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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch)
[2022] EWHC 789 (Ch)

Case Nos. CR-2022-002044
CR-2022-002046

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 28 February 2022

Before:

MR JUSTICE MICHAEL GREEN

IN THE MATTER OF **CAVERSHAM FINANCE LIMITED (in administration)**
AND IN THE MATTER OF **THE INSOLVENCY ACT 1986**
B E T W E E N:

(1) CHRISTINE MARY LAVERTY
(2) TREVOR PATRICK O'SULLIVAN
(3) HELEN JULIA DALE
(in their capacity as Joint Administrators of
Caversham Finance Limited (in administration)) — Applicants

- and -

CAVERSHAM FINANCE LIMITED — Respondent

IN THE MATTER OF **CAVERSHAM TRADING LIMITED (in administration)**
AND IN THE MATTER OF **THE INSOLVENCY ACT 1986**
B E T W E E N

(1) CHRISTINE MARY LAVERTY
(2) ANDREW IAN CHARTERS
(3) SARAH ANNE O'TOOLE
(in their capacity as Joint Administrators of
Caversham Trading Limited (in administration)) — Applicants

- and -

CAVERSHAM TRADING LIMITED — Respondent

MR M. ABRAHAM (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Claimant.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE MICHAEL GREEN:

1 This is an application by the respective Joint Administrators of Caversham Finance Limited ("CFL") and Caversham Trading Limited ("CTL"), together referred to as the "Companies", principally for:

(i) a declaration that their terms of office as Joint Administrators were effectively and validly extended by the consensual procedure last year to 29 March 2022; and
(ii) to extend their terms of office for another year.

2 If I was not minded to make that first declaration for whatever reason, the Joint Administrators sought alternative relief by way of a fallback for me to make administration orders to take effect retrospectively so as to expire on 29 March 2022, and then to extend those orders for another year.

3 As I indicated before this hearing, and having read into the papers, I am going to make the declarations sought in the primary application, and it is not therefore necessary to consider the secondary applications or for them to be issued or dealt with in this judgment.

4 So I will now endeavour to explain why I am prepared to make the declarations sought. I have been assisted by the helpful skeleton argument and oral submissions of the Joint Administrators' counsel, Mr Matthew Abraham.

5 A short background is as follows:

(1) Both Companies entered administration at 10.09 am on 30 March 2020;

(2) By para.76(1) of schedule B to the Insolvency Act 1986, the administration would cease to have effect after one year, but by para.76(2) the Joint Administrators' term of office can be extended by the court, or it can be extended for not more than a year with the consent of the Companies' creditors;

(3) Seeking to avail themselves of the consensual procedure and prior to the end of the first 12 months of the administrations, the Joint Administrators sought to extend the administrations by seeking the consent of secured and preferential creditors of the Companies; by following the qualifying decision procedure in the Insolvency Rules, the requisite majorities were obtained for the consensual extensions;

(4) However, in order to obtain the consent of preferential creditors, notices were sent to them to initiate the decision making procedure for approving the consensual extensions;

(5) Recently, and in the course of preparing applications for a further extension of the administrations, the Joint Administrators identified two potential defects in the notices sent to the preferential creditors that meant that there was a risk that the notices did not comply with the requirements of the Insolvency Rules 2016;

(6) The potential defects have given rise to uncertainty as to the validity of the consensual extensions, hence these urgent applications for declarations as to the validity of the extensions being made.

6 Mr Abraham has explained that the Joint Administrators' position in relation to the potential defects is: (i) either there were no defects in the notices; or (ii), alternatively, if there were defects with the notices, they were "formal defects or irregularities" within the meaning of rule 12.64 of the Insolvency Rules, which have not caused any substantial injustice.

7 As for the extension of the administrations:

(1) an extension of the administration of CFL is necessary primarily to permit the continuing realisation of the Loan Book and to explore the possibility of a full or partial sale of the Loan Book to a third party; and

(2) an extension of the administration of the CTL is necessary to support the ongoing administration of CFL by managing the outsourcing of logistics and engineering services and through the support provided by its retained employees.

8 Mr Abraham had asserted that these applications were urgent because there needed to be certainty over the Joint Administrators' authority to act and contract on behalf of the Companies. Also he said that if I had been minded not to make the declaration then the secondary applications for retrospective administration orders would have had to have been made before 29 March 2022. I accept that there is a certain amount of urgency in these applications, but perhaps not the extreme urgency suggested, given that we are still just in February 2022, and this application was actually adjourned from last week.

9 Notice of the applications was given to the secured and preferential Creditors via a notice on the creditors portal, which is the accepted way for the Joint Administrators to communicate with creditors. No one has appeared to oppose the applications or indeed has got in contact with the Joint Administrators in relation to this hearing.

10 The history of the Companies is explained in the supporting witness statement of one of the Joint Administrators, Ms Christine Laverty. The Companies were each part of the Brighthouse Group. CFL was primarily a rent-to-own business in relation to high quality branded household goods, which included insurance and after-sales service. Its most valuable asset was the Loan Book, being all of the hire purchase agreements and cash lending agreements entered into with customers of CFL. CTL provided services to support the business operations of CFL. Its primary business was logistics and engineering, including product repairs and replacements.

11 CFL and CTL have the same secured creditors and security arrangements being co-guarantors of the same secured debt. There are two main secured creditors of the Companies, and Glass Trustees Limited ("Glass") act as the security trustee for both of them. They are Greensill Capital UK Limited ("Greensill"), which provided a senior credit facility to the group, and there are Loan Note Holders of notes issued by Brighthouse Finco Limited on 2 February 2018 (the "Note Holders"). The Companies are co-guarantors of that debt. By 30 March 2020, the balances owing to and secured by Greensill and the Note Holders were £30.8 million and £134 million respectively.

12 The purpose of the administrations was to achieve a better result for the Companies' creditors as a whole than would have been likely had the Companies been wound up. That is Objective B of para.3(1) of Schedule B1 of the Insolvency Act. That Objective is pursued in the case of CFL by realising the Loan Book, and in the case of CTL by supporting the

administration of CFL which will allow better recovery of the debts, of which CTL is a co-guarantor with CFL.

13 The key administration activities between 30 March 2020 to 31 March 2021 included (i) collection of Loan Book debt; (ii) the rationalisation of the workforce; (iii) the closure of retail stores and the surrender of retail leases; (iv) CFL's stock realisations; and (v) distributions to Glass such that by 29 March 2021 Greensill had, in fact, been paid in full.

14 Since 30 March 2021 the Joint Administrators have continued with those activities. In relation to the collection of the Loan Book debt, as at 29 September 2021 £130.8 million had been realised since the start of the administrations, compared to the £99.7 million that been realised by 29 March 2021, and the Joint Administrators have continued to engage with interested third parties with a view to a full or partial sale of the Loan Book.

15 As to the rationalisation of the workforce, there has been a further reduction in the workforce of CFL through redundancy or resignation, and all the CTL employees bar two key staff members have been made redundant or have resigned.

16 There has been a continued closure of retail stores and a surrender of retail leases. In relation to CFL's stock realisations by 29 September 2021, the Joint Administrators had recovered some £1.178 million from sales primarily relating to excess stock. And in relation to distributions to Glass, by 29 September 2021, £30 million had been paid to the Note Holders since the start of the administrations, which was an increase from the £20 million that had been paid by 29 March 2021.

17 So the present position of the Companies' creditors is as follows: there is around £104.8 million remaining owing to Glass for the benefit of the Note Holders. There are no entities within the Group that that have the ability to repay the Group's secured debt in full. In the Joint Administrators' view, there are only likely to be recoveries sufficient to pay the preferential creditors of CFL in full, but not those of CTL, as well as part of CFL's secured creditor debt with Glass likely to suffer a significant shortfall as a result.

18 The preferential creditors of both Companies are essentially claims from employees in respect of (i) arrears of wages up to a maximum of £800 per employee; (ii) unlimited accrued holiday pay; and (iii) certain pension benefits. The Joint Administrators consider there is no prospect of any dividend being paid to the unsecured creditors of either of the Companies, save perhaps for the prescribed part, and that is having regard to the realisations that have been made to date and the value of the assets yet to be realised.

19 So turning to the heart of the application being whether I should make the declarations sought, as I said before, there are two parts to this: (i) whether there were relevant defects in the notices; or (ii), if so, whether they can be waived by Rule 12.64. I have already referred to para.76 of Schedule B1. Paragraph 78 of Schedule B1 defines what is meant by "consent" in para.76(2)(b). It says as follows:

> "(1) In paragraph 76(2)(b) 'consent' means consent of:
>
> (a) each secured creditor of the company, and

(b) if the company has unsecured debts, the unsecured creditors of the company.

(2) But where the administrator has made a statement under paragraph 52(1)(b) ..."

and I interject to say that there has been such a statement in this case -

"... 'consent' means:

(a) consent of each secured creditor of the company, or

(b) if the administrator thinks that a distribution may be made to preferential creditors, consent of:

(i) each secured creditor of the company, and

(ii) the preferential creditors of the company.

(2A) Whether the company's unsecured creditors or preferential creditors consent is to be determined by the administrator seeking a decision from those creditors as to whether they consent."

20 For the purpose of setting out some requirements for the process of obtaining creditors' consent, Insolvency Rule 3.54(2) states that the notice to creditors "must state the reasons why the administrator is seeking an extension." The notices themselves in this case did not state those reasons.

21 The other relevant Rule is 15.8, which deals with the decision procedure. Rules 15.8(3)(f) and (g) state that the notices must include:

"(f) a statement that a creditor whose debt is treated as a small debt in accordance with rule 14.31(1) must still deliver a proof if that creditor wishes to vote;

(g) a statement that a creditor who has opted out from receiving notices may nevertheless vote if the creditor provides a proof in accordance with paragraph (e)."

So those paragraphs are requirements of what the notice must contain, but again the notices contained no such statement, although they did say that, unless they were admitted, those preferential creditors must submit a proof of debt.

22 The Joint Administrators say that there were no creditors within the meaning of those sub-paragraphs of 15.8, and so it would have been pointless putting anything in the notice to that effect.

23 So were the notices defective? In relation to the Rule 3.54(2) requirement to state reasons for the extension, the Joint Administrators accept that the notice itself did not contain those reasons. They point, however, to the covering letters that enclosed the notices, and these referred to their first Progress Report which was available on the creditors' portal. The first Progress Report in turn explained the reasons for why consensual extensions would be sought and, more generally, made it clear that the activities of the administrations were far

from complete. So, for example, at p.2 of the Progress Report the Joint Administrators noted that:

> "... the administrations are currently due to end on 29 March 2021, albeit it is likely that the administrators will request from either creditors or the court that the administrations be extended beyond the initial period in order to enable continued collection of the Loan Book, thereby increasing returns to Secured and Floating Charge Creditors."

So that certainly looks like the reasons for an extension. At section 9.2 of the Progress Report the Joint Administrators made a similar statement regarding the need for an extension. In section 9.1 of the Progress Report it was made clear book realisation activities were expected to continue for some time. Finally, there were no immediate plans within the Progress Report for ending the administrations.

24 However, the covering letters were referring to the Progress Report in relation to the fixing of the Joint Administrators' remuneration, which was the other aspect upon which the Joint Administrators were seeking a decision from the creditors. It would, therefore, be rather an indirect reference to the reasons for the extension, and it would require a thorough reading of the Progress Report to be able to pick out the reasons for the extensions being sought. That said, one would expect interested creditors to read the report, and it would have been fairly obvious that the Joint Administrators' job was far from being done, and the administrations would need to be continued. But I do not see that the incidental reference to the Progress Report in the covering letters to the notices can satisfy the requirements of Rule 3.54(2).

25 As to the Rule 15.8(3) requirements to state what small creditors have to do, I think that Parliament cannot have intended that redundant information should be included on the notice. The voting form did say that all creditors who wished to vote had to submit a proof, but if there were no creditors who could come within the categories of creditor covered by sub-paras.(f) and (g), it seems to me that the notice should not be rendered defective by the omission of a statement that could only apply to such a non-existent category.

26 In any event, because of my conclusion in relation to Rule 3.64, I must go on to consider whether Rule 12.64 applies. Rule 12.64 provides as follows:

> "No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."

So the threshold question to determine is if the failures to comply with the Rules 3.54(2) and 15.8(3) requirements are "formal defects or irregularities" within Rule 12.64.

27 There are now quite a few authorities dealing with the question as to whether out of court appointments of administrators which have defects in them render the appointments invalid. The cases consider whether the breach of the Rules is so fundamental as to make the appointment a nullity, or whether it is more of a procedural nature, such that Parliament cannot have intended to nullify the appointment and it is remediable under 12.64. Mr Abraham has submitted that these cases are equally applicable to the out of court consensual extension of the administration and I agree with him. But the cases are not always that easy to reconcile.

28 Mr Abraham referred to the case of *Re A.R.G. (Mansfield) Limited* [2020] BCC 641, a decision of HHJ Davis-White QC, (sitting as a High Court Judge in Leeds), where he exhaustively went through all the authorities and provided a helpful analysis as to whether the requirement of obtaining the consent of the FCA was of such a fundamental nature as to render the appointment invalid. He and Mr Abraham also referred to *Re Euromaster* [2012] BCC 754, a decision of Norris J, who, referring to the streamlining of the process of appointment of administrators out of court, and looking to the substance rather than the form, divided the requirements into ones of fundamental validity, breach of which rendered the appointment a nullity, and procedural irregularities, which do not and which can be cured. Even if the wording of the rule or the requirement is the same, one has to look at the effect to see if it is so fundamental that it cannot be cured.

29 Marcus Smith J also considered this in *Re Skeggs Beef Limited* [2020] BCC 43, which considered whether the prescribed form had been filed in the correct way and the effect of it not being done in the correct way. Marcus Smith J said there was a distinction between using the incorrect form and filing it in the wrong way, and decided that that was a defect. That was not, therefore, fundamental and could be cured. If it is a defect within Rule 12.64 the court then needs to consider if it has caused substantial injustice.

30 So turning to the defects in this case, I believe that the failure to provide any reasons in the notice to preferential creditors in breach of Rule 3.54(2) is of the procedural variety and therefore within Rule 12.64. Mr Abraham compared the Rule 3.54(2) requirement with the fundamental requirement of actually obtaining the consent of the preferential creditors under para.76(2)(b) of Schedule B1 to the Insolvency Act. If that consent had not been obtained then clearly the extension would be a nullity, whereas the failure to give reasons does not, in my view, have the same consequences, nor could it have been intended by Parliament to have the same consequences. The preferential creditors receiving the notice could have easily been able to find out the reasons, which are pretty obvious anyway. Those that voted were presumably happy, and they did have the covering letter that referred to the Progress Report in which some reasons were given for the extension.

31 As to the Rule 15.8(3)(f) and (g) breaches which I found are probably not a breach, that is an *a fortiori* case in any event. I have held that I do not think the notices were in breach of this Rule as there are no such creditors, but even if I am wrong on that then unquestionably that is a procedural requirement and does not go to the fundamental power to grant the extension.

32 As to the question of substantial injustice, I do not think that the creditors can credibly claim to have been prejudiced by the failure to provide reasons. The reasons were there in abbreviated form in the Progress Report, which the creditors had been provided with. As I have just said, if any creditor was unaware of the reasons and wanted to find them out, they had the contact details for Grant Thornton, the Joint Administrators, and they could easily have asked. The resolutions were passed with overwhelming majorities and, in any event, it appears that the preferential creditors of CFL will be paid in full whenever the administration ends. The preferential creditors of CTL, by contrast, will not recover anything, and will not have done so whether the administrations had or had not been extended.

33 So there is, it seems to me, no prejudice to any creditors as a result of non-compliance with the Rules in these respects, and I will declare the administrations were validly extended by consent to 29 March 2022.

34 Turning to the further extensions that are sought to, I assume, 28 March 2023, any further extension requires an order of the court. There can only be a consensual extension for up to a year, so this application is made to extend under para.76(1) of Schedule B1 of the Act.

35 In relation to extension applications, there is the authority of *Re Nortel Networks UK Limited* [2017] EWHC 3299, in which was said the following:

> "The Court's discretion under paragraph 76(2)(a) is not circumscribed in any express way, but it is readily apparent that it should be exercised in the interests of the creditors of the company as a whole, and that the Court should have regard to all the circumstances, including (i) whether the purpose of the administration remains reasonably likely to be achieved, (ii) whether any prejudice would be caused to creditors by the extension, and (iii) any views expressed by the creditors. In that regard, where a company is making distributions to its Unsecured Creditors within the administration process, it is likely to be appropriate that the administrator's term of office should be extended to allow the distributions to be made, rather than to require the company to go into liquidation, which might well increase the costs or delay the distribution process with no countervailing benefit."

36 The evidence of Ms Laverty discloses sensible and credible reasons for extending the administrations for a further year:

(i) she says an extension of the administration of CFL is necessary primarily to permit the continuing realisation of the Loan Book and to explore the possibility of a full or partial sale of the Loan Book to a third party;

(ii) an extension of the administration of CTL is necessary in order to support the ongoing administration of CFL by managing the outsourcing of logistics and engineering services and through the support provided by its retained employees;

(iii) as the strategy for the collection of the Loan Book debt remains subject to ongoing review, key operational wind-down tasks needed to complete the administrations will only become appropriate, and the final receipts and payments accounts that need to be prepared prior to exit can only be prepared at a later stage;

(iv) one year will allow sufficient time for these tasks to be completed leaving an adequate margin for unforeseen delays; and

(v) other exit routes from the administration are less advantageous. Dissolution of the Companies and liquidation are inappropriate, given that CFL's collection activities are ongoing, and CTL's administration continues to support those activities, while liquidation would involve expenses that would diminish the returns available to creditors.

37 The Joint Administrators put all the creditors on notice of their intention to make this application in the third Progress Report, and that Progress Report was available on the creditor portal. As at the date of this hearing no objections had been raised by the creditors, and so accordingly I will extend the administrations for a further year, and, as I said at the

beginning, I do not need to consider any of the other applications, and I will therefore make the order in the terms sought.

_____

CERTIFICATE

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This transcript has been approved by the Judge.