Neutral Citation Number: [2024] EWHC 1425 (Ch)

Case No: CR-2022-BRS-000056

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: 11 June 2024

Before :

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

- -

IN THE MATTER OF TOOGOOD INTERNATIONAL TRANSPORT AND AGRICULTURAL SERVICES LTD

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

(1) MARK GUY BOUGHEY **(2) MICHAEL IAN FIELD**	**Applicants**
- and -	
TOOGOOD INTERNATIONAL TRANSPORT AND AGRICULTURAL SERVICES LTD (IN ADMINISTRATION)	**Respondent**

- -
- -

Osborne Clarke for the **Applicants**

Application dealt with on paper

- -

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 11 am on 11 June 2024.

HHJ Paul Matthews :

Introduction

1. This is my judgment on an application made by Insolvency Act application notice dated 4 April 2024 by the administrators of Toogood International Transport and Agricultural Services Ltd ("the company"). The application by paragraph 9 seeks the following order:

> "(a) the administration of the Respondent and the term of office of the Applicants as joint administrators of the Respondent be extended until 4 PM on 20 June 2026;
>
> (b) if necessary, a declaration that the previous extension by creditor consent was valid;
>
> (c) alternatively, a retrospective administration order (with further details provided below);
>
> (d) such other directions as the Court see fit; and
>
> (e) the costs of this Application be paid as an expense of the administration of the Respondent."

The application was supported by the witness statement of the first applicant dated 28 March 2024, together with one exhibit. There was no other evidence before the court.

Background

2. The company was incorporated in 2006 and for many years carried on the business of an independent express transport and haulage company, based near Bristol. However, following both the United Kingdom's exit from the European Union and the Covid-19 pandemic, its business shrunk while its costs increased, resulting in the company's being unable to pay its debts as they fall due. By the end of May 2022 the company had an unsatisfied court judgment against it obtained by one creditor, and an unsatisfied statutory demand served by another. The directors of the company obtained insolvency advice, and the administrators were appointed on 21 June 2022 by those directors. The purpose of the administration was to realise properties in order to make a distribution to one or more secured or preferential creditors, under paragraph 3(1)(c) of schedule B1 to the Insolvency Act 1986.

3. Prior to the appointment, notice to all of the creditors who held an unsatisfied "qualifying floating charge" (and were thus entitled to appoint administrators under paragraph 14 of the schedule) of intention to appoint administrators was served under paragraph 26 of the schedule on HSBC Bank plc, HSBC UK Bank plc, and HSBC Invoice Finance (UK) Ltd. All of these had had security granted by the company in the past, which at that time appeared from the records at Companies House still to be unsatisfied.

4. In point of fact, however, the only securities granted by the company that was still unsatisfied at the time of the appointment were (i) a debenture created by the company in favour of HSBC UK Bank plc on 11 March 2021 and registered on 2 April 2021, and (ii) a fixed charge on non-vesting debts and a floating charge created in favour of HSBC Invoice Finance (UK) Ltd on 9 April 2009 at registered at Companies House on 11 April 2009. HSBC UK Bank plc was the new "ring-fenced" bank set up in 2018 to which all personal and most business customers of HSBC Bank plc had been transferred. As part of that process any liability owed by the company to HSBC Bank plc, and any security held by HSBC Bank plc in respect of that liability, were transferred to HSBC UK Bank plc.

5. The administrators have issued a number of progress reports covering periods of approximately six months each from June 2022 to December 2033. The company has approximately 565 unsecured creditors with debts totalling about £1.9 million. Key steps taken by the administrators included obtaining a sworn statement of affairs from the directors of the company, and asset realisations. Relevant also to this application is the fact that the company's liability to HSBC Invoice Finance (UK) Ltd was discharged in full by the end of 2022.

6. However, replies to a number of queries addressed by the administrators to Jason Toogood, one of the directors, have not yet been received. It is apparent that there is an inter-company balance owed to the company by Toogood Properties Ltd, which is controlled by Mr Toogood. This appears to exceed £224,000. There is also a director's loan account, payable to the company by Mr Toogood, again exceeding £200,000. In addition to that, the company's records indicate that there is a director's loan account payable to the company by another director, Chris Kendry, although this is disputed by him. At present, the administrators anticipate that the most likely outcome of the administration would be dissolution of the company.

The extension of the administration by consent

7. Under paragraph 76 of schedule B1 to the Insolvency Act 1986, the original appointment of the administrators would have come to an end after one year (*ie* in June 2023) unless the term was extended by consent for not more than one year, or by order of the court for a specified period. "Consent" for this purpose would in the circumstances of this case be the consent of "(a) each secured creditor of the company" and of "(b) the unsecured creditors of the company", under paragraph 78(1) of the schedule. The administrators decided to seek such consent, on the basis that there was further work to be done before the company could exit administration. Perfectly sensibly, the administrators sought to achieve this extension by way of the consent route provided for in the legislation. The consent procedure is (partly) set out in rule 3.54 of the 2016 Rules.

8. Definitions applicable only to Schedule B1 are set out in para 111 of that schedule. They do not include a definition of "secured creditor". But Schedule B1 is incorporated into the 1986 Act by section 8 of that Act, in Part II of the First Group of Parts. Accordingly, the meaning of this term for the purposes of

Schedule B1 is to be found in section 248 of the Act (also in the First Group of Parts), which 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 … "

9. In considering *whose* consent should be obtained to the extension of the administration, the administrators took the view (based on legal authorities, to which I will refer shortly) that, so far as concerns secured creditors of the company, the consent of HSBC UK Bank plc alone was necessary, for only that creditor had any economic interest in the administration. The position of HSBC Bank plc had been transferred to HSBC UK Bank plc in 2018, and HSBC Invoice Finance Ltd had been paid in full in 2022. Accordingly, HSBC Bank plc and HSBC Invoice Finance Ltd were not asked for their consent. So far as concerns the general body of the unsecured creditors, the administrators' position is that their consent was deemed to have been given under section 246ZF of the 1986 Act, because appropriate notice was given to them and no objections or requests for a physical meeting were received. I am not concerned with that on this application.

This application for a further extension

10. The administrators continued with the administration of the company on the basis that the extension was valid and effective. By virtue of paragraph 78(4), the consent procedure in paragraph 76 can be used only once. The administrators, considering that they required yet more time to complete the administration, accordingly issued this application to the court for a further extension by order in April 2024. In so doing, they drew the attention of the court to a passage in the *First Review of the Insolvency (England and Wales) Rules 2016*, published by The Insolvency Service on 5 April 2022, in a section headed "Creditor approval of proposals and fees".

11. That passage reads as follows:

> "Several respondents asked for clarification on the position of secured and preferential creditors that had received payment in full. It has been the Government's position for some time that the classification of a creditor is set at the point of entry to the procedure and that this remains, even if payment in full is subsequently made. We believe that to legislate away from this position could cause more problems than it would seek to solve. Accordingly, the government has no plan to change its long-standing view

> on this matter. We will amend rule 15.11(1) [of the Insolvency (England and Wales) Rules 2016] to be clearer that where the Insolvency Act 1986 or the Rules require a decision from creditors who have been paid in full, notices of decision procedures must still be delivered to those creditors."

12. But, so far as I am aware, rule 15.11(1) of the 2016 Rules (which deals with the procedures for giving notice of decisions) has *not* so far been amended. It relevantly continues to read as follows:

> "(1) Notices of decision procedures, and notices seeking deemed consent, must be delivered in accordance with the following table.

Proceedings	***Decisions***	***Persons to whom notice must be delivered***	***Minimum notice required***
[…]	[…]	[…]	[…]
administration	decisions of creditors	The creditors who have claims against the company at the date when the company entered administration (except for those who have subsequently been paid in full)	14 days
[…]	[…]	[…]	[…]

> (2) This rule does not apply where the court orders under rule 15.12 that notice of a decision procedure been given by advertisement only."

13. The question therefore arises at this stage as to whether the consent of HSBC Bank plc and HSBC Invoice Finance Ltd should have been obtained to the 2023 extension, on the basis that they were still "secured creditors", though by that stage neither of them was in fact a creditor of the company at all. If it should have been, then the administrators seek from the court appropriate declarations or orders to render the conduct of the administration retrospectively valid. It is convenient to deal with this matter first, before considering whether any further extension of the administration is justified.

The authorities

14. I referred above to authorities on the basis of which the administrators were advised that they need obtain consent only from HSBC UK Bank plc, as the only secured creditor with an economic interest in the administration. The first is the decision of Norris J in *Re Biomethane (Castle Eaton) Ltd* [2020] BCC 111. In 2017 a secured creditor with a qualifying charge appointed administrators to the company. An extension of the administration was sought. The administrators used the deemed consent procedure for unsecured creditors, but overlooked the fact that this did not apply to the secured creditors. However all concerned believed the extension to be valid. When a further extension was needed, the error was realised. The administrators sought both a retrospective validation of the original extension, and the further extension now sought.

15. Norris J considered both that the criteria for an administration order were satisfied and that there was jurisdiction to make one retrospectively. He then said:

> "25. … the court will have regard, amongst all the other circumstances, as to whether the purpose of the administration remains reasonably likely to be achieved within the extended period, whether any prejudice would be caused to creditors by the extension, and to any views expressed by the creditors themselves. As to this last point, as I have already said twice, the only persons with an economic interest in [the company]'s administration are the secured creditors. Each of them consents to the extension sought, but aside from that consent, I do not see that any prejudice would be caused to the creditors by the extension sought. [One secured creditor] is funding the trading in administration. The unsecured creditors are gradually being repaid within the administration."

The judge made the order sought.

16. In *Re Burningnight Ltd (in administration)* [2021] BCC 133, the administrators of two companies sought an extension of the administration, opposed by a secured creditor (Crowdstacker) who had appointed them in relation to one of the companies. The directors of the other company had appointed them in relation to that other. Crowdstacker argued for the appointment of an independent liquidator in relation to the companies, on the basis of criticisms of the conduct of the administrators. The deputy judge (Philip Marshall QC) was prepared to extend the administration in relation to the second company, but not the first, where a liquidator would be appointed.

17. The deputy judge said:

> "36. As regards the views of Crowdstacker, as the sole creditor with any real interest, and the potential prejudice to it, the following factors appear to me to be significant:
>
> 36.1 Crowdstacker has expressed the firm view that the appointment of a liquidator is necessary to investigate properly the affairs of Burningnight and in particular the conduct of the administrators themselves in respect of

> the asset sale. On the material before me it is not possible to dismiss the concerns they have expressed as fanciful … "

18. In *Re Lehman Brothers Europe Ltd (in administration)* [2020] EWHC 1369 (Ch), the former administrators of the company (appointed originally in 2008, but whose appointments had been extended by the court thereafter, until they ceased to hold office in 2019) sought their discharge from liability under para 98(1) of Schedule B1 to the 1985 Act. However, such a discharge would take effect only in the circumstances set out in para 98(2). Ordinarily this would be by decision of the creditors. This was however an application to the court.

19. Hildyard J explained why:

> "3. The application has been made necessary because the matter of when the Former Administrators' discharge should take effect was never put to the Creditors' Committee before the end of the Administration; and there is no longer any creditors' committee nor (since all creditors have now been paid) is there any body of creditors who might resolve to determine that matter. Thus, the Administrators can only obtain an effective discharge as and from a date specified by order of the Court under paragraph 98(2)(c) of Schedule B1 to the Act."

The judge ultimately made the order sought.

20. None of these cases involves a decision on the point which arises before me. But the first two rely on the idea that the most weight in creditors' decisions in administration should be given to the creditors with a real economic interest in the outcome. Creditors who have been paid off since the administration began have no economic interest in the outcome. There is no *a priori* reason why their views should count. The third case does not refer to creditors with an economic interest in the outcome, but the point is the same. If *all* the creditors have been paid off, there are no creditors with an interest in the outcome, and the court should take the decision.

21. In addition to these authorities, the applicants have now also cited a further, very recent, decision of the court, made by ICC Judge Prentis in *Re Pindar Scarborough Ltd (In Administration)* [2024] EWHC 908 (Ch). There, the facts were very similar to those arising in the present case. The directors of a company appointed administrators in March 2022. At that time Barclays Bank was a secured creditor, with a charge registered at Companies House. An extension of the appointment was sought in March 2023. In August 2022, however, Barclays Bank had been paid off, and the charge marked as satisfied. The extension of administration was consented to by the main secured creditor, but not by Barclays Bank, which was not asked. On the application for renewal, the question arose as to whether Barclays' consent had been necessary.

22. ICC Judge Prentis referred to the definition of "secured creditor" in section 248 of the 1986 Act (set out earlier), and said:

> "9. The definition of secured creditor is framed in the present tense: 'a creditor of the company who holds… a security'. To state the obvious, a secured creditor is a creditor, therefore one owed a debt by the company or other obligation sounding in money; and he is a creditor who holds a security as defined. A creditor who had once held security would not be within the definition. Neither does the definition purport to apply any time period other than the present. It does not, for example, treat a secured creditor as being one who was owed at a particular point a debt which was then secured.
>
> 10. On that straightforward reading, by the time paragraph 78 was engaged in respect of the company, Barclays was no longer within the section 248 definition."

23. The judge then referred to the extract from the *First Review of the Insolvency (England and Wales) Rules 2016*, published in 2022, set out above (at [11]). He also set out the relevant part of rule 15.11(1), also set out above (at [12]). He then pithily commented:

> "13. It is not therefore apparent how the rule can be made 'clearer' in order to reflect the Government's long-standing view that notice ought to be given to creditors who have been paid in full. Instead, if that were what this rule was meant to do, the wording would have to be reversed.

Indeed, he went to say that

> "14. … rule 15.11(1) does not itself create any ambiguity. Insofar as there is ambiguity it is in this Insolvency Service response"

24. The judge further went on to refer to each of the three earlier authorities which were cited to me and to which I have referred above. He concluded:

> "25. The position seems to me to be governed by section 248. Nothing in the observations within the Insolvency Service's Review undermines that position. I therefore consider that the consensual extension of this administration was effective and that no retrospective order is required."

Discussion

25. I respectfully agree with ICC Judge Prentis. Section 248 is clear, and contained in primary legislation. A secured creditor is defined as "a *creditor* … who holds … a security". Even if one were to construe "security" as including a reference to a security for a debt of zero (like the case of a mortgage loan repaid but where the charge has not been formally cancelled) section 248 still refers to "a creditor". A creditor who has been repaid is no longer "a creditor". I do not ignore the words "except in so far as the context otherwise requires" at the outset of the subsection. But there is nothing in the context of Schedule B1 even to suggest, let alone require, "otherwise".

26. Rule 15.11, contained in secondary legislation, does not contain a definition of secured creditor for the purposes of Schedule B1. Even if it did, it would not

lead to a different conclusion from section 248. Indeed, and contrary to the view of the Insolvency Service, it supports it. But even if it had been contrary to the section, the definition section of the Act would have primacy. That is our rule.

27. A secured creditor is one who is owed a debt that is secured. Any creditor whose debt has been paid off is *ex hypothesi* no longer a creditor, and therefore no longer a secured creditor. Nothing in the legislation suggests, let alone compels, the conclusion that the position is to be governed *only* at the point of entry into the administration process. And, as it seems to me, that is as it should be. Only those who have an economic interest in the outcome should be concerned to make decisions about the continuance of the administration. There is no reason why a commercial organisation such as a bank that has been repaid in full should have to be bothered thereafter with making administration decisions that do not affect it. Why should it spend its time, unremunerated, in doing so?

28. The Insolvency Service's 2022 Review of the 2016 Rules said merely that

> "We believe that to legislate away from this position could cause more problems than it would seek to solve."

If the Government wishes there to be a different result, then it must legislate more clearly than it has done, and moreover explain why those with *no* economic interest in the outcome of an administration should nevertheless determine what happens. In the meantime, I hold that a secured creditor whose debt is paid off ceases to be a secured creditor for the purposes of Schedule B1 of the 1986 Act, and its consent is no longer needed for any decision requiring the consent of such a creditor. No prejudice can be or is caused to such a person by not obtaining its consent.

29. Accordingly, in my judgment the extension of the administration by consent in June 2023 was valid.

The need for a further extension

30. The evidence establishes that there are still a number of important things to do within the administration. These include continued investigation into and recovery of the directors' loan accounts and inter-company loans. Such recoveries will probably require the sale of two properties, which will take some months. They also include pursuit and recovery of a tax refund from HMRC of approximately £100,000, as well as establishing the company's tax position more generally. This too will take some months to achieve. However, the tax refund claim cannot be made until the problem of the director's loan account is resolved. Thirdly, once the asset realisations are complete, there is the process of making a distribution to preferential creditors of the company. This can be more lengthy than imagined. The evidence explains the component parts of the process, and suggests that up to eight months may be needed. The administrators therefore ask for an extension of 24 months.

31. Because the company is unable to pay its debts within section 123 of the 1986 Act, the administration cannot come to an end without an insolvency procedure. Dissolution without realising assets is not in the creditors' interest. The alternatives to an extension are therefore creditors' voluntary or compulsory liquidation. Either kind of liquidation will however incur significant further costs, and the appointment of different persons as liquidators still more. In the opinion of the administrators, the purposes of the administration can still be met, and will result in a better result for the creditors than if the company were put into liquidation now.

32. HSBC UK Bank plc has been asked for and has given its consent to the extension sought of 24 months. Other former secured creditors have not, but they no longer have any economic interest in the administration.

Conclusion

33. There are significant asset realisations still to be pursued, and the only secured creditor supports the extension needed for this to happen. There will then need to be further time for distributions to take place. The reasons given for the extension are compelling. In my judgment, it is appropriate to extend the administration for 24 months, to 20 June 2026, and I will so order.