ADMINISTRATION – WHAT'S UP?

Catherine Burton, DLA Piper UK LLP & Jeremy Bamford, Guildhall Chambers

1. These notes provide a round-up of what has been happening in respect of the law and practice of administrations over the last 12 months and a look forward to changes which are soon to be brought into force.

A1 What's In? – Appointment

2. Whilst the spate of reported cases concerning invalid or defective appointments abated following the acceptance at first instance of the more benign attitude to construction and classification of procedural defects in *Re Ceart Risk Services Ltd*[1], *Re Care People Ltd*[2] and *Re Harlequin Management Services Ltd*[3], issues over appointment continue to result in litigation and cause the previous cases to be re-visited in the courts, albeit in an uncontroversial manner.

3. In *Synergi Partners Ltd*[4] the court was invited to but declined to make an administration order with retrospective effect to a date more than 4 years earlier. The order was sought in order to try to remedy a void appointment of CVL liquidators under para 83 Sch B1 IA 1986 (notice procedure for moving from administration to CVL). The company was part of a group providing consumer financial debt solutions and Mr Mond ("M") was a creditor and QFCH of the company. M as QFCH pursuant to para 14 Sch B1 appointed A as an administrator of the company on 22 November 2009. Modified proposals of A were approved by creditors at a meeting on 3 November 2010, to allow the company to be placed into CVL by the notice procedure and K & P to be appointed as liquidators. K & P duly acted as liquidators for some 4 years, principally investigating a potential wrongful trading claim against the directors. However it was then spotted that A had only filled in the relevant Form 2.34B notice to move to CVL on 23 November 2010 (the day after A's appointment as administrator had expired by effluxion of time) and registered on 27 November 2010. *Re Globespan Airways Ltd*[5] did not therefore assist and it was accepted that the purported appointment of the liquidators was void. M as a creditor then applied for an administration order to take effect retrospectively from 23 November 2010 (the date of the conversion notice).

4. HHJ Hodge QC refused to make the retrospective administration order that was sought on the basis that, even if such an order could operate retrospectively to validate the conversion to CVL (which was questionable) the second threshold condition in para 11 Sch B1 (reasonably likely to achieve the purpose of administration) was not satisfied, i.e. it would merely be the re-creation of a temporary administration for the sole purpose of moving the company into CVL. The court instead, at the Judge's suggestion, treated the application under para 13(1)(e) as a winding up petition and made a compulsory winding up order, leaving M to make representations to the OR for the appointment of K&P as compulsory liquidators.

5. A more unusual validity challenge was made in *Mackellar v Griffin*[6], concerning a company called Westmorland Estates Ltd, the principal asset of which was an office block in Horsham, West Sussex. The company was however incorporated in the BVI. Administrators from Baker Tilly were appointed in the UK by Credit Suisse as QFCH under para 14 Sch B1, following default by the company in respect of a £43.3m loan agreement. The administrators sold the office block for £19m. A liquidator ("M") was subsequently appointed in the BVI respect of the company, who applied for (i) recognition under the Cross Border Insolvency Regulations and (ii) a declaration that the administrators were not validly

[1] [2012] 2 BCLC 645
[2] [2013] BCC 466
[3] [2013] EWHC 1926 (Ch)
[4] [2015] EWHC 964 (Ch) HHJ Hodge QC Manchester LTL 16/4/2015 AC 0145968
[5] [2013] 1 BCLC 339 CA, which pragmatically held that if a conversion notice was filed with the Registrar during the administrator's term of office, then the administrator's term of office was by implication extended by the filing of the conversion notice until the registration of the conversion notice.
[6] [2014] EWHC 2644 (Ch) Mann J

appointed. Recognition was granted as a box ticking exercise. As regards the challenge to validity para 111(1A) Sch B1 defines "company" for the purposes of Sch B1 as being (a) a company registered under the Companies Act 2006 in England, Wales or Scotland, (b) a company incorporated in an EEA state other than the UK or (c) a company not incorporated in an EEA state but having its centre of main interests in a member state other than Denmark. As regards (c) para 111 (1B) defines COMI as "having the same meaning as in the EC regulation and, in the absence of proof to the contrary, is presumed to be the place of its registered office. In addition to para 111 (1A), article 3(1) of the EC Regulation required the company's COMI to be in England and Wales for the opening of insolvency proceedings in this jurisdiction.

6. The administrators resisted the declaratory relief on 2 grounds: (i) the court would only grant a declaration if it would serve a useful purpose but in the present case M had already formed a view on the validity point and no practical purpose would be served; M would not be able to do anything with the declaration because on the sale of the property Credit Suisse had been left with a significant shortfall and the company had therefore suffered no loss by reason of the administrators selling the property rather than anyone else selling it and (ii) it was alleged that COMI was in England.
Mann J rejected those arguments:

6.1. as regards the purpose point (described by the Judge as "so what?") the liquidator was entitled to have the validity issue determined as an issue first and once and for all by way of a declaration, in circumstances where it had not been conceded by the administrators. That served a useful and practical purpose and it also made sense from a litigation management point of view, to take the simpler question of validity first before the more complicated questions as to the consequences and whether there was any recoverable loss[7].

6.2. on the evidence the COMI was in the BVI as:

6.2.1. the starting point was the presumption in para 111(1B) Sch B1 and Art 3(1) that it was the place of the registered office, absent proof to the contrary;

6.2.2. although not of significance, the Credit Suisse loan agreement contained a representation by the company that its COMI was in the BVI with no establishment elsewhere and an agreement that it would not cause or allow its registered office or COMI to be moved;

6.2.3. the company had 3 directors resident in Jersey, Portugal and Ireland; head office functions were carried out either in Ireland or Jersey, including board decisions by telephone between the 3 jurisdictions mentioned but not from the UK; no significant shareholder meetings; all control, operational management and development decisions were taken by a company in Jersey, including accounting functions and correspondence and electronic communications; no employees in UK;

6.2.4. the administrators sought to rely on 2 points to rebut the presumption. First, the existence of the office block in England. That was a factor of no particular weight: see *Interedil*[8]. Secondly reliance was placed on a single sentence in the evidence that there were professional agents operating in England on behalf of the company. Whilst the judge accepted that if those agents had been managing head office functions (rather than just limited commercial activities) it might be material from which to infer COMI, the mere reference to agents being engaged without particulars, did not even begin to rebut the presumption.

[7] The judge did however reject an argument by the liquidator that the declaration could be justified because the court had its own interest in making sure that the appointment of administrators was done properly: "I would not accept the premise of Mr Robins' argument. The court does not provide some general policing role in relation to the appointment of administrators, disciplining people who get it wrong and commending those who get it right. … The court determines questions about the validity of appointments when they are placed before the court. It is a feature of modern appointments of administrators that they demonstrate the almost infinite number of ways in which parties can get wrong a procedure which ought to be relatively straightforward and immune from the sort of problems which has beset them. "

[8] *Interedil Srl v Fallimento Interedil* C-396/09; [2012] BLR 1582 at para 53

7. *Melodious Corp*[9] concerned another BVI company and in this case there was no valid para 22 out of court appointment by the directors because the board meeting to pass the resolution to appoint an administrator was inquorate. The factual background was complicated. In summary, the company's shares were owned 51% by a Miss Chan and 49% by a Mr Leung who had had a personal relationship between 1992 and 1998. Whilst they were together the company had been used as a vehicle to purchase a house in Woking (Hill House) in which they lived and 9 other rental properties. Following the break up Miss Chan had successfully managed to be appointed as a director of the company together with her mother Madam Ho, the articles requiring a quorum of 2 for directors' meetings. Between 1998 and 2002 Miss Chan and Mr Leung had commenced a suite of proceedings including a creditor's WUP and just and equitable WUP by Mr Leung and a TLATA claim by Miss Chan claiming a beneficial interest in Hill House. During the proceedings the net sale proceeds of the 9 properties had been ordered to be placed in a stakeholder account held by the respective solicitors. The 3 proceedings went to trial where the WUP were dismissed, a declaration made that the company held Hill House on trust 51% for Miss Chan and 49% for Mr Leung and not be sold pending completion of Miss Chan's studies. The judge ordered an account of what sums ought to be paid by the company to its creditors and members and gave directions for the service of evidence.

8. After an unsuccessful appeal, Mr Leung had been made bankrupt in Hong Kong in 2002. Neither party (nor Mr Leung's TinB) pursued the account. Instead Miss Chan disinstructed her solicitors (who had been paid by the Legal Services Commission) and in 2007 engaged Mr P an IP with a view to placing the company into administration. Minutes of a board meeting of the company on 29 October 2007 recorded that the company was insolvent and resolutions to place the company into administration under para 22 and appoint Mr P as administrator. The minutes only recorded Miss Chan as a director being present. A notice of appointment sworn by Miss Chan was filed and Mr P appointed as administrator. Mr P's proposals referred to the early litigation but showed Hill House as an asset (subject to charges to Miss Chan and Mr Leung) and £170,000 in the stakeholder account. Mr P then wrote to Mr Leung's former solicitors requesting their consent to the funds being paid to him as administrator. The solicitors refused without the consent of Mr Leung's TinB or court order, questioned the rationale of the administration and pointed out that "it appeared to them that the purpose of the administration was to defeat the claims of Mr Leung's creditors and the statutory charge of the Legal Services Commission". They claimed that the company had no beneficial interest in Hill House which was held on bare trust for Miss Chan and Mr Leung's TinB and that the monies in the stakeholder account were subject to the order of the court for the taking of accounts and enquiries to determine the rights of Miss Chan, Mr Leung and the creditors of the company.

9. Mr P claimed to have converted the administration to a CVL by notice which he claimed was sent on 23 October 2008 to the Registrar, shortly before the expiry of the term on 31 October 2008. Miss Chan fell out with Mr P and applied for orders (i) removing from the register the forms showing the company as an overseas company in liquidation, (ii) transfer of the stakeholder monies to a joint account in the names of her new solicitors and Mr Leung's solicitors and (iii) that Mr P personally pay the costs. Miss Chan contended that the company was not validly placed into administration because the board meeting was inquorate as Madam Ho did not attend (which was factually disputed by Mr P, who contended that Madam Ho attended the board meeting) and alternatively the administration had expired by effluxion of time because a conversion notice had not been sent or registered prior to 31 October 2008.

10. The Chancellor heard oral evidence from Miss Chan, Madam Ho and Mr P and concluded:

    10.1. Madam Ho was not at the board meeting, preferring the evidence of Miss Chan and Madam Ho, coupled with the minutes which only recorded Miss Chan as attending and the lack of any independent evidence recording attendance, e.g. a visitors' book to the IP's offices.

[9] [2015] EWHC 621 (Ch) Etherton C, LTL 17/3/2015

10.2. As a result the board meeting was inquorate and the resolution to appoint an administrator was invalid.

10.3. That invalidity could not be saved by r 7.55 IR 1986, which only applied to insolvency proceedings and there were no insolvency proceedings unless there was a resolution of the directors. The case fell within the description of "nullity" rather than "defect": see *Re Frontsouth (Witham) Ltd*[10], *Re Euromaster Ltd*[11], *Re Assured Logistics Solutions Ltd*[12] and *Minmar (929) Ltd v Khalastchi*[13].

10.4. For completeness the Chancellor also dealt with the conversion point, finding (albeit with hesitation) that the requisite notice had been sent on 23 October 2008.

10.5. However the evidence was that Companies House did not receive the conversion notice until 5 November 2008 (after the term of office would have expired on 31 October 2008) and it was only registered thereafter. The issue therefore arose as to whether it was sufficient to send the notice prior to expiry or whether it also had to be received by Companies House before expiry. The Chancellor held that neither *Re E Squared Ltd*[14] nor *Globespan Airways Ltd*[15] decided that point and that David Richards J's *obiter* comment at paragraph [16] in *E Squared Ltd* (suggesting that the critical point was the date of sending, irrespective of when received) had not been approved by Arden LJ in *Globespan*.

10.6. The point had been considered by HHJ Purle QC in *Re Property Professionals Ltd*[16], with which, together with the *obiter* comment of David Richards J in *E Squared* the Chancellor agreed [106]: "…paragraph 83(6) of schedule B1 is triggered where the conversion notice is sent before the date on which the administrator's office is due to expire even if the notice is received by the Registrar after that date."

11. *Re Eiffel Steelworks Ltd*[17] saw one of the more common validity issues. On a directors' para 22 appointment, where there was no QFCH to whom notice of intention to appoint had to be given, a notice of intention to appoint had not been given to the company pursuant to para. 26.2 Sch B1 and r.2.20(2)(d) IR 1986. The deputy judge was invited to proceed on the basis that such a notice was required. He accepted that the failure to give the notice was a remediable defect, which did not result in the administration being a nullity and, given that the corporate shareholder of the company was aware of and approved the resolution to appoint administrators, made a declaration that the appointment was valid, notwithstanding the failure to give notice to the company, following the approach in *Re Virtualpurple Professional Services Ltd*[18], *Re Ceart Risk Services Ltd*[19], *Re Assured Logistic Solutions Ltd*[20], *Re BXL Services*[21]and *Care People Ltd*[22]. The judge indicated that he was declining to follow para [42] of *Euromaster* (where Norris J whilst making a declaration that the office holders were in office as administrators and no prior acts were invalidated by reason of the defect in failing to file notice of their appointment within 10 days of the notice of intention to appoint, was not willing to make an order under r.7.55 waiving the defect), although he did not expressly make an order under r.7.55 waiving any defect.

[10] [2011] EWHC 1668 (Ch), [2011] BCC 635 at [16] to [25]
[11] [2012] EWHC 2356 (Ch); [2013] 1 BCLC 273 at [34]
[12] [2011] EWHC 3029 (Ch), [2012] BCC 541
[13] [2011] EWHC 1159 (Ch), [2012] 1 BCLC 798
[14] [2006] EWHC 532 (Ch), [2006] 1 WLR 3414 David Richards J
[15] [2012] EWCA Civ 1159, [2013] 1 WLR 1122
[16] [2013] EWHC 1903 (Ch), [2013] BCC 606 at [18]
[17] [2015] EWHC 511 (Ch) A Hochhauser QC
[18] [2011] EWHC 3487 (Ch), [2012] 2 BCLC 330 Norris J
[19] [2012] EWHC 1178 (Ch), [2012] 2 BCLC 645 Arnold J
[20] [2011] EWHC 3029 (Ch), [2012] BCC 541 at paras [33] to [38] HHJ Purle QC
[21] [2012] EWHC 1877 (Ch), [2012] BCC 657 at paras [11] – [14] HHJ Purle QC
[22] [2013] EWHC 1734 (Ch)

12. Buried within the diverse contents of the Deregulation Act 2015, the Bill of which received Royal Assent on 26 March 2015, are 2 provisions relevant to administrator appointments. First, with effect from 26 May 2015[23], a new para 25A is inserted into Sch B1 IA 1986[24] to allow the appointment of an administrator out of court by the directors or company under para 22 if a winding up petition has been presented[25] after a notice of intention to appoint was filed by the directors/company:

> "25A(1) Paragraph 25(a) does not prevent the appointment of an administrator of a company if the petition for the winding up of the company was presented after the person proposing to make the appointment filed the notice of intention to appoint with the court under paragraph 27.
> (2) But sub-paragraph (1) does not apply if the petition was presented under a provision mentioned in paragraph 42(4)."

13. Secondly, although not yet brought into force[26], the para 26 requirement to give notice of intention to appoint to the additional persons specified in r. 2.20(2) (enforcement officer, distraint creditor, VA supervisor and the company if not appointor) is amended to make it clear that such notice is only required where a notice of intention to appoint is served under para 26(1) on a person entitled to appoint an administrator or administrative receiver. The existing sub-para is:

> "26(2) A person who proposes to make an appointment under paragraph 22 shall give such notice as may be prescribed to such other persons as may be prescribed."
> and the new amended sub-para will be:
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> "26(2) A person who gives notice of intention to appoint under sub-paragraph (1) shall give such notice as may be prescribed to such other persons as may be prescribed."

14. That amendment to para 26(2) when brought into force will clear up the technical issue as to whether it is necessary to serve the r. 2.20(2) persons where there is no QFCH, resolve the conflicting caselaw (*Minmar Ltd v Khalatschi* (*supra*) and *National Westminster Bank v Msaada Group*[27] having held that it was necessary even where there was no QFCH, whereas *Virtualpurple* (*supra*) having held that is was not necessary where there was no QFCH) and avoid precautionary curative applications like *Eiffel Steelworks Ltd* (supra).

A2 Revised SIP 16 and pre-pack pool

15. The Graham Report on Pre-packs proposed the adoption by the profession of voluntary measures to address points of concern, including the "pre-pack pool" and a proposed re-draft of SIP 16. Those recommendations were accepted by the SoS[28]. In response, the Joint Insolvency Committee ("JIC") issued a revised draft SIP 16 (a copy of which accompanies these notes) and launched a consultation in January 2015 on the revised draft, as to whether it would be practical for IPs to comply with the terms of the revised draft, which closed on 2 February 2015. The JIC revised draft SIP broadly follows the Graham draft, including provision in respect of connected parties for potential review of the proposed sale by a member of the proposed pre-pack pool and a viability report on the reincarnated business by the buyer. The result of the consultation is still awaited, along with progress on the pre-pack pool.

16. In addition, as recommended by Teresa Graham and agreed by the SoS in the 16 June 2014 statement, the Government has enacted in the Small Business Enterprise and Employment Act 2015

[23] s. 115(3)(n) DA 2015
[24] By s.19 and Sch 6, para 5 DA 2015
[25] Unless it is a WUP mentioned in para 42(4) Sch B1 IA 1986, namely (a) s.124A public interest petition, (b) s.124B petition against a Societas Europaea or (c) s.357 FSMA 2000 petition by FCA or PRA
[26] S115(7) such day as the SoS may by SI appoint. Likely to be after October 2015. Possibly at the same time as the new IR which are scheduled for April 2016.
[27] [2012] 2 BCLC 342
[28] 16 June 2014 statement.

("SBEEA 2015")[29] "backstop" legislation which can be brought into force, should the Graham recommendations and voluntary reforms including the revised SIP 16 and pre-pack pool not be successfully implemented. By section 129 SBEEA 2015 para 60 Sch B1 (which refers to the administrator having the powers specified in Schedule 1) becomes para 60(1) and a new sub-para (2) is inserted: "(2) But the power to sell, hire out of otherwise dispose of property is subject to any regulations that may be made under paragraph 60A".

17. In turn a new para 60A is inserted into Sch B1 enabling the SoS by way of regulations to prohibit or impose requirements or conditions in respect of the disposal, hire or sale of property by the administrator to a connected person in the circumstances specified in the regulations, which no doubt would cover pre-packs but could extend beyond pre-packs. The regulations may require the sale (etc) to be subject to independent scrutiny and approved by or provide for requirements or conditions to be imposed by (a) the creditors of the company, (b) the court or (c) a person of a description specified in the regulations (presumably including someone from the pre-pack pool). The regulations can be made within 5 years of para 60A being brought into force. Section 129 SBEEA 2015 and thereby para 60A is brought into force on 26 May 2016[30].

B The places in between – What's Up?
B.1 Moratorium

18. The Northern Irish High Court (Horner J) in *Fulton & Fulton v AIB Group (UK) Plc*[31] has held that an administrator can give consent retrospectively to the issue of legal process during the moratorium under para 43 Sch B1 IA 1986[32]. The case follows on from *Bank of Ireland v Colliers International (UK) Plc*[33] in which David Richards J had held that the court could grant retrospective permission for proceedings and commented *obiter* (para [32]) that "I can think of no convincing reason why an administrator should not be permitted to grant retrospective consent." The "legal process" in that case was the presentation of statutory demands against the partners in the partnership which was in administration. Horner J concluded that the service of a statutory demand was a form of legal process, which is probably wrong, as a SD is an extra-judicial document and not a legal process[34].

B.2 Proposals – amendment and registration at Companies House

19. In *Gardenprime Ltd*[35] administrators by way of a pre-pack sold the company's assets under an SPA, which included a confidentiality clause in respect of certain information ("Information") in favour of the buyer. The administrators included in their SIP 16 report and also in their proposals (which were sent to creditors and filed with Companies House under para 49 Sch B1) certain of the Information. The buyer objected to the inclusion of the Information in the proposals, whereupon the administrators produced amended proposals excluding reference to the Information and applied and obtained from the court an order under r 2.33A IR 1986 (restricting disclosure of matters resulting in prejudice to the conduct of the administration or lead to violence against a person), that specified parts of the proposals which referred to the Information should not be sent to the Registrar, the inclusion of the Information was unnecessary material under s.1074 CA 2006, an order that the administrators file the amended proposals and an order directing the Registrar to exercise his power under s. 1076 CA 2006 to remove the original proposals and accept the amended proposals.

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[29] The Bill of which received Royal Assent on 26 March 2015
[30] s.164(3)(i)(ii) end of period of two months beginning with the day on which the Act is passed.
[31] [2014] NI Ch 8
[32] In fact it was a NI partnership to which the corporate administration regime in NI applied by the Insolvency (NI) Order 1989 (as modified by the 1995 and 2006 Orders), which meant that the relevant para under that Order was para 44(5) (the relevant paragraph numbers under the Order are +1 when cf Sch B1 IA 1986).
[33] [2012] EWHC 2942 (Ch) and the earlier case in respect of retrospective consent in bankruptcy under s.285(3) IA 1986 of *Bank of Scotland v Breytenbach* [2012] BPIR 1.
[34] See e.g. *Re a Debtor (No 190 of 1987)* (1988) Times, 21 May; *Re a Debtor (No 88 of 1991)* [1993] Ch 286; *Shalson v D F Keane Ltd* [2003] EWHC 599 (Ch), which do not appear to have been cited to the Judge.
[35] *Registrar of Companies v Swarbrick* [2014] EWHC 1466 (Ch) Richard Spearman QC

20. The Registrar of Companies (who appears to have taken great exception to being ordered what to do by the court) applied to set aside the order, challenging the extent to which it was open to the court to intervene in the performance of the Registrar's duties and powers, resulting in a long (108 paras), detailed judgment. The objections by the Registrar of Companies were rejected. In short, r. 2.33A did allow the court to make an order retrospectively after proposals had been sent and filed limiting disclosure of information and the jurisdiction was not exhausted once the proposals were sent. The Registrar was required to comply with the court order and could do so by exercising his power under s.1094 CA 2006 to remove material from the register. Although not necessary for the purposes of the application the judge also considered that the inclusion of the references to the Information in the proposals was also unnecessary material and could be removed under s.1074 and 1076 CA 2006.

B.3 What can you sell?

21. The Court of Appeal decision in *O'Connell v Rollings*[36] provides helpful guidance for administrators in connection with the power to apply under para 71 Sch B1 for an order allowing the administrator to sell property of the company which is subject to fixed charge security. The court is given jurisdiction to make an order if "the court thinks that the disposal of the property would be likely to promote the purpose of the administration"[37] but subject to a condition that the net proceeds of disposal of the property and any additional sum to make up its market value should be applied to the security being released[38].

22. In this case there had been a shareholders' dispute between 3 directors resulting in the administration, 2 of the shareholders held a single debenture, which one of them, Mr O'Connell, refused to release to allow a sale, claiming to be owed £800,000. The administrators had continued to trade the business for a short time whilst marketing the business for sale, which attracted a number of offers. They formed the view that they had to complete a sale as a matter of urgency, given lack of funds to continue the business, pay employees and rent, conducted a contract race and wished to sell the business and assets to the successful bidder, who had imposed a condition entitling him to withdraw from the contract if an order was not obtained by 25 September 2013 releasing Mr O'Connell's security. The administrators therefore applied for an order under para 71 which came before Warren J on 24 September, who refused an application for an adjournment and granted the order on 25 September. Mr. O'Connell appealed.

23. On the appeal it was accepted that the judge had jurisdiction to grant the order and therefore the appeal against the substance of the order and the refusal to adjourn was an appeal against the exercise of discretion (Warren J had described it as "the balance could not be finer"), with the hurdle of having to show that the judge erred in principle. The Court of Appeal rejected the appeal and the 7 grounds relied upon and the judgment provides helpful guidance for administrators. It is worth noting in particular the following points which are relevant to para 71 but could also be deployed in connection with pre-packs or breach of duty challenges to sales by administrators:
    23.1. As regards the adjournment, the court accepted that the application was urgent, there was a real risk that the purchaser would withdraw and the administrators had cash difficulties in continuing to trade. It was not appropriate to adjourn until after the creditors' meeting which was due to be held on 30 September 2013 and the court endorsed the "adoption of a more pragmatic approach to the commercial pressures facing administrators" as exemplified by *T&D Industries*[39] and stated "…I too recognise that the urgency of the situation and commercial pressures will sometimes require administrators to make a decision before a meeting can be convened."

[36] [2014] EWCA Civ 639
[37] Para 71(2)
[38] Para 71(3)
[39] [2000] 1 WLR 646

23.2. The main ground of appeal was that the proposed sale would not achieve a proper price, having regard in particular to the alleged value of intellectual property rights (which were disputed and the subject of an on-going arbitration). That was rejected:

"[56] As for the contention the contract race was unjustified, its seems to me the following points are material. The marketing process was initiated on 9 August 2013 and yet by 17 September 2013 the Administrators still had no firm offer. Further, the Administrators knew that they might well have to make an application to the court under paragraph 71 of Schedule B1; they had limited cash available to them; they were continuing to incur liabilities to the 17 employees in the business; and they knew that on 27 September 2013 another quarter-day rental payment would become due and payable. Faced as they were with diminishing assets and no firm commitment, the Administrators sought to crystallise the situation and bring some finality to the marketing process, and they did so by announcing a contract race. In the circumstances I do not think they can be criticised for so doing."

23.3. As regards the alleged value of the disputed IPR of £3m and that in the previous 5 years the company had obtained gross revenue of £7.8m from licensing its IPR, Kitchen LJ continued:

"[63] This is powerful evidence. However, it suffers from the fundamental problem that the purported termination of the Eyeliner Agreement by Mr Maass had a devastating impact on MSL's business. It therefore seems to me that evidence of the value of the business before the relationship between the various protagonists deteriorated is of little assistance in determining its value once it had. Instead, the Administrators ascertained the value by undertaking a wide and extensive marketing exercise. They placed adverts on appropriate websites, received 29 expressions of interest and 14 prospective purchasers were provided with information regarding MSL's business. But ultimately all of this interest translated into just a few offers. MGL withdrew in the manner I have described leaving Mr Textor and Mr Palma, both of whom made offers which were, in the Administrators' eyes, very similar. I am therefore satisfied that the Administrators did ascertain the value of the business and assets of the company, including its intellectual property rights, such as they were, by testing the market, and doing so in a perfectly sensible and adequate way. Faced with rising costs and diminishing assets, they were naturally concerned to secure a sale as soon as reasonably possible. That is precisely what they did and I am satisfied that, in doing so, they obtained a proper price."

24. Paragraph 72 Sch B1 provides a similar power of the court to allow a disposal of "goods which are in the possession of the company under a hire-purchase agreement", subject to conditions as to the proceeds of sale and was considered in *Edwards v Business Environment Ltd*[40]. The company in administration had carried on business sub-letting a property in Fleet Street as serviced offices on short term lets. The administrators had negotiated a sale of the property together with certain assets and equipment used in the serviced offices ("the Assets") which were claimed to be owned by the respondent, another company in the same group as the company in administration. There was a significant marriage value of £7.65m if the property could be disposed of together with the Assets and any prejudice to the respondent could be met by directing retention of the sale proceeds. The administrators applied as a matter of urgency (given a deadline for completion of the sale) for an order under para 72, alternatively under para 68.

25. The Deputy Judge rejected the application:

25.1. as regards para 72 the application failed. The definition of hire purchase agreement in para 72, by para 111 includes a chattel leasing agreement, which by s.251 IA 1986 means an agreement for the bailment of goods capable of subsisting for more than 3 months. The

[40] [2014] EWHC 3540 (Ch) D Halpern QC

issue was therefore whether the Assets were in the possession of the company under an agreement for the bailment of the Assets. The judge concluded as a matter of construction of the agreement between the company and the respondent (which operated the serviced offices utilising the Assets) that either the respondent retained possession of the assets or possession had been transferred to the subtenants. The agreement stated that it was not an agency agreement, the respondent remained responsible for managing and supervising its staff and they looked after the Assets. As a matter of construction that express denial of agency was not overridden by a clause in the agreement requiring the company to keep the assets in repair:

> "[17] The high point of Ms Toube's argument was paragraph 4.2.6, which requires the Company to keep the Asset in repair. Had this stood alone, I can see the argument that this contemplates that the Assets will be under the Company's control and that, since the Company does not have any employees, the employees of BECSL must be acting on behalf of the Company when performing that function. However, in my view it is a step too far to treat that as governing and overriding the rest of the Agreement. It would indeed [be] a case of the tail wagging the dog."

25.2. The administrator's alternative argument was that para 67 allowed the administrator to take custody or control of "all property to which he thinks the company is entitled" and para 68 required the administrator to manage the company's affairs subject to any directions given by the court "in connection with any aspect of his management of the company's affairs, business or property". It was suggested that these 2 paras combined allowed the court to give directions for the disposal of assets to which the administrator thinks the company is entitled, even if owned by a third party. The Deputy Judge rejected that claim:

> [19.1] … …it is important to emphasise that paragraph 67 does not itself permit the administrator to dispose of assets; it is merely concerned with safeguarding assets which the administrator thinks belong to the company. If his thinking proves to be wrong, he would have no basis for continuing to maintain custody or control. Ms Toube says that in practice many administrations (albeit not this one) proceed by way of pre-pack, in which case there is no sense in drawing a distinction between the power to take control and the power to sell. I do not accept this. If in practice the two events occur together, then I can see no justification for permitting a sale merely because the administrator thinks that the assets belong to the company.

25.3. whilst the reference in para 68(1) to management of the Company's property would include disposal, it was not appropriate to extend the meaning of the Company's property in para 68 to include property to which the administrator thinks the company is entitled (under para 67). As the Deputy Judge commented:

> "…there is no warrant for reading the paragraph purposively in this way. It would confer an exorbitant jurisdiction on the administrator to convert property belonging to third parties, simply because this happened to be desirable on the balance of convenience."

25.4. Section 234(3) and (4) did not support the administrator's argument:

> "[19.5] [Ms Toube] argued that this was the flip-side to paragraph 68. In my judgment the purpose of section 234 is to relieve an administrator from a liability which he would otherwise have for conversion of a third party's assets where he has acted reasonably. It does not give the administrator licence to convert third-party chattels, still loess does it give any such power where the administrator merely thinks subjectively that they belong to the company, nor does it extend the court's limited powers (e.g. under paragraph 72) to override the rights of third parties."

26. Dealing with third party assets brings us nicely on to *Blue Monkey Gaming Ltd v Hudson*[41]. The Agora Group ("G") carried on business via an operating company ("F") running 104 amusement arcades. M supplied gaming machines to F pre administration subject to an ROT clause "The legal ownership of goods herein is retained by the Seller until full and final settlement is made." Administrators were appointed over the G companies in December 2009 who continued to trade the business pending a sale as a going concern which was achieved on 30 November 2010. M issued proceedings for conversion and £7.71m damages against the administrators in respect of 586 gaming machines supplied by it to F. Following the liquidation of M that conversion claim was assigned to Blue Monkey Gaming Ltd.

27. HHJ McCahill QC rejected the conversion claim following an 8 day trial including oral evidence. The judgment is long (140 pages) and very fact specific. However the following points are worth noting, which are of general assistance to administrators:

    27.1. The judge held that it was for the claimant to prove the number of gaming machines owned by it which were in F's possession as at the date of administration and rejected arguments that the administrator was obliged to do so:

    "[155] … I do not accept that the Administrators were duty bound to compile an inventory of assets held at each of the 104 sites. Nor, in my judgment, was it their duty on their own to set about identifying machines owned by individual third parties, including MDM … Their obligation was to permit and supervise access to an alleged owner to enable it to identify its own goods and then to adjudicate on any claim arising on the basis of all the evidence supplied."

    "[157] The Administrators came to this business as strangers. In my judgment, it was the duty of the person claiming ownership of goods to identify its own goods, not for the Administrators to do so. To hold otherwise would be not only totally unrealistic and practically unworkable but would also impose an obligation on Administrators which I do not consider the law demands."

    27.2. Whilst the claimant could rely on the invoices between 2005 and 2009 to show the number of machines delivered, the judge rejected that number as still being in the possession of F as at administration, due to the passage of time, break up and scrapping and diversion of machines by the directors. He instead worked back from the evidence of the number of machines returned by the purchaser and court ordered inspections.

    27.3. The administrators themselves were never in possession of the machines, which were in the possession of F at all times.

    27.4. M had in the initial stages of the administration up to 20 July 2010 consented to the machines remaining in the possession of F and the use by F of those machines free of charge because it hoped to do a deal with the proposed purchaser [681(4)]. Whilst a letter dated 20 July 2010 had included a demand for the machines, it was not a clear, genuine or unequivocal demand for the delivery-up of the machines. Furthermore the administrators did not refuse, wrongfully, unreasonably or otherwise, to make the machines available for collection [681(5)].

    "[541] The position before the letter dated 20 July 2010 is, in my judgment, abundantly clear. MDM was perfectly happy to leave the machines in situ to aid the administration, without any expectation of payment for the use, because it believed it would do better out of a negotiated deal with the ultimate purchaser of the Agora business and assets than it would do either as an unsecured creditor in the administration or by the recovery of old out of date and depreciated stock. Even the letter, dated 20 July 2010, did not terminate Frankice's right to use the machinery or revoke its right to possession of those machines."

[41] [2014] All ER (D) 222 HHJ McCahill QC

27.5. If liability had been established the judge would have awarded a maximum of £112,500 being the diminution in value of the machines over the period of wrongful detention and not "user damages" by way of market rate for the use of the machines during the administration.

B4. What establishment?

28. The Court of Justice of the European Union ("CJEU") gave judgment on 30 April 2015 in respect of *USDAW and Wilson v WW Realisation 1 Ltd*[42] on the meaning of "establishment" for the purposes of collective redundancies. Following the administration of Woolworths and Ethel Austin thousands of employees were made redundant in various high street stores. The trade union USDAW and Mrs Wilson (an employee at the St Ives branch of Woolworths) brought claims in the employment tribunal for protective awards on behalf of dismissed employees on the ground that prior to the redundancy programme the consultation procedure provided for in the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA") had not been followed. Section 188(1) of TULCRA, which implemented the UK's obligations under EU Directive 98/59, provides:

> "Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals."

29. If there is a failure to comply with s. 188, s 189 allows compensation by way of a protective award to be ordered by the Employment Tribunal against the employer. If the employer were not able to satisfy the awards then the Secretary of State could be required to pay them, up to a statutory maximum.

30. By 2 decisions of the Employment Tribunal protective awards were made in respect of a number of employees but approximately 4,500 employees were denied an award on the ground that they had worked in stores with fewer than 20 employees and each store was to be regarded as a separate "establishment". The Employment Appeal Tribunal in a judgment dated 30 May 2013 allowed an appeal, controversially holding that s.188(1) should be read so as to make it compatible with Directive 98/59, which it considered required deletion of the words "at one establishment". The SoS appealed to the Court of Appeal which stayed the proceedings and request a preliminary ruling from the CJEU.

31. The CJEU has by its judgment restored the prior interpretation of s.188 holding that:

    31.1. The term establishment in Art 1(1)(a)(ii) of the Directive must be interpreted in the same way as the term in Art 1(1)(a)(i) on which there was existing CJEU case law, in particular:

        31.1.1. *Rockfon*, which held that "establishment" must be interpreted as designating, depending on the circumstances, the unit to which the workers made redundant are assigned to carry out their duties. It is not essential in order for there to be an "establishment" that the unit in question is endowed with a management that can independently effect collective redundancies;

        31.1.2. *Athinaiki Chartopoiia* that an establishment, in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks;

        31.1.3. The above case by the use of the words "distinct entity" and "in the context of an undertaking" clarified that the terms "undertaking" and "establishment" are different

[42] C-80/14 obtainable from www.curia.europa.eu

and that an establishment normally constitutes part of an undertaking. That does not, however, preclude the establishment being the same as the undertaking where the undertaking does not have several distinct units.

32. The matter will therefore return to the Court of Appeal, which should overturn the EAT decision and then review whether the correct test was applied below as regards separate establishments: see para [70] judgment:

> "…the employment tribunals took the view that the stores to which the employees affected by those dismissals were assigned were separate "establishments". It is for the referring court to establish whether that is the case in the light of the specific circumstances of the dispute in the main proceedings, in accordance with the case-law recalled in paragraphs 47, 49 and 51 above."

B.5 What a surplus!

33. David Richards J gave judgment in the Lehmans' Waterfall 1 application *Lehman Brothers International (Europe)*[43] which deals with numerous points concerning the entitlement to claim and ranking of various claims where there is a surplus (e.g. foreign currency conversion claims, interest accruing during administration period, ranking of subordinated debt) which we were going to cover. However quite apart from the lack of wider relevance to run of the mill West County cases, an appeal was heard by the Court of Appeal on 23 and 24 March 2015 and judgment is due to be handed down on or about 14 April 2015.

B.6 What expenses / supplies?

34. *Laverty v British Gas Trading Ltd*[44] dealt with the issue as to whether charges under deemed contracts for the supply of gas and electricity to a company after it vacated a store was an administration expense under r.2.67(1)(f) or a proveable debt under r 13.12(1)(b). Deemed contracts arise under the Gas Act 1986 and Electricity Act 1989 where gas or electricity is supplied other than under an actual contract, including where an actual contract has been expressly terminated by the supplier. Notwithstanding the vacation of various Peacock stores by the administrators, it appeared that gas and electricity may have continued to be used at the stores (a factual issue yet to be resolved) and BGT claimed some £1.2m. The administrators had accepted that the amounts payable under the deemed contracts whilst they traded the stores were payable as an administration expense but contended that did not apply after vacation of the stores.

35. The Chancellor held that the charges to BGT would not be an administration expense but would be a proveable debt. In summary:

    35.1. The Gas Act 1986 and Electricity Act 1989 were silent as to priority under deemed contracts in the event of insolvency.

    35.2. Counsel for BGT placed heavy reliance by way of analogy on the rates cases. The Chancellor rejected that analogy as in the rates cases liability arises by reason of actual occupation from day to day of the premises and a positive decision by the occupier to continue to occupy. By contrast liability under a deemed contract arose at the instance of the supplier (who could terminate an existing contract), it did not depend on occupation of premises and applied after vacation of the premises and the administrators may not have been able to bring about an end of the deemed contract, which required a novation to a new occupier.

    35.3. The analogy with an express post administration contract entered into by an administrator was also misplaced as a deemed contract arose without any positive or conscious act by the

[43] [2014] EWHC 704 (Ch)
[44] [2014] EWHC 2721

administrator and the terms of that deemed contract were unilaterally imposed by the supplier.

35.4. Section 233 IA 1986, which allowed a supplier to require a guarantee as to payment of future charges by the officeholder, was considered to be of some relevance by the judge as it was enacted at the same time as the IA 1986, provided a means of obtaining priority by way of guarantee. It therefore pointed against the deemed contract charges being an administration expense.

35.5. The sums due under the deemed contract would be a provable debt and the Chancellor accepted that the 3 parts of the test by Lord Neuberger at para [77] of *Nortel*[45] applied.

36. The reference in *Laverty* to s.233 IA 1986 brings us neatly to the Insolvency (Protection of Essential Supplies) Order 2015[46]. As regards administration that Order provides:

36.1. amendments to s.233 IA 1986, which by s. 233(2)(b) prohibits a supplier of utilities (gas, electricity, water and communications services – s.233(3)) from compelling the payment of charges incurred before the administration by threatening to terminate the supply of services on the grounds of non payment of those pre-insolvency charges. Amendments are made to s.233(3) to widen the category of suppliers to include private suppliers of gas, electricity water and communications services, including the supply of utilities from a landlord to tenant.

36.2. "Communication services" was already included as a supply but is now extended by new s. 233(3)(f) to:

> "a supply of goods or services mentioned in subsection (3A) by a person who carries on a business which includes giving such supplies, where the supply is for the purpose of enabling or facilitating anything to be done by electronic means."

36.3. The new s.233(3A) provides:

> "The goods and services referred to in subsection (3)(f) are-
>
> (a) point of sale terminals;
> (b) computer hardware and software;
> (c) information, advice and technical assistance in connection with the use of information technology;
> (d) data storage and processing;
> (e) website hosting."

36.4. A new s. 233A applies to contracts for the supply of essential goods or services to a company (i.e. those mentioned in s.233(3): see s233A(7)) which are entered into on or after 1 October 2015 (s.233A(10)). "Insolvency-related terms" of supply contracts as defined in s.233A(8) cease to have effect if the company enters administration or a CVA is approved (but not liquidation or other insolvency processes), the intention thereby being to prevent the supplier from (i) terminating the supply contract or (ii) altering the terms of the supply contract or compelling higher payments. The supplier can however terminate the contract if s.233A(4) is satisfied, namely (a) consent of office-holder, (b) court grants permission if satisfied that the continuation of the contract would cause the supplier hardship or (c) charges post administration or CVA are not paid within 28 days or due date. The supplier can terminate the supply under s.233A(5) if the supplier requests in writing an office-holder guarantee and that is not provided within 14 days.

[45] [2013] 3 WLR 504
[46] SI 989/2015, which comes into force on 1 October 2015.

B.7 What rem?

37. There have been 3 reported cases in the last year on challenges to administrators' remuneration.

38. In *B W Estates Ltd, Randhawa v Turpin*[47] R challenged the administrators' remuneration of some £80,000 as excessive and that it be either disallowed entirely or reduced under r. 2.109 IR 1986. R had purchased a company debt to gain creditor status to mount the challenge. Their real economic interest was that they had been pursuing a £2m fraud claim against a director/shareholder of the company (RW) and had obtained a judgment and charging order over RW's 75% shareholding in the company. RW had resigned as a director of the company following a disqualification order, leaving his son as sole director and minority shareholder. The company carried on a property investment business with 5 properties charged to Nationwide and let out to tenants. In the course of proceedings against RW a freezing order was obtained, the company's bank refused to allow payments out of its bank account, which led to mortgage payments to Nationwide being missed and Nationwide appointed LPA receivers over the properties, the rental stream being sufficient to clear Nationwide's instalments plus receiver's costs and the property values exceeded the capital due.

39. The administrators were appointed by RW's son on 11 September 2013 due to the difficulties caused by the freezing of its bank account, to take control of the company and protect the interests of creditors. The administrators do not appear to have done much, save for investigating whether a creditor for c £1/2m in the accounts existed, had been dissolved or was fictitious and applying for directions to the court in respect of that issue. The court at an earlier hearing had directed the summoning of a meeting of creditors to consider revised proposals to hand control back to the directors. Those had been approved, the administrators ceased to hold office on 22 August 2014 and RW's son had been removed as a director and R appointed in his place.

40. The real substance of the claim by R was that the company should not have been placed into administration in the first place, the administration had been brought to an end and the company was in exactly the same position as before, save for depletion of its assets by the costs of administration. R's view was that the Nationwide default had been engineered and administrators appointed at the instance of RW, as a means of trying to thwart or delay R's enforcement actions against RW. It was contended by R that the administrator should not have made the statement that the statutory purpose could be achieved and/or that once appointed they should have rapidly brought the administration to an end after statutory reporting. The judge rejected that contention:

    40.1. the claim was not run on the basis that the administrators acted from any improper purpose or participated or assisted in such improper purpose. It was also not run on the basis of any negligent advice as to the appropriateness of administration;

    40.2. even if the administrators took the view that a director was being unnecessarily timid in seeking to make an appointment rather than himself continuing to control the company, it was not the function of the administrator to refuse appointment so as to compel the director to take those risks;

    40.3. if the directors did act for an improper purpose or in breach of duty in making their decision to appoint administrators, that gave a claim against the directors not the administrators. The responsibility on the prospective administrator in considering whether the statutory purpose could be achieved was to look ahead at what will or may happen in the administration and not behind at the motives which may have led the directors to chose to make the appointment;

    40.4. the quantum of the claim was not however determined due to time and the judge noted that there appeared to be force in the suggestion that significant costs should not have been

[47] [2015] EWHC 517 (Ch) HHJ Cooke

incurred pursuing the investigation of the alleged creditor, where there was no funds to make a distribution.

41. *Calibre Solicitors Ltd*[48] raised technical points concerning r.2.109 challenges. The applicant by an application challenged the remuneration in a first progress report. After that application had been issued, there was a second progress report (5 February 2014) which the applicant sought to challenge in his initial application and then issued a second application (13 June 2014) outside the 8 week period for challenge under r. 2.109(1B). Registrar Jones held:

    41.1. it was necessary for there to be a separate application to challenge the remuneration claimed in each progress report and the sums claimed in the second progress report could not be challenged in the first application;

    41.2. there was power to extend the 8 week period pursuant to r 12A.55(2) IR 1986 applying CPR 3.1(2)(a) and the policy surrounding the 8 week challenge period did not suggest that the period was intended to be absolute and against any extensions. Applying the test for extensions from *Denton*[49] it was appropriate to extend time as [para 26]:

        "… the Applicant always intended to challenge the remuneration and expenses in the Second Progress Report; the underlying grounds relied upon are stated to be the same as those for the First Progress Report; the evidence in reply in the First Application addresses the issues; the failure to issue the Second Application in time was due to a misunderstanding of the Rules; the consequential delay in itself is not significant; the Respondent in the course of correspondence was willing to agree an extension subject to agreeing directions; and the delay has had no material effect upon the policy of certainty [given the challenge made by the First Application]".

    41.3. The Registrar was concerned that the costs of the challenge application (estimated at £175,000 for each side) were disproportionate to the likely sums at stake, where some £175,000 was probably unchallengeable, leaving some £112,000 in issue. He therefore gave directions (i) for the parties to assume £150,000 in remuneration was reasonable and concentrate on the reasons why additional costs beyond that were excessive and (ii) set costs budget guidelines for the further procedural steps down to a further C+CMC.

42. *Brilliant Independent Media Specialists*[50] was not a r. 2.109 challenge but instead an application by the former administrators under r. 2.106 to the court to fix their remuneration for a period of the administration. The creditors committee had agreed remuneration from appointment (1 December 2011) to 17 February 2012 in the sum of £180,173 plus pre-appointment costs of some £32,000 but declined to agree any subsequent remuneration. The administrators had sold the business in a pre-pack, having been advising the company for 8 months. The initial creditors' meeting was adjourned as the creditors wanted the administration concluded as soon as possible and a liquidation with new office holders to investigate the circumstances leading up to insolvency. Modified proposals were agreed at an adjourned meeting on 22 February 2012, which provided that on the expiry of 6 months from the commencement of administration (i.e. 31 May 2012) the company would be placed into CVL with different officeholders appointed. The creditors' committee took the view that it was never envisaged that the administrators would carry out a vast amount of work and that their role should have been limited to bringing the administration to an end and placing the company into CVL as quickly as possible.

[48] Registrar Jones, 12 November 2014
[49] [2014] 1 WLR 3926
[50] [2014] All ER (D) 111 Registrar Jones 23 September 2014

43. The Registrar:

43.1. Rejected a contention that the administrators should not receive remuneration for work carried out which went beyond the wishes of the creditors' committee:

> "[26] Whilst the views of a creditors' committee should be taken into account during an administration and will frequently be taken as reflecting the views of the creditors as a whole, it is not for the committee to determine how the administration should be conducted. That is a decision for the office holder in performance of the duties and powers Parliament has thought fit to entrust to administrators."

43.2. Held that the court retained jurisdiction to fix remuneration for the whole of the period of the administration, even though it extended beyond the 6 month deadline imposed by the modified proposals.

43.3. None of the work streams carried out by the administrators was found to be outside the scope of the modified proposals.

43.4. After a detailed consideration of the work done, the Registrar allowed some £230,000, a reduction of some £250,000 against the sum claimed. Various reductions were made for (i) unjustified partner involvement, (ii) insufficient particulars or narrative and lack of justification and (iii) all amounts claimed in respect of investigation of a potential negligence claim, as there was no narrative at all to justify why it was done and how it would further the statutory purpose.

43.5. A claim for remuneration in respect of time spent post administration at the liquidator's request, assisting in debt collection and settling trade debtors and inter-company balances was disallowed entirely, as that was not remuneration for their services "as such" administrators and was a matter between them and the liquidators.

43.6. The sum claimed for dealing with the remuneration application itself was heavily cut from £90,000 to £7,500 on the basis that the administrators should have had in place software allowing a detailed narrative to be recorded as time was recorded, rather than being constructed for the purpose of the remuneration application.

A. What's Out

44. Exit cases have been limited to *Harlow v Creative Staging, Blak Pearl Ltd*[51]. CS had presented a creditor's WUP petition against the company Blak Pearl Ltd on 24 August 2012. The company paid off CS by 2 instalments payments of £50,000 on 15 October 2012 and £38,000 on 29 November 2012. A QFCH appointed H as administrator on 29 November 2012, which resulted in the petition being suspended under para 40(1)(b) Sch B1 but not dismissed. Having concluded the administration H applied for an order (i) that his appointment cease to have effect, (ii) to dismiss an extant application by CS to withdraw its petition, (iii) dismiss an application by a 3rd P creditor to be substituted as petitioner and (iv) for an order that the company be wound up on the suspended WUP, so that s.127 IA 1986 could be relied upon by the liquidator. The district judge refused the application and H appealed.

45. HHJ Purle QC allowed the appeal and made the winding up order on CS's petition. He concluded that:

45.1. the desire to preserve s.127 claims was an entirely proper reason for the administrator to wish to proceed on the suspended petition;

[51] [2014] EWHC 2787 (Ch) HHJ Purle QC

45.2. the objections by CS were essentially procedural and it would just add to the costs to send the administrator off to find a creditor willing to take over the petition.

> "[40] The court is often faced with applications concerning companies which have ceased to have any ongoing commercial viability but are in administration, where it is ought to proceed to a liquidation. It is commonplace in such cases for immediate orders to be made and for procedural requirements to be waived under Rule 7.55.
> …
> [42] All that is just a procedural thicket, guaranteed to enhance costs and make the ultimate result more needlessly distant than it should be."

D. What's New?

46. As mentioned above in Section A.2 the Small Business Enterprise and Employment Act 2015 ("SBEEA 2015")[52] has been enacted, which in Part 10 provide a host of substantial changes in respect of insolvency proceedings generally. As regards administrations the main highlights are as follows (copies of the relevant extracts from SBEEA 2015 are attached to these notes).

46.1. s. 117 SBEEA 2015 inserts a new s. 246ZA IA 1986 allowing an administrator to bring a fraudulent trading claim, a new s.246ZB IA 1986 allowing an administrator to bring a wrongful trading claim and a new s. 246ZC IA 1986 applying s.215 to such claims by the administrator.

46.2. s.118 SBEEA 2015 inserts a new s. 246ZD IA 1986 allowing an administrator or a liquidator to assign a right of action (including the proceeds of an action) under office holder claims by way of fraudulent trading, wrongful trading, TUV, preferences, extortionate credit transactions and the Scottish gratuitous alienations and unfair preferences.

46.3. s. 119 SBEEA 2015 inserts a new s. 176ZB IA 1986 in respect of office-holder claims (i.e. under the above statutory causes of action) and provides that the proceeds of such office-holder claims or the assignment are not available to secured creditors

> "(2) The proceeds of the claim or assignment … are not to be treated as part of the company's net property, that is to say the amount of its property which would be available for satisfaction of claims of holders of debentures secured by, or holders of, any floating charge created by the company."

46.4. s.122 SBEEA 2015 as regards company insolvency generally in effect abolishes the requirements to hold meetings and inserts a new s.246ZE IA 1986 allowing decisions to be made by creditors or contributories by a "qualifying decision procedure" (to which we are referred for enlightenment to para 8A of Sch 8) unless a minimum number of creditors/contributories request in writing a meeting and s.246ZF IA 1986, which introduces the concept of "deemed consent" absent objection by 10% in value. Amendments to the IA 1986 flowing from the abolition of the requirement to hold meetings are set out in Sch 9 of SBEEA 2015, with the relevant amendments to Sch B1 being set out in para 10 of Sch 9.

46.5. s. 124 SBEEA 2015 introduces a new s. 246C IA 1986 to allow the truly apathetic creditor who does not wish to be disturbed by mail to opt out (or be deemed to have opted out) of receiving notices from office-holders.

46.6. s. 127 SBEEA 2015 helpfully amends para. 76(20(b) Sch B1 IA 1986 allowing the administrator's term of office to be extended by creditors by 1 year, in place of the current 6 months.

[52] The Bill of which received Royal Assent on 26 March 2015

46.7. s. 128 SBEEA 2015 amends

46.7.1. para 65(3) Sch B1 IA 1986 to read:

"A payment may not be made by way of distribution under this paragraph to a creditor of the company who is neither secured nor preferential unless

(a) the distribution is made by virtue of section 176A(2)(a), or
(b) the court gives permission."

which thereby enables the prescribed part to be distributed without a court application.

46.7.2. para 83(1) (which gives power to move from administration to CVL) to read:

"This paragraph applies in England and Wales where the administrator of a company thinks:

(a) that the total amount which each secured creditor of the company is likely to receive has been paid to him or set aside for him, and
(b) that a distribution wil be made to unsecured creditors of the company (if there are any) **which is not a distribution by virtue of section 176A(2)(a)**."

46.8. s. 131 SBEEA 2015 inserts in Sch 8 IA 1986 power to allow rules to be made to treat creditors with small debts as if they had proved their debts for the purposes of distribution.

47. The commencement dates for the Insolvency provisions of SBEEA 2015 are set out in s.164, the default under subsection (1) being when brought into form by regulations. Sections 127 to 130 (in respect of administrations) and sections 131-132 (in respect of small debts) are however governed by subsection (3) and commence on 26 May 2015.

Jeremy Bamford, Guildhall Chambers
Catherine Burton, DLA Piper