

CORPORATE
INSOLVENCY:
EMPLOYMENT AND
PENSION RIGHTS

Fifth Edition

DAVID POLLARD

BLOOMSBURY

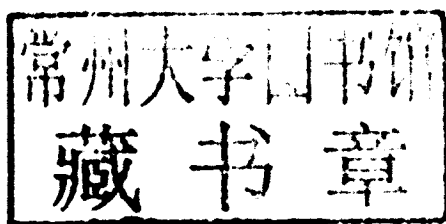
Corporate Insolvency: Employment and Pension Rights

Fifth Edition

David Pollard

Partner

Freshfields Bruckhaus Deringer LLP



Bloomsbury Professional

Bloomsbury Professional Ltd, Maxwellton House, 41–43 Boltro Road, Haywards Heath, West Sussex, RH16 1BJ

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First edition: 1994 (Tolley Publishing)

Second edition: 2000 (Butterworths)

Third edition: 2007 (Tottel Publishing)

Fourth edition: 2009 (Bloomsbury Professional)

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ISBN: 978 1 84766 887 5

Typeset by Phoenix Photosetting, Chatham, Kent

Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon, CR0 4YY

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Fifth Edition

Preface

The aim of this book is to bridge the gap between what have generally been regarded as three separate legal disciplines. Legal practitioners, whether solicitors or barristers, have tended to specialise in one area only, whether it be pensions law, employment law or insolvency law. Each of these areas is covered by its own legal books and literature although the pensions area has seen the least by way of legal literature.

This division into distinct specialisations has tended to mean that difficulties can arise at the stage where two or more areas meet. The purpose of this book is to draw out the legal principles applicable where the different legal regimes interact.

Although a brief overview of employment law and insolvency principles is given, the basic law in each of the three areas concerned is dealt with in more depth in other, readily available, works. Instead, this book focuses on the application of the rules relating to corporate insolvency and how they impact on employees and pensions. For example, how is the position of employees affected by the appointment of an insolvency practitioner over their employing company? Who is liable and what priority is given to past or future claims? This simple and everyday question leads to a complex legal analysis.

This book will have succeeded if it brings out the difficulties that can arise in these three areas, and gives practitioners a base on which to answer the questions that arise. Not least, it aims to bring together the statutory and other materials applicable in this area.

As in other areas, the law is becoming more and more complex.

Since the fourth edition appeared in 2009, there have been continual changes:

- determinations of the Pensions Regulator using its ‘moral hazard’ powers (mainly in insolvency cases);
- the issue on what is and what is not an insolvency expense (and so gets a super priority) has become increasingly confused. The Supreme Court is due to hear next year the Nortel/Lehmans case (on the status of financial support directions made after the insolvency starts). Hopefully this will clarify the position (partly arising from the unclear legislation and partly from difficulty in the case law);
- case law on who is or is not an employee or worker;
- case law on how to identify an employer for pensions purposes;

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- the new pensions auto-enrolment provisions;
- more cases on the moratorium on legal proceedings once an administration or court winding-up starts;
- cases on the new insolvency provisions in TUPE 2006 – again heading for the Supreme Court;
- clarification from the Court of Appeal as to when liability for an employee dismissed before a transfer will transfer to the transferee;
- changes to the employer debt provisions on pensions and case law clarifying how the debt calculation is to be carried out;
- the Equality Act 2010 and cases on the potential for joint and several liability on those who help unlawful discrimination.

This new fifth edition takes account of all these changes.

In practice the legislation is often confusing and unclear.

In some cases this can be the result of the drafter being faced with a rather vague EU Directive (are there any other kinds?) and deciding to follow it (rather than risk mis-interpreting it). I do have some sympathy for this, given the track record of the ECJ in delivering even vaguer ‘judgments’.

But in other cases, the problem is a pure UK ‘own goal’. Take the re-casting of the employee adoption provisions in administration by the Enterprise Act 2002. The Court of Appeal in *Krasner* castigated the new drafting as being ‘on any view ... unsatisfactory’ and a ‘thoroughly unsatisfactory piece of drafting’.

This is not rocket science. There is no good reason why the drafters cannot do better.

Many people have given me useful comments and suggestions. The mistakes, of course, remain my own. Thanks should go in particular to Alex Chiang. Thanks are also due to my colleagues at Freshfields Bruckhaus Deringer who gave comments: Dawn Heath, Andrew Murphy, Leanne Turner, Alexandra Fricke, Lindsay McLeod, Suhasini Gunasena, David Mendel, Harriet Sayer, Katharina Crinson and Claire O’Hare. Particular thanks must go to Ken Dierden whose advice (‘don’t do it’) was invaluable.

Last, but by no means least, this book is dedicated to my wife, Louise, and my children, Jessica, Elizabeth and Andrew. Their hope to be able to see me occasionally in the evening and at weekends, instead of losing me to the office, must be close to realisation.

The law is stated as at 28 January 2013.

David Pollard
Freshfields Bruckhaus Deringer LLP
London
28 January 2013
david.pollard@freshfields.com

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Abbreviations

Insolvency processes

CVA	Company voluntary arrangement
CVL	Creditors' voluntary liquidation
MVL	Members' voluntary liquidation

Legislation

ARD	Acquired Rights Directive
EPA	Employment Protection Act
EPCA	Employment Protection (Consolidation) Act
ERA	Employment Rights Act
IA	Insolvency Act
ICTA	Income and Corporation Taxes Act
IORP	Directive on Institutions for Occupational Retirement Provision (2003/41/EC)
ITEPA	Income Tax (Earnings and Pensions) Act
MFR	Minimum Funding Requirement
PA	Pensions Act
PSA	Pension Schemes Act
SI	Statutory Instrument
SSF	Scheme Specific Funding (Part 3, PA 2004)
SSPA	Social Security Pensions Act
TULRCA	Trade Union and Labour Relations (Consolidation) Act
TUPE	Transfer of Undertakings (Protection of Employment) Regulations
UCTA	Unfair Contract Terms Act
Employer Debt Regulations	The Occupational Pension Schemes (Employer Debt) Regulations 2005
MFR Regulations	The Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996
PPF Entry Rules Regulations	The Pension Protection Fund (Entry Rules) Regulations 2005

Scheme Funding Regulations The Occupational Pension Schemes (Scheme Funding) Regulations 2005

Courts/Tribunals

CA	Court of Appeal
CJEU	Court of Justice of the European Union (including the ECJ)
DC	Divisional Court
DP	Determinations Panel (of the Pensions Regulator)
EAT	Employment Appeal Tribunal
ECJ	European Court of Justice, now part of the Court of Justice of the European Union
ET	Employment Tribunal
HL	House of Lords (replaced as a judicial body by the Supreme Court from October 2009)
IT	Industrial Tribunal (became the ET from August 1998)
NIRC	National Industrial Relations Court
PC	Privy Council
SC	Supreme Court
UT	Upper Tribunal

Judges

C	Chancellor (replaced the Vice-Chancellor from October 2005)
CJ	Chief Justice (High Court)
J	Justice (High Court)
JSC	Justice of the Supreme Court
LJ	Lord Justice (Court of Appeal)
MR	Master of the Rolls
V-C	Vice-Chancellor

Other bodies

APL	Association of Pension Lawyers
BAS	Board of Actuarial Standards
BERR	Department for Business, Enterprise & Regulatory Reform (became BIS in June 2009)
BIS	Department for Business, Innovation and Skills (created in June 2009 by a merger of BERR and the Department for Innovation, Universities and Skills)
CAC	Central Arbitration Committee
DP	the Determinations Panel of TPR
DSS	Department of Social Security (became the DWP in June 2001)
DTI	Department of Trade and Industry (became BERR in June 2007)

DWP	Department for Work and Pensions
FAS	Financial Assistance Scheme
FMLC	Financial Markets Law Committee
HMRC	Her Majesty's Revenue and Customs
ILA	Insolvency Lawyers Association
IP	Insolvency Practitioner
IT	Independent Trustee
OPRA	Occupational Pensions Regulatory Authority (replaced by the Pensions Regulator in April 2005)
PPF	Pension Protection Fund
R3	the Association of Business Recovery Professionals
RPO	Redundancy Payments Office (of the Insolvency Service, an executive agency forming part of BIS)
SPI	Society of Practitioners of Insolvency (the SPI is now called 'R3' or the 'Association of Business Recovery Professionals')
TPR	the Pensions Regulator

CASE REFERENCES

AC	Appeal Cases
ACLC	Australian Company Law Cases
ACLR	Australian Company Law Reports
All ER	All England Law Reports
ALR	Australian Law Reports
BCC	British Company Cases
BCLC	Butterworths Company Law Cases
BPIR	Bankruptcy and Personal Insolvency Reports
CCPB	Canadian Cases on Pensions and Benefits
Ch	Chancery
CLR	Commonwealth Law Reports (Australian)
CMLR	Common Market Law Reports
CSOH	Court of Session (Outer House)
DLR	Dominion Law Reports (Canadian)
ECR	European Court Reports
Env LR	Environment Law Reports
Eq	Equity
EWCA	England and Wales, Court of Appeal
EWHC	England and Wales, High Court
FCA	Federal Court of Australia
HCA	High Court of Australia
ICR	Industrial Case Reports
IR	Irish Reports
IRLIB	Industrial Relations Legal Information Bulletin
IRLR	Industrial Relations Law Reports
ITELR	International Trust and Estates Law Reports
ITR	Industrial Tribunal Reports
JLR	Jersey Law Reports

Abbreviations

KB	King's Bench
NSWLR	New South Wales Law Reports
NZLR	New Zealand Law Reports
NZSC	New Zealand Superannuation Cases
OPLR	Occupational Pensions Law Reports
P	Probate
P&CR	Property and Compensation Reports
PLR	Pensions Law Reports
QB	Queen's Bench
SC	Scottish Cases
SCLR	Scottish Company Law Reports
SCR	Supreme Court Reports (Canada)
SLR	Singapore Law Reports
STC	Simon's Tax Cases
TLR	Times Law Reports
UKHL	United Kingdom, House of Lords
UKPC	Privy Council
UKSC	United Kingdom, Supreme Court
VR	Victorian Reports (Australian)
WLR	Weekly Law Reports
WN	Weekly Notes
WTLR	Wills and Trusts Law Reports

See generally the index 'Cardiff Index to Legal Abbreviations' (maintained by Cardiff University) at www.legalabbrevs.cardiff.ac.uk.

Useful websites

Organisation and website

APL:
www.apl.org.uk

Austlii
www.austlii.edu.au

BAILII:
www.bailii.org

CANLII
www.canlii.org/en/index.php

Cardiff Index to Legal
 Abbreviations
www.legalabbrevs.cardiff.ac.uk

ECJ
<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

Employment Appeal Tribunal
www.justice.gov.uk/tribunals/employmentappeals

Financial Markets Law Committee
www.fmlc.org

Freshfields Bruckhaus Deringer
 LLP
www.freshfields.com

HMRC Insolvency Manual
www.hmrc.gov.uk/manuals/insmanual

Details

Association of Pension Lawyers:
 The APL has a website and most of the papers given at its conferences find their way on to it. But you have to be a member to access them.

Australasian Legal Information Institute:
 Materials include copies of Australian cases (including state courts).

The newer British Isles equivalent of Austlii. It contains British and Irish case law and legislation, European Union case law, Law Commission reports, and other law-related British and Irish material.

Canadian Legal Information Institute:
 It provides copies of Canadian cases, including from the provinces.

Case citation index from Cardiff University.

Judgments of the European Court of Justice from 1997 (earlier case law is also available). The link is to the search form.

The EAT hears appeals from the Employment Tribunal (ET). The ET has jurisdiction in most employment matters and for discrimination cases.

Some papers on insolvency issues.

Publications page includes copies of various briefings. Includes many on employment and pensions issues.

Tax manual on insolvency issues.

Useful websites

Organisation and website

House of Lords
www.publications.parliament.uk/pa/ld/ldjudgmt.htm

Insolvency service
www.bis.gov.uk/insolvency

Legislation:
Office of Public Sector Information
www.opsi.gov.uk/legislation

NZLII
www.nzlii.org

Pensions Ombudsman
www.pensions-ombudsman.org.uk

Pension Protection Fund
www.pensionprotectionfund.org.uk

Pensions Regulator
www.thepensionsregulator.gov.uk

Privy Council
www.jcpc.gov.uk (from 2009)
www.privy-council.org.uk (1999 to 2009)

R3
www.r3.org.uk

National Archive Legislation
Database
www.statutelaw.gov.uk

Supreme Court
www.legislation.gov.uk/

Subscription needed:

Justis – UK official law reports.

Lexis Nexis – All England Law Reports etc.

Perspective/Pendragon – a commercial site dedicated to pensions. Includes a ‘timetravel’ option to see what was in force on earlier dates.

PLC (Practical law for Companies) – includes a pensions section.

Details

This page lists Html versions of all House of Lords judgments delivered since 14 November 1996. Not searchable (but try BAILII). From October 2009, see the Supreme Court website.

The Insolvency Service is an Executive Agency of the Department for Business, Innovation and Skills (BIS).

This site provides links to the full text of all UK Parliament Public General Acts (from 1988 onwards) and all statutory instruments (from 1987 onwards) as they were originally enacted. For more recent legislation, the explanatory memorandum is also available.

The New Zealand equivalent of Austlii and Bailii. Includes New Zealand court decisions.

Includes determinations of the Ombudsman in a searchable form.

Includes materials for insolvency practitioners, trustees and employers.

Includes various codes of practice and guidance. Also the decisions of the Determinations Panel.

Privy Council judgments since 1999 (yes, there are still some appeals, notably from the Isle of Man, the various Channel Isles, Jamaica, Mauritius, the Cayman Islands, Bermuda, Gibraltar and Brunei).

Association of Business Recovery Professionals.

The National Archive (which includes HMSO) publishes copies of the official version of legislation. In the main this is as originally enacted, but in some cases references to later amendments are included.

The Supreme Court took over from the House of Lords in relation to legal appeals from October 2009. Supreme Court decisions are on this website.

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