disability discount and perhaps consider asking for alternative illustrative calculations of loss. By doing so they will be well placed to advise clients as to their litigation risks and the optimum level at which to pitch their Part 36 Offers.

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