IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
INSOLVENCY AND COMPANIES LIST
(ChD)

No. CR-2018-006093

[2018] EWHC 3852 (Ch)

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 27 July 2018

Before:

THE HONOURABLE MR JUSTICE BARLING

IN THE MATTER OF FORCE INDIA FORMULA ONE TEAM LIMITED (Reg'd No. 02417588)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN**:**

BROCKSTONE LIMITED
(a company incorporated in Guernsey)

Applicant

-and-

FORCE INDIA FORMULA ONE TEAM LIMITED

Respondent

MISS R. PAGE (instructed by Eversheds Sutherlands (International) LLP) appeared on behalf of the Applicant.

MR G. DAVIS QC and MR R. AMEY (instructed by Onside Law) appeared on behalf of the Respondent.

MR A. AL-ATTAR (instructed by DWF) appeared on behalf of an Interested Party, BWT.

MR PERKINS appeared on behalf of Formula One World Championship Limited.

J U D G M E N T

MR JUSTICE BARLING:

Introduction

1 This is a creditor's application for an administration order in relation to a company, Force India Formula One Team Limited ("the Company"). Administration is sought under paragraph 12(1)(c) of Schedule B1 to the Insolvency Act 1986. The proposal is that a Mr Geoffrey Rowley and a Mr Jason Baker of FRP Advisory LLP should be appointed as joint administrators. They have confirmed their consent to act in that capacity and there is some further material from Mr Rowley in the evidence that has been shown to me.

2 The application has been brought in the interim applications list on a particularly busy day. Hence, I am giving judgment at nearly 7pm, the parties having been waiting until sometime after 4pm to begin the hearing. However, the matter is of some urgency and importance, and therefore I have taken the view that it should be resolved as soon as possible.

3 The process was initiated when the application, together with supporting documents, were delivered to the Company by email and hard copy last Friday, 20 July 2018. It is therefore clear that the Company and its officers have been aware of it. Indeed, they have instructed Mr Davis QC and Mr Robert Amey to appear to oppose the application, and have filed evidence in opposition, including, in particular, statements from Mr Robert Fernley, a director of the Company, and Mr William Storey, a director of a company called Rich Energy Racing Limited, to whom I will need to refer again in a moment.

4 Ms Page has appeared on behalf of the applicant, a Guernsey company called Brockstone Limited, and I have also heard submissions from Mr Adam Al-Attar, who is instructed by an Austrian company called BWT Aktiengesellschaft, which is a creditor of the Company. Finally, by way of appearances, I should refer to Mr Perkins who has appeared in order to produce a letter from, I understand, Formula One itself, the organisers and/or the commercial rights-holder of the Formula One World Championship. I will refer in due course to the contents of this letter.

5 The main evidence in support of the application for the appointment of administrators over the Company is a witness statement by Mr Adrian Sussmann, who is a director GP Sports Management Limited, a company that acts as an agent for one of the Company's drivers. Mr Sussmann states that in his capacity as an agent for the driver he has extensive dealings with both the applicant and the Company.

6 The applicant's position is that it is urgent for an administrator to be appointed very quickly. The way it was put by Ms Page was that the administrator should be appointed before the Hungarian Grand Prix, which takes place this weekend. The reason was that for an administration to have the best possible chance of success in maximising the realisations for the creditors, it would be highly desirable for the administrator to be in a position to go to the Grand Prix and to speak to the participants (including, as I understand it, other competing teams), and to give support to the Formula One Championship organisers in seeking to encourage the continued maintenance of the rights of the Company in its share of prize money. Such rights are, she submits, arguably in question when there is any kind of insolvency process on foot or in the air. In that regard there has already been a form of insolvency process, namely a winding-up petition which is stood over until sometime later, in August 2018. As I understand it, the petition has not yet been advertised. Although

originally issued on behalf of HMRC whose debt has since been paid, the petition has now been taken over by another alleged creditor and so is still in play.

The background to the application

7 The Company operates a Formula One racing team. The applicant provides to the Company the services of a driver, a Mr Sergio Pérez, pursuant to an agreement that dates from 1 January 2016. Under that agreement, the Company agreed to pay the applicant certain fees for the services of the driver. In relation to those fees, the applicant claims to be a creditor for over a year in respect of the 2017 season. The amounts claimed are substantial - in the order of US$3 to 4 million, excluding interest - and are not entirely disputed. It is not in dispute that the Company is not able to pay its debts as they fall due.

8 In respect of that debt, the applicant served a statutory demand on the Company at its registered address on 23 May 2018. The demand was for a sum exceeding US$4 million. The debt was not paid within twenty-one days and for that reason the applicant asserts that the Company is deemed unable to pay its debts under the relevant provisions of the Insolvency Act 1986. Indeed, the applicant states that further substantial sums have fallen due since then. I do not think it is necessary to identify them all, save to say that according to the applicant, as at the date of this application the total principal sum owed by the Company was about £4 million sterling.

9 The Company is 100% owned by a company called Orange India Holdings SARL, which is incorporated in Luxembourg ("Orange India"). Mr Davis has explained that there are, effectively, three shareholders of Orange India. One is Dr Vijay Mallya. Whether he holds the shares directly or not is unclear, but, directly or indirectly, he has a 42.5% interest in Orange India. The other two shareholders are, first, a company called Sahara, which also holds 42.5%, and the remaining 15% shareholding is owned by a family called Mol.

10 According to the Company's accounts, there is no individual company with ultimate control of Orange India, but Ms Page has referred to statements in the media that the Company is controlled by Dr Mallya and a Mr Subrata Roy. In evidence are quotes from interviews with Dr Mallya, in which he is reported to have indicated that he has a degree of control over the Company. That is said to be relevant to the exercise of the court's discretion in the present case. Dr Mallya is not a director of the Company, but he is supposed to have said that Mr Fernley, who is a director of the Company, is his very good friend and confidante of over thirty years. Ms Page has also drawn attention to comments in a judgment of Mr Andrew Henshaw QC, sitting as a judge of the High Court, when dealing with an application for a freezing order against Dr Mallya: *State Bank of India and Others v Dr Vijay Mallya and Others:* [2018] EWHC 1784 (Comm). Certain points relied upon by the Deputy Judge in relation to the risk of dissipation are set out at paragraph 180 of the judgment. I do not consider it necessary to recite these points in detail, but it is fair to say that they do not reflect well on Dr Mallya. The Deputy Judge refers to the conclusions of other authorities that Dr Mallya had been involved in money-laundering. As I understand it, he is also currently facing an application for extradition to India to face various legal issues in that jurisdiction. The point being made by the applicant is this: the fact that Dr Mallya is someone who may have influence over the current management of the Company should inform my discretion whether to make an administration order.

11 Another feature of the evidence drawn to my attention is the statement in the Company's financial statements that its sole shareholder, Orange India, has outstanding loans to the Company in the sum of £159 million. I am told that Orange India has no present intention to call in those loans, so that its support in that respect would continue in the absence of an administration order.

12 BWT, represented by Mr Al-Attar, also filed evidence on 25 July 2018 - this Wednesday. It is in the form of a witness statement of Mr Stevie Loughrey. In summary, he states that BWT is owed about £5.6 million by the Company. Although it had been the principal sponsor of the Company for two seasons, it has now terminated its sponsorship and it supports the application to appoint administrators. Mr Loughrey also provides some information about the Company's financial position, as known to BWT.

13 I mentioned earlier that a winding-up petition has been presented. That was on 5 June 2018. There was a hearing this Wednesday, 25 July, at which the HMRC debt was satisfied, but a company claiming to be another creditor of the Company, namely Formtech Werkzeug- Und Formenbau GmbH, obtained an order for substitution. The petition now stands adjourned until 22 August 2018.

14 As to the jurisdiction of the court to make an administration order, there is no issue. Mr Davis on behalf of the Company, very properly and realistically accepts that the Company is or is likely to become unable to pay its debts, and that an administration order would be reasonably likely to achieve the purpose of the administration. The purpose put forward by the proposed administrators would primarily be to rescue and dispose of the business as a going concern, and thereby 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. It is common ground that a winding-up would be disastrous, because that would effectively end the Company's business as a Formula One racing team.

15 According to the evidence, the administrators would be put in funds to the tune of £5 million, which I am led to understand would be provided by BWT. Thus, their remuneration and ability to deal with immediately pressing problems would be assured. One of the most pressing issues is the payment of the Company's 400 employees: these are due to be paid on Wednesday next. In the light of the winding-up petition, there is a freeze on the Company's bank accounts, and unless something is done the employees will not be paid, which would obviously be disastrous for the business.

16 Given the common ground on jurisdiction, it is not necessary to go into any huge detail in this judgment about the degree of likelihood that an administration order would achieve its purpose. In his evidence, Mr Rowley has stated that he considers it is reasonably likely to be achieved, and that there would be a better result for the creditors of the Company as a whole than would be likely if the Company were wound up without first being in administration. This is because the business would be preserved as a going concern, with a view to sale within the administration. Ms Page submitted that it was not inconceivable, albeit perhaps not very likely, that depending on what emerged by way of further income, sponsorship and the like, the Company itself might be rescued as a going concern.

17 I note that Mr Rowley has already had some connection with the Company. Mr Rowley was engaged by the Company in May of this year. He met the senior management team, including Mr Fernley, the deputy team principal, and the chief operating officer, to discuss the financial situation in which the Company found itself, with a view to providing possible

restructuring or advisory services. From the end of May he was in regular correspondence with the Company about a number of matters, as he describes in his proposed Administrator's Statement and Consent to Act, dated 20 July 2018. He explains the matters to which he was giving consideration. In particular, he had available to him a short-term cash flow forecast, including funding requirements. He had to take account of the practicalities of administering the Company in the context of Formula One, the impact of a winding-up petition which had been issued or was about to be issued by HMRC, the relationship of the Company with its primary sponsor, BWT, and the progress of discussions between the Company and the Formula One Group itself. A potential sale of the underlying business and assets of the Company as a going concern following an administration of the Company was also considered. There were, apparently, three potential purchasers who were credible supporters of the Company's future operations within the Formula One World Championship.

18 Mr Davis, for the Company, points out that Mr Rowley does not indicate the kind of price that was being considered in relation to those potential purchasers. However, Mr Rowley does express the opinion that liquidation would be disastrous for the creditors, and would almost certainly lead to termination of the contracts of employment of the 400 employees, termination of the Company's contract with Formula One, and termination of its contracts with the supplier of engines, lubricants and fuel to the Company, namely Mercedes. (The latter is part of a consortium known as DAG, which provides this kind of support to the Company.)

19 Mr Rowley states that he is confident that the best way to maximise the value of the Company's assets for the benefit of its creditors, would be for the business to be preserved with a view to sale as a going concern. He is also confident that a sale as a going concern could be achieved. Mr Rowley states that he has experience of acting as administrator of a company that operates a Formula One team, and provides details. He is confident that the appointment of administrators over the Company would not bar the Company and its team from participation in the Hungarian Grand Prix, or any Grand Prix.

20 On that point, I return to the letter produced by Mr Perkins on behalf of Formula One Championship. This letter, dated 27 July 2018, is signed by the general counsel of Formula One, Sacha Woodward-Hill, and states:

> "In the unhappy event that an administrator should be appointed to Force India, we would seek to facilitate negotiations between the other teams with a view to encouraging the teams to allow Force India to maintain its rights to a share of the prize money that we pay to the teams. We recognise this is important to Force India remaining viable as a team. This matter would need to be addressed briskly to ensure that Force India should not miss/fail to participate in any Grand Prix events as missing an event is further prejudicial to prize fund entitlement."

21 Finally, Mr Rowley in his Consent to Act statement, indicates that, although there is no formal agreement, two of the parties interested in purchasing the business and assets of the Company have stated that they would be prepared to provide funding. He says:

> "I consider that the Company should have sufficient funding to enable it to participate in the Hungarian Grand Prix, following which there will be an opportunity to put appropriate funding arrangements in place."

That is presumably a reference to the fact, much emphasised by the applicant and the supporters, that following the Hungarian Grand Prix there is a four-week break over the summer period which will provide breathing space. As I have said, Mr Al-Attar's client, BWT, has guaranteed funds of £5 million to the administrators, if appointed.

22 Mr Fernley, a director of the Company, in his witness statement of today's date, accepts that the Company owes £16-17 million to creditors. That figure is not necessarily common ground, but it has been used for the sake of argument. On that basis, the Company is clearly currently insolvent, as confirmed by the balance sheet of the Company. Mr Fernley has produced a cash flow projection, prepared up to December 2018. This shows a deficit of about £1 million, as at that month.

23 Ms Page, on behalf of the applicant, has called into question a number of items in that projection, and submits that the projected deficit of £1 million is optimistic. She states that the cash projection reflects a possible payment, in September 2018, of a third driver's fee of £10 million. Mr Davis suggested that there was a third driver waiting in the wings, who would be willing to pay that sum for an opportunity to drive the Company's Formula One car. Nevertheless, there was no real evidence substantiating this or the sum, and Mr Davis is not in a position to identify anybody.

24 Ms Page also pointed out that the amount owed to her client as at July 2018 was understated by about £1 million in Mr Fernley's projection. Mr Davis retorted that the amount owed to Ms Page's client is not necessarily agreed, and although a £3.9 million debt is claimed, as distinct from the £2.8 million set out in the projection, the correctness of the claim should not be assumed against the Company. In any event, I note that, even giving credit for a £10 million third driver's fee, the cash flow projection put forward by the Company still shows a deficit of about £1 million.

25 The applicant produced another projection, apparently supplied by the Company to Mr Rowley on 25 July 2018. This shows a deficit of £34 million at the end of 2018. Not unnaturally, Ms Page drew attention to the difference between the two projections. Part of this difference reflects the fact that the applicant's does not include any proposed payment of £10 million by a third driver. Another part of the difference is, no doubt, the effect of an agreement, a copy of which is exhibited to Mr Fernley's witness statement.

26 This is a sponsorship agreement between the Company and Rich Energy Racing Limited ("Rich Energy"), pursuant to which Rich Energy agrees to pay the Company sponsorship fees, in accordance with cl.17 of the agreement, of £30 million, being £10 million in respect of 2018 and £20 million in respect of 2019. However, both these sums are to be paid upon execution of the agreement. When that was produced in evidence today, Mr Davis indicated that the money should be arriving by bank transfer into the respondent's solicitors' account momentarily, as the Americans say. When we started this hearing a little after 4pm, the money had not arrived in the solicitors' account. It is now 19.40. In the light of the evidence before me, there is no obvious reason to believe that the money will not arrive in the course of next week, although it is surprising that it has not yet materialised, as if the money were to be paid by a CHAPS transfer, they are normally executed very swiftly.

27 Mr Fernley, in an endeavour, as it were, to fill the gap between the £30 million for which he has a signed sponsorship agreement, and the extent of the insolvency as shown on the

balance sheet, points in his evidence to the Company's hope that a further sponsorship agreement will be made. Mr Fernley indicates that the Company has secured a non-binding memorandum of understanding in respect of such sponsorship from another third party. Understandably, perhaps, that third party is not identified but is said to have agreed in principle to a sponsorship arrangement of £13 million per annum for ten years, with 15 per cent on signature (said to be imminent), and then payments of 15 per cent on 1 September, 20 per cent on 1 December, 25 per cent on 1 March and 25 per cent on 1 June. For years 2 to 10 there would be 40 per cent in December, 30 per cent in March and 30 per cent in June. However, Mr Fernley states that this further sponsorship agreement is still subject to negotiation and is unlikely to be concluded before these proceedings are disposed of. That obviously renders this possibility of very much less weight than it might otherwise have.

28 Further, the applicant and supporters of the applicant criticise this approach, on the basis that it is unusual to sell sponsorship twice. They submit that if the principal sponsorship is, in effect, being sold for £30 million, it would be very unusual in this business for another principal sponsor to agree funding of an equivalent nature. Whilst there might be other smaller sponsors, they would not normally be regarded as principal sponsors. Therefore, the applicant and others cast doubt on the likelihood of such a further agreement materialising.

29 The present position is clear: The Company is, by a very large margin, insolvent. The business is significantly at risk if nothing is done, because there is a winding-up petition pursuant to which the Company's bank accounts are frozen. It cannot pay its employees. It cannot pay its suppliers. There has been no application by the Company for a validation order to enable such payments to be made. Such applications, as one knows, can take time to organise, whereas the employees are due to be paid by Wednesday.

30 In that regard, Mr Davis has submitted that, if the £30 million were to become available early next week, there would be time to seek a validation order and, in due course, to pay off the creditors and have the winding-up petition dismissed. Mr Davis makes the point that all the material before the court has emerged in a very short space of time, with very little opportunity to deal with it. He also submits that, whilst his client accepts that the court has jurisdiction to make an order, and that Mr Rowley is a perfectly proper person to be an administrator, there is not a simple binary choice between an administration and a winding-up. There is a third possible course. As to whether £30 million will be enough to enable the Company to continue, he pointed out that even though there was still an insolvency, the £30 million could be used to settle immediate debts, including the employees' salaries. Further, that would not be the only source of funds. There was the possibility of third driver fees such as put forward in one of the cash projections, and other opportunities of a commercial nature would be likely to present themselves if a little time were allowed.

31 Mr Davis pointed out that in their letter of support, Formtech were really indicating that they simply wanted their money, rather than necessarily an administration of the Company. It was in that context that he said that if the money turned up next week there could be an urgent application for a validation; alternatively, there could be a dismissal of the petition if the creditors were paid. Therefore, his suggestion was that one should wait until next week to see whether the money arrived and then reconsider the position in the light of that. He submitted that the only urgency put forward was that it would be very convenient for the administrators to have the conversations with other members of the constructors' group at the Hungarian Grand Prix this weekend, and that was not a very good ground for urgency.

My conclusions

32 The present application involves the exercise, in accordance with well-established principles, of a discretion, in the light of the material before me.

33 I have no doubt that it would not be appropriate to adopt Mr Davis' proposed third course.

34 If I had thought that the arrival or otherwise of the money would make any difference to the conclusion that I reach on this application, then I may well have hesitated before deciding not to adjourn this matter for a reasonable time to await the event. However, for reasons which I will endeavour to express briefly, it does not make any difference to my decision. In my view £30 million is not sufficient to make a difference to the Company. When looking at the financial statements for 2017, there was a net profit in the Company of £5.3 million. In the directors' report that is said to have been thanks to sponsors such as BWT. However, the Company's balance sheet shows current liabilities of £46 million, and the fact remains that the Company is, and is admitted to be, balance sheet heavily insolvent.

35 The application for appointment of administrators is supported, not just by the applicant, but also by a number of very substantial creditors. I have mentioned the suppliers loosely known as the DAG Group, including Mercedes, and others who are in association with them, who supply engines and other materials to the team. They claim to be owed in the region of €10.5 million, payable immediately. Also, the other creditor to whom I have referred, Formtech, has expressed support for this application. Formtech, the substituted petitioning creditor in the winding-up, is said to be owed €3 million. In my view, it is significant that suppliers of that kind, whose support is essential for the continuance of the team and the Company in its business, are supportive of an administration order rather than of Mr Davis' third way of "wait and see".

36 I do not doubt, as Mr Davis said, that the Company would have wished to have longer to prepare for this application, but the basic facts are not really in dispute and it seems to me that the bullet must be bitten. It is, to say the least, surprising that it has apparently taken the present administration application to galvanise the Company into considering the dire situation confronting it, which, judging from the way in which it has been described, does not appear to have been the subject of serious consideration until now. Mr Davis, understandably, has no instructions as to how the present management allowed a situation to develop, where generous sponsors and suppliers, together with others whose support is essential for a Formula One team of this kind, should have so clearly lost faith in the existing management as being capable of acting in the best interests of the creditors.

37 Mr Al-Attar, on behalf of BWT, has emphasised another aspect of the "wait and see" approach proposed by Mr Davis, which he submits should be considered in the light of the Company's insolvency. Mr Davis' suggestion means that the decision about what to do in order to protect the interests of the creditors would, in effect, be made by Orange India. As 100% shareholder, Orange India has, under the articles of association, the ability to remove and appoint the directors of the Company. It also claims to have a massive loan to the Company outstanding. Mr Al-Attar submitted that, in those circumstances, it would be wholly wrong to allow the creditors' interests to be at the mercy of the existing management, and that for that reason alone it was appropriate for an administration order to be made. In my view, there is considerable force in this submission.

38 I should say, straight away, that there is no evidence here of any misappropriation by the management of the Company or of the assets of the Company. I note the concerns which have been expressed about some of the problems which have beset Dr Mallya, but I do not

regard them as being of more than marginal relevance. As pointed out, there are other shareholders of Orange India, including Sahara, who have apparently appointed four directors of the Company. No one has expressed any criticism at all of Mr Fernley.

39 I consider that Mr Davis' hope for what may develop next week, and beyond, are little more than a pious aspiration, and the fact remains that this company is, clearly, very insolvent and has seemingly been so for some considerable time. There are very major creditors who are sufficiently concerned that they have either appeared here to support the application or have written to express their support for it. The management of the Company for whatever reasons have opposed the administration, although they had consulted Mr Rowley, an experienced insolvency practitioner with knowledge of this particular area, and the clear tenor of his conclusions was in favour of an administration as producing the best result for the creditors.

40 Even if the £30 million had arrived by now, or was definitely going to arrive soon, in my view the decision would still be the same, viz that this is a case where an administration order should be made at the earliest opportunity if the interests of the creditors are to be properly preserved. It is quite clear that the existing management have not hitherto been in a position to do that. Nor do I consider that one could have any confidence that they would do so in the future. As I have already indicated, I consider that there is considerable merit in the specific concern to which Mr Al-Attar on behalf of BWT has drawn attention, viz, that where a company is very insolvent, it is inappropriate for the decisions as to what should be done to be made by a management whose very existence in office is dependent upon the shareholders of the company.

41 For all those reasons (somewhat truncated in view of the hour, but, I hope, sufficient to indicate what the basis of my decision is), I am satisfied that the court has jurisdiction to make an administration order here, and that it should be made as soon as possible. Therefore, I make the order sought at 8.06 p.m.

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