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Commercial Litigation News Bites



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Welcome to the May edition of Newsbites from the Commercial Litigation team in our Leicester office.

This month we consider: liability for pre-action costs following a "Part 36" offer made before the commencement of formal legal proceedings; an insolvent company's right to deal with goods that are subject to a retention of title clause; and the new Insolvency Rules which are likely to be brought into force by the Autumn of 2013.

A Pre-action Part 36 Offer Should Refer to Pre-action Costs

A "Part 36" offer is an important tactic that parties can use in litigation. It is an offer of settlement made in accordance with the provisions of Part 36 of the Civil Procedure Rules. It is important as a tactic because it places pressure on the other side by affording the offeror a degree of protection, should the offer not be accepted, in relation to legal costs.

A Part 36 offer may be made at any time, including before legal proceedings have commenced. However, Part 36 of the Civil Procedure Rules is drafted on the presumption that proceedings are under way at the time that such an offer is made or accepted. There has therefore been a degree of uncertainty over whether the costs consequences set out in Part 36 would apply to an offer accepted before formal proceedings have been commenced.

The Senior Courts Costs Office has held, in this recently published case, that a Part 36 offer made before formal legal proceedings have been commenced should refer specifically to liability for pre-action costs if the offeror intends liability for pre-action costs to be determined under Part 36, should the offer be accepted.

Parties to litigation should therefore be careful to ensure that a Part 36 offer made before formal legal proceedings are commenced makes specific reference to pre-action costs. Otherwise, the automatic cost consequences following acceptance of the offer may not apply.

Case: Udogaranya v Nwagw [2010] EWHC 90816 (Costs)

Court of Appeal Considers Insolvent Company's Right to Deal with Goods Subject to Retention of Title Clause

Isher Fashions UK ("**Isher**") supplied Jet Star Retail Limited ("**Jet Star**") with goods. The contract for the supply of the goods contained retention of title provisions, but it was agreed between the parties that the contract implicitly gave Jet Star the right to deal with the goods despite Isher's claim to retention of title. The contract also gave Isher a right, by notice, to prevent Jet Star from selling or parting with possession of any goods supplied if Jet Star became the subject of formal insolvency proceedings.

Jet Star entered administration. Isher failed to serve a notice preventing the sale of the goods supplied and Jet Star's administrators continued to sell goods supplied by Isher. Isher brought proceedings against Jet Star and the administrators alleging that the sale of goods after Jet Star entered administration amounted to wrongful interference of its title to those goods. In the Court of Appeal, Isher contended that Jet Star's right to deal with the goods was limited to dealings in the ordinary course of its business. An analogy was drawn to the treatment of floating charges by the High Court. Isher argued that trade or dealings by a company in administration were not "*in the ordinary course of business*".

The Court of Appeal disagreed and found that there was no limitation on Jet Star's right to deal with the goods "*in the ordinary course of business*". The contract expressly allowed Isher to serve a notice terminating Jet Star's right to deal with the goods after it had entered administration. The existence of this provision meant that the parties could not have intended that Jet Star's right to deal with the goods terminated on the

event of insolvency. Further, the Court did not accept any analogy between retention of title clauses and floating charges - a floating charge is security over assets and it is inherent that those assets are only dealt with in the course of business, but it is open to the parties themselves to negotiate the terms of retention of title provisions and the Court will not imply terms into such contracts for them.

It is, however, likely that the Court would have reached a different conclusion if the retention of title clause had expressly provided that Jet Star could deal with goods in the ordinary course of business. The Court accepted that trade by a company in insolvency proceedings was not in the ordinary course of its business. Parties should be careful when drafting clauses such as retention of title to ensure that they adequately cover all possible situations, including the insolvency of one party.

Case: Sandhu (t/a Isher Fashions UK) v Jet Star Retail Limited & Others [2011] EWCA Civ 459

New Insolvency Rules by 2013

There has been a considerable amount of discussion and work undertaken in relation to the modernisation of the Insolvency Rules. Towards the end of last year, the Insolvency Service invited views and comments on whether to work on a complete re-write of the Insolvency Rules or to just make necessary amendments to the existing rules.

The Insolvency Service has now confirmed, in a letter to stakeholders, that an entirely new set of rules will be written and will replace the Insolvency Rules 1986. The new rules will consolidate all the amendments made to the Insolvency Rules since they came into force on 29 December 1986. In order to address concerns about the introduction of new rules so soon after changes introduced in April 2010, the new Insolvency Rules will not come into force before October 2013.

The Insolvency Service will publish a draft of the new rules in the near future. We will keep you updated of any substantial amendments to the Insolvency Rules and the date for their implementation as and when they are confirmed.



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Phillippa has substantial experience of litigating in the High Court and County Court, has assisted on an international arbitration and has also been involved in bringing and defending injunctive proceedings. She has successfully settled disputes through negotiation, mediation and expert determination and has advised a variety of clients including FTSE 100 companies, public sector organisations and private individuals. Phillippa also has experience of bringing judicial review proceedings and can provide regulatory and risk management advice.

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