



## TUPE and insolvency: what about provisional liquidation?

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*There is no authoritative decision on whether reg 8 of TUPE applies to the transfer of a business in provisional liquidation and, if it does, whether it is reg 8(2) to (6) or 8(7) that applies.*

There are three possibilities:

The first is that reg 8 of TUPE does not apply at all to the transfer of a company in provisional liquidation. If so, regs 4 and 7 will apply in full and the transferee will be saddled with all the usual TUPE obligations.

The second is that provisional liquidation is opened not with a view to the liquidation of the transferor's assets. Therefore, if there is a transfer, reg 8(2) to (6) will apply and employee debts accrued at the date of transfer will be reduced on transfer. (Chapter VI of Part XI and Part XII of the ERA, which guarantee payments by the Secretary of State, will apply, as modified, to the employees of the transferor. This has the effect that the transferee will not be liable for statutory redundancy payments, arrears of pay of up to eight weeks' statutory pay, statutory notice pay, holiday pay up to six weeks' statutory pay, and the unfair dismissal basic award.)

The third possibility is that provisional liquidation is analogous to bankruptcy and is instituted with a view to the liquidation of the assets of the transferor within reg 8(7). If so, then neither the employees of the transferor nor any liabilities under reg 4 or 7 will transfer.

(The only appellate case on this issue, *Crossroads Caring*, allowed an inadequate reasons appeal and remitted the case.)

### **The nature of provisional liquidation**

A provisional liquidator is appointed by the court only after a winding up petition has been presented (s.135(1) IA). The appointment may be made by the court of its own motion or by application of any person entitled to present a winding up petition (IR 4.25). The provisional liquidator only has the functions conferred on him by the court and set out in the court order (s.135(4) IA and IR 4.26(1)). His powers may also be limited by the order appointing him (s.135(5) IA).

Provisional liquidation preserves the position between the presentation of a winding up petition and the making of the

petition to prevent the dissipation of assets or one creditor gaining an advantage. A provisional liquidator is usually appointed where it is necessary to safeguard assets or provide immediate managerial control over the company until the winding up order is made. The court may limit the provisional liquidator's powers by ordering that assets are not to be distributed or disposed of until further order.

### **(1) 'Insolvency proceedings': 'instituted' or 'opened'?**

Reg 8 only applies to 'insolvency proceedings' that have been 'opened' (reg 8(2) to (6)) or 'instituted' (reg 8(7)). This mirrors the ARD (Articles 5(1) and 5(2)). There does not appear to be any rationale for the different expressions. In *Slater* at [27] to [28] it was held that it is necessary to look at the insolvency procedure in question and determine in accordance with the relevant statutory provisions whether insolvency proceedings had commenced or not. As provisional liquidation is generally intended to preserve the position pending liquidation, it might be said that it is not a form of insolvency proceedings at all, or at least there is at this stage no 'opening' or 'instituting' of such proceedings. Such an argument is unlikely to succeed.

The concept of insolvency proceedings being 'opened' derives from European, not domestic law. The expression appears in Article 5 of the ARD and also is found in the EC Insolvency Regulation. This is concerned with cross-border insolvency and the issue of when proceedings are 'opened' is critical in many cases because it will be determinative of which court in which country has jurisdiction. Article 2(8) of the recently recast EC Insolvency Regulation provides: 'The time of the opening of proceedings' means the time at which the judgment opening insolvency proceedings becomes effective, regardless of whether the judgment is final or not.'

The leading European case on 'opening' insolvency proceedings is *Eurofood*, which was concerned with whether the appointment by the court of a provisional liquidator in

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Ireland amounted to the 'opening of insolvency proceedings' within the earlier EC Insolvency Regulation. The ECJ held it did.

*Eurofood* was applied by the High Court in *Arm Asset Backed Securities*. In that case it was held that, as there was no relevant difference between Irish and English law as regards provisional liquidation, the appointment by order of the English court of a provisional liquidator amounted to the 'opening' of the main insolvency proceedings for the purposes of the EC Insolvency Regulation. As the same expression 'opened' appears in Article 5(1) of the ARD, and if the word 'instituted' has no different meaning, there is a good argument that the same approach should be taken when considering reg 8 of TUPE. The desirability of the insolvency provisions in TUPE being construed in accordance with the EC Insolvency Regulation was recognised in *Key2Law* at [107].

## **(2) What type of proceedings is a provisional liquidation?**

Reg 8 of TUPE divides insolvency proceedings into two types: Those 'not opened ... with a view to the liquidation of the assets of the transferor', to which reg 8(2) to 8(6) applies, and those which are analogous to bankruptcy and 'instituted with a view to the liquidation of the assets of the transferor', to which reg 8(7) applies. It is implicit that insolvency proceedings must be one or the other.

### **(a) Is the absolutist approach appropriate?**

In *OTG* the EAT observed that the distinction between the different types of insolvency proceedings within Article 5 of the ARD is 'more likely to depend on the legal character of the relevant proceedings, in other words on the object of the procedure rather than the object of the individuals operating it'. In doing so the EAT eschewed the fact-based approach in *Oakland* in favour of an absolutist approach.

This absolutist approach was confirmed in *Key2Law* when it was held that Administration proceedings would always be within reg 8(2) to (6), (ie instituted not with a view to the liquidation of the assets of the transferor). This was because of the requirements of para 11 of Schedule B1 to the IA, which impose on an administrator (by para 3) a hierarchy of objectives that the administrator has to consider. The first of those objectives is to rescue the company as a going concern. Because of this primary objective, administration proceedings can never be instituted with a view to the liquidation of the company's assets within reg 8(7), even if the reality is that

the company is always likely to be wound up. By contrast, compulsory liquidation proceedings will always be within reg 8(7) as they are analogous to bankruptcy and instituted with a view to the liquidation of the assets of the transferor.

Consistent with the approach in *Key2Law* and *OTG* any tribunal considering whether provisional liquidation is within reg 8(2) to (6) or reg 8(7) is likely to want to take an absolutist approach. However, unlike administration proceedings or liquidation proceedings, the object of provisional liquidation is not found in the IA but is determined by the court order, which appoints the provisional liquidator.

There is scope for the argument that the absolutist approach is not appropriate for provisional liquidation as it is not possible to determine what type of insolvency proceedings a provisional liquidation is, without considering each individual case. The purpose of the provisional liquidation does not depend on the intention of the participants; rather, the object is that which has been set out by the court.

In most cases the purpose of the provisional liquidation, as reflected in the powers conferred on the provisional liquidator, will be to preserve the assets for the benefit of the creditors until such time as the winding up petition is made; in which case, it is arguably within reg 8(2) to (6). However, in some cases the court may order the provisional liquidator to go further. For example, in *Brown Bear Foods* the court ordered the provisional liquidator to 'get in and realise the trade and assets of [the company] on the best terms reasonably achievable in a short period of time'. This order arguably rendered the provisional liquidation in that case analogous to bankruptcy and instituted with a view to the liquidation of the assets of the company and therefore within reg 8(7).

### **(b) Which applies: reg 8(2) to (6) or reg 8(7)?**

Assuming the absolutist approach is applied, there are arguments in favour of provisional liquidation being both within reg 8(2) to (6) and within reg 8(7).

It can be argued that provisional liquidation is opened with a view to securing the company's assets pending the winding up of the company and not with a view to the liquidation of its assets; thus, reg 8(2) to (6) applies. This argument depends on what is meant by 'with a view to the liquidation of assets'. In a narrow sense provisional liquidation will often (but not always, see *Brown Bear Foods*) be opened with a view solely to preserving the position pending the winding up order.

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However, against this it can be argued that provisional liquidation proceedings are always commenced in the context of an intention to wind up the company as, to appoint a provisional liquidator, a winding up petition must have been presented. Furthermore, a creditor applying for the appointment of a provisional liquidator must establish that he is *likely* to obtain a winding up petition (see *Rochdale Drinks* at [75]). Thus, a provisional liquidation can be seen as an intermediate step and 'instituted with view' to the preservation of assets for the purpose of their ultimate liquidation.

Provisional liquidation shares many similarities with liquidation. For example, on the appointment of a provisional liquidator, no proceedings may be commenced without leave of the court (s.130(2) IA). The official receiver can require prescribed persons to make a statement of affairs in provisional liquidation as he can in liquidation. No distinction is drawn between provisional liquidation and liquidation in dealing with company property; both a liquidator and a provisional liquidator are required to take into their custody all company property (s.144 IA). It is of course a liquidator who is appointed, albeit provisionally (s.135 IA), and not an administrator.

Finally, the provisions dealing with provisional liquidation are within Chapter VI, 'Winding up by the Court', which is within Part IV, 'Winding up Companies under the Companies Acts', of the IA. IA s. 73 provides that Part IV applies to winding up companies registered under the Companies Act 2006 and specifically in Chapter VI with winding up by the court.

### **(3) Are provisional liquidation proceedings under the supervision of an insolvency practitioner?**

In *Ward Brothers* it was held that for the insolvency proceedings to be under the supervision of an insolvency practitioner, that practitioner must have been appointed as a liquidator, provisional liquidator or administrative receiver as required by s.388 IA. In any case a provisional liquidator will be appointed by the court and therefore a provisional liquidation, assuming they are held to be insolvency proceedings, will be proceedings under his supervision.

### **Conclusion**

It is likely that reg 8 of TUPE will be held to apply to the transfer of a company in a provisional liquidation. The battleground is likely to be whether it is within reg 8(2) to (6) or reg 8(7) and

whether or not the absolutist approach applied in *Key2Law* and *OTG* should be applied to provisional liquidation. Any potential transferee considering acquiring the business of a company in provisional liquidation would be well advised to wait, if possible, until a winding up order is made before doing so at which point there will be no uncertainty that reg 8(7) will certainly apply. Finally, it should be noted that even in reg 8(7) cases a transferee will be still be joint and severally liable for any protective award for failure to consult under reg 15.

### **KEY:**

TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006
<i>Crossroads Caring</i>	<i>Crossroads Caring Scotland Ltd v McGuire</i> UKEATS/00051/14/SM
ERA	Employment Rights Act 1996
IA	Insolvency Act 1986
IR	Insolvency Rules 1986
ARD	Consolidated Acquired Rights Directive 2001/23/EC
<i>Slater</i>	<i>Secretary of State for Trade &amp; Industry v Slater</i> [2008] ICR 54
EC Insolvency Regulation	Regulation EU 2015/848 on Insolvency Proceedings
<i>Eurofood</i>	<i>Eurofood IFSC Ltd</i> (C-341/04) [2006] Ch 508
<i>Arm Asset Backed Securities</i>	<i>Re: Arm Asset Backed Securities SA</i> [2014] EWHC 1097 (Ch)
OTG	<i>OTG Ltd v Barke</i> [2011] ICR 781
<i>Oakland</i>	<i>Oakland v Wellswood (Yorkshire) Ltd</i> [2009] IRLR 250
<i>Key2Law</i>	<i>Key2Law (Surrey) Ltd v D'Antiquis</i> [2011] EWCA Civ 1567 [2012] ICR 881
<i>Rochdale Drinks</i>	<i>Commissioners for HM Revenue &amp; Customs v Rochdale Drinks Distributors Ltd</i> [2011] ECA Civ 1116
<i>Brown Bear Foods</i>	<i>Re: Brown Bear Foods Ltd</i> [2014] EWHC 1132 (Ch)
Ward Brothers	<i>Ward Brothers (Malton) Ltd v Middleton</i> UKEAT/0249/13/RN