THE CITY OF LONDON LAW SOCIETY INSOLVENCY LAW COMMITTEE

MINUTES OF THE MEETING HOSTED BY SLAUGHTER AND MAY

BY CONFERENCE CALL ON THURSDAY 21st MAY 2020 AT 8.30am

Present: Jennifer Marshall, Allen & Overy LLP (chair)
Catherine Balmond, Freshfields Bruckhaus Deringer LLP
Ian Johnson, Slaughter and May
Megan Sparber, Slaughter and May
Nicky Ellis, Slaughter and May
Giles Boothman, Ashurst LLP
Inga West, Ashurst LLP
Jo Windsor, Linklaters LLP
Hamish Anderson, Norton Rose Fulbright LLP
Kevin Pullen, Herbert Smith Freehills LLP
Gabrielle Ruiz, Clifford Chance LLP
Adrian Cohen, Clifford Chance LLP
Joe Bannister, Hogan Lovells International LLP
Dominic McCahill, Skadden Arps Slate Meagher & Flom (UK) LLP
Ian Fox, Dentons UK and Middle East LLP
Ross Miller, Simmons & Simmons LLP
James Roome, Akin Gump Strauss Hauer & Feld
Stuart Frith, Stephenson Harwood LLP
Simon Thomas, Goodwin Procter (UK) LLP
Peter Wiltshire, CMS Cameron McKenna LLP
David Ereira, Paul Hastings (Europe) LLP
Ben Larkin, Jones Day
Ben Klinger, Brown Rudnick LLP

Apologies: None

In attendance: Rebecca Oliver, Norton Rose Fulbright LLP (secretary)

1 Opening of meeting and welcome to new member Simon Thomas.

2 The minutes of the meeting held on 12th March 2020 were approved.

3 Current consultations/proposals

Terms of reference	Working party	Comments/Update
A. BEIS response on insolvency and corporate governance consultations of 2016 and 2018 published 26 August 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf	Jennifer Marshall Catherine Balmond Katharina Crinson Jo Windsor Ian Johnson Inga West Dominic McCahill Hamish Anderson	Meeting with Insolvency Service held 4 December 2018. Joint CLLS and ILA paper commenting on reform proposals submitted to the Insolvency Service 27 February 2019. BK-#47806318-v5-Joint_ILA___CLLS_respor
B. Joint Insolvency Committee consultation on		Closing date 20 July

changes to Statement of Insolvency Practice 3.2 - Company voluntary arrangements, Statement of Insolvency Practice 3.1 - Individual voluntary arrangements, Statement of Insolvency Practice 9 - Payments to insolvency office holders and their associates and Statement of Insolvency Practice 7 - Presentation of financial information in insolvency proceedings. https://www.icaew.com/technical/insolvency/sips-regulations-and-guidance/consultation-on-statements-of-insolvency-practice		2020

4 COVID-19 insolvency law reform: Corporate Insolvency & Governance Bill

The Committee discussed the key elements to the Corporate Insolvency & Governance Bill 2020 published the day prior to the meeting and in particular:

- new Part A1 to the Insolvency Act 1986 introducing a free-standing moratorium giving various protections from creditors whilst directors of a company in financial distress take action take action to rescue the business under the supervision of an insolvency practitioner monitor;
- new Part 26A to the Companies Act 2006 introducing a new procedure for arrangements and reconstructions of companies is financial difficulties facilitating agreements with creditors and "cross-class cram-down" allowing dissenting classes of creditors or members to be bound to a restructuring plan;
- suspension of liability for wrongful trading during COVID-19 crisis; and
- new section 233B Insolvency Act 1986 expanding existing provisions on the protection of supplies of goods and services to companies in insolvency procedures by prohibiting termination clauses triggered on insolvency so that contracted suppliers continue to supply even where there are pre-insolvency arrears (previously limited to utility and IT supply contracts).

The discussions were continued at a further meeting held by video conference call on Tuesday 26th May 2020, following which the Committee wrote to the Insolvency Service team drafting the Bill by email on Saturday 30th May in support of the proposed new measures and identifying some issues with regards to the drafting which it was suggested might be considered as the Bill passed through Parliament with the second and third readings in the House of Commons listed for Wednesday 3rd June relating to:

- the priority of moratorium debts and pre-moratorium debts for which the company did not have a payment holiday during the moratorium;
- the veto rights for such debtors on a restructuring plan, scheme of arrangement or CVA;
- the exclusion of parties to capital market arrangements from moratorium and ipso facto provisions; and
- the interaction of the moratorium and pension liabilities.

A copy of the email of 30th May is scheduled to these minutes.

5 FCA statement on financial services exemptions in forthcoming Corporate Insolvency and Governance Bill

Noted by Committee.

6 Brexit – implications for restructuring and insolvency

Agenda item postponed to next meeting.

7 COVID-19: Temporary insolvency practice direction in force from 6 April 2020 to 1 October 2020

Noted by Committee.

8 Soft administration: ILA template administrators' consent to directors exercising powers

Noted by Committee.

9 Insolvency Statistics, January to March 2020

Noted by Committee.

10 Some recent cases noted by the Committee:

Re Carluccio's Ltd [2020] EWHC 886 (Ch)

Re Debenhams Retail Ltd [2020] EWHC 921 (Ch)

Re Debenhams Retail Ltd [2020] EWCA Civ 600 (CA)

Arkin v Marshall and another [2020] EWCA Civ 620

Shorts Gardens LLB v London Borough of Camden Council [2020] EWHC 1001 (Ch)

Davies v Ford and others [2020] EWHC 686 (Ch)

Re Corporation of West Kent and Ashford College (in education administration) [2020] EWHC 907 (Ch)

11 Any other business

None noted.

12 Next meeting

Thursday 17th September 2020, to be hosted by Ian Fox, Dentons UKMEA, at a time to be confirmed.

Schedule

From: Jennifer.Marshall@AllenOvery.com [mailto:Jennifer.Marshall@AllenOvery.com]
Sent: 30 May 2020 16:48
To: Corporateinsolvencyandgovernancebill@beis.gov.uk
Cc: Paul.Bannister@insolvency.gov.uk
Subject: CLLS Insolvency Subcommittee: concerns regarding Corporate Insolvency and Governance Bill

Dear CIGB team

I am sending this email in my capacity as chair of the Insolvency Subcommittee of the City of London Law Society (**CLLS**).

First of all, we wanted to thank your team for all its hard work in putting together such an impressive Bill at such speed. We are fully supportive of the new tools that the Bill will add to the restructuring toolbox and we think that the Bill will go a long way in maintaining the UK's reputation as a preeminent place to do restructurings of distressed companies. We are also very conscious of the ambitious timetable for getting the Bill through the Parliamentary process and we appreciate that, in light of this, the chances of any amendments at this stage are slim. However we did want to draw your attention to a few key provisions of the Bill that we think could have a significantly detrimental effect on the utility of the new proceedings (and restructurings generally), just in case there is any chance of getting these provisions amended on 3 June when the Bill is heard by the Commons. Given the excellent dialogue that the CLLS has had with the Insolvency Service as the Bill was being prepared, we wanted to raise these points with you in the first instance. If, however, you would prefer us to raise them with an MP (or indeed a member of the House of Lords), we would be happy to do so.

In addition to the points raised below, a number of our members have concerns about 901I and 899B in respect of creditors with aircraft-related interests but we understand that industry experts from the airline industry have written to you separately about this.

Furthermore, a concern has also been raised as to whether a listed company could use the restructuring plan as there are no consequential amendments made to, or dispensations of, the Listing Rules. We wonder if this could be dealt with by way of discussions with the FCA who might be able to make changes to the Listing Rules outside of the Bill.

We appreciate that there are powers under the Bill to make changes after it has become law but given the significance of the points raised below, we would have a strong preference for these points to be corrected prior to the Bill becoming law if at all possible. **If there is only the opportunity to fix a few of these concerns, the most important are those listed in 1, 2 and 3(a) of the table below**.

No.	Topic	Issue	Draft Bill reference	Proposed solution
1.	Moratorium	In any winding up or administration that occurs	Sch 3, para 13: new section	In new section 174A(2)(b)/para 64A(2)(b),

	debts: priority	within 12 weeks of a moratorium, any moratorium debts and pre-moratorium debts for which the company did not have a payment holiday during the moratorium are to be paid in priority to liquidation/administration expenses (including the office-holder’s fees), preferential creditors, floating charge creditors and the claims of (other) unsecured creditors (including without limitation the section 75 pensions debt). This would include all pre and post moratorium bank debt as a result of A18(3)(f). Furthermore, if the lenders have accelerated the loan (given that loan agreements are excluded from the ipso facto provisions), the entirety of the (accelerated) bank debt would be payable by virtue of these provisions, with very significant changes to the usual order of priority. (The same point would arise in an SME context as regards overdraft facilities where it is foreseeable that banks will routinely demand repayment in order to achieve super-priority if rescue as a going concern cannot be achieved.) In practice, this could make it very difficult to find an office-holder who would be willing	174A and para 31: new Sch B1 para 64A	limit the debts that have priority to unpaid debts falling within the following categories: • Moratorium debts • Pre-moratorium debts falling under A18(3)(a) to (e) • Pre-moratorium debts falling under A18(3)(f) if and to the extent that the scheduled payment dates (ignoring for these purposes any acceleration of the debt following the commencement of the moratorium) arise during the period of the moratorium.

		to take on the appointment following a failed moratorium (given that the office-holder's fees would rank behind the accelerated bank debt).		
2.	Restructuring plan, scheme and CVA: veto rights for moratorium debts etc	In any CVA, scheme or restructuring plan that is proposed within 12 weeks of a moratorium, the holders of any moratorium debts and pre-moratorium debts for which the company did not have a payment holiday during the moratorium have, in effect, a veto right in respect of the CVA, scheme or restructuring plan as: (a) in the case of a CVA, neither the company nor the creditors may approve a CVA unless these debts are paid in full (unless the creditors consent); and (b) in the case of a scheme or plan, the court may not sanction the scheme or plan if it includes provision in respect of such creditors without their consent. As per comment 1 above, this would include lenders in respect of the entirety of the (accelerated) bank debt. In practice, this could make it impossible to do a CVA, scheme or restructuring plan	Sch 3, para 4 (amendments to CVA provisions); Sch 9, Part 2, para 35 (amendments to scheme provisions); Sch 9, 901H (re plan)	Same change as is proposed above regarding the definition of a "relevant creditor" with a veto right.

		within the 12 week period.		
3(a)	Exclusion of parties to "capital markets arrangements" from moratorium and ipso facto provisions	The definition of a "capital markets arrangement" requires either the grant of security or a guarantee or a derivative and an investment in an option, future or contract for differences. Hence although A18(3)(f) would apply to liability in respect of a secured or guaranteed bond, it would not apply to an unsecured bond which would, instead, be subject to the payment holiday. There would seem to be no policy reason for requiring bank debt to be paid during the moratorium but not unsecured bond debt. Furthermore, it is not clear why Sch ZA2, para 6, only picks up the definition of "capital market arrangement" from Sch ZA1, para 13 and not the rest of this definition. By taking 13(2) out of context, any arrangement where there is security would be covered, not just secured bond issues.	Sch 1, Sch ZA1, para 13; Sch 2, Sch ZA2, para 6; Sch 4ZZA, para 17	Solution: • In Sch ZA2, para 6, add the words "where the requirements of paragraph 13(1)(b) and (c) of Schedule ZA1 are met" to the end of that paragraph. • Add a new paragraph 6A immediately following existing paragraph 6: Capital market investment 6A This paragraph applies to an agreement which is or forms part of an arrangement involving the issue of a capital market investment as that expression is defined in paragraph 14 of Schedule ZA1. • In Sch 4ZZA, add the words "where the requirements of paragraph 13(1)(b) and (c) of Schedule ZA1 are met" to the end of that paragraph. • Add a new paragraph 17A as per 6A above. This would have the advantage of leaving in place the well-understood definition of capital market arrangement while including this new wording to cover unsecured

				bonds.
3(b)	Exclusion of parties to "capital markets arrangements" from moratorium provisions	In the case of a secured or guaranteed bond, the definition in para 13 is very wide and could include any group company that has benefited from the on-loan of the bond proceeds (for example). This could have the effect that many companies in a group that has issued a secured or guaranteed bond would not be able to benefit from the moratorium.	Sch 1, Sch ZA1, para 13	The main reason for the exclusion is to protect securitisations and other rated transactions that could otherwise be downgraded as a result of the changes. The reason these transactions are not impacted by an administration is because the holder of the capital market arrangement has the right to appoint an administrative receiver which, if exercised, prevents the appointment of an administrator. A similar mechanism could be used here by requiring: • company to give 5 business days' notice to any person entitled to appoint an administrative receiver before filing documents with the court for the moratorium (and add to A6(1) a statement that such person has been given notice); • if administrative receiver is appointed in those 5 business days, company is already prohibited from using moratorium by virtue of Sch ZA1, 2(3)(d); and

				• disapplying Sch 1, Sch ZA1, para 13 (though relevant parts of the definition would need to be picked up in Sch 2, Sch ZA2, para 6; Sch 4ZZA, para 17).
3(c)	Exclusion of parties to “capital markets arrangements” from wrongful trading provisions	Particularly in light of the wide definition referred to above, it is hard to see (from a policy perspective) why the directors of companies in a group that has issued a secured or guaranteed bond should not benefit from the relaxation of the wrongful trading provisions.	section 10(4)(h) and (i)	Delete section 10(4)(h) and (i) [i.e. paragraph 12 (securitisation companies) and paragraph 13 (parties to a capital markets arrangement)]
4.	Moratorium and pensions liabilities	In relation to defined benefit occupational pension schemes, we assume that the reference to “*a contribution to an occupational pension scheme*” is intended to be limited only to contributions in respect of the future accrual of benefits due to active service (rather than including deficit repair contributions payable pursuant to a schedule of contributions within the meaning of Part 3 of the Pensions Act 2004). We note that the definition of “*wages or salary*” in Clause A18 of the Bill has been copied directly from para 99 of Sch B1 IA 86 (which relates to the priority of certain employment	A18(7): definition of “wages and salary”, limb (d)	Consider amending limb (d) to make it clear that this refers only to contributions in respect of the future accrual of benefits due to active service.

		liabilities upon the adoption of employment contracts by administrators). In the context of para 99, the administration itself will be an "insolvency event" likely triggering a PPF assessment period and thereby ceasing the obligation to pay deficit repair contributions – this means deficit repair contributions could not come under the definition of "*wages or salary*" under para 99 Sch B1. However, as the new moratorium procedure is not an "insolvency event" under the Pensions Act 2004, then deficit repair contributions may remain payable and there is therefore a risk that "*a contribution to an occupational pension scheme*" in clause A18 could be interpreted to include deficit repair contributions. If the wider interpretation were possible, this might prevent companies with pension scheme deficits from using the moratorium. We would also suggest clarifying in the Bill whether payments in respect of personal pension plans should be included within the definition of "*wages or*		

		salary"		

We would be very happy to discuss these comments if that would be helpful.

Kind regards

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