Davey v Money; Dunbar Assets plc v Davey [2018] EWHC 766 (Ch), 11 April 2018
Neil Levy, Guildhall Chambers April 2018

In a long-awaited judgment, Snowden J has dismissed claims by Ms Davey that administrators of Angel House Developments Ltd acted in breach of duty by accepting directions and instructions from the bank appointing them as to the conduct of the administration or that this led to a sale of the company's only asset at an undervalue. Stephen Davies QC and Neil Levy acted for Ms Davey at the trial of the case in April-June 2016. Although turning largely on findings of fact, the lengthy judgment provides important guidance on the duties of administrators and the potential liability of banks if they intermeddle in an administration.

Snowden J confirmed the following general principles.

(1) An administrator is required to have regard to the interests of all of the company's creditors and he can only limit his ambition to seeking to realise assets to repay the secured creditor if 'he thinks' that it is not reasonably practicable to achieve anything else; even then he must not unnecessarily harm the interests of creditors as a whole [254].

(2) The expression the administrator 'thinks' is an indication that Parliament intended a degree of latitude to be given to an administrator in deciding upon the objective to be pursued, and that he is not lightly to be second-guessed by the court with the benefit of hindsight. An administrator's decision not to pursue the first objective (rescue) will only be open to challenge if it was made in bad faith or was clearly perverse in the sense that no reasonable administrator could have thought that it was not reasonably practicable to rescue the company as a going concern [255].

(3) This applies to the choice of objective but not to the methods adopted by the administrator to pursue his chosen course. Those methods are subject to a more objective standard of review [256].

(4) Seeking information and the views of the directors and shareholders as to the prospects for the company may well be a sensible step in most cases. However, there can be no 'fundamental' rule requiring the administrator in every case to go through a process of consultation with the directors and shareholders, still less that he should seek their 'confirmation' that rescue of the company as a going concern is not feasible [287].

(5) Assisting the appointing bank to serve guarantee proceedings on a director/guarantor and providing the bank with personal information concerning the director/guarantor forms no part of the proper functions of administrators [312].

(6) An administrator's proposals are defective if they do not include an explicit explanation of why the administrators thought that their proposed course of action would be unlikely to result in the rescue of the company as a going concern or a better realisation for creditors than a liquidation [320]. But this defect has no consequence if the administrators can nevertheless attempt to achieve the proposed objective of the administration [323].

(7) When administrators select and appoint agents, there is no hard and fast rule that a competitive selection process should be carried out. There may be practical reasons, including the limited scope of duties to be performed by the agent and the pressures of time, why a 'beauty' parade is neither needed nor desirable [339].

(8) Nor is there any hard and fast legal rule prohibiting the appointment by administrators of agents who have been recommended by the secured creditor(s). The essential question in all cases will be whether the agents to be appointed are competent and able to discharge their fiduciary duties to the company [341].

(9) Providing a financial incentive to office-holders and/or agents for an asset to be realised for more than just the amount owing to a secured creditor may very well be in the interests of unsecured creditors [361].

(10) When acting as agents to sell the assets of a company in administration, administrators owe a duty to the company to take reasonable care to obtain the best price which the circumstances of the case permit. They do not owe the more onerous duties of a trustee selling trust property. The relevant standard of care is that of an ordinary skilled practitioner [383-4].

(11) The administrator's duty includes a duty to consider the timing of realisations. The administrator cannot simply decide to sell the company's assets at a time to suit the interests of the secured creditor, if by doing so he causes harm to the unsecured creditors which is not necessary for the protection of the interests of the secured creditor [391-2].

(12) Administrators cannot be liable in negligence to the company if they reasonably rely on advice from agents that appeared to be competent [451].

(13) Whether administrators or other office-holders should advertise assets for sale is a question of fact in each case, depending upon the nature of the asset and the relevant market [455].

(14) An administrator must exercise independent judgment. He must not simply allow another person to dictate to him how he should exercise his powers as administrator [590].

(15) This does not mean that an administrator cannot take account of the wishes of the relevant creditor(s) whose interests are likely to be affected by the decisions he takes. An administrator is entirely at liberty to consult with those creditors to ascertain their views, and in many cases it will be entirely sensible that he should do so. He is not, however, bound to follow their wishes [592].

(16) An allegation that an administrator surrendered his discretion to the appointing creditor or acted with a view to serving the appointing creditor's interests rather than those of the company or acted out of personal antipathy to a director/shareholder rather than to advance the interests of the company, if made out, could properly be regarded as a breach of fiduciary duty. Allegations of failure to take care would not amount to breaches of fiduciary duty [624-6].

(17) If an administrator seeks to arrange or complete a sale of property subject to a fixed charge, there is no deemed agency in favour of the company that would prevent the court from finding, on appropriate facts, that in relation to such a sale the administrator was acting as agent of the secured creditor, so that the secured creditor could be held liable for any breach of duty to the company or others interested in the equity of redemption [705].

(18) The level of involvement by the secured creditor to justify a finding that an agency relationship has been created between the administrator and the secured creditor or otherwise to justify the imposition of liability on the secured creditor is something going beyond the

legitimate involvement that a secured creditor could expect to have in the administration process by reason of its legal rights. The administrator should either have been compliant with directions given by the secured creditor, or to have been unable to prevent some interference with his intended conduct of the administration [706].

(19) The appointing bank (or other third party) cannot be liable in tort for causing the administrators to breach their fiduciary duties to the company, because the law does not recognise such a tort. The closest equivalent liability in equity would only arise if it could be shown that the third party dishonestly assisted a breach of fiduciary duty by the administrators [712].

(20) The tort of inducing a breach of statutory duty requires that the defendant knew or was reckless whether the party owing the duty was in breach of a duty owed to the company, and the breach of duty was procured by the defendant. In addition, the defendant must have aimed at bringing about the breach rather than this just being a foreseeable consequence of his actions. This could only be made out against an appointing bank if a person whose relevant knowledge and intention was attributable to the bank could be shown to have had the required knowledge and intention [714-5].

(21) An unlawful means conspiracy is committed where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so [718].