

## **Staying a bankruptcy petition for an IVA and that Tomlin Orders can be subject to CCA regulation**

In the case of *Gertner and another v CFL Finance Ltd* [2020] EWHC 1241 (Ch), the High Court held that the creditor's bankruptcy petition against Mr. Gertner should be stayed in favour of an Individual Voluntary Arrangement (IVA) as long as the 'good faith' principle had not been breached. The High Court also held that although the Tomlin Order (settlement agreement) was not regulated by the Consumer Credit Act (CCA) in this case, other Tomlin Orders in general would not cause the CCA to cease to apply if it otherwise did apply.

### **Background**

CFL Finance Limited (CFL) had applied to make Mr. Gertner (Gertner) bankrupt following missed payments under a Tomlin Order made in 2011 for a debt that he had personally guaranteed. A bankruptcy petition hearing was scheduled for 23 November 2015. At that time, Gertner made a proposal to enter into an IVA where creditors would receive 0.07p in the pound, which would have been a better result than in bankruptcy. This was originally accepted by one of the creditors – 'Kaupthing' who was Gertner's largest creditor by value (90%).

After this time, Kaupthing had entered into a settlement agreement separately with Gertner and others, which CFL was not aware of. CFL were unhappy with this and challenged it under s262 of the Insolvency Act 1986 on the basis that there had been a 'material irregularity' due to the agreement benefiting Kaupthing, but not the other creditors. The court accepted this and CFL set out to resume the bankruptcy petition against Gertner.

By this time, Kaupthing had assigned the debt to Laser Trust. Gertner applied for the bankruptcy petition to be stayed on the basis of a second IVA for creditors receive 0.43 pence (the funds would largely come from a third party), but CFL opposed this arguing that Laser Trust should not be permitted to vote because similar to the first IVA, it would breach the good faith principle and it would be an abuse of process for the second IVA to be proposed by Gertner, as the first IVA had been successfully challenged.

Judge Briggs of the Chief Insolvency and Companies Court rejected Gertner's arguments because he felt the second proposed IVA was in breach of the 'good faith' principle, which Judge Briggs commented "*The need for transparency goes hand-in-hand with the good faith principle. Without transparency there can be no good faith.*"

Judge Briggs rejected the proposed second IVA. Gertner and Laser Trust appealed against the Bankruptcy Order on several grounds, the main grounds being that Judge Briggs had erred in refusing to stay proceedings on the petition so as to enable a proposal for an IVA supported by Laser Trust who was Gertner's largest creditor by value (90%), and that the Tomlin Order originally made between CFL and Gertner did not comply with the Consumer Credit Act (CCA) and was therefore, unenforceable.

### **The Court's decision**

#### **Stay of the bankruptcy petition**

The High Court considered numerous case law decisions regarding the good faith rule and after a detailed analysis, Marcus Smith J concluded that there had not been a breach of the good faith rule – just because Laser Trust had been assigned the debt from Kaupthing (who had been found to have breached the good faith principle) did not mean that Laser Trust were tainted by Kaupthing's conduct.

In turn, the High Court overturned Judge Briggs' original decision and allowed for the bankruptcy petition to be stayed in order for Gertner's creditors to vote in an IVA. In this way, the creditors were to receive 0.43 pence in the pound compared to nothing in bankruptcy.

### Tomlin Orders and the CCA

Section 173 of the CCA stops parties from contracting out of the effect of the CCA and states that the Act applies to "agreements". Considering whether the settlement agreement in question could not be subject to the effect of the CCA because it was appended to a Tomlin Order, the Judge said:

*"Whilst a Tomlin order causes the proceedings between the parties to remain live for the purposes of enforcement of the settlement, the fact that a contractual settlement is appended to an order staying proceedings save for the purpose of carrying the terms of the settlement into effect does nothing to change the contractual nature of the compromise between the parties. The scheduled terms to a Tomlin order form, notwithstanding the related order of the court, a contractual agreement. I can see no reason why the fact that a contractual agreement is scheduled to a Tomlin order would cause the Consumer Credit Act to cease to apply if it otherwise did apply."*

### **Comments**

This case highlights the potential position that some clients might be in – where some creditors want to avoid bankruptcy so that a debtor could enter into an IVA in order for creditors to receive some sort of dividend as opposed to no money in a bankruptcy after the trustee's fees have been paid. For some clients, staying a bankruptcy petition to vote in an IVA could be a realistic option and should be considered as part of the debt advice process where appropriate.

The main principles to come from the case:

- Where majority creditors seek a stay to a bankruptcy petition to vote in an IVA, the court should not refuse the stay unless a breach of the good faith rule can be established.
- On the facts, the settlement agreement in the Tomlin order was not a credit agreement, and therefore not a regulated credit agreement under the CCA (but this does not mean that all settlement agreements are excluded from CCA regulation).