



Neutral Citation Number: [2024] EWHC 1491 (Ch)

Case No: CR-2022-BRS-000022

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 17 June 2024

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

**IN THE MATTER OF OAS REALISATIONS (2022) LIMITED (formerly known as
Open Administration Systems Ltd) (IN CREDITORS' VOLUNTARY LIQUIDATION)**

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) STEPHEN HOBSON
(2) LUCINDA COLEMAN

Applicants

- and -

**OAS REALISATIONS (2022) LIMITED (formerly
known as Open Administration Systems Ltd) (IN
CREDITORS' VOLUNTARY LIQUIDATION)**

Respondent

Simon Passfield (instructed by Stephens Scown LLP) for the Applicants

Hearing dates: 30 January 2024

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 17 June 2024.

HHJ Paul Matthews :

Introduction

1. On 30 January 2024 I heard an application by the joint administrators of OAS Realisations (2022) Ltd (“the company”), under section 112(1) of, and/or paragraph 12(1)(c) of Schedule B1 to, the Insolvency Act 1986. The primary relief sought by the application were three declarations relating to their own and the company’s status. These were declarations that

“a. the Company moved from administration to creditors’ voluntary liquidation on 21 February 2023 on the registration by the Registrar of Companies of the notice sent by the Applicants under paragraph 83(3) Sch B1 IA on 14 February 2023 pursuant to paragraph 83(6)(b) Sch B1 IA;

b. the Applicants’ appointment as joint administrators of the Company ceased to have effect from that time pursuant to paragraph 83(6)(a) Sch B1 IA;

c. the Applicants were appointed as liquidators of the Company at that time pursuant to paragraph 83(7) Sch B1 IA.”

In the alternative to those declarations, the application sought an administration order in relation to the company, appointing the applicants as joint administrators of the company with effect from 3 March 2023.

2. Essentially, the application concerned the validity of a notice sent to the Registrar of Companies by the applicants. After hearing Mr Passfield, I announced my decision that I was satisfied that the construction of paragraph 83 of Schedule B1 to the Insolvency Act 1986 that he was contending for was correct, and that the notice had been valid. Accordingly, I made the declarations sought. However, I said I would give my reasons subsequently in writing. This short judgment contains those reasons. Naturally, I had not intended that they should take so long to prepare, but pressure of other, more urgent, work has prevented this until now. I hope that, because I gave my decision at the time, and it was the decision desired by the applicants, this has not caused any inconvenience.

Background

3. I can take the background circumstances directly from Mr Passfield’s very helpful skeleton argument:

“a. on 3 March 2022, the Applicants were appointed as joint administrators of the Company by its directors pursuant to para 22 Sch B1 IA ... On the same day, the Administrators completed a prepackaged sale of the Company’s business and assets. Following the completion of the sale, the Applicants concluded that they would likely be able to pay a dividend of 59.1p/£ to the Company’s secondary preferential creditors but there would be insufficient realisations to enable any distribution to be made to ordinary unsecured creditors ...

b. by para 76(1) of Sch B1 IA, the Applicants’ term of office was due to expire on 3 March 2023. In or around January 2023, the applicants considered whether to seek an extension (either by consent pursuant to para 76(2)(b) Sch B1 IA or on an

application to the court pursuant to para 76(2)(a) Sch B1 IA) but concluded that it was more appropriate for the Company to move into liquidation ...

c. on 27 January 2023, the applicants sought advice from their solicitor, Andrew Knox of Stephens Scown LLP ('Mr Knox') as to whether they were entitled to convert the administration into a creditors' voluntary liquidation ('CVL') by sending the Registrar of Companies ('the Registrar') a notice under paragraph 83(3) Sch B1 IA in circumstances where the only prospective distribution was to a preferential creditor ... Mr Knox advised the applicants that they were so entitled on the basis that a preferential creditor is an 'unsecured creditor' for the purposes of para 83(1) Sch B1 IA by reference to the statutory definitions in s.248 IA ...

d. on 14 February 2023, acting in reliance on Mr Knox's advice, the Applicants duly sent notice to the Registrar under para 83(3) Sch B1 IA ('the notice') ... and on 21 February 2023, the Registrar duly registered the notice ... At first blush, the consequence of this was that: (i) the applicant's appointment as the joint administrators of the Company ceased to have effect (para 83(6)(a) Sch B1 IA); (ii) the Company moved into CVL (para 83(6)(b) Sch B1 IA); and (iii) the Applicants became the joint liquidators of the Company (para 83(7) Sch B1 IA);

e. on 5 September 2023, the Applicants external compliance reviewer told the Applicants that she believed that (i) Mr Knox's interpretation of 'unsecured creditor' for the purposes of para 83(1) Sch B1 IA was wrong (and that term does not include a preferential creditor); (ii) accordingly, the Applicants had not been entitled to file the notice because the requirements of para 83(1) Sch B1 IA were not satisfied; and (iii) in consequence, their purported appointment as joint liquidators of the Company was invalid. If that is correct, it will mean that the applicant's appointment as joint administrators of the Company will have terminated by effluxion of time on 3 March 2023 pursuant to para 76(1) Sch B1 IA."

The relevant law

4. Schedule B1 to the Insolvency Act 1986 deals with administration as an insolvency process. It is incorporated into the 1986 Act itself by section 8 of that Act, in Part II of the First Group of Parts. The initial term of office of an administrator is one year: paragraph 76(1). It can be extended (for a maximum of one year, once only) by the creditors, or by the court: paragraph 76(2). There may however be good reasons for not extending it, but instead moving the company into liquidation, or even (for example where there is nothing left to distribute) directly to dissolution. Paragraph 83 of the schedule is one of a number of provisions dealing with the end of administration. It deals with moving a company from administration to a creditors' voluntary liquidation.
5. It relevantly provides:

“(1) This paragraph applies in England and Wales where the administrator of a company thinks—

- (a) that the total amount which each secured creditor of the company is likely to receive has been paid to him or set aside for him, and
- (b) that a distribution will be made to unsecured creditors of the company (if there are any) [which is not a distribution by virtue of section 176A(2)(a)].

[...]

(3) The administrator may send to the registrar of companies a notice that this paragraph applies.

(4) On receipt of a notice under sub-paragraph (3) the registrar shall register it.

(5) If an administrator sends a notice under sub-paragraph (3) he shall as soon as is reasonably practicable—

- (a) file a copy of the notice with the court, and
- (b) send a copy of the notice to each creditor [other than an opted-out creditor,] of whose claim and address he is aware.

(6) On the registration of a notice under sub-paragraph (3)—

- (a) the appointment of an administrator in respect of the company shall cease to have effect, and
- (b) the company shall be wound up as if a resolution for voluntary winding up under section 84 were passed on the day on which the notice is registered.

(7) The liquidator for the purposes of the winding up shall be—

- (a) a person nominated by the creditors of the company in the prescribed manner and within the prescribed period, or
- (b) if no person is nominated under paragraph (a), the administrator.

[...]”

6. The reference in paragraph 83(1)(b) to a distribution under section 176A is to a distribution of the “prescribed part” of debts owed to unsecured creditors. Such distributions were introduced by the Enterprise Act 2003, to be paid out of assets subject to a floating charge. It was thought unfair that the holders of floating charges should benefit by another reform introduced by that Act, namely the abolition of the preference given to Crown debts, and “scoop the pool” at the expense of unsecured creditors.
7. As stated above, in the present case the administrators considered that they would probably be able to pay a dividend to the company’s secondary preferential creditor (HMRC), but nothing to the ordinary unsecured creditors. Preferential debts are those listed in Schedule 6 to the Act, and references to “preferential creditors” are read

accordingly. Under the schedule as originally enacted, certain Crown debts were preferential, but as just mentioned this status was removed from them by the Enterprise Act 2002. However, some debts owed to HMRC were subsequently restored to (secondary) preferential status, by the Finance Act 2020. In administration, the preferential debts are payable in priority to all other debts: para 65(2) of Schedule B1, applying s 175(1). The administrators could move the company from administration to creditors' voluntary liquidation under paragraph 83(1) of the schedule only if they thought that "a distribution will be made to unsecured creditors". The question therefore is whether the preferential creditors (who were intended to receive a dividend) were "unsecured creditors" for this purpose. This is a matter of the interpretation of the words of the Act.

8. Schedule B1 does not itself include a definition of "unsecured creditor". But as it falls (via section 8) within the First Group of Parts of the 1986 Act, the meaning of this term for the purposes of the schedule is to be found in section 248 of the Act (also in the First Group of Parts). This relevantly provides that:

"In this Group of Parts, except in so far as the context otherwise requires—

(a) 'secured creditor', in relation to a company, means a creditor of the company who holds in respect of his debt a security over property of the company, and 'unsecured creditor' is to be read accordingly; and

(b) security' means—

(i) in relation to England and Wales, any mortgage, charge, lien or other security ... "

So, unless the context otherwise requires, an 'unsecured creditor' is a creditor who does *not* hold "in respect of his debt a security over property of the company".

Discussion

9. A preferential creditor has preference over other creditors, but does not hold any security over the property of the company. On the face of it, therefore, such a creditor is an unsecured creditor for the purposes of paragraph 83. If it had been intended to restrict moving from administration to creditors' voluntary liquidation to the case where ordinary (*ie* non-preferential) unsecured creditors were to receive a dividend, it would have been simple enough to make this clear in paragraph 83. This is in fact done in paragraph 65(3) of the schedule, which limits the ability of an administrator to make a distribution other than a prescribed part distribution to "a creditor of the company who is neither secured nor preferential".
10. As stated above, the Enterprise Act 2003 introduced a scheme of "prescribed part" distributions to unsecured creditors, taken from assets otherwise subject to a floating charge. Before 2020, this meant that, if there were no preferential creditors, but there was a floating charge over an asset of such value that there was a prescribed part to be distributed to unsecured creditors, paragraph 83(1)(b) would not be met. The reintroduction of Crown privilege for certain HMRC debts in 2020, without any change to the prescribed part regime, has unbalanced the equation. It may therefore be asked why the existence of HMRC as a secondary preferential creditor should alter

matters. Yet the statutory words are clear. And they have to mean the same for all kinds of preferential creditors. In my judgment, the context of paragraph 83 does not require the meaning of unsecured creditor to be restricted to non-preferential unsecured creditors. On that basis, the notice sent to the registrar of companies by the administrators was valid, and effectively moved the company from administration to creditors' voluntary liquidation.

Alternative view

11. But even if I were wrong about the interpretation of paragraph 83, it is important to notice the precise wording of the paragraph. It applies not only where the conditions in sub-subparagraphs (a) and (b) of subparagraph (1) are *in fact* satisfied, but also where “the administrator of a company *thinks*” that they are satisfied. In *Unidair plc v Cohen* [2005] EWHC 1410 (Ch), Lewison J (as he then was) accepted the evidence of Mr Cohen, the administrator of a company who, acting on the basis of legal advice, considered that a debenture was invalid, and that accordingly a distribution would be made to unsecured creditors, so that the conditions in paragraph 83(1) were satisfied. The judge held that the legal advice was wrong, and that the debenture was in fact valid. But that did not mean the paragraph 83 did not apply.

12. The judge said:

“71. Reading paragraph 83 literally, Mr Cohen did think that the only secured creditor (the bank) had been repaid; and that there would be a dividend payable to creditors. Thus, on the face of it, paragraph 83 applied. Ms Agnello submitted that the administrator's conclusion must be based on reasonable grounds; or at least not be one which no reasonable administrator could have reached. I do not consider that paragraph 83 should be interpreted in this way. I accept that the process of thinking involves a rational thought process, and in that sense must be reasonable; but I do not accept that what the administrator thinks is subject to any form of test by reference to an objective standard.

72. Assuming that my conclusion on the validity of the debenture is right, Mr Cohen was wrong to reject Unidare's claim to be secured. However, in rejecting the validity of the debenture, Mr Cohen relied on the legal advice he was given. Ms Shekerdemian's excellent argument demonstrates that the legal advice that Mr Cohen received (even though I disagree with it) was not unreasonable. So in my judgment it can fairly be concluded that Mr Cohen formed his opinion on that point on reasonable grounds.”

13. Applying that opinion to the facts of this case, it is plain that the administrators thought that the conditions in paragraph 83(1) were satisfied. Otherwise, they would not have sent the notice to the registrar. In line with what Lewison J said in paragraph 71 of his judgment, it is not required that the administrator should *reasonably* think that the conditions are satisfied. It is necessary only that there should be a thought process to that effect. But I have no doubt that, given the clear wording of the definition in section 248 of the Act, and in light of the advice of their solicitor, the leader of the specialist insolvency and restructuring team at his firm, the administrators in this case had reasonable grounds for taking the view that they did.

Conclusion

14. It was for these reasons that I granted the declarations sought, and did not need to consider the alternative application for a retrospective administration order.