CONTESTED ADMINISTRATION APPLICATIONS

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INTRODUCTION

1. As the length of this paper would suggest, there is a great deal to administration applications. More so when the application happens to be contested. This paper will discuss the relevant principles and will give guidance where appropriate. The paper is intended to be a companion piece in support of a webinar by the aforenamed authors on 22 February 2022.

ADMINISTRATION OR LIQUIDATION?

2. Why administration? And better yet, why not use the out of court process? Why not simply seek an order that the company be wound up? These are all questions which are likely to be considered by a party confronted with a company that seems to be in financial trouble. It may be thought a company can be rescued as a going concern and hence, liquidation is a step too far. More practically, it may be that a qualifying floating charge holder is unwilling to exercise its power to appoint an administrator and hence an application to court is required. Or indeed, a creditor with a floating charge may well have concerns over the validity of their charge and, rather than having the process disrupted by allegations that the appointment was invalid, or expose themself and the proposed administrator to claims following a defective appointment, they may well consider a court application is appropriate (see *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th Ed) at 6-024).

3. Equally, seeking an administration order may well be a reaction to the presentation of a winding up petition. The interim moratorium under paragraph 44 of Schedule B1 ("**Sch B1**") to the Insolvency Act 1986 ("**IA**") will, whilst the administration application is pending, mean that the court will refrain from making a winding up order. There is also the matter of void dispositions under s.127 IA. Section 127 IA applies only in a winding up by the court, so there might well be commercial reasons to prevent the unravelling of any transactions post-presentation of the petition. Though see below on how effective that strategy really is.

STANDING?

4. It is logical to start by considering whether a party has standing to apply. Without standing, the hypothetical applicant cannot apply for an administration order.

5. The persons who can apply for an administration order are set out in paragraph 12 of Sch B1 IA. They include:
    a. "the Company;
    b. the directors of the Company;
    c. one or more creditors of the company (which includes contingent and prospective creditors: paragraph 12(4) of Sch B1);
    d. [….][1]; and
    e. a combination of persons listed in paragraphs (a) to (d)."

6. Furthermore, the following have standing to apply by virtue of other provisions of the IA and other legislation:
    a. the liquidator of the company,(para.38(1), Sch.B1 IA);
    b. the supervisor of a CVA (s.7(4)(b) and paras.12(5) Sch B1 IA);
    c. the Financial Conduct Authority (s.359 of the Financial Services and Markets Act 2000).

Directors

7. Issues of standing have arisen in the case of directors who have used the in court rather than the out of court process.

8. Directors can make informal decisions to appoint administrators, but in such circumstances, the decision should be unanimous. If the decision is taken formally at a board meeting, directors will only have standing to seek an administration order if the decision was by majority (see *Re Re Equiticorp International Plc* [1989] 1 WLR 1010). It follows that if the opposite is true of the two scenarios given, the relevant director(s) will not have standing to apply.

[1] Paragraph 12(d): "the designated officer for a magistrates' court in the exercise of the power conferred by s.87A of the Magistrates' Courts Act 1980 where a fine has been imposed on the company;".

9. Assuming there is unanimity or majority agreement, there remains still the question of compliance with the company's internal governance rules, that is the articles of association. Will directors have standing to apply if the articles have not been complied with, say, for instance, if the meeting is inquorate?

10. The position in summary is this: where the in-court process for seeking an administration order is used, if there is a serious question over whether a director has standing to apply, the court takes into account the question of standing but does not allow the same to be determinative of the issue. Factors relevant to the exercise of the discretion will include whether an administration order would result in a better return for creditors, and the urgency of seeking such an appointment (*Lumineau v Berlin Hyp AG (Re Brickvest Limited and others)* [2019] EWHC 3084 (Ch)).

11. Further, a sole appointed director has standing to apply to the court for an administration order by virtue of para 12(1)(b) of Sch B1 IA, because by section 6 of the Interpretation Act 1978, the plural form of 'directors' in paragraph 12 of Sch B1 IA would include the singular. Further, it was observed (obiter) that a director would have standing to apply even if under the company's articles, the director could not pass a resolution of the company to make such an application by themselves, (*Re Nationwide Accident Repair Services Ltd* [2020] EWHC 2420 (Ch)).

12. For those interested in seeking to understand how we seemingly arrived at the position in paragraphs **10-11**, paragraphs **13-24** are instructive.

13. The Chancellor expressed the view in *Minmar (929) Limited v Khalastchi* [2011] EWHC 1159 (Ch) that a decision taken by the majority of directors to appoint administrators will only be valid if the decision complies with the company's internal governance rues, that is, and *inter alia*, the decision was taken at a duly convened board meeting which was quorate. Paragraph 105 of Sch B1 IA does not apply in such circumstances to override the company's internal management procedure.

14. *Minmar* was followed in *Baker v London Bar Co Ltd* [2011] EWHC 3398 (Ch) and *Re BW Estates Ltd* [2017] EWCA Civ 1201. In the latter case especially, the central plank of the

Court of Appeal's decision rested on the importance of ensuring that the company's rules of internal governance had been complied with: per Sir Geoffrey Vos C:

> *"I respectfully find myself in agreement with the reasoning of Sir Andrew Morritt C in Minmar supra at paragraphs 49-52 to the effect that there is no notion of informality in the provision allowing the directors of a company to appoint an administrator. This approach seems to me to be consistent with the decision of Millett J in Equiticorp supra, and also with the general requirement of company law that the provisions of the articles of association cannot be ignored."*

15. In *Brickvest* however, Marcus Smith J confined *Minmar* as an authority applicable to the appointment of administrators out of court. Marcus Smith J said:

> "*It is clear law that in the case of the appointment of administrators out of court , such an appointment is only regular if the internal rules regarding the company's internal management are properly followed. That, one might think, is self-evidently the case: there must be some form of binary control where the court is not involved in the making of an appointment. Either the resolution appointing the administrator is valid or it is not. If it is valid, then the appointment can take effect. If it is not, then there is an irregularity that must be cured. The authority that stands for this proposition is Re BW Estate Limited (No.2), [2017] EWCA Civ 1201."*

16. In *Brickvest* the judge did not decide one way or the other whether the articles had been complied with. As the applications seeking administration orders were made under urgent circumstances, it was considered 'inapt' to consider in detail the company's articles of association or to delay an order that ought to be made whilst an irregular position was being rectified. The judge acknowledged that there was a real benefit in making an administration order and that any delay might cause a company to be at risk of trading insolvently which would thwart the purpose of an administration order.

17. Penultimately, in *Brickvest*, the judge established an approach which should be followed in cases where a serious question arises over a director's standing to make an application for an administration order: essentially, the court should treat the matter as a discretionary one, "*taking full account of the question as to standing, but not allowing the point to be automatically determinative against the application*".

18. The issue cropped up again in *Re Nationwide Accident Repair Services Ltd* [2020] EWHC 2420 (Ch). This case concerned a group of 9 companies over which an administration order

was sought by the companies' sole director ("**the Director**"). Nationwide Accident Repair Services Limited ("**NARS**"), included amongst the 9, was the non-trading holding company of the group. The articles of association of each of the companies other than Howard Basford Ltd arguably required a quorum of at least two directors before a resolution could be passed. It was possible, therefore, that the Director did not have authority to resolve on behalf of the companies to seek the appointment of an administrator. The companies' ultimate parent declined to appoint another director or to amend the articles and indicated that it would not sign a shareholder's resolution to appoint an administrator or consent to NARS' director making such an appointment.

19. Fancourt J went on to make the administration order. He did not consider that he was prevented from doing so by the absence of any quorum (if more than one was required) and therefore the possibility that the Director did not have authority to make the decision. The following reasons were given.

    a. The judge held that, on the basis of *Brickvest*, and as a matter of principle, there was no impediment to a single director making an application under paragraph 12(1)(b) of Sch B1 to the IA where he is the sole director, nor would that prevent the court making an administration order where it is otherwise appropriate to do so. The judge held that by virtue of s.6 of the Interpretation Act 1978, the plural form of 'directors' in paragraph 12 of Sch B1 IA would include the singular. Further, the judge held, a director has standing to apply to the court for an administration order by virtue of para 12(1)(b) of Schedule B1 IA, even if under the company's internal rules of management, i.e., the articles, the director could not pass a resolution of the company to make such an application by themselves.

    b. Secondly, the judge rationalised the point regarding a sole director on the basis of directors' duties and ensuring that creditors receive the best outcome:

    "*Each director of a company, including a single director, has a duty owed to the company and its creditors to cause a company to cease trading where it is clearly insolvent and to instigate an appropriate insolvency process. Where a better result for a company's creditors will be achieved by an administration, a director must be entitled – if not bound – to apply to the court for that relief, if an administrator cannot be appointed out of court or for some other reason it is necessary or appropriate to apply to the court.*"

c. Thirdly, the judge considered if the company could not have resolved to appoint an administrator, then that would be a matter that is to be taken account of and considered in the court's exercise of its discretion to make an administration order. This discretionary exercise, the judge held will take account of all the relevant circumstances, "*which may include the reasons why there is a sole director and the effect of the company's articles as to the relevant powers of its board*". Though the judge also stated that this particular issue is likely to be outweighed by other relevant considerations, such as where an administration order would result in a better return for creditors and there is no other realistic alternative to a winding up.

20. There appears (see below) to be a tension between *Brickvest* and *Nationwide* on one hand, and *BW Estates and Minmar* on the other. However, neither *Brickvest* or *Nationwide* made a firm finding that the articles hadn't been complied with. The issue of non-compliance was essentially side-stepped in *Brickvest* in favour of looking at the bigger picture and not allowing a potential defect to stand in the way of an administration order which, on the facts, needed to be made. If it had been decided in *Brickvest* that there was non-compliance, then applying *BW Estates* (which is a Court of Appeal decision) to the letter would, one might say, have meant that there was no standing to apply.

21. Commentators[2] describe a case such as *Brickvest* as authority for the proposition that the court has discretion to disregard non-compliance with the company's articles in a court led process. Whilst the authors disagree that that is what the aforenamed authority actually decides (there was no finding of non-compliance in *Brickvest*) it is only a matter of time before a court is invited to go one step further a make such a decision.

22. Indeed, in *Nationwide*, the court suggested (albeit *obiter* given that there was no finding of non-compliance) that if the articles had not been complied with, the director would still have standing to apply:

> "It seems to me that is a case in which a director is the sole appointed director of a company, and that director has standing to apply to the court for an administration order by virtue of para 12(1)(b) of Schedule B1, <u>even if under the internal governance of the company he could not alone pass a resolution of the company to make such an application. The Court will then exercise its discretion, taking into account all relevant</u>

[2] Sealy & Milman: Annotated Guide to the Insolvency Legislation 25th Ed. – 2022 (Appointment of Administrator by Court)

circumstances, which may include the reasons why there is a sole director and the effect of the company's articles as to the relevant powers of its board."

23. That line of thinking cuts against what is said in *Minmar and BW Estates* and the primacy accorded towards ensuring the articles are complied with. True, a distinction has been drawn between the out of court and the in court process by Marcus Smith J. However, whilst *Minmar* and *BW Estates* concerned out of court appointments, it is at least arguable that it was implicit in *Minmar* that the same principle would equally apply to paragraph 12 of Sch B1 IA. The answer will come down to whether a court is persuaded by the distinction drawn by Marcus Smith J. If a court is persuaded, then *Nationwide* may well form the basis for saying the court has the power to disregard non-compliance with the articles. It may also be that the court is influenced by pragmatism over principle, where as here, the administration order needed to be made.

24. So, in cases where there are competing and plausible answers to the question of whether a director has standing, *Brickvest* may well be of assistance. Where the position is more clear cut and adverse to the applicant, then the outcome may well be that the court finds that the applicant doesn't have standing. It is also worth stressing that in *Brickvest*, the court was satisfied it should make an administration order and indeed that there was real benefit in doing so. In a case where the position is less clear, it will be much harder for a court to justify side-stepping the question of standing and therefore the matter would have to be dealt with. As a guide for the future and in the meantime therefore – ensure the articles are complied with!

Creditors

25. Contingent and prospective creditors have standing to apply for an administration order. Whether they are successful in persuading the court to make an administration order is another matter entirely.

26. A party has standing to apply for an administration order as a creditor even where their debt is disputed if they can show that they have a good arguable case that a debt of sufficient amount is owing to them (presumably this requirement would require modification in the case of a contingent creditor), *Hammonds (a firm) v Pro-fit USA Ltd* [2007] EWHC 1998 (Ch).

27. A word of caution, however. It doesn't follow that by attaining creditor status for the purpose of standing to present the application means that the applicant is a creditor "*for the purposes of section 123(1)(a) or that the amount of his alleged debt is a debt or liability for the purposes of section 123(1)(e) or (2)" – Hammonds*. Thus, the same evidence which is sufficient for the purposes of *locus standi* is not necessarily sufficient to persuade a court that a company is unable to pay its debts, *Hammonds*. We can treat this principle as essentially establishing a threshold for the purposes of *locus standi* to present an application but doesn't determine whether the court will make the administration order. Once the issue of *locus* is surpassed, for the purpose of establishing that a company is unable to pay its debts, the issue of whether the disputed debt should be taken into account will have to be resolved; the court will either decide the issue itself or direct that it be resolved and during such time the application will remain pending:

> "Thus, focusing on sections 123(1)(e) and 123(2) , it has to be proved to the satisfaction of the court that the company is unable to pay its debts as they fall due or that the value of its assets is less than its liabilities. In carrying out that assessment, the debt (where it is disputed or subject to across-claim) of an applicant is in no different a position from any other debt which is disputed or subject to a cross-claim. The court will have to form a view on the basis of all the evidence before it whether it is satisfied as required by either of those sections. There is this difference however. The court may, in the exercise of its discretion, require the dispute (about the debt or the cross-claim) to be decided before making an order, either requiring the matter to be determined in a separate action or by deciding the issue itself. In such a case, of course, the court would not need to make a determination about solvency unless and until the dispute had been resolved."

28. In summary, therefore, a view will have to be taken over whether one has a good arguable case in respect of a disputed debt. If so, and once the gateway of standing is surpassed, unless the applicant can demonstrate (not taking into account the disputed debt) that there are other debts possibly belonging to others which show that the company is or is likely to become unable to pay its debts (for instance unsatisfied judgments) then the issue of the disputed debt will need to be resolved one way or the other.

DEMONSTRATING THAT THE COMPANY IS OR IS LIKELY TO BECOME UNABLE TO PAY ITS DEBTS

29. By paragraph 11 of Sch B1 IA, in order for the court to make an administration order it must be 'satisfied':

> "(a) that the company is or is likely to become unable to pay its debts, and
> (b) that the administration order is reasonably likely to achieve the purpose of administration."

30. The test under paragraph 11(a) Sch B1 IA is whether it is more probable than not, whereas under paragraph 11(b) Sch B1 IA the test is whether there is a real prospect, *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch).

31. Unable to pay its debts has the same meaning as in s.123 IA (paragraph 111(1) Sch B1 IA), i.e cash-flow insolvency or balance sheet insolvency.

32. As regards the cash flow test under s.123(1)(e) IA:
    a. Contingent and prospective liabilities in the near future can be taken into account (liquidated liabilities[3]), *Re Cheyne Finance plc* [2007] EWHC 2402;
    b. A failure by a company to pay a debt which is due and undisputed is of itself evidence that the company is unable to pay its debts as they fall due – the key here will of course be to evidence unfulfilled demands; *Taylor's Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd* [1990] BCLC 216, CA;
    c. Courts must take into account what current revenue a company has as well as what it can obtain by realising assets within a relatively short time – the key here will be establishing the likelihood (or the opposite) of such assets being sold in a short time; *Re Capital Annuities Ltd* [1979] 1 WLR 170;
    d. Obtaining a loan is unlikely to be treated as supporting solvency if the result of the lending means the company is going to delve deeper and deeper into long term debt, *Bucci v Carman* [2014] EWCA Civ 383;
    e. General indicators of cash flow insolvency are: (i) the company has a large number of outstanding debts and unsatisfied judgments; (ii) admissions by the company that they are unable to pay; (iii) the absence of assets to levy execution against, *Doyle, Keay and Curl: Annotated Insolvency Legislation 2022* (Tenth Edition) Part IV, Chapter VI.

[3] See: *Doyle, Keay and Curl: Annotated Insolvency Legislation 2022* (Tenth Edition) Part IV, Chapter VI.

33. As regards the balance sheet test under s.123(1)(e) IA:

a. Contingent and prospective liabilities can be taken into account, but not contingent and prospective assets – so assets which may in the future become the company's do not fall part of the assessment; *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28;

b. The starting point is that if a company's immediate liabilities exceed its assets, the Company is unable to pay its debts, *Re Casa Estates (UK) Ltd* [2013] EWHC 2371 (Ch). There is then an evidential burden on the company to establish why, notwithstanding its balance sheet, it can reasonably be expected to meet its liabilities;

c. However, establishing balance sheet insolvency is not a simple comparison of the company's assets and liabilities as recorded in the accounts. The court must consider the company's finances from a commercial and overall perspective – courts will look at whether it is clear in practical terms that incurable deficiencies in a company's assets means that it will be unable to meet its liabilities, *BNY Corporate Trustee Services Ltd v Eurosail*-UK 2007-*3BL plc* [2011] EWCA Civ 227;

d. The more distant a liability is the more difficult it is to establish it (*Eurosail)* at [42]). The court also said that for the purposes of the 'balance-sheet' test the ability of a company to meet liabilities, both prospective and contingent, is to be determined on the balance of probabilities with the burden of proof on the party asserting balance-sheet insolvency (*Eurosail* at [48]).

34. So, in light of those principles, what practical issues emerge? First, as commentators have observed, it is likely that a court will be minded to accept an assertion by directors that a company is insolvent as they will likely be able to present evidence that demonstrates that a company will be unable to meet its longer term obligations. Conversely, for creditors, *Eurosail* seems to make it more difficult to establish that a company is balance sheet insolvent since the matter is not confined to a simple calculation of assets as against liabilities and of course because the creditor's knowledge of the company's affairs will be limited, at least in comparison to the directors. On that topic, a creditor should take reasonable steps to obtain as much publicly available information about the company along with information which it has obtained through its own dealings with the company to

'*present as full a picture as possible to the court'*. *Lightman & Moss on The Law of Administrators and Receivers of Companies 6th Ed* (6-028 – 6-032).

DEMONSTRATING THAT THE ADMINISTRATION ORDER IS REASONABLY LIKELY TO ACHIEVE THE PURPOSE OF ADMINISTRATION

35. It will be recalled that under paragraph 11(b), Sch B1 IA the test is whether there is a real prospect that the administration order is reasonably likely to achieve the purpose of the administration. *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch).

36. By way of reminder, the statutory purpose of an administration is to be found in paragraph 3 of Sch B1 IA which, so far as material, provides that:

> (1) "The administrator of a company must perform his functions with the objective of—
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors."

37. Warren J in *Auto Management Services Ltd v Oracle Fleet UK Ltd* [2007] EWHC 392 (Ch) said this:

> *"There is no dispute about the applicable principles. There has to be a real prospect that the administration order will achieve the purpose. That does not mean that I need to be satisfied that on the balance of probabilities there will be a better outcome upon administration as compared with winding up. There has to be a real prospect. It is not enough to show a real prospect that administration would achieve no worse an outcome. The prospect of a better result must be shown. However, I venture to think that if an administration can be shown in all but the most unlikely circumstances to produce a result no worse than liquidation, and if it can be shown that there are reasonably possible circumstances in which administration can in fact produce a better result so that paragraph 11(b) [now 3(1)(b)] is satisfied, that will be a significant factor when it comes to exercising a discretion whether or not to make an order."*

38. Sensibly, HHJ Eyre QC (as he then was) in *Baltic House Developments Ltd v Wing Keung Cheung & PO Shing Patrick* [2018] EWHC 1525 (Ch) decided that the above paragraph falls into two halves divided by the word 'however'. A real prospect needs to be shown that the statutory purpose will be achieved otherwise there will be no jurisdiction to make an administration order. Whilst the demonstration of a real prospect would show that the court has power to make an administration order, whether that power is exercised becomes a matter of discretion.

39. As regards demonstrating a real prospect, there must be something more than speculation; there must be something of substance and reality, *Baltic.* It is not necessary to identify in advance with certainty which of the statutory objectives will be obtained, *Hammonds,* although in practice if such an approach is adopted one will invariably have to discuss one or more in isolation.

40. So in practical terms:
    a. The evidence put forward should be cogent and compelling (albeit in the context of demonstrating a real prospect); *Baltic*
    b. It should give some thought and detail on how the practical mechanics of how a given purpose might be achieved, for instance, details of any funding which might be available in the case of selling property; details of any support which a lender might be prepared to give to assist with rescuing a company as a going concern; *Baltic*
    c. The evidence should explain 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, *Green v Gigi Brooks Ltd* [2015] EWHC 961 (Ch).
    d. In order properly to address the matters set out above, it is generally sensible for the proposed administrators to provide a witness statement or report to amplify the matters set out in the applicant's own evidence.
    e. Go in fear of thin and unsubstantiated evidence; *Green v Gigi Brooks Ltd*.

THE COURT'S DISCRETION AND ALTERNATIVE INSOLVENCY PROCESSES

41. By this stage, let us assume that issues of standing have been surpassed, and the court is satisfied that it has jurisdiction to make an order under paragraph 11 Sch B1 IA. The question then is whether it should exercise the discretion which it has to make an administration order, under paragraph 13 of Sch B1 to the IA.

42. By paragraph 13 of Sch B1 IA:

> "(1) 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."

43. Generally, the discretion is open ended and wide; it should be exercised judicially, taking into account the interest of all relevant parties and the purpose of the legislation, *Rowntree Ventures Ltd & Anor v Oak Property Partners Ltd & Anor* [2017] EWCA Civ 1944, *Baltic.*

44. Factors relevant to the exercise of the court's discretion and which may also result in an alternative insolvency process being adopted are these:

a. The views of creditors – they may be pressing for a liquidation rather than administration, *Baltic House Developments Ltd v Wing Keung Cheung & PO Shing Patrick* [2018] EWHC 1525 (Ch) or they may consider that a CVA or restructuring plan is more appropriate (e.g. see *NGI Systems & Solutions Ltd v The Good Box Co Labs Ltd* [2023] EWHC 274 (Ch)).
b. The court may prefer liquidation because the company's affairs might warrant a 'comprehensive examination'[4], *Re West-Tech International* [1989] BCLC 600

[4] Bailey and Groves: Corporate Insolvency - Law and Practice Fifth Edition, 10:28

c. The court can treat an application as a winding up petition under paragraph 13(1)(e) Sch B1 IA and under paragraph 13(1)(f) Sch B1 IA the court is able to appoint a provisional liquidator. A court may well be concerned about payments made following the presentation of a winding up petition which could be caught under s.127 IA. In such circumstances, the court may prefer not to treat the application as a winding up petition, and make a winding up order because the winding up will then be deemed to commence on the date the winding up order is made rather than the date of presentation of the petition. The court can therefore either: (i) treat the application as a winding up petition, refrain from making a winding up order and appoint a provisional liquidator, *Data Power Systems Ltd v Safehosts (London) Ltd* [2013] EWHC 2479 (Ch); (ii) transfer the petition, call it on for hearing and appoint a provisional liquidator who could then investigate and make any application for validation, see *Re Brown Bear Foods Ltd* [2014] EWHC 1132 (Ch); *Re Officeserve Technologies Ltd* [2017] EWHC 906 (Ch).
d. The degree of risk that an administration would produce a worse outcome or the extent to which a potential outcome might be worse in an administration rather than a liquidation. For instance, cost and delay, *Baltic*.
e. Whether an administrator could act without causing unnecessary harm to the creditors of the company as a whole '*would be a potent and probably compelling factor'* in the court's discretion as to whether or not to make an administration order. This is likely to be relevant where an administration would be more costly, and there are no countervailing benefits of an administration which outweigh that cost, *Baltic*.
f. Where an administration would produce only a trivial benefit as compared to a liquidation, in one case, the balance was in favour of winding up as opposed to administration because the creditors were entitled to the '*complete independence and objectivity of the Official Receiver*', *El Ajou v Dollar Land (Manhattan) Ltd* [2005] EWHC 2861 (Ch).

DISPUTES AS TO THE APPROPRIATE APPOINTEES

45. Not infrequently, the court must decide the identity of the administrator where the parties are unable to agree on who the administrator should be. There are a couple of avenues of dispute. There may be a dispute between creditors as to who the administrator should be.

Equally, there may be a dispute between a candidate proposed by a creditor and a candidate proposed by a director of the company/the company. There is also some cross-over in terms of the principles which are to apply.

46. The same principles which the court considers in the case of appointing a liquidator apply equally to administrations, *Med-Gourmet Restaurants Limited v Ostuni Investments Limited* [2010] EWHC 2834 (Ch). Those principles were set out in *Fielding v Seery & Anor* [2004] BCC 315, where HHJ Maddocks said *inter alia:*

> *"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."*

47. As regards creditor v creditor, there is a general principle that where one has a difference of view between creditors, the views of the majority are to be given greater weight. If all else is equal, for instance either candidate is suitable and there are no concerns of justice being seen to be done, then it is the view of the majority creditor (by value) which will prevail, *Healthcare Management Services Ltd v Caremark Properties Ltd* [2012] EWHC 1693 (Ch).

48. In *Healthcare*, the court was keen to point out that in other cases the view(s) of the majority creditor may not prevail, and there might be something to counter-balance the weight given to their views. For instance, a nominated person may well have already made some headway towards investigating issues which will need to be dealt with in the administration. Those circumstances would tend towards appointing that candidate to stave off the delay and cost in appointing an alternative candidate. *Healthcare* was an unusual case because there was no other point like that (the applicant's nominees involvement was very recent)

to which the court could accord any weight. The fall-back position was therefore the views of the majority creditors.

49. Hence, and as a general principle, there is every possibility that the court will prefer the appointment of those who are already familiar with the company's business – that would usually mean the applicant's nominated person(s) who will have gained such knowledge in order to form the view that the statutory purpose can be achieved, *Re Maxwell Communications Corp Plc (No.1)* [1992] B.C.C. 372.

50. As regards disputes between the company's proposed nominee and a candidate proposed by a creditor: in *Med-Gourmet* the court said:

> *"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."*

51. So, in cases where there are real concerns by creditors such that they do not have any confidence in the proposed nominee's ability to conduct a thorough and vigorous investigation, the court may well appoint the nominee proposed by the creditors. This being a reflection of justice being seen to be done, *Med-Gourmet.*

52. It has also been said that if the only contest is between creditors' nominee and directors' nominee, the '*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 this of course has to be read in the light of *World Class Homes Ltd, Re* [2004] EWHC 2906 (Ch) (discussed below) and is subject to the principle above in *Re Maxwell* as regards the attractiveness of a candidate who is already familiar with the affairs of a company.

53. In *GP Noble Trustees Ltd v Directors of Berkeley Berry Birch Plc* [2006] EWHC 982 Ch; the court acceded to a major creditor's choice over the directors' proposed nominee. It was

relevant that the creditor was a very substantial creditor and it was therefore "*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"*. Whilst the directors' proposed candidate was already acting in relation to the company's subsidiary, there was no evidence before the court about the amount of the economies of scale that would arise by having the same firm of accountants involved in the administration of the whole group. Had there been, then this may well have tipped the scales in favour of the directors' candidate.

54. In another case concerning director v creditor, it has also been said that where significant creditors have a clear preference for one administrator over another, in circumstances where secured and other creditors remain neutral, the court should favour the wishes of those creditors '*for whose benefit in the end the administration is': Oracle (Northwest) Ltd v Pinnacle Financial Services (UK) Ltd* [2008] EWHC 1920 (Ch). In that case, the issue of pre-existing familiarity with the company was not raised and the court's approach was more general, with a focus on the wishes of creditors:

> *"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."*

55. However, where there are no reasons for believing that the company's nominated administrator was unlikely to be independent, in other words where there are no reasonable grounds for a lack of confidence, it is normally inappropriate to 'hold a head count' of creditors to decide between the company's choice and the opposing party's choice of administrator; the court acknowledged that a head count is unreliable and one cannot know what weight to attach to their preferences unless one knows exactly what was said to creditors, *World Class Homes Ltd,*. As the court put it:

> *"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."

56. Although, in that case, the court did go on to suggest that a head count could be taken into account if creditors had received/given a proper explanation as regards the choice of proposed administrators:

"*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."*

57. In *World Class Homes*, the court appointed the choice of the directors of the company.

58. In *Stanley International Betting Ltd v Stanleybet UK Investments Ltd* [2011] B.C.C. 691, the dispute was between two substantial creditors, C1 and C2. It was not possible to determine who in terms of value was the majority creditor. The court appointed C1's choice of administrator. C2 had not established to the court's satisfaction that the creditors at large could not have confidence in C1's choice to conduct a thorough and vigorous investigation to the extent necessary. However, the editors of *Lightman & Moss on The Law of Administrators and Receivers of Companies* 6th Ed say that:

"*Given the inherent moral hazard, and the difficulty in challenging the integrity of an appointee, it is suggested that the approach in* Oracle *and* Taylor Gallery *is to be preferred*."

59. There is also the potential for a middle ground – a joint appointment. Normally it will be inappropriate to appoint joint IP's from different firms because it leads to an increase in time and costs, *Re Structures & Computers Ltd*, [1998] B.C.C. 348.

60. If a joint appointment is proposed, evidence should be provided of how the administrators seek to divide tasks between them and their agreement on the admin strategy. If there isn't any evidence of that, this will be a disadvantage as the court will be concerned about the prospect of applications for directions and the cost and time consequences thereon, *Oracle (Northwest)*.

61. As a final point, there may well be disputes between unsecured creditors and those who have or appear to have security. In the case of an unsecured creditor versus a qualifying floating charge holder ("**QFCH**"), the QFCH will generally be able to have its choice of administrator appointed by virtue of paragraph 36 Sch B1 IA (although the court may still appoint the unsecured creditor's nominee if it thinks it right to do so because of the particular circumstances of the case).

62. If it transpires that a party's charge is not a 'qualifying' floating charge (as defined in paragraph 14(2) Sch B1 IA), we consider that the court may nevertheless place a great degree of weight on the floating chargeholder's views, given that the administrator will be given power to deal with the charged assets as if they were not subject to security (by para.70 Sch.B1 IA) and the costs and expenses of administration, preferential debts and the prescribed part will be payable in priority to the chargeholder's claims. This will particularly be the case where the purpose of the administration is that in para 3(1)(c) of Sch B1. Of course, if the security is invalid, i.e it is not a floating charge at all, then the purported floating charge holder would simply be an unsecured creditor and the dispute would be resolved according to orthodox principles.

63. So, those principles in a nutshell are that:

    a. As between 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;
    b. If creditors lack confidence in the proposed nominee's ability to conduct a thorough and vigorous investigation, the court may appoint the creditor's choice pursuant to ensuring that justice is seen to be done;
    c. If there are no reasonable grounds for lacking confidence, it is 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.

d. Joint appointments are usually inappropriate, but if that is being sought, the evidence should detail the division of labour and the extent to which an administration strategy is agreed.

e. A QFCH will generally be able to have its nominee appointed, paragraph 36 Sch B1 IA. As between an unsecured creditor and a mere floating charge holder, we consider that the court may place a great degree of weight on the floating chargeholder's views.

COSTS

64. If the court makes an administration order, the costs of the applicant and any other person appearing whose costs are allowed by the court are payable as an expense of the administration, by r.3.12(2) of the Insolvency (England and Wales) Rules 2016 ("**IR**"). So far, so good. But what about the costs of a party who has unsuccessfully opposed the making of the administration order?

65. In *Re Structures & Computers Ltd* the court allowed the costs of a majority creditor who opposed a company's application for an administration order. The costs judgment is remarkably brief and is worth repeating in full:

> *"To order that a party opposing the making of an administration order should receive his costs as part of the administration when the court had thought it right to make an administration order is unusual. Nonetheless, this is an unusual case and I do not think it would be just to make any other order. As I indicated during argument, the arguments and points made on behalf of Ansys not merely caused me considerable doubts as to whether to make an administration order but, perhaps more importantly on this issue, have caused me to make certain observations about the conduct of the administration which will find their way into the order the court makes.*
>
> *I think on the exceptional facts of this case and bearing in mind that, anyway, Ansys is having to bear the majority of the shortfall anyway as a major creditor of the company, it is the right order to make in this case. It reflects the justice of the case and that is the order I make."*

66. In future cases therefore, an unsuccessful party who is a a majority creditor and had more than merely arguable points against making the order may well be able to seek their costs.

67. Of course, costs are always a matter of discretion, so it is open to an unsuccessful party to try and seek their costs, but as the general tenor of the judgment above reveals, the

circumstances would need to be unusual, there would need to be very strong arguments against the making of an administration order and there would need to be some underlying prejudicial factor which is referable to the administration. In the case above, the final factor was that the opposing party was the majority creditor, who would necessarily have to bear the majority of the shortfall between its debt and the sums it would obtain following the administration.

68. Directors can potentially become liable for the costs of an administration application. In *Re W.F. Fearman Ltd. (No. 2)* (1988) B.C.C. 141 an application for an administration order made by directors was subsequently withdrawn and the court made a winding up order. The court ordered that the directors should bear the costs which they had incurred in respect of the administration application, notwithstanding that (what is now) r.3.4 IR provides that after an administration application made by directors is filed, it is treated as an application by the company itself. The court's rationale was that even though the directors had acted bona fide, that, in and of itself, did not justify the prejudice which would be caused to creditors by allowing those costs to rank as an expense in the winding up.

69. The potential harshness of this principle was softened in *Re Gosscourt (Groundworks) Ltd* (1988) B.C.C 372. In that case, the company applied for an administration order some five days after the presentation of a winding up petition. On the first hearing of the administration application, the company did not seek to support the administration application which was subsequently dismissed. A winding up order was then made without any opposition from the company. The court allowed the company's costs of the administration petition to the date of the first hearing to be paid in the winding up and refused to make a costs order against one of the directors personally. This was because it was satisfied that the administration petition had been presented in good faith, reasonably and on the advice of an insolvency practitioner.

70. That the acid test is whether the application has been made reasonably was shown in *Re Land and Property Trust Co plc* [1991] B.C.C 446. In that case, the court ordered the directors of a company who applied for an administration order to pay an opposing party's costs on a joint and several basis. Key to this finding *inter alia* was that:

a. There was no evidence that the directors had received any advice on whether an administration was suitable by the time they resolved to make an application for an administration order;
b. The application was persisted with in the face of overwhelming opposition and was not abandoned, in circumstances where the court concluded it was extremely unlikely that the statutory purpose of the administration would be achieved.

71. The test was made somewhat more stringent in *Re Tajik Air Ltd* [1996] B.C.C 368. The court held that the test for whether a director should be ordered to pay the costs of a failed administration application is whether reason and justice require the directors to pay the costs. 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.

CONCLUSION

72. How a number of the principles which we have discussed work in practice will be further explored during the course of the webinar.

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