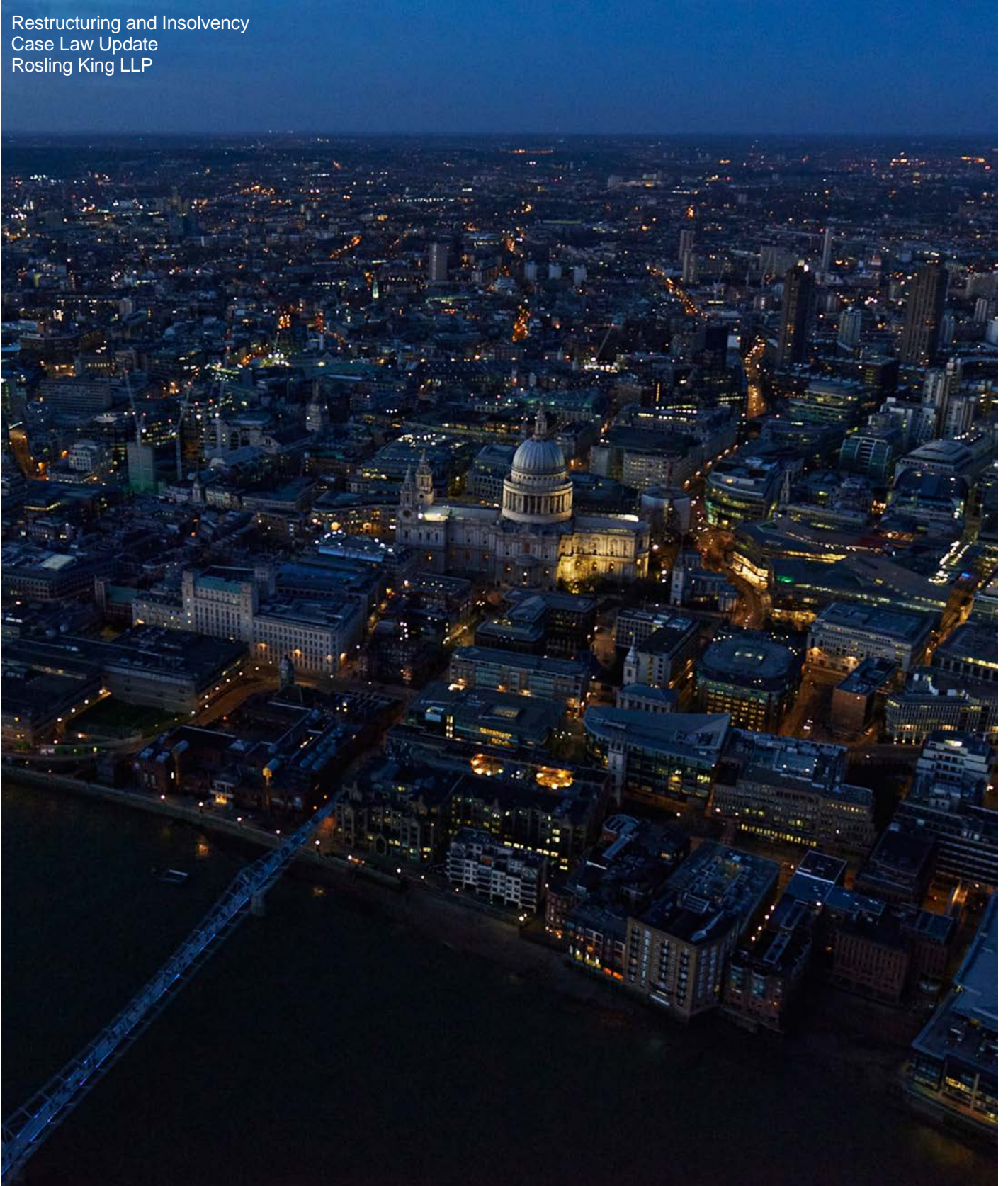


Restructuring and Insolvency
Case Law Update
Rosling King LLP



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In *Davy v Pickering and others* [2015] EWHC 380 (Ch) the High Court held that the period between the dissolution of a company and its restoration would not count for the purposes of any limitation argument and that a potential creditor's petition for that company's winding up could be backdated to the date of dissolution. The result was that a liquidator could challenge an antecedent transaction and claw back company assets dissipated prior to the company's dissolution.

Background

On 15 October 2001, Mr Graham Frank Davy (the "Claimant") transferred £610,398 out of his employer's pension scheme into a private pension plan, allegedly in reliance on the advice of a company known as Heather Moor & Edgecomb Limited (the "Company"). It was the Claimant's contention that he had suffered significant losses as a result of the Company's advice.

On or around 28 July 2011, the Claimant made a complaint to the Financial Ombudsman Service (the "FOS") regarding the above. On 28 July 2011, the FOS wrote to Mr Pickering, a director of the Company at the time, informing him of the complaint. By 18 October 2011, Mr Pickering had written to the Claimant on two occasions confirming that the Company had received the complaint and asking on what grounds it had been made. On 26 October 2011, the FOS wrote to Mr Pickering enclosing a copy of the complaint form and requesting that the Company submit a statement of its case before 9 November 2011. The Company did not respond to this request. On 17 November 2011, the Company applied to the Registrar of Companies for the Company to be struck off the register pursuant to section 1003 of the Companies Act 2006 ("CA 2006"). The Claimant denied receiving a notice of this application in his capacity as a creditor of the Company under section 1006(1) of the CA 2006. The Company was struck off the register under section 1003 of the CA 2006 and, on 20 March 2012, was dissolved.

On 1 July 2014, the District Judge ordered the restoration of the Company to the register, as sought by the Claimant. The judge, however, adjourned consideration of the directions that ought to have been made in conjunction with the restoration. The Claimant commenced a claim against the Company on 16 January 2015 and the matter came before the High Court on 30 January 2015.

Application for Directions

The Claimant asserted that he first had the knowledge required for bringing an action for damages against the Company for the purposes of section 14A of the Limitation Act 1980 when he received advice from another financial adviser on 19 July 2011. In order to preserve his position against any argument that his claim against the Company was statute-barred on account of an earlier date of relevant knowledge, the Claimant sought the following direction:

"That the period between the striking off of the Company and the marking of the order for restoration is not to count for the purposes of any enactment, including the Limitation Act 1980, as to the time within which proceedings against the Company must be brought" (the "Limitation Direction").

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It was also the Claimant's contention that within the two year period preceding the dissolution of the Company, its assets were distributed to the Company's two personal shareholders, Mr and Mrs Pickering, although they had reason to be aware there were claims outstanding against the company such as that of the Claimant. In order to restore those assets to the Company and render it capable of compensating him, the Claimant sought an order for the winding up of the Company, so that a liquidator could make use of the antecedent transaction provisions of the Insolvency Act 1986. As at the 30 January 2015, however, it was too late for liquidator to make use of those provisions since the winding-up petition would have had to have been presented within two years of the relevant transaction. Accordingly, the Claimant sought a further direction that:

"... if the [C]laimant shall petition for the winding up of the Company within 14 days of the making of this Order the petition shall be deemed to have been presented on 20 March 2012" (the "Petition Direction")..

The Decision

The Court considered the Limitation Direction and Petition Direction sought by the Claimant by reference to its powers under section 1032(3) of the CA 2006 to "... give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."

On the facts, the Claimant was found by the Court to have been denied the opportunity to bring the claim now sought as a result of the conduct of Mr and Mrs Pickering in bringing about the dissolution of the Company. The Court was of the view that "... if justice requires that the effects of the striking-off of the Company be undone by restoring to [the Claimant] his lost opportunity, the risk that his position will be improved over what it might have been... seem[s]... to be the price of seeking the best attainable equation of positions under section 1032(3)". Accordingly, the Court made the Limitation Direction and Petition Direction.

Commentary

Discounting the period between the dissolution of a company and its subsequent restoration for the purposes of limitation is not a new concept for the Courts. What is of particular interest, however, is the Court's decision in this case to allow the backdating of a potential creditor's winding up petition to ensure the availability of the antecedent transaction provisions of the Insolvency Act 1986. It is interesting to note that the Court did not need the Claimant's claim to be more than 'properly arguable' and thought the window of opportunity, though a small one, should be restored to him.

The decision is to be welcomed by potential creditors/insolvency practitioners who may previously have believed that the application these provisions had been lost as a result of that company's earlier dissolution.

For further information, please contact [James Walton](#) or the Partner with whom you usually

