KEMP & KEMP PRACTICE NOTES:
INSOLVENT DEFENDANTS

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1. Every so often, a claimant is faced with a defendant, corporate or personal, that is insolvent. Insolvency, now, takes many different forms: in the corporate field, compulsory and voluntary liquidation, administration, receivership and company voluntary arrangement; at the end of a liquidation, a company is dissolved and a company can also be dissolved for failing to file its returns; in the individual field, there is bankruptcy and individual voluntary arrangement. The consequences for a claimant in a personal injury case are not always the same.

2. The problem is at its most acute when a claimant is running up against a limitation period and discovers that the potential defendant, being a company, has been dissolved. Quite simply, at that stage the defendant does not exist and, unlike in respect of deceased individual defendants, there is no provision in the CPR enabling a claim to be commenced against a dissolved company (perhaps there should be).

3. If the company has been dissolved for failing to file its returns pursuant to section 652 Companies Act 1985, an application can be made pursuant to section 653 for the company to be restored to the register. The application is made to the Companies Court and it is usual to give an undertaking that the claimant will not seek to enforce any judgment against the assets of the company.

4. There is a similar provision in relation to dissolutions of companies following winding up in section 651 Companies Act 1985. On restoration, the court has the power to order that in the case of a claimant whose claim was not statute barred at the date of dissolution the period between the date of dissolution and the date of restoration shall not count for the purposes of any statute of limitations, see Re Donald Kenyon Ltd (1956) 1 WLR 1397.

5. In general the costs of these restoration proceedings are recovered in the subsequent proceedings against the restored company.

6. The claimant will, ordinarily, be relying on his rights under section 1 Third Parties (Rights Against Insurers) Act 1930. Those rights, however, only accrue to the claimant where, in the case of a company, it is wound up, or enters administration, or a receiver is appointed or there is a company voluntary arrangement. The section does not apply in cases where the company is simply struck off the register and dissolved for failing to file returns and, therefore, in such a case, an insurer could take the point that the section does not apply until and unless the company is restored and, subsequently, wound up.

7. In the case of a compulsory liquidation, section 130 Insolvency Act 1986 provides that when a winding up order has been made no action or proceedings shall be proceeded with or commenced against the company or its property except by leave of the court. Fortunately, the courts have interpreted this as giving the power to give such permission retrospectively, see Re Saunders (A Bankrupt) Bristol and West Building Society v Saunders (1997) CH 60. Thus proceedings can be issued and they are valid and the claimant must then make

an application for retrospective permission which will ordinarily be granted on terms similar to those imposed when a company is restored to the register. Again the costs of such a permission application should be recoverable, see above.

8. In the case of a voluntary winding up or a receivership, there is no automatic restriction on proceedings against a company. So far as a company being made the subject of an administration order is concerned, in respect of administration orders made pursuant to petitions presented before 15th September 2003, section 11(3)(d) Insolvency Act 1986 makes similar provisions as does section 130(2) in relation to compulsory winding up orders as does clause 43(6) of Schedule B1 of the Insolvency Act 1986 in relation to administration orders made subsequently.

9. The position is rather different in relation to a company that has made a company voluntary arrangement pursuant to Part I Insolvency Act 1986. Pursuant to section 5(2) of the Act, where a voluntary arrangement is passed by a creditor's meeting, it binds every person who in accordance with the rules either was entitled to vote at that meeting or would have been so entitled if he had had notice of it as if he were party to a voluntary arrangement made by the company at that meeting. In other words, there is a statutory contract between the company's creditors and the company even if a creditor opposed the arrangement but was outvoted and even if the creditor had no notice of the meeting in circumstances where the creditor ought to have had notice of the meeting. This was a change made to the regime in 2000 and brought into force

on 1st January 2003. Before then, creditors who did not have notice of the meeting were not affected in any way by the arrangement.

10. It might be thought that a claimant who has a personal injury claim against a company is not someone who is likely to be affected by such an arrangement. This is not the case.

11. Although there is no definition of creditor for the purposes of Part I of the Insolvency Act 1986, the Insolvency Rules at rule 1.17(3) clearly envisage creditors who have unliquidated debts being entitled to take part in a company voluntary arrangement, and the cases have held that future, contingent and unliquidated debts are all capable of being included within a company voluntary arrangement, see Doorbar v All Time Securities Limited (1996) 1 WLR 456 and Beverley Group Plc v McClue (1995) BCC 751.

12. A voluntary arrangement may well have its terms so drawn as to exclude from it claims such as a claimant for damages for a personal injury might bring. Many, however, do not. The procedure in these circumstances is somewhat cumbersome. Technically speaking, a claimant would have to seek to apply under section 6 Insolvency Act 1986 for a revocation of the arrangement or the giving of a direction for the summoning of a meeting to consider a revised proposal on the grounds that the arrangement unfairly prejudices the interests of the particular creditor. Such an application, however, ordinarily has to be made within the period of 28 days beginning with the day on which the claimant not having notice of the meeting became aware that a creditor's meeting approving the arrangement had taken place.

13. Given the cumbersome nature of that process, the supervisor of the voluntary arrangement will ordinarily agree not to take any point on behalf of the company to the effect that the claimant's claim has been compromised by the arrangement upon the claimant undertaking not to seek to enforce any judgment against the assets of the company comprised in the arrangement (a very similar agreement or undertaking to that which is commonly given in restoration proceedings).

14. So far as an individual is concerned, the provisions concerning individual voluntary arrangements in Part VIII Insolvency Act 1986 closely mirror those relating to company voluntary arrangements. So far as bankruptcy is concerned, section 285(3) Insolvency Act 1986 provides that before the discharge of a bankrupt, no action may be commenced against the bankrupt except with the leave of the court. Again, an action commenced in breach of that provision is not invalid and leave can be given retrospectively (see Re Saunders). If proceedings are on foot, then section 285(2) provides that the court may stay proceedings or allow them to continue on such terms as it thinks fit.

15. Once the bankrupt is discharged (now usually within one year of the bankruptcy order), a claimant is free to commence proceedings against the discharged bankrupt in relation to liabilities in respect of personal injury because, pursuant to section 281(5), a bankruptcy debt which consists of a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, being in any case damages in respect of personal injuries to any person, is not a debt that is released by the discharge of the bankrupt.

16. If the claimant's claim arises out of a road traffic accident, the above can be circumvented by making use of the European Communities (Rights Against Insurers) Regulations 2002. Those Regulations apply to a road traffic accident covered by compulsory insurance under the Road Traffic Act 1988. Pursuant to regulation 3(2), the claimant may issue proceedings against an insurer that issued a policy of insurance relating to an insured vehicle, and that insurer, "shall be directly liable to the entitled party (the claimant) to the extent that he is liable to the insured person".

17. That gives a direct right of action against an insurer that has insured a person for compulsory road traffic insurance. It might be said that an insurance company can only be liable to an insured person that exists (in the case of a company for example), but in road traffic cases there will always be a defendant who is an individual, although that defendant may be dead, but his estate would still be an insured person. Thus in road traffic cases, the simple answer is to sue the insurance company direct. That cannot, however, work in other types of personal injury, employer's liability and so on.

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