



## **Commercial and Insolvency Update October 17**

### Duress and Undue Influence: Signing a Tomlin Order

#### Hieber v Duckworth (Liquidator of Hieber Ltd) (Unreported, 20 June 2017)

The High Court has indicated that insolvency practitioners need to be wary of signs of duress and undue influence exerted on those who are signing settlement agreements. If insolvency practitioners are put on notice of a risk of undue influence and duress, they must take reasonable steps in relation to that risk. Otherwise, such agreements fall to be set aside.

In this case, the defendant Liquidator sought to recover almost £86,000 paid as unlawful dividends to the husband and wife operators of Hieber Ltd.

Initially, an insolvency practitioner communicated with the Liquidator on the couple's behalf. Later, a direct access barrister informed the Liquidator that he was instructed by Mrs Hieber alone. Subsequently, a third advisor (M), who purported to act on behalf of both Mr and Mrs Hieber, proposed a settlement whereby Mr Hieber would pay £30,000 in instalments and Mrs Hieber would grant a charge over her property limited to £11,800. The Liquidator accepted this offer and a Tomlin order was signed by Mr and Mrs Hieber and emailed to the Liquidator's solicitor from Mrs Hieber's email address.

Mr Hieber subsequently died. It emerged that Mrs Hieber had played no active role in the company and was unaware that she had been the company secretary and a shareholder. Mr Hieber had been a violent and abusive



alcoholic and had bullied and physically abused her. Mrs Hieber submitted that she had never met M, had never authorised him to seek a settlement on her behalf, and had never emailed the Liquidator. She accepted that she had signed the Tomlin order but only under duress.

Deputy Registrar Garwood held that the events had put the Liquidator and his solicitor on notice of possible undue influence and that they had failed to take reasonable steps in relation to that possibility, *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44 considered. Reasonable steps would have included ensuring that Mrs Hieber understood the transaction and establishing that M was authorised by Mrs Hieber.

The court also considered the application of the so-called rule in *ex parte James (Condon ex parte James, Re (1837-74) LR 9 Ch. App. 609)* regarding unjust enrichment. Deputy Registrar Garwood found that, even if not for the reasons of duress and undue influence, the Tomlin order fell to be set aside as a result of this rule. It would be unfair for the Liquidator to rely on his strict legal rights, as the result would be an unjustified enrichment to the company. This decision confirms that the *ex parte James* rule remains a powerful tool in modern insolvency disputes.

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