The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

City of London Law Society Insolvency Law Committee response to the Insolvency Service call for evidence on collective redundancy consultation for employers facing insolvency

The City of London Law Society ("**CLLS**") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response, in respect of the Insolvency Service call for evidence on collective redundancy consultation for employers facing insolvency has been prepared by the CLLS Insolvency Law Committee with the support of, and contributions from the CLLS Employment Law Committee.

Summary

The CLLS working party has had the opportunity to review the responses to the call for evidence of both R3 and the Insolvency Lawyers' Association. The CLLS Insolvency Law Committee agrees with the comments put forward by R3 and the ILA and will not therefore repeat the comments in this response. We would, however, emphasise the fact that we share the concerns expressed by these bodies that the requirements of the Insolvency Act 1986, combined with the practical realities of insolvency, often make it impossible, or impractical, for insolvency officeholders (and, to some extent, the directors of insolvent companies), to fully comply with the statutory consultation process.

In particular, we are of the view that insolvency officeholders should not be criticised, given the tensions between employment law and insolvency legislation, for failing to consult where they reasonably believe that compliance with their obligation to consult would either jeopardise jobs or be contrary to their statutory duty to act in the interests of the creditors as a whole.

While acknowledging that there are clearly underlying policy considerations which need to be balanced, we also consider that the circumstances in which an insolvent employer finds itself should always be taken into account by a tribunal, as a "special circumstance" when deciding whether it is appropriate to make an award, and, where it is considered appropriate to do so, when deciding on the size of any such award.

Specific Considerations

(i) Ability of employer to meet the requirements of consultation where the employer is facing insolvency

The collective redundancy provisions of TULRCA require consultation "*with a view to reaching agreement with the appropriate representatives*" on ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. This requirement assumes both that the insolvent employer is able to carry on its business during that

consultation period and that, given the insolvent employer's circumstances, there remains a possibility of there being a meaningful dialogue For the reasons noted in the R3 and ILA responses, the options available to an insolvent employer may be limited, particularly where the company in question does not have sufficient cash to continue trading during the consultation period, and, in addition, there may be little scope to negotiate meaningfully with a view to reaching an agreement.

Where the company's financial position permits, consultations do generally appear to take place, but, in practice, particularly where the company has been put into liquidation, the consultation will often be simply seeking to mitigate the effects of the redundancy on the employees. In our experience insolvency officeholders do actively engage with employees to assist them in considering alternative employment options and putting them in touch with the appropriate advice agencies, even though strict adherence to the consultation period may not always be possible, given funding restraints which may limit the company's ability to continue trading during the full consultation period.

(ii) Saving jobs or talking about saving jobs?

It is often the case that the best way of reducing the number of employee dismissals is to arrange for a rapid sale of at least part of the business, so that the purchaser takes on at least some employees, even if this means that the remaining employees cannot be kept on. A quick sale, which is completed before suppliers and customers become aware that the relevant company has entered into an insolvency process, and which therefore allows all parties to downplay the impact of that process, can both increase stakeholder returns and preserve jobs. This is, in our experience, particularly the case in the service sector, where the damage to a company's brand and goodwill, combined with the poaching by competitors of key employees, would generally mean that there would no longer be a viable business after the full statutory consultation period had expired.

The insolvency officeholder can be placed in an invidious position if he or she is forced to choose between conducting a quick sale which will save jobs and waiting until the conclusion of the statutory consultation process, in the interests of ensuring that there is a meaningful consultation with all options left open. In practice, the insolvency officeholder will almost invariably pursue the quick sale option, if he or she considers that this is in the interests of the company's creditors. He or she may be able to satisfy the TUPE consultation requirements for employees whose contracts are transferred following a sale, where no minimum consultation period is required, but not the consultation period required for employees facing redundancy, so may potentially expose the insolvency officeholder to criticism and, depending on the facts, result in the company's creditors receiving a lower recovery as a result of the imposition of a protective award. Similar considerations could apply to the directors prior to the commencement of formal insolvency proceedings but in circumstances where the company is distressed which is why we would discourage any "one size fits all" approach.

(iii) Statutory inconsistencies

(a) Inconsistency of time periods for administrators to adopt employment contracts and the redundancy consultation period

It appears to be inconsistent to require a 45 day period of collective redundancy consultation during which no dismissals can be made, when administrators are given only 14 days in which to decide whether to adopt a contract of employment under the Insolvency Act, with it being deemed to being adopted under the *Paramount* case if employment continues after the 14 day period. The consequences of adoption of the contract are that the employee's wages become an expense of the administration payable in priority to other creditors (in accordance with paragraph 99 of Schedule B1 to the Insolvency Act 1986), so an administrator must consider carefully his or her duties owed to all creditors when adopting employment contracts.

(b) Inconsistency of time periods for administrative receivers to adopt employment contracts and the redundancy consultation period

A similar point applies to administrative receivers, who are personally liable in respect of any "*qualifying liability*" on any employment contract which they adopt under Section 44(1)(b) Insolvency Act 1986. As with administration, there is a 14-day grace period in which to decide whether to adopt a

contract of employment, with the administrative receiver being treated as having adopted employment contracts unless he or she takes steps to terminate them within 14 days of appointment.

(c) Inconsistency with the administrator's statutory duties

Paragraph 3(2) of Schedule B1 to the Insolvency Act 1986 provides that "*the administrator of a company must perform his functions in the interests of the company's creditors as a whole*." While the administrator of a company is required to consult, he or she must also comply with his or her statutory duties as administrator. Where a company's business is loss making, carrying on trading (and making losses) during the consultation period would result in lower recoveries for the company's creditors, as otherwise available cash would have to be used to fund ongoing trading losses. It is difficult to see how an administrator could properly argue that he or she was acting in the interests of the company's creditors as a whole if the administrator chose to pursue a course of conduct which reduced the overall repayment to those creditors unless, arguably, the administrator believed that a Tribunal would make an award greater than that of the resulting loss as a consequence of the administrator's failure to consult.

(d) Inconsistency with "wrongful trading" legislation"

Any consultation which is taking place because the employer is facing imminent insolvency would generally be taken as evidence that the employer was "in the zone of insolvency", at which point the company's directors may, depending on the exact circumstances, face a potential wrongful trading liability. If a director has formed the view that liquidation is inevitable, he or she is required under Section 214(3) Insolvency Act 1986 to take "*every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken*". This requirement may be inconsistent with the obligation to carry out a consultation exercise, particularly where the company is trading at a loss, as stopping trading immediately may, depending on the relevant facts, be the only way of satisfying Section 214(3).

(v) Electing employee representatives and the issues of confidentiality

Dear IP issue 39 states that "If an employer genuinely believes that open consultation could jeopardise the business the employees' representatives may be asked to keep details of the consultation confidential." The reason behind this is that the very fact that a redundancy process has been commenced may be perceived as a signal that the business is distressed and if the process is not kept confidential then this can be damaging to the business and make rescue less feasible. Often, however, there are no employee representatives in place, and they will need to be elected. In practice the process of finding and appointing representatives can take a number of weeks, during which time it is extremely difficult to keep a distressed situation confidential, which can, as mentioned, be damaging to all creditors, including the employees.

(vi) Tribunal Awards

Given the points outlined above, we agree with the view expressed by R3 that there appears to be a strong case, given inconsistencies in the approaches taken by individual tribunals when dealing with the tensions between employment law and insolvency legislation, for providing guidance to tribunals, so that the size of the award can be balanced against the effort made by the insolvency practitioner or by the board of a company facing imminent insolvency to conduct as meaningful a consultation as possible in the circumstances. It would also be helpful to tribunals in following such guidelines if they received some training to enable them to better understand the issues which may affect how the consultation process can be usefully conducted when an employer is insolvent.

11 June 2015

THE CITY OF LONDON LAW SOCIETY

INSOLVENCY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Hamish Anderson (Norton Rose Fulbright LLP) (Chairman)

C. Balmond (Freshfields Bruckhaus Deringer LLP)
J. Bannister (Hogan Lovells International LLP)
G. Boothman (Ashurst LLP)
T. Bugg (Linklaters LLP)
A. Cohen (Clifford Chance LLP)
L. Elliott (Herbert Smith Freehills LLP)
S. Frith (Stephenson Harwood)
I. Johnson (Slaughter and May)
B. Klinger (Sidley Austin LLP)
B. Larkin (Jones Day)
D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)
Ms J. Marshall (Allen & Overy LLP) (Deputy Chairman)
B. Nurse (Dentons UKMEA LLP)
J.H.D. Roome (Bingham McCutchen LLP)
P. Wiltshire (CMS Cameron McKenna LLP)
M. Woollard (King & Wood Mallesons SJ Berwin)

Working party members for this consultation:
Jennifer Marshall (Allen & Overy LLP)
Byron Nurse (Dentons UKMEA LLP)
Gabrielle Ruiz (Clifford Chance LLP)
Jo Windsor (Linklaters LLP)