

The ILA Technical Committee wishes to draw members' attention to the High Court's decision in *Gold Fields Mining LLC v (1) James Robert Tucker (2) Jeremy Spratt (the joint supervisors of Energy Holdings (No.3) Limited (in liq))* [2008] EWHC 1696 (Ch) and [2008] EWHC 1697 (Ch).

In this case, the High Court considered, in the context of company voluntary arrangements ("CVAs"), whether a creditor's claim for distributions, lodged outside of the claims date, should fail on the basis that it resulted from the wilful default or lack of reasonable diligence of that creditor.

Background:

Facts: Energy Holdings (No.3) Limited ("EH3") was put into creditors' voluntary liquidation in December 2002. On 31 March 2005, the creditors approved a CVA pursuant to which Mr. J Tucker and Mr. J Spratt were appointed as Supervisors. Peabody Energy Limited ("Peabody"), a creditor of EH3, did not attend or receive notice of the meeting at which the CVA was approved. However, the meetings had been advertised in the Financial Times and the Wall Street Journal, and further advertisements were placed in those publications on 7 April 2005 after the approval of the CVA.

On 19 June 2007, Peabody assigned the benefit of its debt to its subsidiary, Gold Fields Mining LLC ("GFM"). Two days later, on 21 June 2007, GFM submitted a claim to its solicitors with a view to that claim being sent to the Supervisors. The claim covered present, future and contingent liabilities under a deed of indemnity made in 1998 for the sum of \$230million. The claim was subsequently submitted to the Supervisors on 9 July 2007.

The above dates are relevant because the CVA provided that any claims in the CVA would only rank for distributions to the extent that they were "Allowed Claims". For these purposes, "Allowed Claims" were defined as those claims in respect of which claim forms were completed and submitted by a creditor on or before the "Claims Date", being 45 days after the approval of the CVA i.e., 16 May 2005.

In the event a Claim Form was lodged after the Claims Date, para 23.5 of the CVA provided that "a CVA Claim will not rank for Distributions unless the CVA Supervisor of the relevant CVA Company or the Court determines either that the failure to lodge the Claim Form earlier did not result from a wilful default or lack of reasonable diligence on the part of a CVA Creditor, or that the CVA Creditor (a) did not have notice of the Creditors' Meeting of the relevant CVA Company and (b) within twenty-eight days of becoming aware that the Creditors' Meeting of the relevant CVA had taken place it lodged its claim with the CVA Supervisors" (emphasis added).

The Supervisors rejected GFM's claim on the ground that it was submitted out of time. GFM issued an application to the Court, the main issue being whether, on the true construction of the CVA, GFM's claim should be allowed on the basis that the failure to submit its claim within the relevant date was not due to wilful default or lack of reasonable diligence (as the Supervisors claimed).

The Decision:

(1) The Court agreed with GFM that those who did have notice of the CVA meeting should not have more favourable treatment than those who did not. The Supervisors were wrong to have excluded GFM's claim form on the grounds that it was out of time. The Court said that it was late in relation to the primary date, but it was not formally out of time unless and until somebody had determined whether the late submission was due to "wilful default or lack of reasonable diligence" on the part of the creditor in question.

(2) On the issue of whether this applied to GFM, the Court held that this could not arise unless and until it knew, or with reasonable diligence would have known, of both the underlying claim and the opportunity to lodge a claim form to receive distributions in the CVA.

(3) In this regard, the first period of time in which the Supervisors argued there was wilful default or lack of reasonable due diligence on the part of Peabody was between March 2005 to January 2007, being the period between when the CVA was first approved and when Peabody first received notice of the CVA. However, the Court held that it was not sufficiently clear to those convening the meeting of creditors of EH3 that notice should have been given to Peabody and, on that basis, there was no reason to infer that Peabody should have noticed the advertisements in the Financial Times and the Wall Street Journal and realised that they presented them with an opportunity to realise their claim by sharing distributions in the CVA. In the words of the Court, “reasonable diligence does not require periodic visits to websites to ascertain what might be there in the absence of circumstances indicating the need to do so”. Given that Peabody was not aware of the existence of the CVA, the Court rejected the Supervisors’ argument in relation to this period in time.

(4) The Court then turned its mind to whether there was any wilful default or lack of reasonable diligence on the part of Peabody and GFM during the period from January to July 2007; being the period between when Peabody received notice of the CVA and GFM’s lodgement of the claim. The Court held that it had to be borne in mind that “the standard is one of reasonable diligence only”. In this regard, in the current situation, there was sufficient evidence before it which demonstrated considerable activity by GFM and Peabody in that period to particularise and quantify the claim and, on this basis, there was no sign of wilful default or lack of reasonable diligence.

(5) The Court concluded that the claim form lodged on 9 July 2007 was capable of ranking for distributions under the CVA.

Comment: The case is important to practitioners who hitherto have included a “bar date” in a CVA/scheme of arrangement as an effective way of achieving certainty and finality on the list of claims. The decision highlights that the bar date might not achieve its commercial purpose and of course this decision could have implications for how contingent claims are considered in a CVA/scheme context.

Permission to appeal the decision was refused but an application has been made to the Court of Appeal for leave to appeal and a decision on whether that application will be successful is awaited.

Finally, also of interest were the *obiter* remarks about whether s.7(3) IA 1986 conferred a discretion on the Court so as to allow GFM to share in any future distribution (as would be the case in a liquidation). It was suggested that this could not apply in the current situation as the late lodgment of GFM’s claim was not the result of “any act, omission or decision” of the Supervisors. In the circumstances, therefore, the appropriate challenge to para 23 of the CVA might have been under s.6 IA 1986 on the basis that it was unfairly prejudicial.