



LITTLETON

EMPLOYER INSOLVENCY

Strategies, Claims and Pitfalls

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AGENDA

- 1 Introduction to insolvency regimes
- 2 Employment claims in insolvency: stays & priorities
- 3 TUPE
- 4 Other means of recovery

INSOLVENCY REGIMES

ADMINISTRATION



Aimed at business rescue
Continued trading

LIQUIDATION



Winding-up of company –
compulsory or voluntary

COMPANY VOLUNTARY
ARRANGEMENT (CVA)



Debt repayment agreement between
company and creditors

MORATORIUM (new)



Proposed: Corporate Insolvency and Governance Bill
2020 ('CIGA 2020') 'Breathing space' from creditors

ADMINISTRATION

OBJECTIVES

IA 1986, sched. B1, para. 3

EFFECTS

1. Rescue company as going concern



Company continues trading
Some employees retained – ‘adoption’

2. Achieve better result for creditors than winding up



‘Pre-pack’ business sale, better for creditors – TUPE issues

3. Realise property for distribution to secured/preferential creditors



Only if objectives 1 & 2 not achievable; preferential creditors include employees

APPOINTMENT

- Court order: application by company, directors, creditors: para. 10
- Out-of-court: by floating charge holder: para. 14; by company/director: para. 22

LIQUIDATION

COMPULSORY LIQUIDATION (COURT)



- Petition by creditor, company, directors: s. 124
- Creditor's petition: company unable to pay debts: s. 122(1)(f)
- Court discretion
- Employees automatically dismissed

CREDITORS' VOLUNTARY LIQUIDATION (CVL)



- Company resolution to wind up: s. 84
- Liquidator nominated by creditors / company: s. 100
- Out-of-court process
- Employees not automatically dismissed, but are on ceasing trade

MEMBERS' VOLUNTARY LIQUIDATION (MVL)



- Solvent companies only
- Company resolution to wind up: s. 84
- Company appoints liquidator: s. 91
- Out-of-court; rare
- Employees not automatically dismissed, but are on ceasing trade

CVA

PROCEDURE IA 1986, Part I

- Company proposes arrangement or compromise with unsecured creditors
- For repayment of debts, often at reduced percentage
- 75% of creditors must vote to approve, then binding on all
- Arrangement supervised by IP, 'supervisor'
- Out of court process, unless challenged

EFFECTS

- Company continues trading – uses profits to pay current debts
- No direct effect on employees, continue employment
- But insolvency event, so employees can be eligible for redundancy payment

NEW MORATORIUM

ELIGIBILITY

IA 1986, s. A3 (added by CIGA 2020, s. 1)

1. Company unable to pay debts
2. Moratorium likely to rescue company as going concern

DURATION

IA 1986, ss. A9-A13

- Up to 40 business days (or longer with creditor consent/court order)
- Supervised by 'monitor' (IP)
- Company remains trading

'PAYMENT HOLIDAY'

IA 1986, s. A18

- Creditors cannot put company into administration or liquidation
- Restrictions on legal proceedings & enforcement

All debts except:

- (a) monitor's expenses
- (b) moratorium goods, services & rent
- (c) employees' wages, salary & redundancy payments
- (d) financial services contracts debts

STAY ON CLAIMS 1

No proceedings started or continued against company, except with permission of court.
Instead creditors prove in insolvency

Procedure	When applies	Employment claims?
Compulsory Liquidation	Automatic: IA 1986, s. 130	Covered
Voluntary Liquidation	On liquidator application: s. 112	Case specific
Administration	Automatic: sched. B1, para. 43(6) (administrator can consent)	Covered
Moratorium	Automatic: s. A21(1)(e)	Not covered
CVA	On director application, only small companies: sched. A1, para. 12 (to be removed by CIGA 2020)	Covered

STAY ON CLAIMS 2

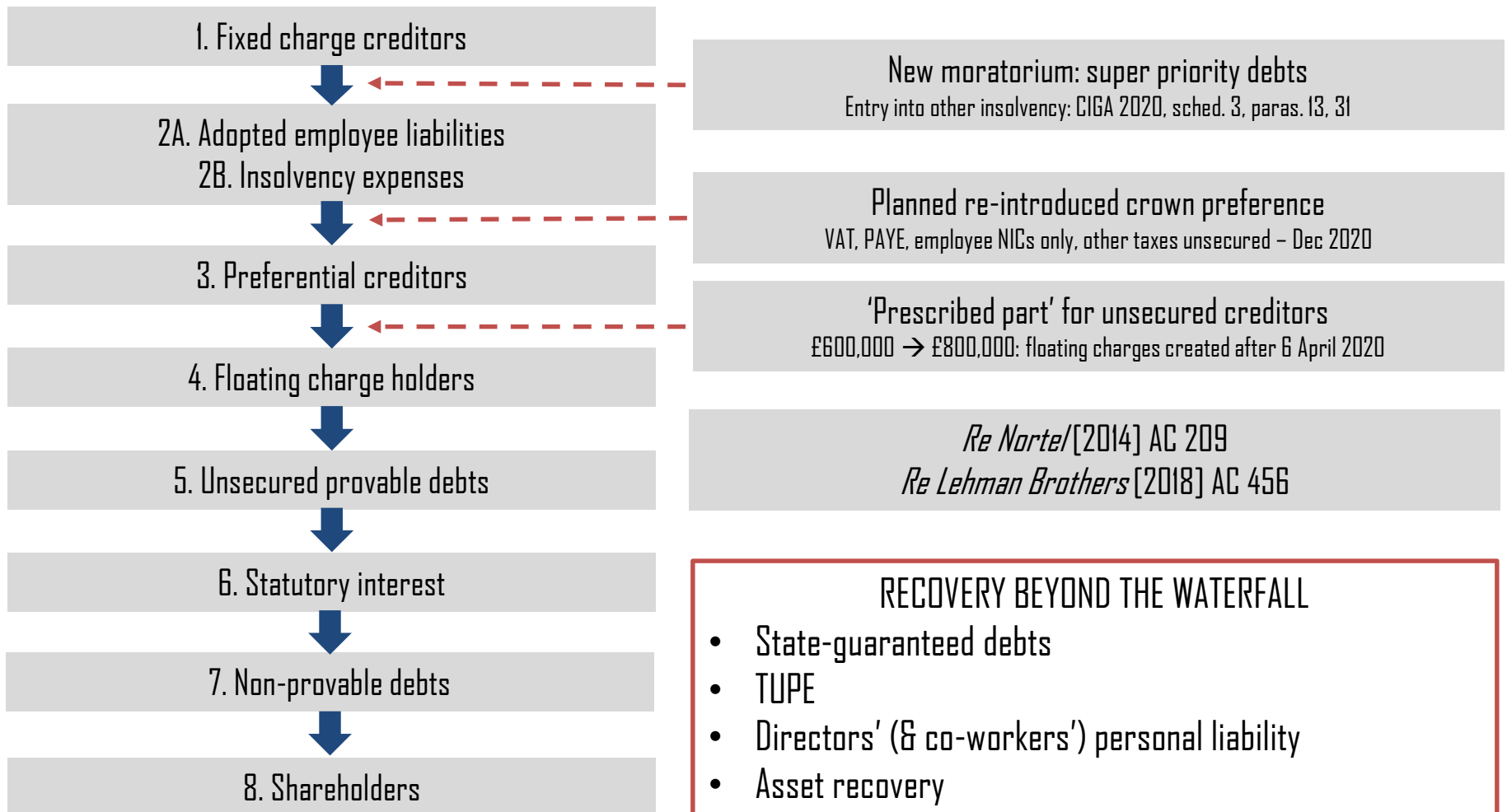
LIFTING THE STAY

- Court will do what is 'right and fair'
- Not often lifted for simple monetary claim: *Unite v Nortel* [2010] BCC 706
- Lifted if leads to inconsistent findings: *Re HIH Insurance* [2002] 2 BCLC 228
- Not lifted if claim better brought within insolvency, e.g. quantum issue
- Often lifted if claim will not impede insolvency or if needed for claim on NIF

CONSEQUENTIAL ISSUES

- Claim brought without permission is valid but stayed, not a nullity: *Carr v British Industrial Helicopters* [1994] ICR 18
- Stay does not cover co-respondents, court/tribunal discretion: *Tunstall v Ince Gordon Dadds* [2020] ICR 124

ORDER OF PRIORITY – 'THE WATERFALL'



ADOPTED EMPLOYEE LIABILITIES

ADOPTION

IA 1986, sched. B1, para. 99(5)

- Given 'super priority'
- 14 day grace period
- Focus is on administrators' conduct: *Re Debenhams* [2020] Bus LR 788
- Usually adopted if working continues, but see *Re Anta*/[2003] 2 BCLC 406
- Furlough: adopted (latest) when paid
- Impact on timing of redundancies & collective consultation

WHICH LIABILITIES?

IA 1986, sched. B1, para. 99(5)

- Only 'wages or salary', including holiday pay (and payment in lieu), sick pay, occupational pension scheme contributions
- Not redundancy pay, protective awards, unfair/wrongful dismissal:
Re Debenhams, para. 30(3)
- But see *Geys v Société Générale* [2013] 1 AC 523

STATE-GUARANTEED DEBTS

Debt	Limit	Conditions
Arrears of pay	8 weeks £538 p/w £800 pref	1. Company in insolvency procedure 2. Employment terminated or in scope TUPE, reg 8(6) 3. Arrears at start of insolvency: ERA 1996, s.185, <i>SoS v McDonagh</i> [2013] ICR 1177
Stat. notice	£538 p/w	
Holiday pay	6 weeks £538 pw	Uncapped accrued holiday entitlement also preferential if employment terminated: sch. 6, para. 10
Protective award	Included within 8 weeks pay arrears (£538 p/w limit)	1. Conditions 1 & 2 above 2. For TUPE: must accrue by time of transfer: <i>Pressure Cookers v Molloy</i> [2011] IRLR 670
Unfair dismissal	Basic award	
Redundancy	Statutory redundancy	1. Dismissal (or laid off etc) by reason of redundancy (ERA 1996, s.135) or in scope TUPE, reg. 8(6) 2. Insolvency procedure or unpaid despite all reasonable steps: ERA 1996, s.166

TUPE: TRANSFERS IN INSOLVENCY

NON-TERMINAL INSOLVENCY

TUPE, reg. 8(1)-(6)

- 'Relevant insolvency proceedings' –not with view to liquidating assets
- Rights and liabilities transfer (except state-guaranteed debts): reg. 8(1)-(6)
- Scope for collectively agreed variation: reg. 9

TERMINAL INSOLVENCY

TUPE, reg. 8(7)

- Insolvency proceedings with view to liquidating assets
- Reg 4 disapplied: transfer of rights & liabilities, attribution of transferor acts to transferee, restrictions on variations by reason of transfer, reg. 4(9) dismissals
- Reg 7 disapplied: restrictions on dismissals by reason of transfer

TUPE: REG. 8(6) PROCEEDINGS

CONDITIONS
TUPE, reg. 8(6)

- Insolvency proceedings not with view to liquidation of assets
- Commenced at time of transfer: *SoS v Slater* [2007] IRLR 928
- Under supervision of insolvency practitioner

Insolvency practitioner: IA 1986, s. 388: liquidator, provisional liquidator, administrator, administrative receiver, monitor, CVA supervisor

RELEVANT INSOLVENCY
PROCEEDINGS

- Administration, even pre-pack: *Key2Law v De'Antiquis* [2012] 2 BCLC 195; *Smallsteps BV* [2017] ICR 1316
- CVA – probably when approved, c.f. ERA 1996, s. 183(3)(c)
- New moratorium:
 - (a) purpose: save company, transfer of part only?: s. A29
 - (b) monitor will be an IP under IA 1986, s. 338
 - (c) company is/likely to be unable to pay debts: s. A6
 - (d) only TUPE reg. 9 relevant at present

TUPE: REG. 8(7) PROCEEDINGS

- Insolvency proceedings with view to liquidation of assets, under IP supervision
- Compulsory winding-up: on appointment of liquidator / provisional liquidator
- CVL: *Bowater v NIS Signs* (ET 15/4/10) cf reasoning in *Smallsteps*



- Reg. 13 consultation and information still applies
 - transferee jointly and severally liable
 - but breakup of business may impact on who is affected employee under reg. 13: / *Lab Facilities v Metcalfe* [2013] IRLR 605
- May still be continuous employment under ERA 1996, s. 218

TUPE: ADMINISTRATION DISMISSALS

SPACERIGHT v BAILLAVOINE
[2012] ICR 250

- Inference drawn that CEO dismissed to facilitate transfer
- Reg 7 dismissal may precede identified transfer, cf *Morris* [1998] ICR 655
- Collusion with transferee relevant but not essential
- ETO defence must:
 - (a) entail change in workforce (still needed CEO)
 - (b) relate to business (not to facilitate sale or enhance price)
 - (c) relate to transferor's business not transferee's: *Hynd* [2007] IRLR 338

KAVANAGH v CRYSTAL PALACE
[2014] ICR 251

- Ultimate sale objective is not fatal – can rely on immediate aim of reducing wage bill
- Highly fact-sensitive

IMPLICATIONS & CONSIDERATIONS

- Impact of revised reg 4(7) wording?
- Scrutiny of administrator reasons: *Dynamex* [2009] ICR 511; cf *Jhuti* [2020] ICR 721
- Burden of proof on employer: *Marshall v Game Retail* (EAT, 13/2/15)
- Proximity: relevant, not essential: *Hare Wines* [2019] IRLR 555; cf *Geys*
- Retention vs dismissals by transfer: *Thomson v SCS Consulting* [2001] IRLR 801

TUPE: REG. 9 VARIATIONS

- Agreed between:
 - (a) recognised trade union or (if none) employee representatives; and
 - (b) transferor, transferee or IP
- Solely/principally by reason of transfer & non-ETO reason
- Designed to safeguard employment by ensuring survival of business
- Takes effect as contractual term
- Binding over individual objections?
 - (a) Directive 2001/23, art. 5(2)(b): variations 'in so far as current law and practice permit'
 - (b) reg. 4(9) remedy



- If agreed by non-trade union reps:
- (a) signed by each rep (or authorised reps if not reasonable practicable)
 - (b) employer must first provide copy to each employee with guidance

EVIDENTIAL ISSUES

- Ensuring survival vs achieving better price
- Ensuring survival vs reducing redundancies
- Timing

OTHER MEANS OF RECOVERY

DIRECTORS' LIABILITY

- Directors' duties, especially duty to consider creditors' interests: CA 2006, s. 172 – company/officerholder claim
- Fraudulent / wrongful trading: IA 1986, ss. 213-14 – officerholder claim
- Directors' disqualification proceedings by SoS, compensation order
- Parallel liability for whistleblowing / discrimination – by directors, co-workers, also administrator

ASSET RECOVERY

- Setting aside preferences and transactions at an undervalue: IA 1986, ss. 239-40 – officerholder claim
- Setting aside transactions defrauding creditors: IA 1986, s. 423 – **creditors' claim, including employees**

ANY QUESTIONS?

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