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IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS AT  
MANCHESTER

No. CR-2019-MAN-000892  
[2019] EWHC 2825 (Ch)

1 Bridge Street West  
Manchester M60 9DJ

Friday, 6 September 2019

Before:

MR JUSTICE SNOWDEN

IN THE MATTER OF MOSS GROUNDWORKS LIMITED  
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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MS DAINTY, of Counsel, instructed by Freeths LLP, appeared on behalf of the Applicant company.

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**J U D G M E N T**

MR JUSTICE SNOWDEN:

1 I have before me an application (the “Application”) by the directors of Moss Groundworks Limited (“the Company”) which was issued yesterday, 5 September 2019, for an order placing the Company into administration pursuant to paras. 11 and 12 of Schedule B1 to the Insolvency Act 1986. The Application seeks the appointment of two members of Leonard Curtis as joint administrators.

2 The Company’s director, Mr. Daniel Lee Moss, has provided a witness statement in support of the Application as required by the Insolvency Rules 2016. The Application and the witness statement have been served on the proposed administrators; on Bibby Financial Services (“BFS”), which is the holder of a qualified floating charge; and on Travis Perkins Plc, which is an unsecured creditor which presented a winding up petition in the Birmingham District Registry based upon a debt of just short of £78,000. That petition is due to be heard on 23 October 2019. I have been provided with an indication by email that neither BFS nor Travis Perkins oppose the making of an administration order.

### The facts

3 The factual background is that the Company was incorporated in 2013 and carries on business as a civil engineering and groundworks contractor. It has 11 employees and trades from leasehold premises. It has, until recently, been funded by way of an invoice discounting facility provided by BFS, but BFS has very recently had its secured debts satisfied as a consequence of what is said to have been a large trading receipt at the end of August.

- 4 The Company has historically traded profitably, and in the year ending 31 July 2018 it recorded a turnover of £6 million and a profit of about £112,000 before tax. However, for the 11 months to the end of June 2019, although the Company's turnover increased to about £7 million, it recorded a loss of about £96,000. This is attributed to an increase in overheads and cash-flow difficulties due to increased finance costs and difficulty in collecting debts from its customers. The result is that the Company has fallen into arrears with its suppliers and it has a large number and amount of current creditors.
- 5 The directors approached Leonard Curtis for advice in relation to the Company's situation on about 14 August 201. As a consequence of that advice, the directors have concluded that the Company is insolvent in that it cannot pay its debts as and when they fall due and that without an immediate injection of working capital, it will run out of money after today, 6 September 2019.
- 6 The most recent management accounts for the Company, to which I have referred, were drawn to the end of June 2019. They show that the Company has tangible assets with a book value of £816,000, and a large ledger of book debts with a book value of about £1.49 million. However, the Company also has a substantial amount of creditors both due within a year and due after one year in excess of £2 million.
- 7 In light of the contents of the report from the proposed administrators explaining the current position of the Company, I am satisfied that the Company is, or is likely to become insolvent, such that the first requirement for the making of an administration order in para.11(a) of Schedule B1 to the Insolvency Act 1986 is satisfied. However, before I can make an administration order under para.11(b) of Schedule B1 I also have to be satisfied that an administration order is reasonably likely to achieve one of the purposes of an administration as set out in paragraph 3 of Schedule B1.

8 In this case, the relevant purposes which it is said are likely to be achieved by the proposed administrators, are “achieving a better result for creditors as a whole than would be likely if the company were wound up”, or “realising property in order to make a distribution to one or more secured or preferential creditors.” I therefore turn to the evidence in that respect.

9 The report from the proposed administrators, having dismissed the possibility of a rescue of the company as a going concern, or sale of its shares or a CVA, describes the likely result of a compulsory liquidation as giving rise to a number of disadvantages, including, in particular, at paras. 9.11 and 9.12 of the report, that:

“Closure of the business and the termination of any contracts will likely impact on realisations from the Company’s book debt ledger. The ledger is contractual in nature, there would be no customer continuity which in our experience, is likely to result in disputes and reasons for non-payment and counter claims.

It is unlikely that there would have been any realisation in respect of goodwill in a liquidation scenario as the majority of this value vested in the ongoing relationships between the Company’s management and its customers.”

10 The estimated outcome statement in the insolvency practitioner’s report suggests that a liquidation would achieve only a very small realisation of the book debts or work in progress of the Company. The book debts have a book value of about £819,000 and the work in progress of £219,000. But it is said that in a liquidation, those assets would only realise about £44,000 for the book debts and nothing at all for the work in progress. The consequence, it is said, of a liquidation would be to create about £7,500 of preferential creditors and to crystallise a shortfall to finance creditors in relation to the plant and machinery and motor vehicles of the Company, with the result that there would be a deficiency of around about £1.7 million and no return to unsecured creditors at all.

- 11 The proposed administrators' report suggests, at paras. 9.18 to 9.20, that an administration will provide a better outcome for all creditors, as it will protect the Company from further creditor enforcement action, and preserve the value of the Company's business and assets during a period of marketing which should result in improved realisations, particularly in respect of the goodwill, tangible assets and book debts.
- 12 Although the proposed report indicated that the possible continuation of trading would be considered as part of the proposed administrators' assessment before the date of the hearing, I have heard nothing more as to that proposal other than a concern that, in practice, the Company will run out of money today.
- 13 Instead, what is plainly proposed is that the purpose of the administration will be to conduct what is usually referred to as a "pre-packaged", or "pre-pack", sale of the assets and business of the Company. In that regard, paras. 9.23 and 9.24 of the report of the proposed administrators state as follows:

"Following discussions with the Directors, where the relevant options were discussed, a strategy to place the Company in administration has been agreed.

It has been proposed that a full marketing process, via an Accelerated Merger and Acquisition ("AMA") process will be undertaken, to seek to identify likely buyers. This will enable the assets of the business to be preserved as far as possible and all staff to be transferred to a buyer(s) under the relevant legislation following a sale of the business."

- 14 At paras. 9.29 and 9.30, the report continued:

"By advertising the business and assets in the manner set out above, the proposed Joint Administrators anticipate the greatest level of exposure to potential interested parties without incurring costs that would be disproportionate to the estimated value of assets involved.

It is considered that an AMA process in this matter will allow: (1) preparation of an information pack and sale memorandum to be circulated and publicised to establish interest in acquiring the remaining business and assets; (2) an opportunity to obtain

signed non-disclosure agreements from interested parties and allow time for interested parties to consider the information pack and access a data room; (3) to receive indicative offers by a deadline; (4) to review and consider offers received and to progress negotiations; and (5) sufficient time to undertake contingency planning in the event that a buyer for the business could not be found.”

- 15 Notwithstanding those stated intentions, what in fact was done is described in brief terms in para. 9.25 of the report as follows:

“On 2 September 2019, due to the circumstances detailed above and time constraints relating to this application, Leonard Curtis placed two advertisements on the following websites: (1) [www.leonardcurtis.co.uk](http://www.leonardcurtis.co.uk), the website of the [proposed joint administrators themselves]; and (2) [www.charlestaylor.co.uk](http://www.charlestaylor.co.uk), the website of Cerberus Asset Management.”

The report indicates that there is a database of “interested parties” maintained by Leonard Curtis to whom it is said such advertisements would become known; and Cerberus Asset Management is said to be an entity with sector specific knowledge and experience in managing asset sales, in particular through their website.

- 16 What the report does not explain, however, is that the website advertisements that were placed on 2 September 2019 were in terms that required all interested parties to sign a non-disclosure agreement and to provide “offers and proof of funding” by 5 p.m. on 4 September 2019. In short, it would appear that the marketing process through the advertisements on those two websites took a maximum of about 48 hours, and without further explanation, does not appear to correspond to the process outlined in paras. 9.29 and 9.30 of the report.

- 17 Perhaps, unsurprisingly, the outcome of that very brief marketing was that no expressions of interest were received from any unconnected parties. The only offer that was received for the business and assets of the Company was received from a new company which is connected with the directors of the existing Company. That offer, which was apparently made on 3 September 2019, was to acquire the Company’s business and assets for £130,000.

Of that amount, only £25,000 will be payable on exchange of contracts, with the remaining balance being paid on or before 7 October 2019, with the outstanding balance being secured by a debenture containing fixed and floating charges in favour of the Company (by the administrators) and personal guarantees from the two directors.

18 The estimated outcome statement for an administration which takes that proposal into account, suggests that the estimated fees and costs of the administrators would be £85,000 which would be paid in full; that a very small amount of preferential creditors of about £629 would be also paid in full (that must, I think, must be amounts due to employees, most of whom will be continued into the new acquiring company); and that a very small dividend of 1.5p in the pound would be payable to unsecured creditors.

19 An explanation of why it is that assets having a book value of in excess of £1 million - namely, the book debt ledger and work in progress - should be sold in an administration for £117,000 (which is the amount they are attributed in the offer that has been received), is given in the report at paras. 4 and 6 of the note to the estimated outcome statement. It is said that this amount reflects an estimated range placed upon the realisable value of the ledger of book debts and work in progress by a company called Cerberus Receivables Management, which appears to be an entity connected to the agents who advertised the business for sale and who have also valued some of the fixed assets. Although it is said that there are significant sums in the book debts ledger which relate to retentions and some disputed debts it is unclear to me why it is said that the book debts and work in progress would have a low value in an administration in which there was no cessation of trade, as distinct from a liquidation in which it is suggested that there would be a cessation of trade, a lack of assistance from the directors and the impact of other risks eroding the collectable ledger.

## Analysis

20 The background to the court's exercise of discretion in a case such as this involving a potential pre-pack sale was considered extensively by His Honour Judge Cooke sitting as a High Court judge in *Re Kayley Vending Ltd* [2009] B.C.C. 578. At para. 6, His Honour Judge Cooke indicated that he examined briefly the nature of concerns that had at that stage, in 2009, been expressed in relation to pre-packs and said:

“The principal advantages of a pre-pack are well known. They are that the process enables a business to be sold quickly with the minimum possible adverse impact from either the public knowledge of its insolvency or the restrictions imposed by the insolvency process itself. Employees can be retained who might leave, or have to be dismissed, once a formal insolvency starts. Continuity of customer and supplier contracts can be maintained. Even if a going concern sale might be achieved by an administrator, the period of trading in administration whilst it is negotiated requires to be funded and may, in any event, result in a damaging leaching away of business.”

21 However, His Honour Judge Cooke then continued to summarise a number of concerns which had been raised by various bodies and the public in relation to pre-pack sales and summarised them as follows at paras. 11 and 12:

“A general summary of these concerns would be that the speed and secrecy which give rise to the advantages claim for pre-packs may too easily lead the directors and the insolvency practitioner to arrive at a solution which is convenient for both of them and their interests (perhaps also satisfying a secured creditor who might be in a position to appoint his own receiver or administrator), but which harms the interests of the general creditors because: (i) it may not achieve the best price for the assets; (ii) credit may be incurred inappropriately in the pre-appointment period; (iii) they are deprived of the opportunity to influence the transaction before it takes place; and (iv) having been presented with a *fait accompli*, they have insufficient information to make it worthwhile investigating and challenging the decisions taken.

It was no doubt in response to these concerns that SIP 16 - Statement of Insolvency Practice 16 - was drafted and promulgated. It will act as a salutary reminder to insolvency practitioners of their responsibilities, which may influence the way in which they and the directors act, although it does not provide the creditors with any direct input into the decisions they take. It will, however, provide creditors with information on the basis of which they may ask questions and, possibly, seek redress after the fact. Any creditor who is dissatisfied with a pre-pack sale is of course still subject to the lack of economic incentive [to pursue the matter]. He may in practice have to fund the whole cost of investigating his concerns and any resulting litigation,

at the end of which, even if successful, recoveries are uncertain and, in any event, go in to the general pool of assets from which, at best, he is only likely to receive an enhanced dividend.”

22 In conclusion, at paras. 24, 25 and 26, Judge Cooke said this:

“It seems to me that in exercising its discretion in pre-pack cases, the court must be alert to see, so far as it can, that the procedure is at least not being obviously abused to the disadvantage of creditors in any of the ways outlined above. If it is, or may be, the court may conclude that it is inappropriate to give the pre-pack the apparent blessing conferred by making the administration order. In reaching that decision, it is likely to be assisted by the provision of information in relation to the pre-pack transaction and its background and, to that extent, the provision of such information falls within [what is now rule 3.6(3)(g) of the Insolvency Rules 2016]. While it is primarily a matter for the applicant to identify what information is likely to assist the court, and that information may not be limited to the matters identified in SIP 16, it seems to me likely that in most cases the information required by SIP 16, insofar as known or ascertainable at the date of application, would fall within the requirement I have referred to and so ought to be included in the application. It should not normally be unduly burdensome or costly for it to be so included, and no doubt if there are special reasons why it cannot readily be provided in a particular case, this can be explained.

It would not, in my view, be satisfactory to wait until an application is actually opposed and rely on the ability of the court to give directions for the filing of further evidence on the hearing of the opposed application. Information sufficient to evaluate the proposed pre-pack, it seems to me, is likely to assist the petitioning creditor in deciding whether or not to oppose the application and he should not be in the position of having to commit himself to opposition, with the cost implications that entails, in order to obtain such information.

Nor is it particularly satisfactory to say that, in so far as the information is not made available to the court on the hearing of the application, it will be provided to creditors in due course and they may exercise any remedy in respect of abuse afterwards. No doubt that is the primary mechanism by which any abuse which in fact occurs will be remedied, but it suffers from all the difficulties referred to above which may mean that it is far from effective.”

23 Those principles were endorsed in *Re Hellas Telecommunications* [2010] B.C.C. 295 at paras.7 and 8, and *Re Halliwells LLP* [2011] B.C.C. 57 at para.21.

24 In this case, as I have indicated, the marketing which appears to have taken place was, on any view, very truncated. So far as any attempt to indicate compliance with SIP 16 is concerned, the proposed administrators’ report at para.10.3 simply said as follows:

“We confirm that the marketing undertaking has conformed to the marketing essentials as set out in the appendix to Statement of Insolvency Practice 16.”

25 SIP 16 in its current form, contains, at paras.1 to 4, a reminder to insolvency practitioners of the very high level of potential public interest in pre-pack sales, particularly where they are to directors or shareholders of the insolvent entity, and reiterates that it is important that an insolvency practitioner acts and is seen to be acting in the interests of the company’s creditors as a whole and is able to demonstrate this. So far as marketing is concerned, para.13 of SIP 16 says:

“Marketing a business is an important element in ensuring that the best available consideration is obtained for it in the interests of the company’s creditors as a whole, and will be a key factor in providing reassurance to creditors. The insolvency practitioner should advise the company that any marketing should conform to the marketing essentials as set out in the appendix to this Statement of Insolvency Practice. Where there has been deviation from any of the marketing essentials, the administrator is to explain how a different strategy has delivered the best available outcome.”

26 The marketing essentials in the appendix include the following:

“Marketing a business is an important element in ensuring that the best available consideration is obtained for it in the interests of creditors, and will be a key factor in providing reassurance to creditors. Any marketing should conform to the following:

- (1) Broadcast - the business should be marketed as widely as possible proportionate to the nature and size of the business - the purpose of the marketing is to make the business’s availability known to the widest group of potential purchasers in the time available, using whatever media or other sources are likely to achieve this outcome.
- (2) Justify the marketing strategy - the statement to creditors should not simply be a list of what marketing has been undertaken. It should explain the reasons underpinning the marketing and media strategy used.
- (3) Independence - where the business has been marketed by the company prior to the insolvency practitioner being instructed, this should not be used as a justification in itself to avoid further marketing. The administrator should be satisfied as to the adequacy and independence of the marketing undertaken.

- (4) Publicise rather than simply publish - marketing should have been undertaken for an appropriate length of time to satisfy the administrator that the best available outcome for creditors as a whole in all the circumstances has been achieved. Creditors should be informed of the reason for the length of time settled upon.
- (5) Connectivity - include online communication alongside other media by default. The internet offers one of the widest populations of any medium. If the business is not marketed via the internet, this should be justified.
- (6) Comply or explain - particularly with sales to connected parties where the level of interest is at its highest, the administrator needs to explain how the marketing strategy has achieved the best available outcome for creditors as a whole in all the circumstances.”

27 In my judgment, at the moment, the information provided to me in the proposed administrators’ report is wholly inadequate to explain how those marketing essentials in SIP 16 have been complied with. There is also no suggestion that the “pre-pack pool” was consulted in this case. Specifically, I do not consider that there is an adequate explanation of why it is that a situation has been reached under which it is proposed that the business of the Company be sold to a company connected with its directors, and that assets with a book value of in excess of £1 million pounds, which would be available for unsecured creditors, are to be acquired by a company to be owned by the directors for the sum of £25,000 in cash and a promise to pay a further £105,000 in a month’s time.

28 Unless a better explanation is given, I would therefore be unable to satisfy myself that this case does not bear the hallmarks of the type of abuse of the administration process to which reference was made in *Re Kayley Vending Ltd* by His Honour Judge Cooke.

29 For these reasons, it seems to me that I should not make an administration order today. Before giving this judgment, I indicated to counsel who has made the application that I was not disposed to make an order, but I was prepared to allow an adjournment to give the Company and the proposed administrators the opportunity to reconsider the evidence, the process of marketing which has taken place, and their compliance with SIP 16, so that if

they can, they might satisfy the court that it would be appropriate to make an administration order.

30 Counsel has indicated that because of the Company's cash position, the adjournment which is sought is a very short one - just over the weekend. She indicated that the marketing process will be re-opened and it is likely that the Company and the proposed administrators will produce further evidence with a view to satisfying whichever judge hears it next week that it is appropriate in all the circumstances to make an administration order.

31 As I have indicated, I am content to adjourn the application on that basis. I would, though, reiterate the point which was made by Mr Justice Lewison in the *Re Hellas Telecommunications* decision to which I have referred, that in the majority of cases - and I think this is likely to be one - even if the court were to make an administration order, it is very unlikely that that order should be seen in any way as indicating that the court has blessed the terms and substance of the proposed pre-pack sale. That will, however, be a matter for whichever judge hears the Application next week.

**CERTIFICATE**

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