



Insolvency update

Dealing with competing claims to the assets of an insolvent company

Ordinarily, where third parties claim a proprietary interest over the assets of an insolvent company and there is real doubt over the legitimacy of those claims, the office holder will usually apply to Court for directions to determine the validity of the competing claims. Otherwise, if he distributes the assets as company property, he risks personal liability for breach of trust if a challenge is made and the disputed property is in fact held to be trust property. The office holder will usually be protected in these circumstances since whatever the outcome, the Court will normally make an order for costs in favour of the office holder out of the disputed property (whatever its character). However, what if the cost of the litigation has the potential to exhaust a substantial part, if not the whole, of the amounts involved? This was exactly the dilemma faced by the Court in a recent case, *In the matter of Equilift Ltd (2009) EWHC 3104 (Ch)*.

Facts

Equilift Ltd, (“the Company”), a supplier and installer of stair-lifts, was in liquidation. The liquidators had identified possible proprietary claims to bank accounts under their control. The funds in the relevant accounts totalled approximately £171K and there were 484 potential beneficiaries falling into 3 categories: consumer customers, trade customers and those who had paid for service contracts. The liquidators applied for directions to determine whether the monies held in the bank accounts were held on trust for the customers or were available to meet the claims of the Company’s creditors.

Decision

The High Court Judge was alarmed at the potential costs if the matter proceeded to a full trial bearing in mind the complex legal arguments involved and the relatively small disputed amounts involved. In particular, he was concerned that this would mean that either the Company’s creditors or the potential beneficiaries would have to shoulder the costs of the liquidators obtaining their understandable desire for certainty and swallow up the whole or a substantial part of the disputed funds.

The Judge therefore firstly directed the liquidators to obtain a written opinion from leading Counsel, which they did. Counsel concluded that the arrangements that the Company had put in place had probably been ineffective to create a trust in favour of any of its customers. Having read that opinion, the Judge decided that the reasonable and proportionate course of action was that the liquidators should act on that opinion and treat the funds in question as

the Company's assets and therefore, available for distribution amongst the Company's creditors.

The Judge recognised that taking this action would nonetheless leave the liquidators open to possible challenge by one or more potential beneficiaries. However, he stated that section 61 Trustee Act 1925 gives the Court a broad discretion to relieve a trustee from personal liability where the trustee has acted honestly and reasonably and that where an office holder has, as in the present case, obtained Counsel's opinion and sought the Court's directions as to whether or not to act upon that opinion, it was inconceivable that he would not be relieved from the consequences of any breach of trust, which distribution in accordance with that opinion might inadvertently involve. However, to reduce the likelihood of a challenge arising in practice, the Judge directed the liquidators to delay distribution of the disputed funds for 2 months after notifying the potential beneficiaries of the opinion they had obtained and the course of action they intended to take.

Summary

The case provides helpful guidance for office holders faced with a similar dilemma where assets are limited and claims complex. The starting point is for office holders to obtain Counsel's opinion on the merits of the competing claims. However, office holders still need to make an application to Court for directions as to whether or not to act upon that opinion if they wish to obtain maximum protection against any claim that might subsequently be made for breach of trust. It is important to appreciate that the fact that the office holder obtains a Court order directing him to distribute the disputed funds in accordance with that opinion is not a defence to a breach of trust claim. However, the comments in this case suggest that if the office holder has the benefit of such an order, then he is likely to be relieved from liability under section 61 Trustee Act 1925. The Judge made it clear that such an application should only be dispensed with if the amounts involved are so small as to make taking even that step disproportionate and unreasonable.

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