

FAILURE TO PROVIDE REASONS FOR SEEKING AN EXTENSION OF AN ADMINISTRATOR'S TERM OF OFFICE - NULLITY OR CURABLE DEFECT?



Overview:

A failure to provide creditors with the reasons for seeking an extension of an administrator's term of office will not mean that the administration is a nullity where consent is ultimately obtained. It is a breach which is capable of being regularised under IR 12.64.

The Facts

1. The joint administrators of Caversham Finance Limited ("CFL") and Caversham Trading Limited ("CFL") sought a declaration that their terms of office had been validly extended by consent and for an extension of the same for another year. Alternatively, the joint administrators sought retrospective administration orders and for those orders to then be extended for another year.
2. The nub of the issue was this. The joint administrators later discovered that the notices seeking the consent of the preferential creditors did not give any reasons why the joint administrators were seeking an extension, contrary to Insolvency Rule (England and Wales) 2016 ("IR") 3.54(2). Furthermore, the notices didn't contain the statements required under IR 15.8(3)(f) and (g).
3. The covering letters which enclosed the notices referred to the joint administrators' progress report. That progress report explained why the administration was not yet complete and gave reasons why consensual (or court ordered) extensions would be sought. The reference to the progress report was, however, an indirect reference to the reasons for the extension – the covering letters referred to the progress report in relation to fixing the joint administrators' remuneration. The above notwithstanding, the requisite majorities were obtained for the extension.
4. The judge considered *Re A.R.G. (Mansfield) Limited [2020] BCC 641; Re Euromaster [2012] BCC 754 and Re Skeggs Beef Limited [2020] BCC 43*. In his view, the failure to provide any reasons in the notice in breach of IR 3.54(2) was a procedural defect rather than a breach which rendered the extension a nullity. Because the reference to the progress report was an indirect reference to the reasons for the extension, it did not satisfy IR 3.54(2). The administration was irregular but not invalid and was capable of being regularised under IR 12.64:

"30. So turning to the defects in this case, I believe that the failure to provide any reasons in the notice to preferential creditors in breach of Rule 3.54(2) is of the procedural variety and therefore within Rule 12.64. Mr Abraham compared the Rule 3.54(2) requirement with the fundamental requirement of actually obtaining the consent of the preferential creditors under para.76(2)(b) of Schedule B1 to the Insolvency Act. If that consent had not been obtained then clearly the extension would be a nullity, whereas the failure to give reasons does not, in my view, have the same consequences, nor could it have been intended by Parliament to have the same consequences. The preferential creditors receiving the notice could have easily been able to find out the reasons, which are obvious anyway. Those that voted were presumably happy, and they did have the covering letter that referred to the Progress Report in which some reasons were given for the extension."

5. Moreover, IR 15.8(3)(f) and (g) state that the notices must include:

"(f) a statement that a creditor whose debt is treated as a small debt in accordance with rule 14.31(1) must still deliver a proof if that creditor wishes to vote;

(g) a statement that a creditor who has opted out from receiving notices may nevertheless vote if the creditor provides a proof in accordance with paragraph (e)."

6. The short point is that were no such creditors within the meaning of the above provision. The joint administrators argued it would have been pointless to include the above, therefore. The judge held that Parliament could not have intended that "*redundant information should be included on the notice*". The notice would not be rendered defective by "*the omission of a statement that could only apply to such a non-existent category*". [25]

7. The judge held that there was no prejudice caused by the breach and declared that the administrations had been validly extended by consent. A further extension was subsequently granted by the court.

Commentary & Analysis

8. These sorts of cases are legion. Recent decisions illustrate a tendency by Courts to uphold the validity of appointments where the circumstances allow.* This was clearly a sensible decision. The requirement to give reasons certainly seems more of a procedural aspect of the fundamental requirement to obtain consent. Given that the requisite majorities had been obtained, there would be little sense in saying that the administration was a nullity.

9. This case also gives us an opportunity to briefly revisit how consent should be obtained in this context and to clear up a little confusion that can often arise. Consent from unsecured creditors and preferential creditors can be sought using the deemed consent procedure. For secured creditors, the deemed consent procedure is not available. Often the following passage from *Baker & Anor v Biomethane (Castle Easton) Ltd (Rev 1)*[2019] EWHC 3298 (Ch) is treated as authority for the proposition that the deemed consent procedure cannot be used to obtain the consent of unsecured creditors. But, in the author's view that is not what the authority actually decides:

"5. Under para.78(2)(a), it is explained that where the consent of the company's unsecured creditors is to be obtained, then the administrators must do so by, "Seeking a decision from those creditors as to whether they consent". The administrators decided to obtain a decision about extending the administration by utilising the provisions of s.246ZF of the 1986 Act, namely a deemed consent procedure. In doing so, they overlooked that although they were to obtain the consent of the unsecured creditors by "seeking a decision" from those creditors, and had used the deemed consent procedure for that purpose, they also had to obtain the consent of each secured creditor. That consent had to be actual consent and the deemed consent procedure was not available to secure it." [emphasis added]

10. It is clear from a natural reading of the passage that the wording marked in bold is a reference to secured creditors, rather than unsecured creditors. Thus, to reiterate, consent from unsecured creditors and preferential creditors can be sought using the deemed consent procedure. For secured creditors, the deemed consent procedure is not available.

11. Lastly, and as a general tip, when preparing evidence in support of an application, the relevant test for whether an extension should be granted should be kept in mind. The power of the Court to extend an administrator's term under para.76(2)(a) Sch.B1 IA 1986 is unfettered, but the relevant questions the court should consider in deciding whether to grant the extension are: (i) why the administration was incomplete, (ii) whether an alternative insolvency regime would be more suitable, (iii) whether an extension was likely to achieve the purpose of administration, (iv) whether any prejudice would be caused to creditors by the extension and to any views expressed by the creditors themselves and (iv) how long any extension should be. *Re TPS Investments (UK) Ltd* [2020] EWHC 1135 (Ch); *Re Biomethane (Castle Eaton) Ltd; Baker v Biomethane (Castle Eaton) Ltd*[2019] EWHC 3298 (Ch). In respect of point (iv) it may well be sensible to explain why (if it be the case) a shorter period than is sought would not be adequate.

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**Re Tokenhouse VB Ltd (formerly Vat Bridge 7 Ltd)* [2020] EWHC 3171 (Ch); *Re Nationwide Accident Repair Services Ltd* [2020] EWHC 2420 (Ch); *Re NMUL Realisations Limited (in administration)* [2021] EWHC 94 (Ch)

