CONTESTED ADMINISTRATION APPLICATIONS

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An overview

- This webinar will focus on:
  - App for AO by creditor whose debt is disputed.
  - App for AO by director – contested by creditors (including guidance on whether POA achievable & court's discretion/alternative insolvency processes).
  - Disputes over the appropriate nominees.
  - Costs.

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Creditor – Disputed Debt?

- Creditor with disputed debt has **standing** to present an AA if they can show '*a good arguable case*' that they're owed a debt of sufficient amount, *Hammonds (a firm) v Pro-fit USA Ltd* [2007] EWHC 1998 (Ch).

- **Doesn't** necessarily mean you're a creditor for purposes of s.123(1)(a) IA or that your debt is a debt or liability for purposes of s.123(1)(e) or (2), *Hammonds.*

- Possible outcomes: (i) insolvency not established; (ii) court resolves issue of disputed debt (app pending); (iii) creditor points to other debts or incurable deficiencies in company's balance sheet.

Creditor – Disputed Debt?

- Obtain as much publicly available info as possible re establishing insolvency – Companies House; CCJ register.
- Other creditors with unfulfilled demands or intel?
- Balance sheet insolvency isn't simply assets – liabilities: harder for creditors to establish.
- Directors likely to have upper hand – intimate knowledge of the company's affairs.

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Director led Application – Creditor Opposes

- Potential for rescue – liquidation a step too far?
- QFCH unwilling or concerned about validity of charge?
- Reactionary tactic to presentation of WUP? Para 44 of Sch B1 IA = no WUO whilst application is pending.
- Void dispositions? Doesn't apply in admin.

Director led Application – Creditor Opposes

Reaction to WUP?

- Areas of focus: (**i**) purpose of admin; (**ii**) court's discretion and alt insolvency processes.
- Para 11(b) Sch B1 IA – real prospect that AO is reasonably likely to achieve purpose of administration, *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch).
- Para 11(a) & (b) Sch B1 IA unsatisfied? – No jurisdiction to make AO! *Baltic House Developments Ltd v Wing Keung Cheung & PO Shing Patrick* [2018] EWHC 1525 (Ch).

Director led Application – Creditor Opposes

POA ACHIEVABLE?

- Evidence should contain more than speculation – must contain substance and reality, *Baltic.*
- Evidence should be cogent and compelling (albeit in the context of demonstrating a real prospect), *Baltic.*
- Should give details about how a given purpose might be achieved; what the administrators are proposing to do in the immediate future and with what result or how this would compare if no order was made.
- Court ran refuse AO if the evidence is thin and unsubstantiated, *Green v Gigi Brooks Ltd* [2015] EWHC 961 (Ch).
- Para 3(1)(c) Sch B1 IA relied upon? If admin more costly than liquidation and benefits of admin don't outweigh costs then purpose of admin can't be achieved, para 3(4)(b) Sch B1 IA, *Baltic.*

Director led Application – Creditor Opposes

Discretion?

- Para 13 (1) Sch B1 IA:

  "On hearing an administration application the court may—

  (a)make the administration order sought;

  (b)dismiss the application;

  (c)adjourn the hearing conditionally or unconditionally;

  (d)make an interim order;

  (e) treat the application as a winding-up petition and make any order which the court could make under section 125;

  (f)make any other order which the court thinks appropriate."

Director led Application – Creditor Opposes

Discretion & Relevant Factors

- Discretion to make AO wide and should take account of all relevant parties and purpose of legislation, *Baltic.*
- Views of creditors – pressing for liquidation? *Baltic*
- Degree of risk that admin would produce worse outcome or the extent to which a potential outcome might be worse in an administration rather than liquidation, eg cost and delay, *Baltic*
- Where benefits of admin are trivial compared to liquidation, creditors should not be deprived of independence and objectivity of OR, *El Ajou v Dollar Land (Manhattan) Ltd* [2005] EWHC 2861 (Ch).

Director led Application – Creditor Opposes

Relevant Factors?

- Court may prefer liquidation because the company's affairs might warrant comprehensive examination, *Re West-Tech International* [1989] BCLC 600.
- Void dispositions? Court can call on WUP and appoint provisional liquidator to investigate, *Data Power Systems Ltd v Safehosts (London) Ltd* [2013] EWHC 2479 (Ch) *Re Brown Bear Foods Ltd* [2014] EWHC 1132 (Ch); *Re Officeserve Technologies Ltd* [2017] EWHC 906 (Ch)
- Court very unlikely to treat AA as WUP when concerned about void dispositions – WUP deemed to commence on making WUO rather than presentation of petition, s.129(1A) IA.

WHO SHOULD BE APPOINTED?

Disputes between:

- Creditors;
- Director/Company nominee v creditors nominee.

WHO SHOULD BE APPOINTED?

Principles which apply to appointment of liquidator apply to administrators, *Fielding v Seery & Anor* [2004] BCC 315 &, *Med-Gourmet Restaurants Limited v Ostuni Investments Limited* [2010] EWHC 2834 (Ch).

1. *The identity of the liquidator has to be considered by reference to the purpose for which he is appointed.*
2. *An application in relation to the appointment of the liquidator accordingly has to be considered by reference to the test adopted by Sir Andrew Morritt V-C, namely, whether it will be conducive to both the proper operation of the process of liquidation and to justice as between all those interested in the liquidation.*
3. *It follows from this that, although the majority vote of the creditors will, in the normal course, prevail, creditors holding the majority vote do not have an absolute right as to the choice of liquidator.*
4. *The liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator.*
5. *More specifically, the liquidator should not be the nominee of a person:*

(a) against whom the company has hostile or conflicting claims; or

(b) whose conduct in relation to the affairs of the company is under investigation."

WHO SHOULD BE APPOINTED?

Justice being seen to be done: *Med-Gourmet*

"14. There is a public interest in office holders charged with the administration of an insolvent estate not only acting but being seen to be acting in the best interest of the creditors generally; and ensuring that all legitimate claims that the company may have are thoroughly investigated. This is a reflection of a more general principle that justice must not only be done but must be seen to be done. The importance of the principle is reflected, amongst other ways, in the fact that applications for recusal are almost always made not on the ground of actual bias but on the ground of appearance of bias."

- And *Stanley International Betting Ltd v Stanleybet UK Investments Ltd* [2011] EWHC 1732 (Ch:

"In both cases, the appointment of the office-holder has to achieve justice between all the interested parties; and the office-holder needs to both act and be seen to act in the best interests of creditors and to properly investigate all claims"

WHO SHOULD BE APPOINTED?

CREDITOR V CREDITOR DISPUTE

- Views of majority (by value) will prevail if all else is equal, *Healthcare Management Services Ltd v Caremark Properties Ltd* [2012] EWHC 1693 (Ch) (majority view does not bind the court who has final say)
- **However** creditors views can be counterbalanced by other factors, e.g. a nominated person may have already made progress in investigating company affairs – delay and cost in appointing alternative candidate; *Healthcare*.
- Thus, generally, court may prefer appointment of a candidate who is already familiar with company's business, *Re Maxwell Communications Corp Plc (No.1)* [1992] B.C.C. 372.
- Resources are also relevant – international firm with large resources may be more suitable than smaller sized firm / one man band.
- Number of administrators – if another is otherwise engaged, admin process isn't ground to a halt.

WHO SHOULD BE APPOINTED?

CREDITOR V CREDITOR DISPUTE

Demonstrating lack of confidence?

- *Stanley International Betting Ltd v Stanleybet UK Investments Ltd* [2011] B.C.C. 691: two substantial creditors, C1 and C2. Not possible to determine who was the majority creditor. C1's choice of administrator appointed. C2 had not established that the creditors at large could not have confidence that C1's choice wouldn't conduct a thorough and vigorous investigation.
- Unusual case – not clear who majority creditor was.
- Justice being seen to be done would warrant C2's choice being appointed?

WHO SHOULD BE APPOINTED?

DIRECTOR / COMPANY V CREDITOR DISPUTE

- If the only contest is between creditors' nominee and directors' nominee, 'plain general rule is that the creditors will prevail' *Privilege Project Finance Ltd v SS Agri Power Ltd [2017] EWHC 2431 (Ch) (Norris J); Med-Gourmet* (but see *World Class Homes Ltd, Re* [2004] EWHC 2906 (Ch)

- Subject to principle that, generally, court may prefer appointment of a candidate who is already familiar with company's business, *Re Maxwell Communications Corp Plc (No.1)* [1992] B.C.C. 372.

- No confidence in director's nominee that they will conduct a thorough and vigorous investigation? Court may approve creditors' nominee instead – justice being seen to be done: *Med-Gourmet*

WHO SHOULD BE APPOINTED?

DIRECTOR / COMPANY V CREDITOR DISPUTE

- Creditors' candidate chosen over a director's candidate, despite latter being familiar with company's affairs and already acting for company's subsidiary: **no evidence of economies of scale that would arise from those facts,** *GP Noble Trustees Ltd v Directors of Berkeley Berry Birch Plc* [2006] EWHC 982 Ch

- Equally, creditor was a very substantial creditor and trustee of an occupational pension scheme with duty to employees (present and former): "*important in those circumstances that it should be seen that there is a rigorous and independent professional analysis of what is in the best interests of the creditors by whichever administrators are appointed*".

WHO SHOULD BE APPOINTED?

DIRECTOR / COMPANY V CREDITOR DISPUTE

- **More general approach which focuses on wishes of creditors?** *Oracle (Northwest) Ltd v Pinnacle Financial Services (UK) Ltd* [2008] EWHC 1920 (Ch)

Significant creditors have a preference and secured/other creditors neutral?

"That being the position, I have to make a choice, and it seems to me that that choice is essentially dictated by the wishes of the creditors, who have a clear preference for Mr Chamberlain over Tenon. It seems to me that where, as in this case, significant creditors have a clear preference for one administrator over another, and the secured and other creditors remain neutral, then the court should resolve that matter in favour of the wishes of those creditors, for whose benefit in the end the administration is."

- Pre-existing familiarity not raised as an issue.

WHO SHOULD BE APPOINTED?

DIRECTOR / COMPANY V CREDITOR DISPUTE

Should the court hold a head count of the creditors to see who should be appointed?

- Inappropriate to hold head count unless you know what was said to creditors, *World Class Homes Ltd, Re* [2004] EWHC 2906 (Ch).

"Unless one knows really what was said to creditors, one does not know what weight to attach to their preference. If, for example, a creditor is told that the only prospect of getting a decent recovery is to have Mr A as administrator, that could have procured a support for Mr A, even if it transpires that Mr B would be quite as good as Mr A. I am, therefore, not at all persuaded that there is anything conclusive in a head count of creditors."

WHO SHOULD BE APPOINTED?

DIRECTOR / COMPANY V CREDITOR DISPUTE

- **However, head count can work if properly explained to creditor:**

"Therefore had it been compelling that the weight of the head count was almost wholly one way and was well explained, I think perhaps I could have taken account of it and attached some weight to it, but in the particular circumstances of this head count I am not persuaded that it pushes me to any real extent in favour of one or against another."

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WHO SHOULD BE APPOINTED?

A MIDDLE GROUND – JOINT APPOINTMENT?

- Normally inappropriate to appoint joint IP's from different firms because it causes an increase in time and costs, *Re Structures & Computers Ltd* [1998] B.C.C. 348;
- If a joint appointment is proposed, provide evidence of how the administrators seek to divide tasks between them and their agreement on the admin strategy, *Oracle.*
- If there isn't any evidence of that, added disadvantage as court will be concerned about the prospect of applications for directions and the cost and time consequences thereon, *Oracle.*

WHO SHOULD BE APPOINTED?

IN SUMMARY:

- Overriding question is whether the appointment will be conducive to both the proper operation of the process of administration and to justice as between all those interested in the administration.
- Creditor v creditor – the majority by value will prevail unless it can be shown that it will save time and cost in using a candidate who is already familiar with the company's affairs. Resources and number of administrators will also be relevant.
- A lack of confidence in a proposed nominee's ability to conduct a thorough and vigorous investigation - the court may appoint the creditors choice pursuant to ensuring that justice is seen to be done.
- If there aren't any reasonable grounds for lacking confidence, its inappropriate to hold a head count of creditors to decide between the company's choice and the opposing party's choice of administrator – unless one knows what has been said to the creditors.
- Joint appointment usually inappropriate.

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COSTS?

- If AO made – costs of applicant and any other person appearing whose costs are allowed by court = payable as an expense, r.3.12(2) IR;

What if you have lost the application?

- In *Re Structures & Computers Ltd* [1998] B.C.C. 348 the court allowed the costs of a majority creditor who opposed a company's application for an administration order.
- Very strong arguments against AO and was going to bear the majority shortfall as a majority creditor.
- So – possible to get costs as an expense if: (i) strong arguments against AO; (ii) underlying prejudicial factor referable to the administration?

COSTS?

- Directors can be personally liable for the costs of a failed AA, *Re Tajik Air Ltd* [1996] B.C.C 368.
- Test is whether reason and justice require the directors to pay the costs, *Tajik.*
- Reason and justice won't usually require a director to pay costs unless they have caused costs to be incurred for an improper purpose, for instance, if a director sought to obtain a private advantage at the expense of creditors or to conceal their wrong doings. *Tajik.*
- Strict test but might it be possible for court to make costs order where: AA made without benefit of advice and in the face of overwhelming opposition? *Re Land and Property Trust Co plc* [1991] B.C.C 446

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