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Company Insolvency and Restructuring

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CORPORATE INSOLVENCY

- Distribution Priority
- Procedures
- Office Holder's Powers
- Pre-Packaged Sales

17 September 2013



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Priority

- Fixed Charge
- Payment of Office Holders Costs and Expenses
- Preferential Creditors
- Floating Charge (less prescribed part)
- Unsecured Creditors (plus prescribed part)
- Shareholders



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Insolvency legislation

- Insolvency Act 1986
- Insolvency Rules 1986
- Enterprise Act 2002
 - New Administration Procedure
 - Abolition of Crown Preference
 - Introduction of Prescribed Part



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Procedures

- Liquidation
- Administrative Receivership
- Administration
- CVA
- Scheme of Arrangement



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Mechanics

VOLUNTARY LIQUIDATION

- Solvent
 - Members Voluntary Liquidation (“MVL”)
 - Members Resolution and Dec. of Solvency
- Unable to pay debts
 - Creditors Voluntary Liquidation (“CVL”)
 - Members Resolution and Creditors Meeting



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Mechanics

COMPULSORY LIQUIDATION

- Petition (Creditor/Shareholder/Directors)
- Advertisement in London Gazette
- Court Order



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Mechanics

ADMINISTRATIVE RECEIVERSHIP

- Lender has a debenture
- Invitation to appoint by Company to debenture holder OR
- Demand for payment under the debenture and appointment by charge holder
- Administrative Receiver accepts appointment within next day



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Mechanics

ADMINISTRATION

- DIRECTORS/COMPANY
 - Notice of Intention to Appoint to Qualifying Floating Charge Holder (“QFCH”)
 - Notice of Appointment lodged at Court
- QFCH – Notice of Appointment (Prior Notice?)
- CREDITOR – Petition



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Mechanics

- ADMINISTRATION
- ALL
 - Evidence of inability to pay debts
 - Evidence that purpose can be achieve
 - Administrator’s Consent to Act



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Mechanics

CVA

- Nominee
- Proposal
- Nominee's Report
- Creditor's Meeting
- 75% of creditors (by value) approve
- Supervisor Appointed



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When do Creditors Know?

- MVL – After Liquidation (No Creditors' Meeting)
- CVL – After Liquidation and Before Creditors' Meeting
- Compulsory Liquidation – Advertisement of Petition
- Admin Receivership – After Appointment of Administrative Receiver
- Administration – After Appointment of Administrator
- CVA – On receipt of Proposal



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Office Holder's Powers

WRONGFUL TRADING – Section 214 IA

- At a time (within 5 years of Liquidation) the Director(s) (or Shadow Director(s)) should have known that there was no reasonable prospect of avoiding insolvent liquidation.
- Only in Liquidation
- Action by Office Holder
- Pierces the corporate vale
- Award – compensatory
- Criminal Offence



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Office Holder's Powers

FRAUDULENT TRADING – Section 213 IA

- Claim against any parties **knowingly** a party to carrying on any business of the company with an **intent** to defraud.
- Only in Liquidation
- Action by Office Holder
- Pierces the corporate vale
- Award – compensatory
- Criminal Offence



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Office Holder's Powers

DIRECTOR'S MISFEASANCE – Section 212 IA

- Where a person concerned with the management of the company has misapplied or retained money or property, is guilty of misfeasance or breach of duty
- Only in Liquidation
- Application by Liquidator, Creditor or Contributory (award to company)
- Award – restorative or compensatory



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Office Holder's Powers

PREFERENCE – Section 239

- Company does or suffers to be done something which puts a creditor or guarantor in a better position on insolvency
- Desire for effect
- Relevant time 6 m/ 2yrs if connected parties
- Condition – Unable to pay Debts
- In Liquidation and Administration
- Application by Office Holder
- Award – restorative



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Office Holder's Powers

TRANSACTION AT UNDERVALUE – Section 238 IA

- Transaction with no consideration or low consideration in money or money's worth
- Relevant time – 2 years before insolvency
- Condition –
 - Unable to pay debts
 - Presumed if connected and associated
- Award - restorative
- In Liquidation or Administration
- Application by Office Holder



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Office Holder's Powers

TRANSACTION DEFRAUDING CREDITORS – Section 423 IA

- Person enters into a transaction at an undervalue for the purpose of putting assets beyond the reach or prejudicing the interests of a potential claimant
- In Liquidation and Administration
- Application by Office Holder or Victim
- Award – restorative/compensatory – to company, victim or victims
- No requirement for insolvency.
- No relevant time



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tPR's Powers – PA04

SECTION 58 PA04 - SECTION 423 IA TRANSACTION DEFRAUDING CREDITORS

- Application by tPR
- On behalf of Victims
 - Trustees
 - Members
 - PPF
- Employer is in Liquidation/Administration
- Where there is a PPF deficit or Statutory Funding Objective not met



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Office Holder's Powers

INQUIRY INTO COMPANY'S DEALINGS – Section 236 IA

- In Liquidation, Administrative Receivership, Administration
- Application by Office Holder
- Against a person
 - Suspected to have company property
 - Capable of giving information



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tPR's Powers – PA04

SECTION 72

- Notice requiring provision of documents and information relevant to tPR's functions
- Use for the purpose of exercising functions (Section 81)
- To Trustees, professional advisors, employers, persons holding relevant information



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What is a Pre-Pack?

- “an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment”.
- Have been used successfully in:
 - Habitat
 - Blacks
 - Halliwells
 - La Senza



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Criticism of Pre-Packs

- “Shrouded in secrecy”; a “stitch up”
- Limited marketing doesn’t maximise returns
- Unsecured creditors have no say in the process – fait accompli
- Involvement of old management in new business
- Debt shedding
- Conflict of interest, allegations of collusion and lack of objectivity by the IP
- Lack of accountability – administrators do not have to obtain approval from the court or creditors



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Benefits of Pre-Packs

- Seamless transfer of business – continuity of trade and “business as usual”
- Minimise erosion of supplier, customer and employee confidence
- Speedy and thus costs can be contained
- Preserve 100% of jobs in 92% of cases compared to 65% on business sale
- Better return to secured creditors – 42% compared to 28% in business sale



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Dealing with the criticisms

- BERR (BIS) Select Committee – “Where there are good reasons for an insolvency practitioner agreeing to a pre-pack, which there can often be, this must be explained clearly and fully”
- 1 January 2009 – revised Insolvency Code of Ethics was issued
 - Avoid Conflicts
 - Be Objective
 - Be Transparent
 - Independent Valuation
- 1 January 2009 – SIP 16 introduced
- 2011 Proposals for notice to creditors



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Schemes of Arrangement

- What is a Scheme of Arrangement?
- How might it apply in a pension scheme context?
- Case study



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Schemes of Arrangement

What is a Scheme of Arrangement?

- Statutory procedure to make a compromise with shareholders or creditors
- Court approved process
- Genuine compromise
- Re Bluebrook Ltd [2009] EWHC 2114 (Ch)



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Schemes of Arrangement

What is the process for a Scheme of Arrangement?

1. Application to Court
 - Summon meeting of creditors & voting classes
 - Chance of approval
2. Member/Creditor Meeting
 - Approve by majority in number representing $\frac{3}{4}$ of value of creditors
3. Second Court application
 - Exercise of Discretion: Reasonable, Representative and Necessary



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Schemes of Arrangement

What are the advantages?

- No insolvency event – business continuity and consumer confidence maintained
- Threshold for approval of a Scheme of Arrangement compared to a CVA
- Flexibility – company can make commercial decisions



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Schemes of Arrangement

When are Schemes of Arrangement used?

- Restructuring insolvent companies
- Acquisitions
- Demergers
- Removing minority shareholders
- Extinguishing a solvent insurance company's uncertain long-term liabilities



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Schemes of Arrangement

How does a Scheme of Arrangement relate to Pension Schemes?

- No “business as usual” option
- Compromise section 75 debt
- Avoid an insolvency event
- Maintain PPF eligibility and achieve PPF drop in
- Notify the Regulator



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Schemes of Arrangement

Case Study

- Setting the scene:
 - Pension Scheme is £20m in deficit
 - 23 year recovery plan, with back loaded contributions (not approved by the Regulator)
 - Company making circa £1m annual profit
 - Covenant (i.e. willingness to fund the Scheme) is weak



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Schemes of Arrangement

Scheme of Arrangement Proposal

- Asset sale of Company for £8.6m
- Trustees are asked to compromise contingent section 75 debt for £3m immediate cash payment plus £1m paid within 2 years of the business sale
- Debenture to parent company (owned by the Directors of Company) paid back in full at £2.5m
- Other sale proceeds to trade creditors and expenses of the sale



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Schemes of Arrangement

Scheme of Arrangement Proposal

- Pension Scheme continues for 2 years and is paid £1m to avoid any PPF drift
- A nominal debt is triggered after 2 years to force insolvency of Company
- Pension Scheme winds up in accordance with its rules and is still eligible for PPF
- Regulation 2(3)(b) of the Pension Protection Fund (Entry Rules) Regulations 2005



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Schemes of Arrangement

Why Would the Trustees Agree?

- £23m → £3m (plus £1m but PPF drift)
- Best option for the members?
 - Better outcome than on insolvency?
 - Certainty as opposed to 23 year recovery plan?
- Consider the interests of Company



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Schemes of Arrangement

Why Would the Trustees Agree?

- Problems
 - Purpose of deferred £1m
 - Regulator view
 - Company continues to make profit
 - Other creditors, including debenture held by the Directors, being paid back in full



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Schemes of Arrangement

Result

- Trustees rejected the proposal
- Trustees and tPR see no reason why Scheme cannot continue
- TPR are investigating the potential for moral hazard powers
- Trustees brought forward the triennial valuation to force discussion on contributions and review employer covenant



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Schemes of Arrangement

Other Cases?

- Re Uniq plc [2011] EWHC 749 (Ch)
 - £400m pension liability and market capitalisation of £10m
 - Regulated Apportionment Arrangement to apportion to Newco
 - Scheme of Arrangement to effect debt for equity swap – Trustees (through Newco) acquired 90% shareholding in return for Principal Employer being released from liability
 - Shares subsequently sold for £113m



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Schemes of Arrangement

Conclusion

- Genuine process where no business as usual option
- Avoids an insolvency event for the Company
- Agreement in principle will be required before a court application
- Must be a genuine advantage to creditors/shareholders
- Trustees and Scheme Actuary should be robust in their assessment of employer intentions



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Questions

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