Restructuring and insolvency roundup

July 2017

In this roundup, we consider four recent cases with implications for practitioners in the restructuring and insolvency sector. Two of the judgments concern the appointment of administrators, including a rare Court of Appeal decision which clarifies several elements of the appointment process and will affect director/company appointors, interested creditors and insolvency practitioners alike.

Cases

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Winding up petition struck out as an abuse of process where the court was not satisfied that the petitioner was a creditor. more›

Any comments or queries?

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Cases

JCAM Commercial Real Estate Property XV Limited v Davis Haulage Limited [2017] EWCA Civ 267

Can a company file a notice of intention to appoint an administrator (NOI) if administration is just one of a number of potential options being explored for rescuing the company?

In *JCAM Commercial Real Estate Property XV Limited v Davis Haulage Limited* [2017] EWCA Civ 267 (judgment available here) the respondent, Davis Haulage Limited (the Company), was a tenant of the applicant, JCAM Commercial Real Estate Property XV Limited (JCAM). After the Company fell behind on rent, JCAM brought possession proceedings. Six days before those proceedings were issued (and unknown to JCAM) the Company's director filed an NOI at court and served it on the Company's qualifying floating charge holder (QFCH) as required by paragraph 26 of Schedule B1 to the Insolvency Act 1986.

An interim moratorium of 10 business days on alternative insolvency proceedings and other legal processes arose under paragraph 44 of Schedule B1 once the NOI was filed, effectively blocking the continuation of possession proceedings.

The interim moratorium expired and the Company's director subsequently filed a further two NOIs, triggering additional interim moratoriums. No administrator was appointed.

A fourth NOI (in the same terms as the preceding three) was filed after the Company's director had filed proposals for a creditors' voluntary agreement (CVA) with the court.

JCAM brought proceedings to have the fourth NOI removed from the court file on the grounds that it constituted an abuse of process. JCAM argued that a company must have a fixed or settled intention to appoint an administrator when filing an NOI, and it was evident that in relation to the Company the director was instead primarily concerned with getting the CVA proposal approved by creditors.

First instance decision

At first instance, the judge held that it was not necessary for a company or its directors to have, at the point of filing a copy of the notice, a settled intention to appoint an administrator. The judge focused particular attention on the use of the word "proposes" in paragraph 26(1), finding that the word need not be read as "intends". The judge saw nothing to prevent a director proposing both a CVA and an administration. JCAM appealed.

Court of Appeal decision

The Court of Appeal overturned the High Court's decision, finding that a person must unconditionally propose or intend to appoint an administrator in order to file an NOI. As a result, the fourth NOI was vacated and removed from the court file as a breach of process, since the appointment of an administrator was contingent on the CVA proposal failing to gain creditor approval.

David Richards LJ, giving the leading judgment, held as follows:

- the terms "proposes" and "intends" are synonymous in the context of paragraph 26 (ie the term "proposes" does not import some lower threshold)

- there is no significant difference between the terms in ordinary language
- NOIs may only be filed if there is a QFCH (or a person entitled to appoint an administrative receiver). The purpose of the interim moratorium is to protect the company and its assets while that person decides whether to appoint an administrator and, if he decides not to do so, to provide the same protection pending an appointment by the person giving notice
- paragraph 26(1) obliges a company or its directors to give notice if it or they propose to appoint an administrator, which is easily explicable if the obligation is triggered by a settled intention to appoint, but is less so if the appointment is only a possibility
- the circumstances in which a company may obtain the benefit of a moratorium in aid of a proposed CVA are limited to small companies (as defined by s 382 Companies Act 2006). It should not be possible to circumvent this rule by filing an NOI.

Key points for practitioners

This Court of Appeal decision gives rise to three key points:

- a company or its directors must have a fixed or settled intention to appoint an administrator in order to file an NOI
- contrary to common practice and previous judicial authority (eg *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch)), JCAM confirms that appointers cannot file an NOI where there is no QFCH
- so long as there is a genuine settled intention to appoint an administrator when filing an NOI, successive NOIs may be filed (subject to the court's oversight of abuses of process). However, the tactical use of NOIs to fend off creditors while other methods of rescuing a company are explored will no longer be tolerated by the court.

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Thomas and another v Frogmore Real Estate Partners [2017] EWHC 25 (Ch)

Should an administrator's appointment be terminated where the motives of the appointor are improper but the statutory purpose of the administration can still be properly achieved?

The case of *Thomas and another v Frogmore Real Estate Partners* [2017] EWHC 25 (Ch) (judgment available here) concerned the administration of three companies whose registered offices were in Jersey and which were all part of a larger company structure which specialising in real estate investment and management in the United Kingdom. The three companies (the Companies) operated as SPVs within the corporate structure, each owning a shopping centre in England. The shopping centres were managed by another company in the group which had its registered office in London.

Administrators had been appointed by Nationwide Building Society in November 2016, following the Companies' failure to pay outstanding loans totalling over £106million. There was an on-going dispute (dating back to 2014) between the Companies and the management company as against Nationwide, arising out of the Nationwide's decision to transfer its economic interest in the loans to a third party.

Issues

The two issues the court had to decide were whether:

- the Companies' centre of main interest (COMI) was in England & Wales, such that the conditions for appointment of the administrators in paragraph 14 of Schedule B1 of the Insolvency Act 1986 (IA 1986) were satisfied. The Companies denied that their COMI was in

England & Wales on the basis that their registered offices and board meetings were in Jersey. As a result they asserted that the IA 1986 provisions were not engaged

- the court should exercise its discretion to order that the appointment of the administrators should cease to have effect as a result of improper motives of the appointor. The Companies argued that Nationwide's decision to appoint administrators was a cynical attempt to stifle the ongoing 2014 dispute and the administrators' appointment should be terminated for improper motive under paragraph 81 of Schedule B1.

Decision as to COMI

The Court held that the COMI for each of the Companies was in England & Wales because irrespective of the fact that board meetings were held in Jersey, the day-to-day conduct of the business and activities of the Companies was in the hands of the management company appointed in England and governed by a contract with an exclusive English law and jurisdiction clause. The management company provided a very large range of services to the Companies, including day-to-day management of the shopping centres and dealing with their financing, accounting, marketing and formulation of their business strategy; and included the "types of function that one would expect a head office to discharge".

Decision as to improper motive

The court held that improper motive did not necessarily thwart the appointment of the administrators but merely "engages the jurisdiction" of paragraph 81 of Schedule B1. The court has a wide discretion and should look to whether the statutory purpose of the administration can be achieved rather than the motives for appointment. The judge held that where paragraph 81 of Schedule B1 is invoked "it is unlikely to lead to an order that the administration cease where the statutory purposes could properly be achieved irrespective of the appointor's motivations".

Key points for practitioners

This judgment will be of some comfort to practitioners that, regardless of the motives of the appointor, the court will not as a matter of course hold that the appointment is invalid. In reaching its decision, the court considered a decision of the High Court of Northern Ireland which stated that "aggressive and, indeed, malevolent motivation would not, per se, undermine the (proposed) administrator's statutory statement of opinion"[1]. Provided the objectives of the administration can be achieved by the appointment, practitioners will likely have good reason to continue with the administration, irrespective of the appointor's motives.

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James Green (Supervisor of the Voluntary Arrangement of James Patrick Wright) (Supervisor) v James Patrick Wright (Debtor) [2017] EWCA Civ 111

Are funds subject to an IVA if they are received by a debtor after a certificate of completion has been issued by the supervisor?

The case of *James Green (Supervisor of the Voluntary Arrangement of James Patrick Wright) (Supervisor) v James Patrick Wright (Debtor)* [2017] EWCA Civ 111 (judgment available here) concerns an individual voluntary arrangement (IVA). The terms of the IVA provided that all of the Debtor's assets, other than his matrimonial home and his car, would be held on trust for the purposes of the IVA in return for a moratorium on the enforcement of creditors' claims. In addition, the Debtor was required to make monthly contributions from his salary for five years.

The Debtor complied with his obligations under the IVA and the Supervisor issued a certificate

1. Cursitan v Keenan [2011] NICh 23, paragraph 48.

of completion. After the certificate was issued, two payments in settlement of PPI mis-selling claims were received by the Debtor. It was not disputed that these claims were property to which the IVA would apply if the IVA survived the certificate of completion. By comparison, had the Debtor been made bankrupt, the mis-selling settlements would have been part of the bankruptcy estate even after the discharge from bankruptcy.

The Debtor applied to court to determine whether these sums were subject to the IVA. It was initially decided in the County Court and on appeal to the High Court that they were not. The courts considered that following the issue of a certificate of completion the IVA was concluded, although they accepted that if a dividend had been declared but not paid this would remain payable. A further appeal was made to the Court of Appeal by the Supervisor.

Decision of the Court of Appeal
The creditors' rights were determined by what was owed to them at the commencement of the IVA. As such, the creditors could remain beneficiaries of the trust even after the trust had purportedly completed.

It follows that, upon issue of a certificate of completion, although the debtor is released from the debts (with no further liability to pay them) the debts themselves do not cease to exist and are not in fact discharged.

Lord Justice David Richards considered that this situation was analogous to bankruptcy where debts can continue to exist without being the personal obligation of the debtor. Therefore, the property subject to the IVA continued to be held on trust for the creditors even after completion of the IVA.

Key points for practitioners
Insolvency practitioners should be alerted to the possibility that recoveries can be made on cases which they may previously have considered to be closed. This decision may also result in confusion on the part of the lay person. In plain English one might expect complete to mean complete and assume that additional realisations would fall outside the IVA. Practitioners will want to be careful to ensure that an individual debtor understands the full implications of entering into an IVA in light of this case.

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Breyer Group Plc v RBK Engineering Ltd [2017] EWHC 1206 (Ch)

Winding up petition struck out as an abuse of process where the court was not satisfied that the petitioner was a creditor

In *Breyer Group Plc v RBK Engineering Ltd* [2017] EWHC 1206 (Ch) (judgment available here), Breyer Group Plc (the Applicant) was a construction company. In May 2015, it entered into a contract with RBK Engineering Ltd (the Respondent) under which the Respondent would carry out the refurbishment of kitchens and bathrooms on a construction project. Under the contract's payment structure, the Respondent would submit an application for payment, after which the Applicant would submit a payment notice or pay less notice. An appendix provided timings for the applications and notices.

In early 2016, the Applicant wanted the Respondent to complete further work. The parties never agreed terms for a new agreement but continued working into the 2016/17 period on the same terms as the original agreement, at least insofar as payments were concerned. By the end of 2016, both parties recognised that they should bring their relationship to an end and entered into a settlement agreement dated 14 December 2016.

On 22 March 2017, the Respondent presented a winding up petition against the Applicant, claiming it:

- had submitted late payment notices and made late payments
- was indebted to the Respondent in the sum of £258,729.16, and
- had admitted that it was insolvent.

The Applicant applied to the court to strike out the winding up petition on the grounds that it was not insolvent and it disputed the debt in question.

Decision
The judge granted the application to strike out the winding up petition for the following reasons:

- the Applicant was not unable to pay its debts. To the contrary, the Applicant was solvent with cash in hand and an unused £4m credit facility. In short, the judge said, this "was not a case of can't pay, but won't pay"
- there was a genuine dispute as to the terms of work and what timing regime had been agreed in respect of payment, the quality of the work undertaken by the Respondent, and the validity of certain electrical and testing certificates issued by the Respondent. The court found that these claims – some of which operated as defences and others as counterclaims – were fairly arguable and it would be inappropriate to resolve them in insolvency proceedings
- the proper place for the dispute between the parties was either adjudication under the scheme established under the Scheme for Construction Contracts or ordinary proceedings
- for the Respondent to continue the insolvency proceedings would be oppressive and would constitute an abuse of process.

Key points for practitioners
This case is a reminder of the courts' reluctance to allow winding up petitions to be brought where there is a bona fide dispute over the debt claimed. Such petitions could create an injustice by pressuring a company to pay in order to avoid the petition being advertised.

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