A YEAR IN THE LIFE OF ADMINISTRATION

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The Insolvency Act 1986 shall be referred to as the IA 1986
Schedule B1 to the Insolvency Act shall be referred to as Sch B1
The Insolvency Rules 1986 shall be referred to in abbreviated form (Rules or simply r.)

Appointments

1. At last year's seminar we explained that there was a great deal of uncertainty regarding challenges to out of court appointments. Since the seminar there have been several more cases where the courts have had to decide the consequences of a failure to follow the appointment procedure with precision. In *Euromaster Limited* [2013] 1 BCLC 273 Norris J noted:

   "This is a complex and technical area of the law containing conflicting decisions, all delivered under pressure of time and after hearing arguments on one side only."

2. There have also been some decisions that were delivered after hearing arguments from two sides: *Minmar*, *Kaupthing Capital Partners II Master LP Inc* and *Msaada Group*.

The literal and purposive approach to construing the legislative provisions

3. The purpose of introducing an out of court procedure was to streamline the appointment process, reducing time and cost.

4. It is worth remembering how the minister explained the out of court provisions to the House of Commons at the second reading of Bill which received Royal Assent on 7 November 2002 to become the Enterprise Act 2002:

   > "…I reassure the House that the intention in company insolvencies is to disengage from active involvement of the courts except in cases where there is a dispute or complexity….in future, both floating charge holders and the company itself will be able to appoint an administrator without a court hearing. The administrator will have extensive powers to deal with cases quickly without reference to the courts."

5. In *Euromaster Limited* Norris J commented:

   "The Explanatory Notes to the Enterprise Act 2002 explain (at paragraph 643) that the procedure has been amended to "streamline the process" in particular by "the introduction of non-court routes into administration" because it was recognized that the existing procedure "was to a degree cumbersome". Mr Warents, Counsel for the Applicants, submitted that if this was the policy objective then it would be wrong to riddle the out-of-Court process with a myriad of technical traps which might catch out all but the most cautious of appointors."

   There is authority for the proposition that Explanatory Notes may aid construction of a statute see *R (Westminster City Council) v National Asylum Service* [2002] UKHL 38, [2002] 4 All ER 654, [2003] LGR 23):

   "The starting point is that language in all legal texts conveys meaning according to the context in which it is used. It follows that the context must always be identified and considered before the process of construction or during it . . . . Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute and the mischief at which it is aimed such materials are therefore always admissible aids to construction. They may be admitted for whatever logical value they have."

6. Most of the cases where judgments have been delivered under pressure of time have not referred to the Explanatory Notes.

7. The difficulties that have emerged in the reported cases often arise after an appointment is made and regulatory checks reveal an error such as a failure to serve the company or other persons prescribed in r 2.20(2) of the Rules (in *Hill v Stokes*, to landlords who were distraining (r 2.20(2)(a)) and in *Virtualpurple*, to the company (r 2.20(2)(d)) as required by para 26(2) of Sch B1.). The outcome of the case has largely depended the court's view of paragraph 28 of Sch B1. This paragraph provides that an appointment 'may not be made under paragraph 22 unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27 of Sch B1'.

8. It is useful to consider some of the limitations on the exercise of the power to appoint administrators out of court. These were explained by Norris J in *Euromaster Limited*:

   "Paragraph 14 of Sch B1 confers upon the holder of a qualifying charge the power to appoint an administrator. Paragraph 16 of Sch B1 says "an administrator may not be appointed" under paragraph 14 whilst the floating charge on which the appointment relies is not enforceable (either because the instrument is invalid or is void for want of registration, or because no event of default has occurred). Paragraph 17 of Sch B1 says that "an administrator may not be appointed" if there is a provisional liquidator or administrative receiver in office (because it is not possible to have concurrent regimes in place).

   Paragraph 22 of Sch B1 confers on the company and on its directors the power to appoint an administrator. Paragraph 25 says that "an administrator may not be appointed" if there is an extant winding-up petition or administration application or an administrative receiver is in office (because again it is not possible to have in place concurrent regimes). Paragraph 28(1) says that "an appointment may not be made" unless the notice requirements set out in paragraphs 26 and 27 have been complied with."

9. Accordingly the legislative provisions give the directors of a company the power to appoint administrators out of court. In order to do so they have to complete, serve and file the relevant court forms and giving the prescribed notice to prescribed persons. Paragraph 26 of the same Sch B1 provides:

   "26(1) A person who proposes to make an appointment under paragraph 22 shall give at least five business days' written notice to –

   (a) any person who is or may be entitled to appoint an administrative receiver of the company, and

   (b) any person who is or may be entitled to appoint an administrator of the company under paragraph 14.

   (2) A person who proposes to make an appointment under paragraph 22 shall also give such notice as may be prescribed to such other persons as may be prescribed.

   (3) A notice under this paragraph must –

   (a) identify the proposed administrator, and
   (b) be in the prescribed form."

10. The persons described under subparagraph 26(2) are prescribed in r 2.20 which starts by indicating the relevant form:

    "2.20 Notice of Intention to Appoint -

    (1) The notice of intention to appoint an administrator for the purposes of paragraph 26 shall be in Form 2.8B.

    (2) A copy of the notice of intention to appoint must, in addition to the persons specified in paragraph 26, be given to –

(a) any enforcement officer who, to the knowledge of the person giving the notice, is charged with execution or other legal process against the company;

(b) any person who, to the knowledge of the person giving the notice, has distrained against the company or its property;

(c) any supervisor of a voluntary arrangement under Part I of the Act; and

(d) the company, if the company is not intending to make the appointment."

11. The prescribed service provisions are dealt with by r 2.23 of the Rules which reads:

2.23(1) The notice of appointment for the purposes of an appointment under paragraph 22 shall be in Form 2.9B or Form 2.10B, as appropriate."

12. One issue has been establishing what is 'appropriate' in the circumstances of any particular case. Some Judges have considered the prescribed forms to assist, but others have decided that the prescribed forms do not assist. The prescribed forms appear in Schedule 4 to the Rules and the heading to Form 2.9B reads as follows:

"Notice of appointment of an administrator by company or director(s). (Where a notice of intention to appoint has been issued)."

13. The comparable heading for Form 2.10B is this:

"Notice of appointment of an administrator by company or director(s). (Where a notice of intention to appoint has not been issued)"

14. The issue of defective or invalid appointments first came to the attention of the insolvency community in *Re G-Tech Construction Ltd* [2007] BPIR 1275, where the court found that the appointment of administrators was invalid as the wrong prescribed notice of appointment had been filed at court. The error was accidental, technical and no one suffered any prejudice. The Judge said "The result [of using the wrong form] was that the court has never received a form in the Form 2.10B which is a necessary pre-requisite of an appointment taking effect under paragraph 31 of Sched B1."

15. The court found that there was no jurisdiction to waive that error whether under r.7.55 of the Rules, under para. 104 Sch B1 or otherwise. The Judge did grant an order appointing the administrators with retrospective effect. The question of whether an error could be waived has arisen many times since this decision and (although it may be dangerous to voice a firm view in this area) it could be said that the issue is much clearer: see below.

16. In *Blights Builders Ltd* [2007] 3 All ER 776 the court was asked to decide a timing point. An out of court appointment was made after a petition had been presented but before it had been sealed and before it had been returned for service. The Court held that the petition had been "presented" for the purposes of para. 25 Sch B1 when it was delivered to court for sealing and issue; as a result the appointment of administrators was invalid. An invalid appointment could not be remedied under the Rule. A practical solution was found.

17. *Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 concerned a limited liability partnership. The issue of the right form arose again. Administrators were appointed out of Court but the appointment process was completed by use of Form 2.10B and it should have been by use of Form 1B which was applicable to limited liability partnerships. It was submitted that "if the wrong form was used, the appointment was simply invalid for the reasons given by Hart J. In Re G-Tech Construction Ltd....use of the prescribed from is mandatory." The court found the appointment to be invalid but permitted a retrospective order appointing the administrators to be made. There was no jurisdiction (the court found) to correct any errors "since relief can only be granted once insolvency proceedings have begun. If the appointment is invalid, there are no insolvency proceedings. Thus in the case of a fundamental flaw going to the validity of the appointment itself, neither r7.55 of the Rules, nor para 104 of Sched B1 can be applied."

18. *Hill Pope v Stokes* [2011] BCC 473 (*Hill v Stokes*) was a Bristol case heard by HHJ McCahill QC and involved a notice point. The directors of the company served notice of intention to appoint on a QFCH and on the company itself on 19 October and, with the consent of the QFCH, appointed the administrators under paragraph 22 on 20 October. However the directors failed to give a copy of the notice to the landlords of 4 properties occupied by the company, who had distrained (which was known to the directors), and on the bailiffs, as required by paragraph 26 (2) of Sch B1. The error was spotted relatively swiftly in or around the start of November, however the administrators had in the short period since their appointment closed 20 stores, made various employees redundant and sold 8 other stores. An application for a declaration as to validity of appointment was made on notice to the company and the QFCH. The court found that paragraph 28(1) of Sch B1 referred to para 26(1) only and in any event a 'flexible approach' should be taken to its analysis of non compliance. A failure to notify was not a mandatory requirement and non-compliance was therefore not fatal to the validity of the appointment.

19. However *in Minmar Limited v Khalatschi* [2012] 1 BCLC 798 (*Minmar*) in which *Hill v Stokes* was not cited, the Chancellor of the High Court had held, in an obiter passage, that administrators had not been validly appointed where notice of intention had not been given to the company, even though there was no floating charge holder to whom notice under para 26(1) of Sch B1 was required. The main issue in *Minmar* was whether the failure to obtain a valid board resolution prior to the appointment of administrators, would preclude other directors of the company from making a valid appointment. The court found that the company's internal regulations had to be obeyed.

20. A failure to serve the company was directly in issue in *Re Derfshaw Limited* [2011] EWHC 1565 where the court made retrospective orders after declaring the appointments (7 different cases were consolidated) invalid for failure to serve the Company.

21. There were subsequent cases[1] of failure to give proper notice to interested persons and in *Re Bezier Acquisitions Ltd* [2011] EWHC 3299 the court was again asked to consider the consequences of a failure to serve the company. The decision was based on agency so the court found that the company had been served as the notice to appoint was handed to a trainee of the company's solicitor at a meeting. The solicitors were the agent of the Company. The outcome was therefore fact specific but it is the approach of Norris J that stands out: he focused on the consequences of non-compliance and, when taking into account those consequences, considered whether Parliament intended the outcome of non-compliance to be total invalidity.

22. In doing so he relied on *R v Soneji* [2005] 4 All ER 321, [2006] 1 AC 340 where Lord Steyn outlined the problem to construction of statutes, and an earlier approach to it which had been adopted by the courts (at [14]):

> 'A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory; a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance …'

23. Lord Steyn explained that the speech of Lord Hailsham LC in *London & Clydeside Estates Ltd v Aberdeen DC* [1979] 3 All ER 876 at 883, [1980] 1 WLR 182 at 189–190 led to 'the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity'.

[1] Re *Fontsworth* (Witham) Ltd [2011] EWHC 1668; Re Care Matters Partnership Ltd [2011] EWHC 2543; *Adjei and others v Law for All* [2011] EWHC 2672

24. When adopting this approach the Judge paid attention to the statutory language drawing a distinction between its mandatory and directory nature and commented: ‘As a separate and independent ground I hold that IR 2.8 is to be construed in the sense that Parliament did not intend, that a failure strictly to comply with the rule as to service of the Notice of Intention at the registered office, should invalidate the giving of notice where at a valid meeting of the directors of the company (a) it was resolved that the company enter administration and that Notice of Intention to Appoint be given and (b) an agent was appointed to act on behalf of the company in respect of the appointment of the administrators (that engagement to include the taking receipt of, and dealing on the company’s behalf with, all relevant notices and formal documentation)’. The evidence was that all the directors and shareholders were aware of and consented to the proposed appointment.

25. There was no QFCH to serve in *Virtualpurple* [2011] EWHC 3487 and the directors appointed without serving the Company. As in *Hill v Stokes* the court adopted a purposive approach. Reading paragraph 26 and 28 of Sch B1 consistently with other provisions and with an eye on the purpose for which they had been enacted, directors could proceed to make an immediate appointment without giving 'notice of intention' to the company. Paragraph 28 of Sch B1 provided that an appointment might not be made by a director 'unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27'. The reference to 'paragraph 26' was a reference to para 26(1) alone.

26. The court found that as a matter of strict construction there was a strong indication that the draftsman had contemplated two scenarios. One in which notice of intention had to be given to a qualifying chargeholder and another in which no such notice had to be given. Paragraph 30 of Sch B1 dealt with the contents of the statutory declaration that had to be contained in the prescribed form 'in a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) and paragraph 28 therefore does not apply'. That indicated that para 28 was intended only to apply where there was someone who was entitled to appoint an administrative receiver of the company or there was a qualifying chargeholder. If that was so then the reference in para 28 to 'paragraph 26' had to be read as a reference to 'paragraph 26(1)'. Further, that reading was reinforced by the requirement of r 20.2(1) of the Rules and the nature of the prescribed forms such as form 2.8B, 2.9B and 2.10B. Reading the Rules in that way made functional sense. Furthermore, notice of intention to appoint, with no prescribed minimum period, was without function if the appointment was immediate and the notice of the appointment immediate.

27. But a different approach was taken in *National Westminster Bank Plc v Msaada Group (a firm)* [2012] 2 BCLC 342 where there was no QFCH (equivalent) to serve but the partnership was subject to a voluntary arrangement and the partners failed to serve the supervisor. The court rejected each of the reasons relied upon by court in *Hill v Stokes* (and thus the reasoning in *Re Bezier*) for concluding that in para 28(1), the reference to para 26 should in fact be read as a reference only to para 26(1), such that there was no need to serve a copy of the notice of intention to appoint on those prescribed persons if there was no qualifying chargeholder who had to be served with notice of intention to appoint under para 26(1). Warren J rejected the purposive approach to construction:

    “In any case, as the Judge himself described matters, the necessary flexibility which he considered desirable was to enable the court to correct minor defects in form rather than substantial defects of substance. Thus the use of the word “must” in various provisions had been taken as directory rather than mandatory. But the wording in the present case leaves no room for that approach. Paragraph 28 is quite clear in saying that an appointment may not be made unless the requirements referred to in paragraph 26) have been satisfied. The question is what, as a matter of construction, those requirements are; and that is not, I consider, a matter which can properly be decided by reference to what the court might see as a “desirable flexibility”.”

28. Accordingly, the court found that the persons listed in Rule 2.20(2) are prescribed for the purposes of paragraph 26(2) even where no notice needs to be given under paragraph 26(1). It found, in concurrence with the reasoning of the Chancellor in *Minmar*, that the clear words of paragraphs 26 and 28 should be followed. A literal approach and not a purposive approach was appropriate.

29. In *MF Global Limited* [2012] EWHC 1091 the court expressed regret that there was a divergence of views with *Hill v Stokes* and *Virtualpurple* on one side of the line and *Minmar* and *Msaada* on the other.

30. There can be difficulties where a company is governed by the Financial Conduct Authority (formerly the FSA). Section 362A of the Financial Services and Markets Act 2000, so far as material, provides: '…(2) An administrator of the company may not be appointed under paragraph 22 of Sch B1 to the 1986 Act [or paragraph 23 of Sch B1 to the 1989 Order] without the consent of the Authority…(4) In a case where no notice of intention to appoint is required (a) subsection (3)(b) shall not apply, but (b) consent under subsection (2) must accompany the notice of appointment filed under paragraph 29 of [Schedule B1 to the 1986 Act or paragraph 30 of Sch B1 to the 1989 Order].'

31. In *Re Ceart Risk Services Limited* [2012] 2 BCLC 645 the company was authorised by the then FSA to carry on non-investment insurance intermediation for retail and commercial customers. On the same date, it was resolved at a general meeting that the company should be placed into administration and that the administrators should be appointed as joint administrators. Also on the same day, the company, without obtaining the consent of the FSA, filed a notice of appointment of the administrators pursuant to para 22 of Sch B1 to the IA 1986. The FSA subsequently wrote to the administrators drawing their attention to s 362A of the Financial Services and Markets Act 2000 (the 2000 Act) and inviting them to write to the FSA as a matter of urgency to provide information and to seek the FSA's consent to their appointment as administrators of the company. The administrators sent two letters to the FSA providing the information which it had requested and seeking the FSA's consent to their appointment.

32. Subsequently the FSA wrote to the administrators giving its consent to their appointment as administrators of the company. Section 362A(4) of the 2000 Act provided that: 'In a case where no notice of intention to appoint is required (a) subsection (3)(b) shall not apply, but (b) consent under subsection (2) must accompany the notice of appointment filed under paragraph 29 of Sch B1 or paragraph 30 of Sch B1.' The administrators contended that that the FSA's consent was subsequently filed with the court, in compliance with s 362A(4)(b) of the 2000 Act. The applicants, who were the sole owner and director of the company and the administrators of the company, applied for a declaration that the administrators had been validly appointed under para 22 of Sch B1 to the 1986 Act, notwithstanding a failure to obtain the prior consent of the FSA to the appointment.

33. The court found that whilst the requirement to obtain the FSA's consent was an important one, it did not follow that it was essential to obtain such consent prior to the appointment of an administrator. If the need to obtain the FSA's consent was overlooked prior to the appointment, it remained possible to seek and obtain the FSA's consent after the event. Accordingly the appointment of the administrators had taken effect when the FSA's consent to their appointment was filed with the court.

34. Since the last insolvency seminar the courts have heard a case where there was failure to give notice to a prior QFCH and another case where there was a failure to serve the company: *Eco Link Resources Limited* and *BXL Services Limited* [2012] 1877. In the latter case HHJ Purle QC commented that 'it was settled law that the failure to give notice of an intended appointment to one of the parties prescribed under para 26(2) of Sch B1 of the Act did not invalidate the appointment, even assuming that such notice was required'.

35. The story in *Euromaster Limited* was that after administrators were appointed, and after they had effected a pre-pack sale, the administrators noticed that the directors filed the appointment documents at court on the 11th business day after the filing of the notice of intention to appoint. The case therefore raised the question whether the appointment of the administrators was "a nullity".

36. The Judge expressed his view that "the question to be addressed is whether, if appointment is made in breach of the restriction in para 28(2) the appointment (a) has no legal effect because it is a nullity or (b) has some conditional effect because it is defective or irregular and the irregularity

may be regarded as curable. The court found that it could not answer that question without at least having in mind consideration of whether the use of very much the same language in relation to the imposition of other restrictions means that the same answer must be given in every case, or whether a failure to observe the restriction might in one case lead to a nullity and in another lead to a merely defective appointment."

37. Norris J. reviewed a considerable amount of the case law and found (adopting the purposive approach) that the purpose of the 10-day window prescribed by para 28(2) of Sch B1 to the 1986 Act was to give the directors of an insolvent company the benefit of an interim moratorium in which to consider how to address the actual or imminent insolvency of the company in the event of the holder of a qualifying floating charge deciding not to exercise its power to appoint an administrator, and Parliament could not have intended that an inadvertent appointment one day outside the 10-day window would incurably invalidate the appointment of an administrator. Accordingly, non-compliance with the requirement of para 28 to file notice of appointment of an administrator within 10 business days from the date on which notice of intention to appoint was filed was an irregularity and did not result in the appointment being a nullity. Since the appointment of administrators was irregular, as opposed to being void, the position was governed by r 7.55, under which insolvency proceedings were not invalidated by any formal defect or by any irregularity unless substantial and irremediable injustice had been caused.

38. Accordingly in *Virtualpurple* the failure to give a copy of the notice of intention to appoint to the required person did not mean that the appointment was incurably invalid, but rather constituted a curable defect. In *Euromaster Limited* the service of a notice outside of the prescribed time limit did not mean that the appointment was incurably invalid, but rather it constituted a curable defect.

39. The purposive approach appears to be preferred on present authority.

Waiving defects

40. Paragraph 104 provides:

    'An act of the administrator of a company is valid in spite of a defect in his appointment or qualification.'

41. In *Ceart Risk Services Limited* the court considered as a second point, on the basis that if the court came to the conclusion that the administrators were not properly appointed, whether it could make a declaration pursuant to para 104 of Sch B1, that the administrators' acts prior to the date when they were properly appointed were valid. The Court followed the reasoning of Norris J in *Re Care Matters Partnership Ltd* [2012] 2 BCLC 311 as follows:

    '[6] Where there is a defect in the appointment of an administrator the judges at first instance are agreed that Insolvency Rule 7.55 cannot be used to waive the defect.

    [7] In *Re G-Tech Construction Ltd* [2007] BPIR 1275 Hart J took the view that the only course open was to make a fresh administration order with retrospective effect. In *Re Blights Builders Ltd* [2008] 1 BCLC 245, unaware of the decision in *Re G-Tech Construction Ltd*, I took a different course, making a fresh administration order with prospective effect and validating the acts of the administrator who had been defectively appointed under para 104 of Sch B1 to the Insolvency Act 1986. Hart J had also been invited to take this course but had held—"It is certainly the case that that provision plainly may [assist] in assessing the validity of acts done by a person purporting to be an administrator, but it does [not] seem to me to provide in itself a cure for the fact that … there has been no administration … if the requirements of paragraph 29 have not been complied with."

    [8] For my own part (and with considerable diffidence in differing from Hart J) I adhere to my view that para 104 may supply the answer in many cases. As Lord Simonds said (of similar provisions in s 143 of the Companies Act 1929 and art 88 of the then current Table A) in *Morris v Kanssen* [1946] 1 All ER 586 at 590–591, [1946] AC 459 at 471: "There is … a vital distinction between (*a*) an appointment in which there is a defect or, in other words a defective appointment, and (*b*) no appointment at all. In the first case, it is implied that some act is done which purports to be an

appointment but is by reason of some defect inadequate for the purpose: in the second case, there is not a defect; there is no act at all … the section and article alike deal with slips or irregularities in appointment, not with a total absence of appointment …" It may well be that para 104 is of no assistance where there is no power to make an appointment (for example because there is no valid charge in respect of which the power under para 14 of Sch B1 could be exercised, or the persons purporting to appoint an administrator under para 22 are not themselves directors). But it may well be that para 104 is of assistance where there is a power to make an appointment but that power has been defectively exercised through some irregularity in procedure.

[9] Mr Solomons and Mr Defty [the administrators] made (but did not pursue) an application for validation under para 104. Thus the point was not argued before me: and I am conscious (a) that both Proudman J in *Pillar Securitisation SARL v Spicer* [2010] EWHC 836 (Ch), [2010] All ER (D) 191 (Apr) and Henderson J in [*Frontsouth* (*Witham*) *Ltd* [2011] EWHC 1668 (Ch), [2012] 1 BCLC 818] accepted Hart J's view on para 104 without comment; and (b) that a wider debate ranges around s 232 Insolvency Act 1986. Having reflected on the matter I have decided that the only proper course for me to take in the circumstances is to accept (with the same misgivings voiced by Morgan J and Henderson J) that the jurisdiction identified in *Re G-Tech Construction Ltd* provides the only answer in the instant case, and to consider whether I may properly exercise it.'

42. Accordingly the court found that notwithstanding the defect in their appointment, the administrators' acts between the date when they took office and the date when the FSA's consent to their appointment was filed with the court were valid. The effect of para 104 of Sch B1 to the 1986 Act was to validate the administrators' acts during the intervening period.

Administration orders

43. Other than out of court appointments this past year has seen the Courts give some guidance on applications for administration orders. In *Bowen Travel Limited* [2012] EWHC 3405, the claimants were the majority of the board of directors of a company (the company). They sought an administration order and an order for the appointment of proposed joint administrators (the proposed administrators). A secured creditor (the creditor), expected to be the largest creditor, contended that the company should go into liquidation quickly so that investigations into the failure of the company and the conduct of its directors could be started without delay. It expressed concern as to the proposed administrators due to a potential conflict and proposed the appointment of another insolvency practitioner as a joint liquidator.

44. The court explained that the first question to be answered on an application such as this was whether there was a real prospect that an administration would produce a better result for the creditors than a winding up. That question, when answered, did not lead to an automatic order one way or the other because the court was given a discretionary power to make such order as was just in all the circumstances of the case. It was important not to lose sight of the discretion the court had which would be answered when taking into account all the circumstances. On the facts of the case the court made a compulsory winding up order as an investigation as to the company's failings was important to the creditors.

45. The court reminded practitioners of the importance of ensuring that the court is given full and frank disclosure of information so it can make an informed decision:

"When the court is asked to exercise its powers under paragraph 13 of Schedule B1 to the Insolvency Act 1986 by making an administration order, it is, in my judgment, essential that the evidence presented to the court is reliable. Implicit in the noun "reliable" in this context is not only that it is accurate evidence and true insofar as it is factual, but also that (1) a clear account is given of all potentially relevant facts and circumstances, and (2) where explanations are given or judgments, estimates or opinions are stated (a) they should be supported by the underlying material, and not contradicted by it, and (b) they should also be credible in the sense of being realistically likely to be true. Such a requirement should be neither onerous nor unreasonable. It requires no more than that an applicant, who, as a director, should know what has been going on at the company, tells the court the informed truth and does not attempt to mislead, including by omission."

46. The court also made a winding-up order in *UK Steelfixers Limited* [2012] EWHC 2409 where the court conjoined a winding-up petition and application for an administration order and found that voidable transactions after the date of the petition required investigation.

47. More recently the comment in *Bowen* about sufficient evidence was approved in *Integeral Limited* [2013] EWHC 164 where there was a competition between a winding-up order and an out of court administration appointment. A winding-up petition was presented on 25 July 2012 and an adjournment granted for 6 weeks at the hearing on 10 September 2012. Three days prior to the adjourned hearing on 22 October 2012 the sole director made an application for an administration order pursuant to paragraph 12(1) of Sch B1. The winding-up petition and the application for an administration order came on at the same time on 30 January 2013. The court made a winding-up order on the basis that there were real grounds for believing that the company might have claims against the director which would not be available in an administration, but which might well be available for the benefit of creditors if a winding-up order were made.

48. Of particular interest was the court's scrutiny of the administration proposal which was based on taking action against another company. The court considered the funding proposal and what the insolvency practitioner nominated as administrator thought about the prospects of the purpose of an administration being fulfilled. The court commented that it was of fundamental importance that any insolvency practitioner nominated as a potential administrator (an officer of the court) should give his opinion of the prospects for administration carefully and independently. Here, the supine approach of both practitioners and their failure to acknowledge the fundamental problems caused by some of the documentation together with the shortcomings in the proposals for funding the claim were so serious as to call into question their competence and independence from the sole director.

Investment Bank Special Administration Regulations 2011

49. Last year we spoke about a new administration process that resulted from the introduction of the Investment Bank Special Administration Regulations 2011. As a reminder the Government explanatory notes to the Investment Bank Special Administration Regulations 2011 no 245 (Regulations) explain:

> "The Government believes that there is a strong case for a SAR for investment firms to ensure that there is minimum disruption to financial markets as a result of their insolvency. It is important that client trust property is returned promptly on the insolvency of an investment firm in order to mitigate the possibility that clients are forced into financial difficulties themselves. The prompt return of client assets will also benefit the insolvent firm's unsecured creditors as their claims can be dealt with quicker and administration expenses will be reduced."

50. In *Heis and Others (Administrators of MF Global UK Ltd) v MF Global Inc* [2012] EWHC 3068 the Court was asked whether a default provision in a global master repurchase agreement made between the investment bank and a connected company was triggered by the appointment of special administrators in the UK. The relevant part of the default provision provided that an "Act of Insolvency….is the presentation of a petition for winding up or any analogous proceeding or the appointment of a liquidator or analogous officer of the Defaulting Party." The issue was whether entry into a special administration was an act of insolvency analogous to liquidation in the context of the master repurchase agreement. The court found that a special administration was not analogous as its sole purpose was not to bring the company's business to an end, collect in and distribute its assets.

51. It was not the correct approach to compare the outcome of a liquidation and the outcome of a special administration in order to determine whether or not they were analogous. They were distinct procedures with different aims and were generally relevant in different circumstances.

Powers and duties

52. In a similar way that companies are creatures of statute so is the law and procedure regarding insolvency. The IA 1986 with its accompanying schedules and the Rules form the frame within

which the Insolvency Practitioner operates. The duties of an office-holder will be referable to the Act and the Rules. In a similar way an administrator gains his powers from the Insolvency Act and Insolvency Rules. Nevertheless it would be a mistake to think that all duties and powers arise from the Act.

53. Administrators may be found to be personally liable for defaults for breaches of duty. In *MIR Steel UK Limited v Christopher Morris and ors* [2012] EWCA 1397 the court considered a claim made against administrators personally in relation to a hive down agreement. The case provides a salutary reminder that any exclusion of liability clauses in contracts binding administrators should be carefully and widely drafted. It is also interesting due to the consideration of the rule in *Said v Butt* [1920] 3KB 497 which was employed in *SCI Games Limited v Argonaut Plc* [2005] All ER 54 (D); [2005] EWHC 1403 where the administrators were sued for unlawfully interfering in the performance of the debtor company's contractual obligations. As a reminder the rule in *Said v Butt* is:

> "I hold that if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action in tort at the suit of the person whose contract has thereby been broken."

54. The claimant was engaged by a steel manufacturing company (the company) to purchase the parts required to assemble a hot strip mill (the mill) to be used by the company for the production of hot rolled steel products. The arrangements in relation to the mill were set out in a contract letter (the mill contract) between the claimant and the company, which expressed that the mill, which was movable, remained the property of the claimant and that the company had no property or other rights in it save the right to use it to roll steel and produce resulting products. In 2007, the company went into administration and administrators were appointed. The second defendant (LL) made an offer to purchase the assets of the company and the administrators were asked to confirm whether they were entitled to dispose of the mill as part of the assets of the company. The administrators did not respond. In the result, an agreement was reached under which LL purchased the assets of the company. It further provided that LL acknowledged the existence of a title dispute in regard to the mill and that LL would be responsible for settling any claims made against it. Subsequently, the first defendant (MIR) was incorporated, and the assets of the business of the company sold to LL were hived down to MIR under a hive down agreement (the hive down agreement). The parties to the hive down agreement were the company, the administrators and MIR.

55. The hive down agreement provided, inter alia, that MIR agreed that it would be responsible for the 'settling of any claim made against it' by the claimant in respect of the mill. The claimant issued proceedings against MIR and LL alleging conversion, claiming the delivery up of the mill and seeking damages. Further, the claimant alleged that MIR and LL induced or conspired a breach of the mill contract. MIR applied, pursuant to CPR Pt 20, to have the company and the administrators joined as defendants to the claimant's claim for inducing or conspiring a breach of the mill contract.

56. The claim failed and went to the Court of Appeal where it was contended that the hive down agreement had not precluded the proposed claim for contribution against the company and the administrators.

57. Clause 9.5 was decisive. It provided:

> "9.1 If any of the Assets are or shall be found to be subject to a lien, hire purchase, hire, loan, leasing or rental agreement or other encumbrance, the Purchaser shall take subject to it . . . .
>
> 9.3 The Purchaser acknowledges that it has had the opportunity to inspect the records of the Vendor to satisfy itself as to the position regarding the matters referred to in clause 9.1.
>
> 9.4 The Vendor and the Administrators warrant that they have not wilfully withheld any materials in their possession nor wilfully failed to supply any details held by them in relation to the interests of Lictor Anstalt in the hot strip mill situated at the Property.

9.5 *The purchaser agrees that it shall be responsible for settling any claim made against it by Lictor Anstalt in respect of the hot strip mill situated at the Property."* [Emphasis supplied]

58. The exclusion of personal liability clause included in the agreement provided:

"16.1 Except as expressly agreed including without limitation as agreed in clauses 9.2, 9.4, 11.2, 15, 22.1 and paragraph 11 of schedule 3, the Administrators shall incur no personal liability in any form. In particular, the Administrators shall incur no personal liability whatsoever under this Agreement or under any deed, instrument or document entered into under or in connection with it.

16.2 This exclusion of the Administrators' personal liability shall be in addition to and not in substitution for any right of indemnity or relief or remedy otherwise available to the Administrators and shall continue notwithstanding completion of this Agreement (in whole or in part).

16.3 The Administrators are parties to this Agreement in their personal capacities only for the purpose of receiving the benefit of the exclusions, limitations, undertakings, covenants and indemnities in their favour contained in this Agreement and for the limited purposes of providing specified undertakings and warranties."

59. The Court of Appeal found that clause 9.5 above properly construed meant that the administrators were not liable. The court did not go on to consider the interesting argument of *Said v Butt*. However the first instance decision found that the rule in *Said v Butt* was decisive in favour of the administrators who as a result avoided liability:

"As regards the claim for contribution against the administrators this in my judgment has no prospect of success. As earlier discussed, the rule in *Said v Butt* prevents a claim against the administrators in tort for inducing a breach of contract by Alphasteel. Equally, in my judgment, the same rule will defeat a claim on the same facts but repackaged, as Mr Tamlyn aptly described it, as a claim for unlawful means conspiracy. The essence of the rule is that agents are not to be liable for procuring their principal to act in breach of contract, provided they acted in good faith in the course of their agency, and it should make no difference whether the claim is made for inducing a breach of contract or for an unlawful means conspiracy."

60. By way of comment the first instance court refused to strike out a similar claim against administrators in *SCI Games Limited v Argonaut Plc* on the basis of *Said v Butt*, permitting the claim to continue to trial. It did strike out a claim on this basis in *MIR Steel* but the Court of Appeal did not need to consider the issue as it found in favour of the administrators based on a construction of the sale agreement. Nevertheless the *Said v Butt* principle has been considered by the Court of Appeal in a receivership context: *Welsh Development Agency v Export* [1999] BCC 270. In that case the Court of Appeal dismissed a claim against receivers on the ground that they could not be held liable for the tort of wrongful interference with any contract made by the company in receivership and a third party.

61. In a further word of warning an administrator of two companies was found to be personally liable for legal fees incurred by the companies during their administrations as a result of a failure to join the companies as defendants in the relevant court proceedings: *Wright Hassall v Morris* [2012] BPIR 654. The defendant administrator (M) was appointed to two companies and instructed the claimant firm of solicitors to act for the companies in certain litigation under conditional fee agreements signed between the claimant and the administrator. In consequence of those agreements, the solicitors sought recovery of their fees. A claim form was served on M which named him as 'the administrator of [the companies]'. The solicitors obtained a judgment in their favour which they sought to enforce against M in his personal capacity.

62. At first instance, the court held that the judgment was enforceable against the companies and not the defendant personally.

63. On appeal, the Court of Appeal found that the judge had wrongly assumed that by suing M as administrator, the claimant had not been suing him personally. The position had been that the claimant had sued the administrator. At no stage had any order of the court been made whereby the companies had become defendants to the claimant's case. The defendant in the action had

remained at all times M as administrator of the companies. Liability could not be imposed against a party not before the court. The proceedings had been an action arising out of a contract. The judgment had been given based on the terms of the contract against the person who had signed it and who had been before the court as the sole party.

64. Further, there was no authority which limited the liability of a defendant sued in representative form so that he was not personally liable on a judgment against him. The companies could only have been parties to the action before the court with the consent of the administrator or by order of the court. Neither of those steps had been taken. Accordingly, the judge had been wrong to find that the judgment had been against the companies as opposed to being against M personally

65. Administrators are required to give thought and reason to their decisions. This was in point before the court in *Lazari GP Ltd v Jervis* [2012] EWHC 1466. After the company went into administration, the administrators orchestrated a pre-pack sale of the business. As is usual, the purchaser was granted a license to occupy by the administrators and as is usual, permission was then sought from the landlord to assign the lease to the buyer. The landlord refused permission to assign on reasonable grounds and wanted to gain possession so that it could lease the unit to a new tenant (a better covenant). The landlord first asked the administrators for permission to forfeit the lease and then applied to court when the permission was refused.

66. When considering whether to allow a landlord to forfeit and break the statutory moratorium the burden will lie with the landlord to make out its case to satisfy the court that it is inequitable for it to be prevented from commencing the intended proceedings. The court has to conduct a balancing exercise of the legitimate interests of the lessor and the legitimate interests of other creditors of the company. To do this it is usually necessary to compare the financial loss suffered by the landlord, if permission to commence proceedings was refused and the landlord was temporarily denied the relief sought, with the loss suffered by the other creditors if permission to issue proceedings was granted. Account had to be taken of any money paid by the administrators to compensate the landlord.

67. The court in *Lazari GP Ltd* permitted the landlord to forfeit. Key to the decision was that the purpose of the administration had been substantially achieved as the business had been sold. Further the administrators were not able to identify what loss the administration would suffer as a result of forfeiture, whereas the landlords were able to demonstrate real prejudice and loss by reason of not securing a new tenant with a good covenant at a higher rent: *cf Innovate Logistics (in administration) v Sunberry Properties Ltd* [2009] 1 BCLC 145 where the court noted that great importance is to be attached to the proprietary interests of a landlord, who should not be prejudiced by the way in which the administration is conducted, save to the extent that that might be unavoidable and even then, that would usually be acceptable only to a strictly limited extent. The *Sunberry* case is a good example of equipping the court with all the evidence to make its decision. The court at first instance did not take account of all the facts: that although there had been an early sale of the business it was important to the success of the administration that the purchaser remain in the property to collect book debts. Unlike *Lazari GP Ltd* there was no tenant waiting to sign up to a new lease at a higher rent providing a strong covenant.

68. The moratorium continued to throw up issues this year and in *Colliers International UK Plc v the Governor & Company of the Bank of Ireland* the question considered was whether the court had jurisdiction to grant retrospective permission to commence proceedings against a company in administration.

69. The Judge considered a considerable number of cases commenting:

    "It appears that from the early 1890s to 1982, it had been the practice of courts not to treat proceedings commenced without permission as a nullity but, in appropriate cases, to give leave for the continuation of the proceedings: see *Re Saunders* [1997] Ch 60 at 70. However, Milmo J in *Wilson v Banner Scaffolding Limited* (The Times 22 June 1982) held that proceedings commenced against a company in compulsory liquidation without prior permission were a nullity and could not therefore be continued with permission. This was followed by Rattee J in *Re National Employers Mutual General Insurance Association Limited* [1995] 1 BCLC 232. The issue arose for decision in *Re Saunders*, in the context of proceedings commenced against a bankrupt.

Following adversarial argument over three days and a consideration of a large number of United Kingdom and Commonwealth authorities, Lindsay J came to the clear conclusion that the earlier decisions of Milmo J and Rattee J were wrong and that legal proceedings commenced against a bankrupt or a company in compulsory liquidation were not a nullity and that the court had jurisdiction to give retrospective permission for their commencement."

70. The court noted a recent contrary view taken in *Re Taylor* [2006] EWHC 3029 (Ch), referred to *Bank of Scotland PLC v Breytenbach* [2012] BPIR 1, a decision of Chief Registrar Baister and concluded:

"I have come to the clear conclusion that *Re Saunders* was correctly decided and that retrospective permission can be given for the commencement of proceedings, whether under section 130(2) or section 285(3) of the Insolvency Act 1986 or under paragraph 43(6) of Schedule B1."

Administrators' liabilityand paragraphs 74 and 75 of Sch B1

71. What is the difference between paragraph 74 and 75 Sch B1? Can a claim be pursued under paragraph 74 even after the administration has ended? These are the questions the High Court was asked to consider in *Coniston Hotel (Kent) LLP* [2013] EWHC 93

72. The Claimants had formed a limited liability partnership in order to refurbish a hotel. The claimants had funded a significant part of the work and obtained large loans from a bank. Shortly before completion of the project the bank withdrew credit. The Respondents were insolvency and restructuring advisers. They agreed to advise the Claimants and the bank about possible ways forward. The Claimants needed approximately £900,000 to finish the project. The hotel had been valued at £7.7 million. The bank obtained a further valuation which valued the hotel at only £3 million. The bank refused to extend the loans, and the Claimants appointed the Respondents as administrators of the LLP. The hotel was sold for £4.25 million and there was a large shortfall in the administration. The Claimants' proof was £4 million. They issued proceedings under Sch.B1 asserting that the Respondents had wrongly advised them to appoint administrators, divulged confidential information to the bank, failed to challenge the incorrect valuation and breached their fiduciary duties. The Respondents obtained a winding-up order and the Claimants' claim was adjourned.

73. The administrators sought to strike out the claim which had been launched pursuant to paragraphs 74 of Sch B1 on the ground that the points of claim disclosed no legally recognisable claim, and as the LLP was no longer in administration the Claimants should not be able to rely upon Sch.B1 para.74 when they could rely upon para.75 instead.

74. The court refused to strike out the whole claim and gave its reasons distinguishing a cause of action in professional negligence, and claims made under paragraphs 74 and 75 of Sch B1. The claim made under Sch.B1 para.74 did not disappear simply because, before it could be adjudicated, the LLP had gone into liquidation. The fact of liquidation obviously shaped the relief that was available, but a court could still grant relief under para.74 even though the administration had come to an end.

75. Paragraph.74 of Sch B1 did not exist to enable individually disgruntled creditors to pursue administrators for compensation. Its focus was on "unfair harm". That ordinarily meant unequal or differential treatment to the disadvantage of the applicant which could not be justified by reference to the interests of the creditors as a whole, or to achieving the objective of the administration. It was clear from the statutory wording that a case based on "unfair harm" was something distinct from a case centred on breach of fiduciary or other duty, which should be brought under para.75 of Sch B1.

76. Paragraph 75 of Sch B1 enabled the court, on the application of a creditor or contributory, to examine the conduct of a person who had been an administrator of an LLP. The reference in para.75 to "misfeasance" was a reference to the sort of wrongdoing that was covered by s.212. The court could not order a wrongdoing administrator to pay equitable compensation for breach of fiduciary duty to an individual creditor. If there was a deficiency in the insolvency, then the

payment was for the benefit of the creditors as a class. Accordingly, the court did not accept that paras 74 and 75 were identical. The difficulty was that the Claimants' claims confused personal losses caused by alleged negligence with a claim for harm caused by the Respondents' alleged failure to act in accordance with their statutory duties. Professional negligence proceedings for acts prior to the administration had as their objective the compensation of the claimant for personal losses caused by breach of a common law duty owed to him personally because of some retainer. The issues were substantially different, as was the procedure for their resolution. As a result the court struck out the common law claim for professional negligence but permitted the claims under paras 74 and 75 to proceed (subject to the Claimants filing amended Points of Claim).

Administration Expenses

77. The Lundy Granite principle has been approved at the highest judicial level[2]. In simple terms it facilitates the payment of pre-administration or liquidation liabilities (which would otherwise be provable debts) in respect of assets which are used for the benefit of the insolvency process but there are qualifications. If a company goes into liquidation and that company occupies leased premises, the liquidator can pay the landlord rent for the period during which the company in liquidation retains the premises for the benefit of the insolvent estate. an expense if the premises is used in the liquidation. Lord Hoffman explained in *Re Toshoku Finance UK plc* [2002] 1 WLR 671:

> "[The *Lundy Granite* principle] was not … a general test for deciding what counted as an expense of the liquidation. Expenses incurred after the liquidation date need no further equitable reason why they should be paid. Of course it will generally be true that such expenses will have been incurred by the liquidator for the purposes of the liquidation. It is not the business of the liquidator to incur expenses for any other purpose. But this is not at all the same thing as saying that the expenses will necessarily be for the benefit of estate. They may simply be liabilities which, as liquidator, he has to pay. For example, there will be the fees payable to fund the Insolvency Service, ranking as paragraph (c) in rule 4.218(1), where the benefit to the estate may seem somewhat remote…
>
> Rule 4.218 determines what counts as expenses, subject only to the limited discretion under section 156 of the 1986 Act to re-arrange the priorities of expenses inter se. The court will of course interpret rule 4.218 to include debts which, under the *Lundy Granite* principle**,** are deemed to be expenses of the liquidation. Ordinarily this means that debts such as rents under a lease will be treated as coming within paragraph (a), but the principle may possibly enlarge the scope of other paragraphs as well. But the application of that principle does not involve an exercise of discretion any more than the application of any other legal principle to the particular facts of the case."

78. and

> "it is important to notice that Lindley LJ was not saying that the liability to pay rent had been incurred as an expense of the winding up. It plainly had not. The liability had been incurred by the company before the winding up for the whole term of the lease. Lindley L.J was saying that it would be just and equitable, in the circumstances to which he refers, to treat the rent liability as if it were an expense of the winding up and to accord it the same priority. The conditions under which a pre-liquidation creditor would be allowed to be paid in full were cautiously stated. Lindley L.J said, at p329, that the landlord 'must show why he should have such an advantage over the other creditors.' It was not sufficient that the liquidator retained possession for the benefit of the estate if it was also for the benefit of the landlord. Not offering to surrender of simply doing nothing was not regarded as retaining possession for the benefit of the estate…"

79. The Supreme Court of Australia[3] has summarized the Lundy Granite principle in the following terms:

[2] Lundy Granite Co, Exp Heavan (1871) LR 6 Ch Appeals 462 applied in Re Toshoku Finance UK Plc [2002] 1 WLR 671
[3] *Ansett Australia Ground Staff Superannuation Plan v Ansett Australia* [2002] VSC 576 at [321]

"First, prima facie claims under pre-liquidation leases are provable; they are not payable as expenses of the winding-up, the importance of preserving *pari passu* distribution being emphasised. Second, although rent is not incurred by the liquidator (the obligation existing in the pre-liquidation lease) the ambit of the administration expense is expanded where the liquidator actively retains (as opposed to passively holds) or uses the premises for the purposes of the winding-up. In those circumstances rent accruing during that period of retention or use will be an expense of the winding-up. Third, the rent will not be an expense of the winding up where the retention or use is agreed to or acquiesced in by the landlord so as to secure mutual benefits for both the purposes of the winding-up and the landlord."

80. The *Lundy Granite* principle is applicable to administrations[4].

81. In *MK Airlines Limited* [2013] Bus LR 243 the principle set out in Lundy Granite was in issue; it was argued that the principle had no application to provisional liquidations. The court considered *Re A.B.C. Coupler & Engineering Co. Ltd (no 3)* [1970 1 WLR 702:

"He held that the test was whether the liquidator had retained possession "for the convenience of the winding up", and that this depended upon his motivation. On the facts, he found that the liquidator had the necessary motivation from a particular point in time, but not earlier, and (by agreement between the parties) apportioned rent accordingly. Plowman J found that up to 25th July 1962 there was nothing to indicate an election by the official receiver to retain the lease. He had left the company's plant and machinery where he found them, he had had them valued, but he had taken no steps to surrender the company's interest in the factory: these were all matters which the Court of Appeal in Oak Pits Colliery case (1882) 21 Ch. D. 322 had said were not sufficient….. Subsequently, however, the official receiver was given leave to sell the company's assets and to take advice as to the best method of doing so; from then on his tactics were directed to carrying out that advice and he retained the lease for the purpose of carrying it out and for the benefit of the liquidation."

82. However that was a liquidation and not a provisional liquidation. A provisional liquidator is appointed before a winding-up order is made: section 135 of the Insolvency Act 1986. As it was the task of a provisional liquidator merely to safeguard the assets of the company and no more, it could not be said that such an office-holder could have the requisite motivation. If Lundy Granite applied to a provisional liquidation then landlords would always be entitled to priority on the basis that the rent was a liquidation expense.

83. On the other hand it is now settled that the Lundy Granite principle applies to administrations and liquidation. It would be an anomaly if it did not apply to provisional liquidations. The application of the principle would not always lead to a landlord gaining priority over other creditors as that would depend upon an examination of the office-holder's motivation.

84. The court found that the principle was applicable to provisional liquidations and went on to consider if there was any difference in the motivation of the office-holder with regard to retaining the premises, between the two quarters rent falling due within the provisional liquidation period. The evidence suggested that consideration was given in the second quarter to retaining the premises for the benefit of housing the heavy and expensive Boeing 747 engines for the purpose of selling and realizing a profit or retaining their value. That consideration was absent in the first quarter and thus the second quarter's rent was treated as if it were an expense of the liquidation.

85. An interesting question arose for determination in the last 12 months is whether solicitor fees incurred when opposing a winding-up order could be treated as expenses of the administration. This was the question in *Neumans LLP v Andronikou, Re Portsmouth City Football Club Ltd* [2012] EWHC 3088 (Ch), [2012] All ER (D) 34 (Nov). A firm of solicitors acted for Portsmouth City Football Club Ltd (the 'old' company to be distinguished from the current company) in opposing a threatened winding-up petition. Eventually their instructions were withdrawn and, shortly

[4] *Trident Fashions, Re, Exeter City Council v Bairstow [2007] EWHC 400 (Ch)*, *[2007] 4 All ER 437, [2007] 2 BCLC 455*; *Goldacre (Offices) Ltd v Nortel Networks UK Ltd (in administration) [2009] EWHC 3389 (Ch)*, *[2010] 3 WLR 171*. The contrary approach in *Atlantic Computer Systems plc, Re [1992] Ch 505, [1992] 1 All ER 476, CA* that whether debts should count as insolvency expenses is a matter for the court's discretion must be discarded. See also Look Chan Ho, 'Sealing administration expenses, puncturing rescue culture?' (2007) 23 Insolvency Law & Practice 26

afterwards, an out of court appointment of the defendant administrators was made which continued for a period of time and resulted in sufficient funds being recovered to pay various expenses including the administrators' fees. The administration came to an end with the result that the winding-up petition was restored and the company was wound up and liquidators appointed. Upon the appointment of the liquidators, there were no assets or funds available for distribution.

86. The applicant applied for the payment of its fees incurred during the period that it was instructed by the company on the basis that Section 51 of the Supreme Court Act 1981 gave jurisdiction to the court to make such an order, and that those fees were to be determined as an expense of the administration of the company (governed by IR 1986, r 2.67) alternatively, a disbursement in the liquidation (governed by IR 1986, r 4.218). The application was opposed by the administrators. The first instance court found:

    (i) In substance the solicitors were looking for an order under the Senior Courts Act 1981, s 51 (court's discretion to determine by whom the costs of proceedings should be paid) which would have indirectly turned the costs of the winding up petition into an administration expense, though such expenses are not within the permissible class of administration expenses set out in IR 1986, r 2.67(1)(f). Section 51 confers no such power.

    (ii) The Lundy Granite principle also was of no assistance. The Lundy Granite principle applies where an office holder elects to retain the benefit of a contract entered into prior to the insolvency process for the purposes of the insolvency process, in which situation payments under that pre-insolvency contract become payable as if they are necessary disbursements in the liquidation or administration. On the facts, the Lundy Granite principle did not apply. The company's contract of retainer of the applicant had been ended by the company before the company had entered administration. The contract of retainer had not had any continuing effect after the company had entered administration. The administrators had not done anything to elect to retain the benefit of the contract of retainer for the purposes of the administration. Accordingly, the applicant's fees did not fall within the Lundy Granite principle and could not be paid as a necessary disbursement within IR 1986, r 2.67 (IR 1986, r 4.218 in a liquidation).

    (iii) There would need to be some special reason, connected with the administration, for the court to have made the administrators pay the fees in full as an expense when the statutory provisions and the rules had not provided for the applicant to have priority in that way over other creditors and other persons entitled to claim payment of expenses. The instant case had not been a case in which there had been a special reason, connected with the administration, to promote the applicant from its position of unsecured creditor. The payment of the applicant's fees could not have been said to be likely to assist achievement of the purpose of the administration. Accordingly, the applicant's fees did not qualify as an expense of the administration under IR 1986, r 2.67.

    (iv) However, it was appropriate to allow the company's costs of appearing on the winding-up petition, represented by its liability to pay the applicant's fees for its work in that respect, as an expense pursuant to IR 1986, r 4.218(3)(h) (costs of any person appearing on the petition whose costs are allowed by the court). The solicitors had been duly instructed on behalf of the company. Those directing the affairs of the company at the relevant time had considered that it had been in the best interests of the company for the company to have opposed the winding up petition and the work done by the applicant on behalf of the company had in fact been in the best interests of the company. Further, there had been no factor which would have justified the court in refusing to allow the company's costs to be an expense in the liquidation.

On the horizon

87. The most significant development in relation to the administration regime will be the Supreme Court judgment in *Nortel GMBH & Ors and Lehman Brothers International (Europe) & Ors v The Pensions Regulator*. The appeal was heard in May and judgment is awaited. The Court must consider whether a financial support direction or contribution notice issued under pensions

88. legislation after the appointment of administrators is an administration expense, a provable debt or something else - in the latter case, whether it would fall within what has been described as a "black hole". The facts invite the court to consider the current understanding of what is and what is not a "contingent liability". All indications suggest that if the Supreme Court upholds the decisions at first instance and in the Court of Appeal, BIS will reinvigorate earlier steps to consider legislative amendment and clarification to R 13.12 (meaning of debt and liability) and/or rules 2.67 and 4.218 (administration and liquidation expenses).

89. In response to further concerns often raised with MPs and in the press and following a further consultation, a revised SIP16 is due soon to be released.

90. The Enterprise and Regulatory Reform Act included at s92 provision enabling the SofS by order to extend section 233 of the Insolvency Act 1986. As a result, specified descriptions of suppliers of gas, electricity, water, communication services and other goods or services will become entitled to require insolvency office holders (administrators, liquidators etc) personally to guarantee future supplies to the insolvent company. However they will be expressly prevented from making it a condition of the supply that pre-insolvency arrears are paid. This is, at least in part, in response to R3's Holding Rescue to Ransom campaign and particular focus will be given to the suppliers of essential IT systems and other communications suppliers who do not fall within the current ambit of section 233. The wording or "descriptions" of suppliers to which the new provisions will relate will therefore have to be very carefully considered. For now, all that has been enacted is an enabling provision and further consultation is likely to precede the relevant draft regulations which will bring the detailed provisions into effect.

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