ADMINISTRATION – ANOTHER BUSY YEAR

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Insolvency Practice Direction – application to administrations

1. The long-awaited update to the Practice Direction for Insolvency Proceedings ('IPD') came into force on 25 April 2018, and replaces its predecessor.

2. Although largely consolidating what was happening 'on the ground' beforehand, the IPD makes some headway into modernising insolvency processes. In particular, it draws attention to the Electronic Practice Direction 51O – The Electronic Working Pilot Scheme. It also attempts to 'future-proof' itself by making reference to "*any subsequent Electronic Practice Direction*". For the purposes of administration, this will apply where an application is made, or intention to appoint an administrator is made using the electronic filing system (para 8.1).

3. This also has the effect of clarifying para 2.1 of the Electronic Practice Direction 51O ('EPD') with regard to out-of-hours administration applications and the new CE-filing system more generally. 'Electronic Working' can be used to commence any insolvency process (EPD, para 2.2). Administration is therefore no exception.

4. However, the content of para 2.1 of the EPD simply says (rather obviously), that the '24/7' approach to filing by means of 'Electronic Working' cannot be relied on when there is down-time, whether planned or unplanned (para 2.1(a) and (b)).

5. Para 8.2 of the IPD also provides that, under Paragraph 5.4 of the EPD "*the date and time of payment*" will be the filing date and time and "*it will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working*".

6. In insolvency processes more generally, and of relevance to administrators, is that when an administration moves into liquidation, IPD para 9.3.3 now confirms that the Official Receiver's deposit in relation to the winding-up petition can now be paid by debit or credit card by telephone.

7. By way of comment, it is fair to say that the IPD is–for the time being–more of a gradual change in terms of how it approaches the issue of Electronic Working. In particular, the main effect of the IPD seems to be that it will peg any progress in this area to developments in the mainstream of civil litigation. In due course, that may turn out to be significant. But for the time being, the steps towards modernisation are incremental rather than revolutionary.

Appointments – the latest including *NJM Clothing*

8. *NJM Clothing* concerned an appointment in the Business and Property Courts in Newcastle, and was a demonstration of both (i) how the logic of the statutory insolvency scheme can fail; and (ii) how r.12.64 may be available to not only cure defects in the documents, but may also provide a swift and pragmatic response to those problems where they are exacerbated by the statutory scheme itself. It is also to be contrasted with the earlier case of *Re Kaupthing Capital Partners II Master LP Inc* [2010] EWHC 836 (Ch); [2011] BCC 338, which appeared to point in the opposite direction.

9. Rule 12.64 of the Insolvency Rules 2016 provides that no insolvency proceedings will be invalidated purely by reason of formal defect or irregularity, "*unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.*" It is therefore substantially identical to its predecessor under the 1986 Rules (r.7.55).

10. A resolution was passed by the directors that a Notice of Intention to Appoint Administrators would be filed, and that was duly done on 4 October 2017. However, the Notice itself was defective, and challenged on the basis that it did not include the date and time of the appointment, as required by IR 2016, r.3.24(1)(j).

11. The argument was therefore that the administration was invalid. The point made by Fashion Design Solutions ('FDS'), who sought to challenge the appointment, was that the appointment could only be effective once all of the requirements under Sch. B1, para 29 had been satisfied.

12. Para 29 provides that a person who appoints an administrator (under para 22) must file in court a Notice of Appointment "*and such other documents as may be prescribed*." Para 29(5) specifically states that the Notice of Appointment must be "*in the prescribed form*."

13. The Notice of Appointment filed at court provided that "the Administrators *were* appointed at the time and date that this Notice *was* filed at court." But as a matter of logic (and literalism), they could technically only have been appointed once the Notice had been filed.

14. So there was a chicken-and-egg situation: the appointment could only have taken place if the Notice was valid. If the Notice was not valid, then the requirements could not have been fulfilled (even after the event), and so the appointment could not have been valid. But the Notice itself stated that the appointment had taken place.

15. The questions for the court was how to untangle this logical problem; could r.12.64 provide a solution?

16. The judge concluded that r.12.64 could apply in this situation:

    a. It was for the directors to decide when to appoint administrators.

    b. The logical steps were then to (i) give the Notice; (ii) appoint the administrators; and (iii) for the Notice to record the fact that the appointment had been made.

    c. Logically, therefore, the appointment *must* have been effective before the Notice of Appointment is filed at court and that the appointment must have preceded the notice that recorded the fact of the appointment, if only within a *scintilla temporis*.

    d. Further, the burden of proof rested on the party seeking to challenge the appointment– it was up to them to demonstrate that the time and date endorsed on the Notice was incorrect. In the circumstances, it appears that it was not possible for them to discharge that burden.

    e. So although the Notice was defective, it could be cured by r.12.64.

17. On one view, this is an eminently sensible decision. Arguably, it would have been a triumph of form over substance retrospectively to invalidate the appointment.

18. Yet the situation is not so different from the earlier case of *Re Kaupthing Capital Partners II Master LP*. In that case, the essential point was that the wrong form had been used. It was held that the Jersey-based entity in question was a partnership, and so should have used Form 1B rather than Form 2.10B.

19. The appointment was therefore defective, and was considered (by Proudman J at [56]) to be a "*fundamental flaw going to the validity of the appointment itself*", which was incapable of being rescued by either IR 1986, r.7.55 or Sch. B1, para 104. The logic to that result was that the insolvency process cannot have been commenced and, if there was no appointment, then there were no insolvency proceedings either, and so r.7.55 could not apply.

20. Proudman J was cognisant of the draconian impact of that result, but was comforted by the fact that transactions with *bona fide* purchasers without notice would not be disturbed.

21. Superficially, it might seem that the distinction between the content of a specific form and using the wrong form altogether is a fine one. By way of comment, the difference between the cases may lie in the fact that the 'chicken-and-egg' situation in *NJM Clothing* was created just as much by the rules themselves as it had been by the failure to comply with the requirements of Sch. B1.

Removals and conflicts of interest - including *VE Interactive Limited* and *Privilege Project Finance v SS Agri Power*

22. This section covers two related situations: (i) where the appointment of an administrator is opposed on the basis of an alleged lack of independence; and (ii) where, after appointment (and a pre-pack), the administrators were found to have totally failed to understand the nature of the conflict in which they found themselves.

23. There are three preliminary points to make with regard to conflicts of interest.

24. The first is that, by virtue of the role that insolvency practitioners play, their training and experience, and the fact that they are licensed professionals, the idea of a 'conflict' or even a *perceived* conflict, is quite different from the idea of a conflict as understood more colloquially. The authorities are littered with examples of cases where an administrator is appointed which could well raise a few eyebrows on the Clapham omnibus.

25. The second point is that, when deciding who to appoint (or remove), the Court must be aware of the economic interests of those who support the appointment of the trustee. It is trite law that creditors are assumed to be in the best place to judge their own commercial interests. The problem–as demonstrated in *Re SS Agri Power*, but ultimately discounted–is that the very nature of another party having an economic interest at all raises the potential for a conflict. So there is a balance to be struck: to give due weight to the interests of the unsecured creditors as a class, but not in such a way that calls into question the independence of the administrators. And it is often the administrators themselves who must keep that balance in check.

26. The third preliminary point is that the role that administrators play changes from pre-appointment (where the relationship will usually be contractual), through an out-of-court appointment, to when they are appointed by the court. How well–or how badly–administrators remain alive to their changing role is of critical importance to their independence. That point is demonstrated very ably by *Re VE Interactive* (below).

27. The judgment of Norris J casts a fresh light on the competing concerns of creditors and directors when it comes to appointing administrators. On one level, it reiterates the notion that creditors are the best people to understand their own economic concerns, and the courts should be slow to supplant their decision of administrator. On another level, *Re SS Agri Power* demonstrates that the mere possibility of conflict will rarely be enough to justify appointing alternative administrators.

28. As the name suggests, Agri Power was in the biofuels business. It made money by generating electricity from an anaerobic digester. The digester and associated works were paid for by borrowed money. The land loan and the money to construct the digester were provided by a specialist funder, known at the time of the hearing as Privilege Project Finance Limited ('Privilege'). The loans totalled between £8.5m and £11m, and Privilege had already exercised its right to appoint a receiver, although this did not encompass all of Agri Power's assets.

29. It was common ground that an administration order was the right way to proceed. Norris J was also so satisfied.

30. The key issue was this: who was going to take office as the administrators? Who should the administrators be? Privilege recommended the appointment of Jason Baker and Glyn Mummery of FRP Advisory LLP.

31. Their appointment was contested by the directors, who had nominated alternative administrators. There were three concerns raised by the directors, namely that: (1) there was an existing close relationship between FRP and Privilege; (2) the conduct of the administration of the company was likely to require close scrutiny of potential claims that the company had (or *may* have had) against Privilege; and (3) Privilege had previously expressed an interest in acquiring the company in the course of settlement negotiations.

32. Norris J summarised the relevant principles as follows at [19]:

    a. It is the statutory duty of an administrator seeking a better result for the company's creditors as a whole than would be obtained in an immediate liquidation to perform his functions *in the interests of the creditors as a whole* . (See paragraph 3(1) and 3(2) of Schedule B1.)

    b. The purpose of the present administration was undoubtedly that set out in paragraph 3(1)(b) of Schedule B1 so that the duty and obligation applied in the present case.

c. This was not a case in which the company itself had any interest in the identity of the administrators. This was not a case where it was possible that the company may have been rescued as a going concern. The opposition of the company to the appointment proposed by Privilege was therefore one made on behalf of others who themselves had not advanced any independent objection.

d. If the only contest is between the directors' nominee on the one hand and the creditors' nominee on the other, the plain general rule is that the creditors will prevail. (See paragraph 9 of the judgment of Lewison J in *Med-Gourmet Restaurants Limited* [2010] EWHC 2834).

e. In the ordinary way, where there is a contest about who should be appointed and that contest is between creditors, the court will normally be guided by the wishes of the majority of creditors. (See *Med-Gourmet* at paragraph 7.)

f. However 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 interests of creditors generally and ensuring that all legitimate claims that the company may have are thoroughly investigated. (See *Med-Gourmet* at paragraph 14.)

g. Accordingly, where the identity of an office-holder falls to be considered, the ultimate question is whether a particular appointment will be conducive both to the proper operation of the administration and to justice as between all those interested in the administration. For that reason as a general rule an office-holder 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 office-holder.

h. Because of the general rules relating to the presumptions in favour of the creditors and of the majority of the creditors, there is a burden of persuasion upon someone who wishes to argue for a different appointment to show that the other considerations are engaged to such an extent that the normal presumptive outcome is displaced in the particular circumstances.

i. It is not in general a relevant consideration that the proposed appointees should have had some role in the lead up to the administration application. That of itself does not compel the conclusion that the proposed administrators would not act with impartiality as they are required to do by statute, a point made in *Targetfollow Properties Holdings Ltd* [2010] EWHC 3606 by David Richards J at paragraphs 40 - 45 of his judgment.

33. The challenge was therefore essentially one brought on the basis of a risk of the "*perception of bias*" (cf. *Re Zirceram Ltd* [2000] B.C.C. 1048 in the context of CVLs). As Norris J observed at [20], what an analysis of "*the perception of bias*" requires is

> *the ascertainment of all the circumstances that bear on the question, and then the enquiry whether in those circumstances an informed and fair-minded observer would conclude that there is a real possibility that the office-holder would not be impartial and would not give objective consideration to the questions arising in the administration. It is necessary to underline that this is an objective test based on evidence, and focussed on the actual issues that are in fact likely to arise in the administration*.

34. With regard to the general relationship between FRP Advisory and Privilege, which extended to FRP advising Privilege during an earlier application in the proceedings Norris J was

> *wholly unpersuaded that a fair-minded and informed observer would think that Mr Baker and Mr Mummery would not act impartially and in accordance with their statutory duties in the light of the expertise that they have gained. Nothing in the evidence of the company indicates any relationship outside the general run of relationships which one encounters when commercial lenders seek administration orders. The contact relied upon has been during the pendency of the administration application itself; and it comes as no surprise at all that the candidates for appointment as administrator would seek to learn about the situation on the ground, of the difficulties being faced by the receiver, of the relationship between that land falling within the scope of the charge and the land required to conduct the business, and of the access problems, and to keep under review whether the purpose of the administration was likely to be achieved.* (Emphasis supplied.)

35. The second basis of opposition was that Privilege would be ill-positioned to deal with any proposed sale by the administrators, which would need to take into account or preserve any *potentially* valuable claims that the company *may* have had against Privilege.

36. Norris J concluded that the administrators' conduct of the sale could not be impeached on the grounds that the person who nominated them had itself expressed a willingness to purchase the business at what seemed to be a price above the balance sheet value of the assets as shown in the last balance sheet endorsed by the directors. On this point, *Re Agri Power* is to be contrasted with *VE Interactive* (below).

37. Finally, dealing with counsel for the directors' plea that it would just be better for wholly independent administrators to be appointed, Norris replied laconically "*my answer to that is "no"*". Where the directors had no economic interest in the administration, it was a case where the usual presumption of the creditors' interests were to be preferred over those who had no such interest.

Re VE Interactive; Ve Vegas Investors IV LLC v Shinners [2018] EWHC 186 (Ch)

38. VE Interactive was a very different company from Agri Power. It operated in the 'AdTech' industry. One of the principal ways it made money was by tracking users on certain websites, noticing that a purchase had been left uncompleted, and then triggering an email to be sent to the user to complete their purchase. VE Interactive also had the rare status of being a tech 'unicorn', i.e. a start-up with a valuation of over US$1bn. That was all the more uncommon for a British company. But, as the old adage goes, if it sounds too good to be true, it probably is...[1]

39. VE Interactive was strapped for cash. The relevant time frame for the purposes of the removal application was relatively short. Between 3 March and 13 April 2017, new directors and a management team sought to raise an extra £20 million in order to keep the business afloat. On 4 April 2017, the new directors formed a company called Rowchester Limited. Rowchester was ultimately the purchaser of the business and assets of VE Interactive via a pre-pack.

40. On 10 April, the administrators met with the new directors to advise upon insolvency options. At that meeting, it appeared that a pre-pack was the favoured option.

41. As Registrar Jones[2] pointed out in his judgment, from the date the directors decided to proceed with a pre-pack purchase at para 18, "*a conflict of interest plainly arose, as it will always arise when directors and/or the management team are seeking to purchase a company's business and/or assets.*" (Emphasis added.)

42. Further, the sale was far from straightforward. The financial position of the Company in the absence of the £20 million investment meant urgency was required. The administrators needed to be provided with the financial information potential purchasers would require.

43. In fact, the first time a potential purchaser other than Rowchester was identified to the administrators by the Company was during the evening of 20 April 2017. Rowchester therefore had a head start and significant information unavailable to the market including information later provided by the administrators relevant to negotiating the purchase price. For example, on 20 April, S&W informed that company alone that *"up front consideration in the region of £2m*" would be needed for a sale.

44. This meant that a situation was created whereby any potential purchaser other than Rowchester would have needed to have made an offer before 26 April 2017 based upon the deficient information and without a memorandum of sale describing (i) what was being sold and (ii) dealing

[1] https://ftalphaville.ft.com/2017/05/26/2189109/ve-interactive-the-rise-and-fall-of-a-tech-unicorn/

[2] The position of 'Bankruptcy Registrar' no longer exists; all such judges are now known as Insolvency and Companies Court Judges (or 'ICC Judges' in short form) in light of the changes under the new Business and Property Courts and to better reflect the work that those judges do. Uniquely, they are addressed in court simply as 'Judge'.

with the potential issues surrounding whatever rights and liabilities existed as between the American LLC. Perhaps most problematic was the fact none of this appears to have been disclosed by the administrators to the court that ultimately made the administration order.

45. As Registrar Jones was at pains to make clear at [20], there were two possible scenarios, at either end of the spectrum of possibilities:

    a. Those facts occurred within a significantly short time-scale because of the Company's dire financial position, deficient books and records and issues of dispute which meant that the directors/management and/or the administrators did the best they could in the circumstances and/or in any event achieved the only realistic sale, for good value at the best possible price; or

    b. Those behind Rowchester took advantage of their position as directors of the Company and used that position and resulting knowledge to achieve an advantage for themselves and intentionally or unintentionally in practice effectively exclude others from a realistically competitive pre-pack process. This enabled Rowchester to agree a pre-pack purchase on terms at an undervalue.

46. In light of the way evidence progressed at the hearing, the administrators attempted to resign on the fifth day. This was no doubt an attempt to avoid a reasoned judgment being given, and the professional consequences that would flow from that judgment.

47. But Registrar Jones was not prepared to allow the S&W administrators to take that course, where he said at [16]:

> *It is* [...] *necessary for consequential relief and future issues within the insolvency that findings and reasons exist. There is every possibility that such matters would raise further expensive litigation should I have failed to give reasons... It is also important that all interested in the insolvency understand what has happened and why. The Application concerns all. As mentioned, the letter of resignation does not achieve that aim. A decision which abridged time and left the matter to rest upon resignation would not reflect the true position. Namely, that grounds for removal are established and that is the appropriate remedy. The decision to refuse abridgment and to remove the Respondents achieves transparency. It is a decision in the interests of creditors and shareholders. Transparency is also in the public interest to ensure confidence in the statutory, insolvency regime.*

48. Registrar Jones ultimately held (at [25]) that the Respondents ought to have concluded, effectively from the date of their appointment or soon thereafter, that they were conflicted and could not carry out the investigations that needed to be carried out. The administrators were inextricably bound up in the process by reason of their contractual retainer and, therefore, so

were the Respondents. Completing his admonition, Registrar Jones made the point that this was "*not technical legal analysis*," but was "*obvious.*"

49. The administrators' failings also lay in the fact that–even if they did not choose to resign–they did not seek the appointment of additional administrators who would be specifically and only responsible for those investigations (on which, see cases such as *Re Angel Group* [2015] EWHC 3624 (Ch); *Re Arrows* [1992] BCC 121; *Re SHB Realisations* [2016] EWHC 1965 (Ch)).

50. The more fundamental problem was that the administrators did not properly appreciate that conflict of interest until their notice of intention to resign. That was clear from:

    a. the events leading up to the hearing of the Application including their continued failure to draw (adequate) attention to the conflict and to deal with it;

    b. their continuous opposition to the Application until day 5;

    c. their attacks upon the Applicants in the evidence;

    d. the evidence of Mr Shinners and Mr Hardman in particular under cross-examination; and

    e. the terms of the intention to resign notice itself.

51. In concluding, Registrar Jones made his displeasure clear (at [32]):

> *I unhesitatingly reach the conclusion from that evidence that the Respondents have lost perspective of their role. Throughout, their evidence demonstrated that they are primarily and essentially concerned with the defence of any claim against S&W and not with the competing, conflicting interests of the Company. The answers and responses of Mr Shinners and Mr Hardman demonstrated that they had and have no adequate appreciation of their conflict.*

Commentary

52. Pre-packs clearly give rise to a peculiar hybrid stance for administrators; their role is partly governed by contract and partly by the statutory scheme pursuant to their appointment.

53. The suggestion in *Re Agri Power* is that there is nothing wrong about a potential, future planned sale of the business and assets of a company to a company who has previously been advised by those same individuals. Clearly, reading across to the ICAEW's Statements of Insolvency

Practice ('SIPs') (in particular at paras 13 and 16), that is correct as a matter of practice, so long as the insolvency practitioner differentiates clearly the roles that are associated with an administration that involves a pre-packaged sale, i.e., the provision of advice to the company before any formal appointment and the functions and responsibilities of the administrator following appointment: see SIP 16 at [5].

54. This position is also in line with the earlier authority of *Sisu Capital Fund Ltd v Tucker* [2006] BCC 463 at [89]; [2005] EWHC 2170 (Ch), at paras 121-132. There, Warren J held that, although conflicts of interest were not irrelevant, they and any breaches of professional guidance to which office holders were subject came into the picture only so far as they were relevant to establish unfair prejudice.[3] A conflict, even a serious one, and a breach of professional rules were not enough, by themselves, to establish unfair prejudice. In line with the observations made by Norris J above in *Re Agri Power*, issue of conflict should therefore be treated with some circumspection when alleged as a ground for removal/unfair prejudice.

55. However, the emphasis of Registrar Jones' decision is subtly different: it suggests there *will* be a conflict where there is a pre-pack. The question is how that conflict is *managed* in such a way that it is compatible with the administrator when he or she acts *qua* court appointee and has had a prior involvement with a connected party.

56. A further complication is raised in that, while a large degree of deference and latitude is shown towards licensed administrators, particularly when dealing with questions of commercial judgment, the standard for an application for removal is a relatively low one in that it requires the judge only to conclude that there is a "*serious issue for investigation*"; not whether there is actually a conflict, or whether the claims identified for investigation have merit. There is a plain logic to that; removal may be ordered if an independent review cannot be carried out because of conflict: *Clydesdale Financial Services Ltd v Smailes* [2009] BCC 810 at [30], David Richards J.

57. However, the dividing line between whether there is a "*serious issue for investigation*" or if the question is one of commercial judgment may not always be an easy one to discern. As Registrar Jones highlighted in his 'two possible scenarios' in *Re VE Interactive*, the same set of facts can give rise to two very different interpretations of that scenario (and of course a spectrum of realities in between). The issue for the office-holder is to read into that situation before he makes a judgment. The suggestion from *VE Interactive*, which is supported by *Davey v Money* (below) is that the *interpretation* or at least *awareness* of the relevant facts is not a question of

[3] *Sisu v Tucker* was in the context of an unfair prejudice challenge to a CVA. *VE Interactive* makes it clear that the same principles apply to administrations.

commercial judgment, but how the administrators act on those facts most certainly is: cf. *Re Mama Milla Ltd* [2014] EWHC 2753 (Ch); [2016] B.C.C. 1 at [148] and [153].

58. Ultimately, the distinction between *Re Agri Power* and *VE Interactive* may simply come down to this: it was not so much the context of their relative appointments which were open to doubt, but the candour with which they operated, and the steps that were taken to minimise conflict. Obviously aware of the wider impact of his speech in *VE Interactive*, Registrar Jones reiterated the principles cited in *Re Agri Power* and recorded that

> *as a matter of policy, it should not be easy to remove an office holder simply because conduct has fallen short of the ideal. However, this has gone further than that. In addition, this is not a case where removal will or should encourage unjustified applications or cause office holders to have to look over their shoulders* (see *AMP Music Box Enterprises Limited v Hoffman* [2002] BCC 996).

59. By way of comment, it appears to follow that, although the perception of bias (and lack thereof) remains important in terms of the public's trust and confidence in administrations, the issue of conduct within the administration is actually of more relevance to the appointment and removal of administrators than any appearance *per se*.

60. As Santow J said in the earlier Australian case of *Advance Housing Pty Ltd* (1994) 14 ACSR 230, prior involvement with a purchasing company would not merit removal, "*provided that the involvement is not likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors ... or give rise to a reasonable apprehension that the liquidator might be so impeded or inhibited*".

61. Set against those considerations is the simple fact that "*creditors are frequently well served by an appointment of a liquidator who has some familiarity with the affairs of the company...*".

62. It was for that reason that, in *Re Agri Power*, Norris J gave the laconic response (at [34]) to the final plea from counsel that wholly independent administrators should be preferred to those who had previously been interested in the creditors' affairs.

Practical guidance

63. By way of summary, and reflecting on the cases of *Re Agri Power* and *Re VE Interactive*, the following guidance applies in situations when an administrator (or any other office-holder) is appointed:

a. The first step is to realise there is a conflict and take steps to resolve it as early as possible. One of the issues that drew Registrar Jones' ire was clearly that S&W had maintained their opposition to the creditors' position, even up to day 5 of the hearing. If they had not dug their heels in for such a prolonged period of time, they may have been able to resign without the reasoned judgment being given.

b. If an application is brought against the administrators, consider carefully whether it is right to oppose, or to adopt a neutral approach: see *Lehman Commercial Conduit & Anor. V Gatedale Limited (In CVL)* [2012] EWHC 848 at [30-31], *per* Vos J. The idea that there are "*differing degrees of neutrality*" was also treated with some suspicion by Registrar Jones in *Re VE Interactive*. The line between these two courses of action will not always be clear.

c. If there is an irreconcilable conflict at the point of the hearing, it may be proper to resign: the mechanism for doing so is provided in Insolvency Rules 2016, r.3.62(1)(c)(i) and paragraph 87 of Schedule B1 to the Insolvency Act 1986, in particular sub-paragraphs (1) and (2)(a).

d. If there is a limited aspect of the administration that requires investigation, it may be appropriate to have an additional administrator or team of administrators to act as 'concurrent' or 'conflict' administrators. So, for example, where the company has a claim against its largest creditor that may not be adequately investigated by the incumbents (as happened in *Re Angel Group* [2015] EWHC 3624 (Ch)), the court can take a pragmatic stance and fashion a solution. In *Re Angel Group*, this was achieved by a memorandum of understanding being drawn up, which effectively governed the division of labour between the liquidators. The costs implications may also be relevant: *Re SHB Realisations* [2018] EWHC 402 (Ch), although as long as there is no duplication of work, such an argument may carry limited weight (*Re SHB* at [32]).

e. If acting on behalf of a dissatisfied creditor, *Re VE Interactive* underscores the fact that the administrators may be removed by way of court: the power to do so under para 88 of Schedule B1 was described as an "*unfettered discretionary power to remove an administrator*."

f. Administrators should be aware that if any such application were to be made against them, removal clearly has an impact upon professional standing and reputation: *Re Edennote Ltd* [1996] BCLC 389 (CA), at 725.

g. Another option, also floated in *Re VE Interactive*, is to consider whether the purpose of administration has been sufficiently achieved and, if so, whether the Company should be

wound up (see Schedule B1, para 79(3)). This may provide an alternative 'exit strategy' if a removal application becomes imminent. There is some guidance on this strategy in the context of CVLs, for which compulsory liquidation is one method of resolution: see *Re Zirceram* [2000] B.C.C. 1048.

Maintaining independence – *Davey v Money*

64. A lengthy judgment was handed down by Snowden J on 11 April 2008 in Julie Anne Davey v James Money & Jim Stewart-Koster (as joint administrators of Angel House Developments Ltd) and Dunbar Assets plc v Julie Ann Davey [2018] Ch 766 (Ch). The cases had been tried together nearly two years earlier from 28 April to 20 June 2016.

65. The Company ('AHD') borrowed £16m from Dunbar to develop Angel House, Marsh Wall, E14 (in/near Canary Wharf) into a tower block. Ms Davey gave Dunbar a guarantee for £1.6m. The loan expired in June 2012. A renewed application for planning permission was made in August 2012. In December 2012 Dunbar made demand (£16.7m) and appointed the administrators. In December 2013 the administrators sold Angel House for £17.05m. In 2014 Ms Davey paid £1.74m under the guarantee, but further enforcement costs were claimed by Dunbar.

66. In a claim against the administrators under para 75, Sch B1, Insolvency Act 1986, Ms Davey claimed the administrators acted in breach of duty by:

    a. failing to consider whether AHD could be rescued as a going concern when setting the objective of the administration;
    b. relying on Dunbar's valuation figures and failing to take their own independent valuation advice;
    c. allowing Dunbar to select the agent (**APAM**) used as both asset manager and sales agent, failing to engage a specialist sales agent and to hold a 'beauty parade';
    d. failing to obtain a proper price for Angel House;
    e. allowing the planning application to lapse;
    f. adopting a limited ('soft') marketing campaign at an unjustified guide price without advertising, to meet a tight deadline dictated by Dunbar;
    g. failing to consult Ms Davey and obstructing her rescue proposals by requiring her to provide a £2m non-refundable deposit and imposing tight deadlines; and
    h. failing to maintain their independence by surrendering their discretion to Dunbar, using their powers to assist Dunbar as if they were its receivers, and allowing Dunbar to take/influence decisions.

67. By counterclaim in Dunbar's action on the guarantee, Ms Davey claimed Dunbar:

a. caused the sale of Angel House at an undervalue by directing/interfering in the administration, thereby assuming liability for the administrators' conduct;
b. procured the administrators' breaches of duty and was jointly liable with them;
c. combined in an unlawful means conspiracy with APAM to sell Angel House at a knock down price which left Ms Davey liable on her guarantee; and
d. orchestrated the sale in bad faith, discharging the guarantee.

68. Snowden J rejected Ms Davey's claims and counterclaims on the facts but also gave guidance on some matters of principle of importance to administrators.

69. The judgment is also instructive for those interested in the "dark arts" of the property market; one expert witness remarked at one point that he would be "shot" by others in the industry for candidly revealing some trade secrets (which may not be so secret now).

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 (para 254).

70. In the hierarchy of administration objectives in para 3 of Sch B1, rescue (Objective 1) may not be easy to achieve but is the top priority. Doing better than liquidation (Objective 2) is the mid-ranking objective. Realising assets for the secured creditor (Objective 3) is bottom of the tree but in many cases is likely to be the easiest option. In a case where administrators are appointed by a secured creditor with which they have a pre-existing commercial relationship, it may be all too easy to adopt Objective 3 as the path of least resistance and to focus on the interest of the secured creditor.

71. Objective 3 is the closest to receivership and old-style administrative receivership, but Snowden J's analysis confirms that there remains a key difference between receivership and administration, because administrators must not unnecessarily harm other creditors. In comparison, a receiver is generally free to determine when and how to realise assets to repay the secured debt without consideration for the interests of the unsecured creditors or the company itself.

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 (para 255).

72. Snowden J set the bar at a high level for any creditor to make a successful challenge on the ground that administrators had selected the wrong administration objective. The test is similar to that required to be met in bringing a judicial review to challenge a decision of a public authority. In effect the administrator's decision has to be shown to be irrational.

73. Ms Davey's complaint was that the administrators had wrongly assumed this was an Objective 3 case without giving proper consideration to Objectives 1 or 2. Snowden J rejected that complaint principally because he found that the administrators had sight of a red book valuation which valued Angel House at only £6-10m (even with planning permission) and this reflected the values stated in statutory information provided by Ms Davey herself. On that basis he concluded that the administrators could not be said to have acted irrationally in forming the view that it was unlikely to be reasonably practicable to make any return to unsecured creditors.

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 (para 256).

74. This means the bar is not so high when considering whether administrators have acted in breach of duty in taking steps to implement the chosen Objective. Precisely what is meant by a 'more objective standard' of review is not clear, but can be expected to be similar if not identical to the standards applied generally when a court reviews professional conduct: so if the allegation is one of negligence, the standard will be of the reasonably competent practitioner.

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 (para 287).

75. Snowden J rejected the submission made on behalf of Ms Davey that the only way in which an administrator can assess the question whether he thinks that the company can be rescued as a going concern is to consult with the director/shareholders, explain that this is his top-ranked priority by statute – i.e. which he must achieve if he can - and invite their proposals or confirmation that such is not feasible. He commented that directors and shareholders may often have an entirely unrealistic and over-optimistic view of the company's business and prospects for rescue. On the facts, he found that Ms Davey was not herself in any position to mount a funded rescue and knew of no such prospects at the time.

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 (para 312).

76. Snowden J found that Ms Davey's complaint that the administrators had been hostile to her was not made out on the evidence (indeed, Ms Davey conceded in cross-examination that on reflection she ought to have put more effort into the relationship with the administrators), but he accepted that the administrators should not have passed to the bank personal information about Ms Davey (including details of her assets) or offered to assist the bank to serve proceedings on her.

77. However, he concluded that this had not had any effect on the 'direction of the administration,' infected any other aspects of the day-to-day conduct of the administration, or affected the decisions taken by the administrators in relation to the marketing of Angel House or Ms Davey's later proposal for a funded rescue. In other words, it was wrong but had no causative effect.

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 (para 320). But this defect has no consequence if the administrators can nevertheless attempt to achieve the proposed objective of the administration (para 323).

78. Paragraph 49(1) of Schedule B1 provides that an administrator shall make a statement setting out proposals for achieving the purpose of administration, and paragraph 49(2)(b) of Schedule B1 provides that such statement must, if applicable, explain why the administrator thinks that Objective 1 or Objective 2 cannot be achieved. The administrators had not given that explanation in their proposals which were therefore defective. But Snowden J did not accept that this failure invalidated the later conduct of the administration of AHDL. He appears to have regarded it as of no consequence.

79. This conclusion was reached essentially on grounds of statutory interpretation. The wording of paragraph 3, which is clearly the substantive cornerstone of the administration regime and appears at the start of the section headed "Nature of Administration" does not contain any hint that it is subject to a pre-condition of compliance with paragraph 49(2)(b), which appears some way into the section headed "Process of Administration". As Snowden J suggested, if Parliament had intended to elevate the requirements of paragraph 49(2)(b) such that it would have had a substantive impact on the administrators' conduct, it would surely have said so expressly in paragraph 3.

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 (para 339).

80. Ms. Davey's case was that the Administrators failed to exercise independent judgment, but simply accepted Dunbar's selection of APAM and their terms of engagement without independent consideration. Snowden J was referred to Australian cases, including *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262, in which the courts have referred to the desirability of holding a competitive tendering process for the appointment of agents. Snowden J rejected the idea that there is any rule requiring this, and that the Australian cases referred to were decided on their own facts.

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 (paras 341).

81. Despite the same Australian cases also referring to the undesirability of administrators employing agents used by the secured creditor or on its panel, Snowden J again considered there was no rule against this. On the facts APAM had only been initially engaged to manage Angel House (addressing repairs and dealing with tenants) which were unlikely to raise concerns as to APAM's independence from Dunbar.

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. 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 (para 455). The relevant standard of care is that of an ordinary skilled practitioner (paras 383-4, 458-461).

82. The exposé on the property market came to the fore on this point. Ms Davey argued that the administrators erred by not conducting a public sale of the principal asset of the company, namely Angel House.

83. The conclusion was that, although administrators will often achieve the best price in the circumstances through an offer to the public, Snowden J accepted the evidence of Mr Forgham that (i) a public offer would have the effect of opening it up to potential 'time wasters'; (ii) further resources would have to be used to weed out those time wasters; and (iii) a public offer would actually be less attractive for big players (and, by extension, serious bidders) in the property market for that reasons. The further risk of the property being 'blighted' if it were to withdrawn and then re-marketed was also an important factor.

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 (para 391-2).

84. This comes back to one of the key distinctions between receivers and administrators. An administrator has less freedom than does an administrative receiver, in that, while an administrative receiver has a similar obligation to obtain the best price, a sale can be timed by an administrative receiver even if delay would result in enhancement of the value of the security.

85. Conversely, an administrator must ensure that no additional harm (or prejudice) is caused to the general body of creditors, even where para 3(2) of Sch. B1 applies. This is part and parcel of the duty on administrators to consider all aspects of the administration. Further, the existence of security substantially in excess of the debt owed to the secured creditor(s) does not entitle administrators to be lax in managing the business and realising the assets.

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

86. In one sense, this is an obvious point. Administrators are entitled to rely on others in the conduct of their office, particularly where the expertise sought goes outside of their own. In this case, that related to the advice to conduct a 'soft' marketing exercise.

87. On this point, the interpretation of *Pitt v Holt* [2013] 2 AC 108 provided by counsel for the administrators was preferred: a trustee will only be liable if the decision which he takes is outside the scope of his powers or contrary to the general law. The alternative interpretation was that administrators could be held liable, even if they were following professional advice if their decision, judged objectively, was unreasonable. This was considered not to be a correct reading of *Pitt v Holt* and accordingly rejected by Snowden J.

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 (para 590).

88. This is a general proposition; an administrator must not allow his behaviour to be dictated by the interests of–for example–the secured creditors. This naturally flows from the fact that the office of an administrator is personal, and the relevant authority and statutory powers are given to the administrator alone. As a general proposition, the starting point that 'delegates cannot delegate' applies to administrators, although they may of course delegate specific tasks to others (such as the marketing of property).

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 (para 592).

89. The starting point given at para 590 must therefore be immediately qualified in that administrators are entirely at liberty to consult with creditors to ascertain their views. The issue is when it comes to implementing whatever they see as being in the best interests of creditors.

90. There is perhaps an analogy here with shareholders of a company, who delegate general decision-making to the directors. The normal response of a majority of shareholders who disagree with the approach taken by a director is effectively to 'vote him out'. The same principle applies (roughly) when it comes to the appointment of administrators. The majority of the creditors (by value) will normally carry the day in terms of the appointment of the administrator in question, but the actual decision-making undertaken by the administrator once in position should not be unduly influenced by those same creditors.

91. It follows that, if the allegation had been made out, if an administrator does surrender his discretion to the appointing director (or simply acts 'on autopilot' in serving the interests of the creditors), then that could properly be regarded as a breach of fiduciary duty. This is distinct from allegations relating to a lack of care (see paras 624-6).

Conclusion

92. *Davey v Money* should offer some comfort to office-holders, as it reiterates the high hurdle that exists before a claim under Para 75 will be successful. The value of the authority in other matters may be where issues relating to the marketing of property arise, on which there is a wealth of detail provided in the judgment.

93. *Davey v Money* may also serve as a useful reminder to administrators of what they can and cannot delegate, to whom they can delegate, and to what extent they should listen to the interests of creditors. It is also a reminder that administrators must not allow their independent judgment to become clouded by the interests of those who appoint them. As Snowden J makes clear, if those allegations had been made out, there is no doubt such breaches would have been breaches of fiduciary duty.

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8 May 2018