

## CHAPTER 22

## INSOLVENCY OF A TRUSTEE

## 1. TRUSTEESHIP

**Exercise of trusteeship***Liquidator*

- 22-03** NOTE 7. DELETE AND REPLACE BY: *Chirkinian v Arnfield* [2006] EWHC 1917 (Ch); [2006] B.P.I.R. 1363 at [18] (liquidator can make appointment if in pursuit of statutory functions but must act in interests of beneficiaries). Compare *Re Crest Realty Pty Ltd* [1977] 1 N.S.W.L.R. 664 (power of liquidator to apply to court for appointment); but contrast *Sjoquist v Rock Eisteddfod Productions Pty Ltd* (1996) 19 A.C.S.R. 339 at 342. In the context of pension trusts, see Pensions Act 1995, ss.22–23, 25 (as amended or substituted by Pensions Act 2004, ss.36(1), (2), (3), (4), 319(1), 320, Sch.12, paras.34, 40, 41, Sch.13, Pt 1 and Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941), art.2(1), Sch.1, para.155(1), (3)).

*Administrators*

- 22-04** NOTE 10. DELETE AND REPLACE BY: Under Insolvency Act 1986, s.8 and Sch.B1, substituted and inserted by Enterprise Act 2002, s.248 and Sch.16.

NOTE 11. DELETE under Insolvency Act 1986, s.8 AND REPLACE BY: under what is now Insolvency Act 1986, Sch.B1 (inserted by Enterprise Act 2002, s.248 and Sch.16).

*Administrative receivers*

- 22-05** NOTE 14. DELETE THE FIRST SENTENCE AND REPLACE BY: The powers of an administrator are conferred by statute (Insolvency Act 1986, Sch.B1 (inserted by Enterprise Act 2002, s.248 and Sch.16), paras.59–61) and in particular he may remove and replace directors (*ibid.*, para.61, a point relied on in *Denny v Yeldon* [1995] 3 All E.R. 624).

## INSOLVENCY OF A TRUSTEE

*Costs and expenses of insolvency practitioner*

**22-06** NOTE 16. DELETE IN THE FIRST SENTENCE Insolvency Rules 1986, r.4.218 AND REPLACE BY: Insolvency Rules 1986, r.4.218 (as amended by Insolvency (Amendment) Rules 1987 (SI 1987/1919), r.3(1), Sch., Pt 1, para.79; Insolvency (Amendment) Rules 1995 (SI 1995/586), r.3, Sch.; Insolvency (Amendment) (No.2) Rules 2002 (SI 2002/2712), r.4(1), Sch., Pt 2, para.23(b), (c), (d); Insolvency (Amendment) Rules 2005 (SI 2005/527), rr.1(2), 3(2), Insolvency (Amendment) Rules 2008 (SI 2008/737), rr.3, 4). DELETE THE SECOND SENTENCE AND REPLACE BY: See too Insolvency Rules 1986, r.4.127 (as amended by Insolvency (Amendment) Rules 2004 (SI 2004/584), r.14; Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.217).

NOTE 18. DELETE Insolvency Rules 1986, r.2.47(1) AND REPLACE BY: Insolvency Rules 1986, r.2.106(1) (as substituted by Insolvency (Amendment) Rules 2003 (SI 2003/1730), r.5(1), Sch.1, Pt 2, para.9 and amended by Insolvency (Amendment) Rules 2005 (SI 2005/527), r.5.15; Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.90).

**22-07** NOTE 20. AT THE END ADD: *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd* (1999) 30 A.C.S.R. 377.

**2. EFFECT ON TRUST PROPERTY****General***Individual trustees*

**22-08** NOTE 24. DELETE THE FIRST SENTENCE AND REPLACE BY: Defined in Insolvency Act 1986, s.283 (as amended by Housing Act 1988, s.117(1)).

NOTE 26. DELETE AND REPLACE BY: Insolvency Act 1986, ss.305(2), 302 and 330 (the last as amended by Insolvency Act 1986 (Amendment) (No.2) Regulations 2002 (SI 2002/1240), regs.3, 15).

## INSOLVENCY OF A TRUSTEE

AT THE END ADD: A power vested in an individual trustee as such does not pass to his trustee in bankruptcy; the point is considered elsewhere.<sup>27a</sup>

**22–09** AT THE END ADD: But where trust money is misapplied when it should have been paid into a client account, the beneficiary has no proprietary claim against the funds in the client account even if there is a surplus on that account after satisfying all other proprietary claims.<sup>33a</sup>

**22–10** AT THE END ADD: Nor is a prior disposition in favour of beneficiaries of property held on trust by a bankrupt liable to be set aside as a transaction at an undervalue under the insolvency legislation.<sup>35a</sup> the element of gift or provision of consideration on the part of the bankrupt, which the legislation assumes, is missing.<sup>35b</sup>

*Corporate trustees*

**22–11** AT THE END ADD: A power vested in a corporate trustee as such will continue to be exercisable, along with the trusteeship generally, by its liquidator or administrator; the point is considered elsewhere.<sup>38a</sup>

**22–12** NOTE 39: AFTER Insolvency Act 1986, s.129 INSERT: (as amended by Enterprise Act 2002, s.248(3), Sch.17, paras.9, 16).

NOTE 40: AFTER Insolvency Act 1986, s.127 INSERT: (as amended by Enterprise Act 2002, s.248(3), Sch.17, paras.9, 15).

AT THE END OF THE TEXT ADD: As in the case of individual insolvency, a prior disposition in favour of beneficiaries of property held on trust by a company is not liable to be set aside as a transaction at an undervalue under the insolvency legislation.<sup>40a</sup>

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<sup>27a</sup> § 29–78.

<sup>33a</sup> *Re BA Peters plc* [2008] EWCA Civ 1604; [2010] 1 B.C.L.C. 142 (trader’s client account rather than solicitor’s).

<sup>35a</sup> Under Insolvency Act 1986, s.339 (as amended by Civil Partnership Act 2004, s.261(1), Sch.27, para.119).

<sup>35b</sup> *Cf. Re OPC Managed Rehab Ltd* (2009–10) 12 I.T.E.L.R. 405, NZ HC, on comparable New Zealand insolvency legislation.

<sup>38a</sup> § 29–81.

<sup>40a</sup> Insolvency Act 1986, s. 238 (Enterprise Act 2002, s.248(3), Sch.17, paras.9, 25); cf. § 11–10.

## INSOLVENCY OF A TRUSTEE

AFTER PARAGRAPH 22–12 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

**Arrangements**

**22–12A** The insolvency legislation makes provision for individual voluntary arrangements and company voluntary arrangements as alternatives to bankruptcy or winding-up.<sup>40b</sup> Where the arrangement is approved by the requisite majority,<sup>40c</sup> it become binding on every “creditor” of the individual or the company.<sup>40d</sup> Beneficiaries of property held on trust by the individual or the company, however, are not creditors and so will not be bound by such voluntary arrangements without their individual consents. Similarly, the court has no jurisdiction to bind such beneficiaries by means of its power to sanction a compromise or arrangement between a company and its creditors under Part 26 of the Companies Act 2006.<sup>40e</sup>

**Trustee with a beneficial interest**

**22–15** NOTE 50. AFTER Insolvency Act 1986, s.335A INSERT: (as inserted by Trusts of Land and Appointment of Trustees Act 1996, s.25(1), Sch.3, para.23 and amended by Civil Partnership Act 2004, s.261(1), Sch.27, para.118).

NOTE 52. DELETE AND REPLACE BY: Law of Property Act 1925, s.36(2) (as amended by Trusts of Land and Appointment of Trustees Act 1996, s.5, Sch.2, para.4).

### 3. TRUSTEE’S RIGHT OF INDEMNITY

**Nature of right**

**22–20** NOTE 74. DELETE Companies Act 1985, s.360 AND REPLACE BY: Companies Act 2006, s.126, replacing Companies Act 1985, s.360.

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<sup>40b</sup> Insolvency Act 1986, Pt I, Pt VIII.

<sup>40c</sup> For which see Insolvency Rules 1986, r.1.19 (as amended by Insolvency (Amendment) (No.2) Rules 2002 (SI 2002/2712), r.3(1), Sch., Pt 1, para.10 and Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.13(1), (2)), r.1.20 (as amended by Insolvency (Amendment) Rules 1987 (SI 1987/1919), r.3(1), Sch., Pt 1, para.5 and Insolvency (Amendment) (No.2) Rules 2002 (SI 2002/2712), r.3(1), Sch., Pt 1, para.110) and r.5.23 (as substituted by Insolvency (Amendment) (No.2) Rules 2002 (SI 2002/2712), r.5(1), Sch. Pt 3, para.24).

<sup>40d</sup> See § 22–35.

<sup>40e</sup> *Re Lehman Brothers International (Europe)* [2009] EWCA Civ 1161; [2010] B.C.C. 272.

## INSOLVENCY OF A TRUSTEE

**Effect of insolvency on right of indemnity**

**22–22** NOTE 80. AT THE END ADD: *Official Assignee of Bainbridge v Menzies* [2011] NZHC 87 at [22]–[25].

NOTE 82. AT THE END OF THE FIRST SENTENCE ADD: *Agusta Pty Ltd v The Official Trustee in Bankruptcy* [2008] NSWSC 685 at [35]; *Re OPC Managed Rehab Ltd* (2009–10) 12 I.T.E.L.R. 405 at [118], NZ HC.

*Creditors benefiting*

**22–24** NOTE 87. AT THE END OF THE FIRST SENTENCE ADD: *Juratowitch v Iannotti* [2009] FMCA 1133 at [48]–[49]. AT THE END ADD: See too *Commissioner of Taxation v Bruton Holdings Pty Ltd* [2008] FCAFC 184; (2008) 244 A.L.R. 177 at [47]–[58], Aus FC.

**Priorities between creditors**

**22–29** NOTE 93. DELETE AND REPLACE BY: See Insolvency Act 1986, ss.175, 328 and 386–387 (the last as amended by Insolvency Act 2000, ss.1, 3, Sch.1, paras.1, 9, Sch. 3, paras.1, 15; Enterprise Act 2002, ss.248(3), 251(3), Sch.17, paras.9, 34; Insolvency Act 1986 (Amendment) (No 2) Regulations 2002 (SI 2002/1240), regs.3, 16).

**22–31** NOTE 2. DELETE AND REPLACE BY: Insolvency Rules 1986, r.4.75(1)(e) (as substituted by Insolvency (Amendment) Rules 2004 (SI 2004/584), r.10) and r.6.98(1)(e) (as substituted by *ibid.*, r.2).

NOTE 3. DELETE AND REPLACE BY: Insolvency Rules 1986, r.4.96(1) (as amended by Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.196) and r.6.116(1).

**Recoupment from beneficiaries**

**22–32** IN THE SECOND SENTENCE DELETE authority AND REPLACE BY: English authority.

AT THE END OF THE SECOND SENTENCE INSERT A NEW NOTE 5A: See *Marginson v Ian Potter & Co.* (1976) 136 C.L.R. 161 at 175–176, Aus HC; *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd. R. 439, Qd. CA.

## INSOLVENCY OF A TRUSTEE

**22–33** NOTE 6. DELETE FIRST SENTENCE AND REPLACE BY: Insolvency Act 1986, s.238 (as amended by Enterprise Act 2002, s.248(3), Sch.17, paras.9, 25) and s.339 (as amended by Civil Partnership Act 2004, s.261(1), Sch.27, para.119).

NOTE 7. DELETE FIRST SENTENCE AND REPLACE BY: Insolvency Act 1986, s.240 (as amended by Enterprise Act 2002, ss.248(3), 278(2), Sch.17, paras.9, 26, Sch.26) and s.341 (as prospectively amended by Criminal Justice Act 1988, s.170(2), Sch.16).

NOTE 8. DELETE SECOND SENTENCE AND REPLACE BY: There is no corresponding provision for companies in liquidation; *cf.* Insolvency Act 1986, s.241 (as amended by Insolvency (No.2) Act 1994, s.1 and Enterprise Act 2002, s.248(3), Sch.17, paras.9, 27).

**4. BREACH OF TRUST****Voluntary arrangements**

**22–35** NOTE 11. AFTER s.260(2) INSERT: (as amended by Insolvency Act 2000, s.3, Sch.3, paras.1, 10). AFTER s.382(1) INSERT: (as prospectively amended by Criminal Justice Act 1988, s.170(2), Sch.16). DELETE ss.5(2) and (3) AND REPLACE BY: ss.3(3) and 5(2) (as amended by Insolvency Act 2000, ss.2(a), 15(1), Sch.2, Pt I, paras.1, 6).

**Proof for liability for breach of trust**

**22–36** NOTE 15. IN THE FIRST SENTENCE AFTER s.382(1) INSERT: (as prospectively amended by Criminal Justice Act 1988, s.170(2), Sch.16). IN THE THIRD SENTENCE DELETE Insolvency Rules 1986, rr.4.73 and 4.180 AND REPLACE BY: Insolvency Rules 1986, r.4.73 (as amended by Insolvency (Amendment) Rules 2003 (SI 2003/1730), r.7, Sch.1, Pt 4, para.18. and Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, paras.1, 191) and r.4.180.

*Quantum of proof*

**22–39** NOTE 21. AFTER r.4.93(1) INSERT: (as amended by Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.195(1), (3)). AFTER r.6.113 INSERT: (as amended by Insolvency (Amendment) Rules 1987 (SI 1987/1919), r.3(1), Sch., Pt 1, para.112).

## INSOLVENCY OF A TRUSTEE

*Secured creditors*

**22–48** NOTE 52. DELETE AND REPLACE BY: Insolvency Rules 1986, r.4.75(1)(e) (as substituted by Insolvency (Amendment) Rules 2004 (SI 2004/584), r.10) and r.6.98(1)(e) (as substituted by *ibid.*, r.2).

NOTE 54. DELETE FIRST SENTENCE AND REPLACE BY: Insolvency Rules 1986, r.4.96(1) (as amended by Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.196) and r.6.116(1).

**Preferences**

**22–50** NOTE 55. AT THE END OF THE SECOND SENTENCE INSERT AFTER S.435(5): (as amended by Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941), art.2(1), Sch.1, para.82).

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