NEUTRAL CITATION NUMBER: [2018] EWHC 2901 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT BRISTOL
INSOLVENCY AND COMPANIES LIST

Case No: 0172 of 2018

Courtroom No. 15

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Wednesday, 15th August 2018

Before:
HIS HONOUR JUDGE PAUL MATTHEWS

B E T W E E N:

MR NEIL ANDREW BENNETT

and

BOSCO INVESTMENTS LIMITED

MR RICHARD ASCROFT appeared on behalf of the Applicant
NO COUNSEL appeared on behalf of the Respondent

JUDGMENT (As Approved)

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HHJ PAUL MATTHEWS:

1. This is an application under rule 3.3 of the Insolvency Rules 2016, and paragraph 12 of Schedule B1 of the Insolvency Act 1986, by Mr Neil Andrew Bennet in relation to a company called Bosco Investments Limited. This company was incorporated in June 1998 and traded by letting property acquired by it for the purpose. In April 2005, it granted a debenture in favour of AIB Group (UK) Plc as security for borrowings.

2. In September 2009, that bank appointed an LPA receiver over certain freehold property belonging to the company, a number of flats at 6 Berrylands, Surbiton. However, in April 2010, the same bank – as a qualifying floating charge holder – appointed the applicant and his then partner, Michael Heeley, as joint administrators of the company under paragraph 14 of Schedule B1 to the 1986 Act. At that time, the company's principal asset was a hotel and bar in Surbiton known as Broughton House, although there was also the other Surbiton property to which I have previously referred. In November 2010, the Broughton House premises were sold off for a consideration and the net proceeds for sale were paid to the bank. This left a shortfall on the bank's lending to the company of some £760,000, although this was subsequently reduced to about £48,500.

3. In April 2011, the joint administrators wrote to the creditors, informing them that their appointment as joint administrators was being brought to an end, on the basis that the company's business and assets had all been sold and there were no other assets capable of being realised for the benefit of the company's creditors, and that there was no prospect of any distribution to unsecured creditors. In addition, there was enclosed with that letter a final progress report on the administration, and a copy of the notice that has to be given to the Registrar of Companies to move the company directly from administration to dissolution under paragraph 84 of Schedule B1.

4. The final progress report recorded that the joint administrators' time costs were £171,192.50, of which £126,674.15 had been drawn, and therefore paid. This left an unpaid balance of some £44,518.35, which it was proposed to write-off on the basis that there was no money to pay it. The notice was deemed to have been received by the Registrar of Companies on 14 April 2011. Therefore, the deemed date of dissolution of the company under paragraph 84.6 of the Schedule B1, was 14 July 2011.

5. Now, it so happened that this company had previously bought some interest rate hedging products ("IRHPs"), and in 2013 the Financial Conduct Authority began a full review into the sale by banks, including AIB, of such products to their customers. In September 2014, apparently in ignorance of the dissolution of the company, AIB wrote to the company, presumably at the last registered office of the company, which would have been the address of the administrators, offering to compromise the company's potential claim which, of course, at that stage had not been made against AIB, in relation to its sale of the IHRPs in 2008. The total redress offered was some £246,672-odd.

6. The applicant, not realising that he no longer had any authority in the matter, in November 2014 wrote to the bank purporting to accept these redress payments on behalf of the company. The applicant now accepts, of course, that he had no such authority. I have been referred to the decision of HHJ David Cooke, sitting as a judge of the High Court, in *Walker and Another v National Westminster Bank Plc and Another* [2017] 1 BCLC 124, at [36](iv), which deals with this point.

7. Consequently, in September 2015, the applicant applied for the restoration of the company to the Register of Companies, and also, at the same time, for an administration order. In March 2016, His Honour Judge McCahill QC, sitting as a judge of the High Court here in Bristol, ordered the restoration of the company to the register, but declined to make an administration order. Therefore, in March 2016, the company was restored to the Register of Companies.

8. Later in the same year, in July or August, the applicant approached AIB to see whether, as a qualifying floating charge holder, the bank would be prepared to appoint administrators in respect of the company. It took something like a year for this matter to be dealt with. But, in August 2017, the bank's solicitors finally confirmed that the bank was not willing to make an out-of-court appointment.

9. The amounts now available as redress payments in relation to the interest rate hedging products claims have been confirmed by AIB in March this year as some £250,646, and remain open for acceptance.

10. On 27 June this year, the applicant issued the present application. It is supported by a witness statement dated 20 June 2018, together with a large exhibit. Unfortunately, a

number of technical points appear to have intruded into consideration of this claim. One, which is purely procedural, is that I was not provided with a bundle for the purposes of this hearing. As I explained to Mr Ascroft of counsel, and as he readily accepted, that has important consequences for the efficient management of the application, both in its preparation by the judge and then its management during the hearing, because it is important that the parties and the Court are operating from the same documents as they go through it.

11. Leaving that on one side, there is a question as to the standing of the applicant. He is one of the two former joint administrators. He does not, however, make this application in that capacity. Instead, he makes the application in his capacity, or claimed capacity, as a creditor of the company, and under paragraph 12.1(c) of Schedule B1. This provides that

> 'One or more creditors of the company may make an application for an administration order'.

The way in which he claims to be a creditor is that – as I have already explained – not all the time costs which were incurred during the course of the administration were, in fact, paid, because there were insufficient assets for this purpose. However, since more assets have appeared on the horizon, the applicant now considers that he may be able to be paid the balance of his time costs.

12. The way in which the remuneration of the joint administrators arose is explained in the progress report, which was filed on 8 April 2011, and is exhibited to the applicant's witness statement. In paragraph 4, subdivided into 4 subparagraphs, of that progress report, at page 7 of the exhibit, the report explains that the administrators' proposals as approved included provisions for remuneration. In addition, in paragraph 4.4, it states as follows,

> 'As advised in our previous report dated 12 November 2010, the Joint Administrators' time costs at 13 October 2010 were £155,037.50. Since that time further costs of £16,155 have been incurred. These combined costs are summarised at Appendix D and comprise 828.3 hours at an average rate of £206.68 per hour. Owing to a paucity of funds and in accordance with approval £126,674.15 has been paid, leaving a balance to be written off of £44,518.35."

Then, detail is given as to the areas in which costs have been incurred.

13. Now, it is clear on the authorities, and in particular the case of *Thunderbird Industries LLC* v *Simoco Digital UK Ltd* [2004] 1 BCLC 541, that "for the Court to exercise this discretion," and I quote from paragraph 1 of the judgment of Patten J, as he then was:

> "the creditor must establish by evidence, firstly its status as a creditor; secondly, that the company is or likely to become unable to pay its debts, and thirdly, that the administration order is reasonably likely to achieve the purpose of administration, as defined..."

So, the question is whether the applicant can establish his status as a creditor. It is clear from the decision of Snowden J in *Re Elgin Legal Limited* [2018] 1 BCLC 521, at [7]-[8], that a solicitor who claimed unpaid fees against a client company had standing to apply for an administration order.

14. In this case, it is clear to me that the approval of the proposals of the joint administrators means that the administrators had authority to draw down from assets under their control in respect of their time costs incurred. That would, of course, be subject to certain creditors' rights, which are set out in paragraph 6 of the progress report on page 9 of the exhibit, which would entitle any secured creditor or an unsecured creditor with a concurrence at least of 10% in value of the unsecured creditors, within 8 weeks of receipt of the progress report, to make an application to Court to challenge the remuneration charged, or expenses incurred, on the basis that they were excessive. However, as I understand the position, no such challenge was ever made. Therefore, the applicant says that in these circumstances, because he has incurred time costs for which he has never been paid, he remains a creditor of the company.

15. I am bound to say that, on the face of it, this all seems rather informal. Nonetheless, it appears to be the basis upon which the administrators became entitled to charge, and I accept it in principle. There is a question as to whether any limitation period is applicable, but I do not think that that should deter me from considering that, in principle, the applicant is a creditor for the purposes of having standing to make this application. It may be that, once appointed, the administrators should, in fact consider whether, strictly speaking, the applicant is indeed a creditor. I say this also because there are other questions which arise.

The appointment, I assume, was a personal appointment, but there must have been some arrangement between the applicant and his firm, by which his fees would be paid over to his firm, and that would be true of his co-appointee, Mr Heeley.

16. Mr Heeley, as explained in the evidence of the applicant, has left the firm and some arrangement, which is not explained, has been made by which Mr Heeley has given up his rights to any claim to that remuneration. Therefore, he is out of it. What is not clear, is whether his rights have gone to the firm or whether they have passed to the applicant, or something else entirely. Nevertheless, notwithstanding these imperfections in the evidence presented to the Court, I am satisfied that the applicant at first sight appears to have a claim to, let us say, one half of the outstanding time cost charges and, therefore, he has standing to make this application.

17. The next point which arises relates to the service of this application. The application is required by the rules to be served on the company. It was so served by sending it to the registered office of the company. This was indeed, the address – the business address – of the joint administrators themselves at the time that they were in office. That is now – still – the applicant's business address. Therefore, the rather strange procedure was gone through of sending the application in the post to the applicant's own address – and thereby to the company at the applicant's own address. In addition, because of the strangeness of the procedure, the applicant caused the application to be also sent to one of the directors of the company at his home address, but, so far as I understand it, he has not responded. At all events, I am satisfied that by one or other of these means, or both, there has been service on the company. There has also, as required, been service of this application on the bank, AIB, itself. I should say that no party has attended this application, apart from Mr Ascroft on behalf of the applicant.

18. The substantive question that then arises, as Patten J observed in the case of *Thunderbird Industries LLC v Simoco Digital UK Ltd*, is whether the company is, or is likely to become unable to pay its debts. I am satisfied on the evidence that that is the case. Then, it must appear that the administration order is reasonably likely to achieve the purpose of administration as defined. Now, the purpose of administration is defined in paragraph 3 of Schedule B1 of the 1986 Act, which is cross-headed 'Purpose of administration'. Subparagraph 1 reads:

> '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'.

19. The first of these objectives – rescuing the company as a going concern – is not contended for by the applicant. He says that it is either (b) or (c). As to (b), he says it will achieve 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. Firstly, he says, this is because the administration would avoid the mandatory set-off against the debt owed to AIB Bank, which would arise under rule 14.25 of the Insolvency Rules 2016. That compares with the position under rule 14.25 of those rules, in relation to set-off in administration. Under that rule, there is no set-off unless a certain notice is given, which need not be. So there is no automatic set-off in the case of administration.

20. However, as it seems to me, the question of set-off does not affect whether or not the result for the company's creditors *as a whole* is better or worse off, because, in my judgment, the company's creditors as a whole are paid exactly the same amount whether there is a set-off or not. It is simply that it is distributed differently amongst those creditors, but subparagraph 1B of paragraph 3 of Schedule B1 does not require or does not stipulate for any particular treatment amongst the creditors themselves. It simply refers to the creditors as a whole. Accordingly, I do not consider that that makes any difference.

21. The second point which is made, however, has more substance. That is that, if there is an administration, the *ad valorem* fees payable to the Secretary of State, and the fee payable to the official receiver, will be avoided. This is helpfully set out in a table produced as part of the evidence before me on page 94 of the exhibit, the estimated outcome statement. It shows that, if there is a liquidation, there will be ad valorem fees of some £37,597, payable to the Secretary of State, and an official receiver administration fee of £5,000. Therefore, that is something like £42,000 or £43,000 paid in the case of a liquidation, which is not paid in the case of an administration.

22. Then, looking further down the outcome statement we see that there would obviously be

remuneration payable to the administrators and then the joint liquidators once the administration came to an end, and some £35,000 is allowed for this. However, as against that, there is an entry for compulsory liquidators' remuneration if there is a compulsory liquidation of some £18,282, and another £5,000 for the petition fees. Therefore, the difference, there, is about some £8,000. Accordingly, what the applicant says is that, overall, the creditors are better off by something that may be between £28,000 and £35,000, if there is an administration as compared to a liquidation. That certainly seems to me to be a substantial benefit which ought to accrue to the creditors if possible.

23. As against that, of course, there is the question, what are the costs of this application? For if this application for an administration order should fail, then there would be no costs to come out of the assets, and there would be a liquidation which would deal with those assets. Insofar as the costs for this application are concerned, of course, it must be recognised that there would still be some costs of setting up a winding up, if there were no administration. At present, it does not seem to me likely that the costs of this application would amount to anything like the £28,000 to £35,000 that would be saved if there were an administration, rather than a liquidation.

24. However, there is one point which I must specifically deal with and it is this. As I have already mentioned, at the time when AIB wrote to the company believing it still to be in existence, to advise it that there was an offer to be made in relation to the compensation – the redress for the mis-selling of IRHPs – the applicant engaged his own time and that of his firm and, it appears, some solicitors in correspondence, and also engaged a specialist firm of advisors in relation to the amount of the redress to be paid. In the estimated outcome statement, entries are made in respect of all of these three forms of time charge or advice charge.

25. It is not possible to separate out the fees said to be chargeable in relation to the applicant's firm, in respect of the interest rate hedging product correspondence, because there is also a claim in respect of time spent on the company restoration and administration application. Therefore, that is not clear. The amount, however, in respect of the specialist advisors is put in at £17,500. Then in relation to the solicitors, again, this also includes time spent on the company restoration and administration application. So it is not entirely clear to me what the total amount might be, that is claimed in this outcome statement, to be payable in

respect of the work done at the time on the IRHP redress claim.

26. The point is that it is not clear to me at this stage that these are costs which should be borne by the company or by the creditors or paid out of the assets of the company, in any event. It may be that they are, and it may be that they are not. I have not investigated the legal basis upon which the company, or the creditors, ought to pay them. That would be something for the office holders, once appointed, to consider, and if necessary, to deal with by way of application to the Court. However, since those figures are put in both sides of the outcome statement, both under administration and compulsory winding up, they do not affect the overall figures.

27. Accordingly, I have come to the conclusion that the creditors overall will be better off to some appreciable extent, if there is an administration rather than a compulsory winding up. However, the costs of the application today will, obviously, not include any costs relating to the advice in respect of the IRHP redress claims or any of the work done in relation to that, as that is a matter which would have to be dealt with by the office holders once appointed.

28. The proposal is to appoint Mr Michael Solomons and Mr Andrew Pear, of both BM Advisory LLP, as administrators, and I will, subject to the terms of the order being considered, therefore appoint them as joint administrators of the company.

End of Judgment

Transcript from a recording by Ubiqus
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