

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE  
THE BUSINESS & PROPERTY COURTS  M A N C H E S T E R  
INSOLVENCY AND COMPANIES LIST

No. CR-2019-MAN-000892  
[2019] EWHC 3079 (Ch)

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester M60 9DJ

Tuesday, 10<sup>th</sup> September 2019

Before:

HIS HONOUR JUDGE EYRE QC

\_\_\_\_\_

IN THE MATTER OF MOSS GROUNDWORKS LIMITED

and

IN THE MATTER OF THE INSOLVENCY ACT 1986

\_\_\_\_\_

Mr. L. Doyle (instructed by Freeths LLP) appeared on behalf of the Applicant

\_\_\_\_\_

J U D G M E N T

( A p p r o v e d T r a n s c r i p t )

JUDGE EYRE QC:

- 1 This is an adjourned administration application. The application was originally before Snowden J on Friday 6<sup>th</sup> September and was adjourned on that occasion. It came before me yesterday afternoon but was adjourned to today for want of court time.
  
- 2 Snowden J gave a judgment in which he set out the background to the application and explained the material which was before him and I need not rehearse those matters here. In essence, the application was adjourned to give the applicant an opportunity to provide more information. That was because on the material before him Snowden J was not able to be satisfied that the proposed administration, which contemplated a pre-pack sale to a company connected to the current management of the company, was not an abuse of the administration procedure. Those concerns derived from: the significant disparity between the apparent value of the book debts and work in progress and the sum being offered for those assets; from the fact that the marketing of the business appeared to have been very truncated; and from the fact that the marketing on the face of the material was not only truncated but had failed to fulfil the criteria of SIP 16.
  
- 3 I have been assisted by substantial further material and by a helpful skeleton argument from Mr Doyle of counsel. Mr Poxon, one of the proposed administrators, has now provided a detailed witness statement with a SIP 16 compliant report attached to it. There has also been a report from Cerebus Receivables Management Ltd giving considerably more detail than was provided to Snowden J about why those valuers regard the offer for work in progress and book debts as appropriate. In addition there has been a further statement from Mr Moss, the director of the company.

- 4 A number of matters emerged from that material. The start of the marketing was delayed because of the imminence of a substantial payment to the company and there was concern that the marketing of the business would cause the debtor to take fright and potentially to cause difficulties about payment and/or to delay payment. Continued trading is not an option. This is because of the absence of funds, the company simply having run out of money and of potential sources of funds, in a line of business where it is difficult if not wholly impracticable to operate without funds. Mr Poxon explains that the plan had been for an out of court appointment and for a longer marketing period under the protection of the statutory moratorium but that the presentation of the winding up petition meant that that course was not possible. There has been further marketing since the hearing in front of Snowden J. Although that has led to one expression of interest it has not led to any further or different offer, perhaps not surprisingly given the shortage of time.
- 5 The further material includes a detailed explanation of the value which is to be placed on the work in progress and book debts in the context of a liquidation or other insolvency process. Reasoned arguments have been put forward in that regard with an analysis based on the nature of the work in progress and having particular reference to the practicalities of the construction industry. In addition, the director has offered to undertake to forego, in the event of an administration, the sums owed to him by way of director's loan account. The amount owed to him is comparatively modest, the sum is a touch over £80,000, and so there will only be a modest increase in the amount actually available to other creditors. However, the significance of the offer is not simply in the modest increase provided for other creditors but in the fact that it is a recognition by the director of the interests of the other creditors. As such it is a matter which can assist the court in addressing the concerns that what is happening is an abuse of the pre-pack administration procedure.

6 What is the approach that I should take in the light of that material? Unless the statutory criteria of insolvency and of a real prospect of achieving a statutory purpose have been established the court has no jurisdiction to make an administration order but, as explained in Snowden J's judgment, those criteria are satisfied here. If those criteria are established then the court has a discretion and has to consider whether it is appropriate to make an administration order. It is at that stage that the court has to have regard to the potential for abuse which is present where there is a proposed pre-pack sale and in particular where the intention is that there should be a pre-pack sale to the existing management or to those connected with it. The risk of such abuse was adverted to by HH Judge Cooke in the case of *Re Kayley Vending Ltd* [2009] EWHC 904 (Ch), [2009] BCC 578 as quoted by Snowden J. It was also addressed by Lewison J in the case of *Re Hellas Telecommunications (Luxembourg) SCA* [2009] EWHC 3199 (Ch), [2010] BCC 295. Lewison J said this at [8]:

“It is not entirely easy to see precisely where in the statutory structure the court is concerned with the merits of a pre-pack sale. It seems to me that in general the merits of a pre-pack sale are for the administrator to deal with; and the creditors, if sufficiently aggrieved, have a remedy in the course of the administration to challenge an administrator's decision. It may on the evidence be obvious that a pre-pack sale is an abuse of the administrator's powers, in which event the court could refuse to make the administration order or could direct the administrators not to complete a pre-pack sale. At the other end of the spectrum it may be that it is obvious that a particular pre-pack is on the evidence the only real way forward, in which case the court could give the administrators liberty to enter into the pre-pack, leaving open the possibility that a sufficiently aggrieved creditor could nevertheless challenge the administrator's decision *ex post facto*. But in the majority of cases the position may not be clear; in which event the making of an administration order, even in the context of a pre-pack should not be taken as the court's blessing on the pre-pack sale”.

7 The effect of that, in my judgement, is as follows. The court in exercising its discretion must be alert to the possibility of abuse of the administration provisions. There is a spectrum or a range of cases. There are those cases where the risk of abuse is clear. At the other end of the spectrum there are those where it is clear that the proposed pre-pack sale is the only way forward if anything is to be salvaged for creditors. The difficulty comes in cases between those extremes. The court has to bear in mind the comments of Lewison J explaining that in general the merits of a pre-pack sale are for the administrator and that the making of an

administration order is not some form of court sanction of a particular sale. Nonetheless, although the merits of a pre-pack sale are generally a matter for the administrator and although the creditors will have redress against the administrator who does not act properly, the court still has to be conscious that it has a discretion. In circumstances where there is a significant risk of abuse the court cannot wash its hands of the matter and approve an administration with a view to simply leaving matters to the administrator's judgement.

- 8 The court does, however, have to remember that it will normally have limited material often gathered at speed. It will, therefore, be having to make an evaluation not only without the benefit of hindsight but also with limited information and the exercise will almost inevitably involve to a greater or lesser extent a degree of speculation. It is clear from HH Judge Cooke's comments that it not just in cases where it is clear that the system is being abused that the court should decline to make an order but that it can and should also do so in cases where it is apparent that the application may be an abuse of the system. Whether that is the position will be a question of fact and degree. In almost any case of an administration where there is a proposed pre-pack sale there is some risk of abuse. What the court has to do is to consider the degree of such risk. If there is real concern such that there is a significant degree of risk of such abuse then it would not be appropriate for the court to exercise its discretion in favour of an administration. However, there will be some degree of risk in almost every such case and there will be cases where it is appropriate for the court to regard the risk as not being significant and where the position of the administrator as an independent insolvency practitioner together with the creditors' rights to challenge matters or to call the administrator to account can be seen as sufficient protection against the risk of abuse. That assessment must be made in the context not only of the factors I have already set out but also having regard to the fact that the burden is on the applicant to show that an administration order is appropriate and mindful that SIP 16 sets out steps which can and should be taken. Evidence of compliance with those steps is likely to be sufficient in very

many, perhaps in most, cases to assuage the court's concerns. Conversely, a party who has failed to take those steps will need to explain all the more clearly why it can be said that the risk of abuse is not significant.

- 9 What is the position here? In this case the material before Snowden J was sketchy. It has been supplemented by helpful further material; by considerable explanation; and by an indication by the director that he will not pursue his director's loan account. The case is not by any means one where it can be said beyond peradventure that the proposed course is the only proper one but it is now considerably closer to that end of the spectrum. The risk that the application is an abuse of the pre-pack administration procedure has been markedly reduced. The position now is that the court is able to say that the risk of abuse is less apparent and that the role of the administrator and the rights of the creditors are sufficient protection against any such abuse. In that regard it is of note that the director has agreed to forego the sum due on the director's loan account. As I have already said, the amount is comparatively modest but the agreement is an indication that the director is putting more into the pot than would otherwise be the case. It is also to some extent a recognition that although it may be that the proposed course is the only viable one and in the circumstances is the least bad solution for the creditors it is nonetheless an arrangement which has benefits for the controllers of the new company who are on the face of matters getting book debts and work in progress of significant value for a relatively modest payment.
- 10 In those circumstances, I will subject to one matter make an administration order in the terms of the draft which is in commonplace and standard terms. The draft order proposed that the applicant's costs of and incidental to the application should be paid as an expense of the administration. There have been two hearings, indeed three attendances before the court, in respect of an application which if the material now before me had been put before Snowden J could have been disposed of at one hearing. Despite Mr Doyle's elegant

submissions, it is not appropriate that the costs of all hearings should be expenses of the administration which would have the effect of reducing the amount available for creditors even further. There has to be some recognition of the deficiencies in the material put before Snowden J and in the circumstances the appropriate way of marking those is that the costs of Friday's hearing before Snowden J will not be paid as an expense of the administration.

---

**CERTIFICATE**

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by **Opus 2 International Limited**  
Official Court Reporters and Audio Transcribers  
5 New Street Square, London, EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
civil@opus2.digital*

**\*\* This transcript has been approved by the Judge**