Snoozebox summary

Raquel Agnello KC and Anna Scharnetzky acted for Snoozebox Limited (the **Company**).

Mr Richard Farnhill (sitting as a Deputy High Court Judge) handed down judgment on 17 April 2023 granting the Company's claim for a declaration that any fine, which the Company might be ordered to pay in pending criminal proceedings, would not be recoverable.

In summary, the Company sought declarations that the Health and Safety Executive (the **HSE**) and HM Treasury (**HMT**) were bound by a CVA approved by the Company's creditors on 16 February 2018 and further that the Company's liability to pay any fine or prosecution costs award, which might be imposed in pending criminal proceedings, had already been compromised and released under the CVA.

The criminal proceedings relate to health and safety offences allegedly committed by the Company in August 2016. They were brought by the HSE in November 2018 following a mandatory investigation. The criminal trial is due to take place in May 2023.

The CVA had been proposed by the Company's administrators. It was unanimously approved by the Company's creditors on 16 February 2018. The administrators had given notice of the creditors' meeting to the HSE, but not to HMT. Neither the HSE nor HMT nor any other government department sought to vote (or subsequently to prove) in respect of any fine or prosecution costs, which the Company might be ordered to pay in future criminal proceedings. Following approval of the CVA, the entire issued share capital in the Company was sold and the Company continued under new ownership and management.

HMT and the HSE argued that notice of the CVA should have been given to HMT. They contended, relying upon *Re Pascoe* [1944] 1 Ch 310, that a criminal fine is a debt of record due to the Crown and would ultimately be paid into the consolidated fund administered by HMT. The Judge rejected that position and, accepting the Company's submissions, held that the HSE, as prosecutor of any criminal proceedings, was the correct emanation of the Crown for the purposes of the CVA in respect of both the fine and prosecution costs.

Relying on *Re Nortel* [2013] UKSC 52, the Judge further held that, as at the date of the CVA, the Company had been "well within the penumbra of criminal prosecution" and that "the prospect of liability was sufficiently real" to render any potential fine a contingent liability. The Judge rejected HMT's submission that a fine should not be capable of compromise by a CVA on grounds of public policy. He concluded that the Company's contingent liability to pay such potential fine had been compromised and released under the CVA. As a result, even if a fine were imposed against the Company following the criminal trial, it would not be open to the Crown to collect or enforce such fine.

As regards prosecution costs, the Judge considered himself bound by the remarks of Lords Neuberger and Sumption in *Re Nortel GmbH* [2013] UKSC 52 made in the context of overruling a line of cases, which had held that a liability under a costs order made after an insolvency event was not a contingent liability capable of proof as, at the date of the insolvency event, it depended upon the court's exercise of discretion. The Judge interpreted those remarks (at [89] and [135] of *Re Nortel*) as laying down a universal rule that a person can *only* come under a contingent liability for costs once proceedings have been commenced. On that basis, he concluded that, as at the date of the CVA, the Company had not been under a contingent liability to pay prosecution costs given that the HSE's criminal proceedings had not then been underway.

The Judge's reading of those passages in *Re Nortel* is open to doubt. Any such universal rule would be contrary to Lord Neuberger's earlier formulation of a general test for contingent liabilities in *Re Nortel.*

Moreover, it is difficult to see how different "trigger" points for the Company's contingent liabilities to pay prosecution costs and the fine can be justified. The likelihood of the Company being ordered to pay a fine or prosecution costs was materially identical. Both were parasitic upon a successful prosecution. The Judge refused permission to appeal this point.

The judgment in *Snoozebox Limited v The Health and Safety Executive and His Majesty's Treasury* [2023] EWHC 851 (Ch) can be found **here.**

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