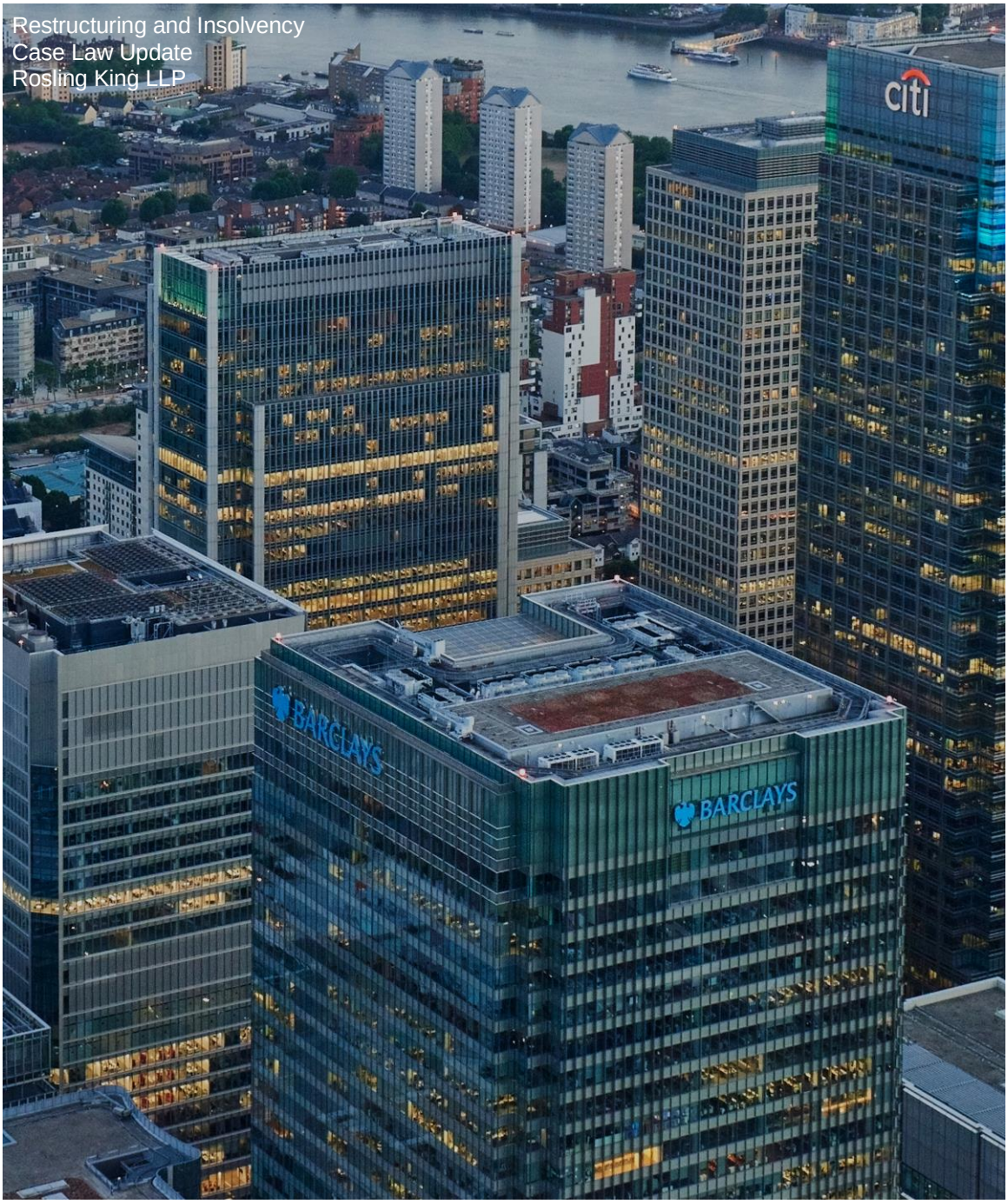
Restructuring and Insolvency
Case Law Update
Rosling King LLP



The Facts

Mr Walker (the "**First Respondent**") was appointed as liquidator of Domestic & General Insulation Limited (the "**Company**") under the member's voluntary liquidation procedure. Several months later the liquidation of the Company was converted into a creditor's voluntary liquidation and Scott Bevan and Simon Chandler (together, the "**Applicants**") were appointed as joint liquidators. The appointment took place during a creditors meeting which was convened by the First Respondent.

The Applicants became concerned about the validity of their appointment as liquidator, which in turn was dependant on the validity of the First Respondent's appointment as liquidator.

The Applicants concern was rooted in the fact that under section 84(1)(b) of the Insolvency Act 1986 (the "**Act**") a company may be voluntarily wound up if that company resolved by special resolution to do so. In this instance however, the required written notice of the special resolution was not given to HSBC Bank Plc (the "**Second Respondent**"), who held a qualifying floating charge (the "**QFCH**") over the Company.

As only the First Respondent had the capacity to convene a creditor's meeting, if his appointment was not valid, he had no authority to appoint the Applicants as joint liquidators.

It was noted that at the time of the creditor's meeting, the Applicants did not believe that the Second Respondent's QFCH was enforceable.

The Judgment

The High Court recognised that under section 84(1)(b) of the Act, a company must give written notice to the holder of any floating charge to which section 72A of the Act applies. The definition of 'holder of a qualifying floating charge' is the same under this section of the Act as that adopted in paragraph 14 of Schedule B1 of the Act.

Upon proper construction of paragraph 14 of Schedule B1 of the Act, the Court found that the Second Respondent was a qualifying floating charge holder and, as such, was entitled to be given notice of the special resolution to wind up the Company. The Court held that it was immaterial as to whether or not the charge was enforceable at the time the special resolution was passed; the question of enforceability was a matter for the charge holder to decide.

Despite this, the High Court held that the initial resolution and successive appointments of the First Respondent and the Applicants were valid.

The Court held that once a special resolution had been passed to wind-up the Company, that resolution was effective notwithstanding that there was a failure to give notice to the Second Respondent. Specifically, the Court noted that both the First and Second Respondent did not object to the relief sought by the Applicants. As such, the Court concluded that, in circumstances such as this, where a special resolution has been passed to wind up the

Company, that resolution was effective in spite of the failure to give notice.

The appointment of the First Respondent and the Applicants as liquidators of the Company was therefore declared to be valid.

Commentary

This decision demonstrates that, on occasion, the Court is prepared to take a more flexible approach to the formalities surrounding the insolvency process. Shareholders' powers to resolve to place their company into liquidation, provided the requirements set out in the company's constitution have been complied with, should not be deemed to be invalid simply because the formalities set out in the Act have not been fully observed.

Nonetheless, this short decision also serves as a useful reminder that charge holders must be kept informed about the insolvency process. In this particular case the Second Respondent did not object to the Company being wound-up. However, it may be that had the Second Respondent been dissatisfied with the Company being placed into liquidation without it having the opportunity to exercise its rights under its qualifying floating charge (for example, because it had wished to take steps to appoint an administrator of the Company), the decision that the liquidators' appointment was valid may have been different. Therefore, insolvency practitioners should always make sure that all of the necessary formalities under the Act are complied with to safeguard their appointment and avoid it being put in doubt.

For further information, please contact Alexander Edwards or the Partner with whom you usually deal.