IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES COURT

Case No. CR-2022-000889
[2024] EWHC 908 (Ch)

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Wednesday, 13th March 2024

Before:

ICC JUDGE PRENTIS
in the ICC Interim Applications Court

In the matter of
PINDAR SCARBOROUGH LTD (IN ADMINISTRATION)

MR P DIBGY appeared on behalf of the APPLICANT ADMINISTRATORS

JUDGMENT
(Approved)

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ICC JUDGE PRENTIS:

1. Pindar Scarborough Limited entered administration by directors' appointment on 31 March 2022. The administrators are Philip James Watkins and Philip Edward Pierce. On 29 February they issued this application seeking an extension of the administration period. Their application also seeks, so far as is necessary, a retrospective appointment to 31 March 2023. That is because an issue which is apparently of some novelty has arisen as to the consent of secured creditors to the extension which had apparently been obtained in March 2023.
2. The issue is whether consent was required from Barclays Bank plc, which had held security under a 7 February 2020 charge at the outset of the administration, but which charge had been marked as satisfied at Companies House on 17 August 2022, so some seven months before the apparent consensual process was undertaken.
3. In his evidence, Mr Watkins describes the background to the administration and what has occurred thereunder. He notes that the introduction of FRP, to which he belongs, was effected in respect of the company and other members within its group in January 2022, at the behest of its main secured creditor, the Prudential Insurance Company of America. Hopes for a sale of the company's business and assets and those of other members of the group were dashed, and therefore administration became the desirable option. The administrators rapidly closed down the company and undertook a disposal process, and on 4 May 2022 they completed a sale of the plant and machinery to Walstead York Limited. That sale included a licence to Walstead to occupy properties from which the company had traded, including one known as Pindar House. The stock was also sold to Walstead, subject to retention of title agreements. The administrators instructed Atlantic RMS to collect in the outstanding debtor ledger. This was subject to an invoice discounting facility granted by Barclays, and it was because of this that Barclays held its charge. Barclays was repaid in full from these collections, and there was a surplus on them of around £475,000.
4. On 17 August 2022 Osborne Clarke, solicitors to the administrators, lodged the MR04 at Companies House, recording that the Barclays charge had been satisfied in full. That was consensual, and there is no doubt that the filing was proper. When the administrators sought approval of their fees by an email of 28 July 2022, they did so by reference to Barclays. They asked for Barclays' confirmation that it would consent to the fee proposal or in the alternative confirm that "Barclays no longer has a secured interest in the group and as such, is not in a position to consent". The Barclays' response from Sara Walser of Special Asset Management confirmed the latter.
5. The extension received consent from the Prudential Insurance Company of America and from the preferential creditors. That was considered to be what was required under paragraph 78, the administrators having made a paragraph 52(1)(b) statement.
6. An extension of 12 months is now sought, until 30 March 2025. That is so the administrators can finalise the position following allegations of damage to Pindar House under the Walstead licence; they need to finalise VAT deregistration and reclaims; they need to agree to pay preferential and secondary preferential creditors; and they need to undertake the general matters to wind down and finalise the administration. Mr Watkins confirms that they have considered alternative options. He notes that the company is unable to pay its debts and therefore it would not be appropriate for there to be an ending of the administration without some insolvency procedure in place. Dissolution would not be appropriate at the moment because of the matters which remain outstanding, and a creditors' voluntary liquidation is

not going to result in any distribution to unsecured creditors and is just going to add to costs. Further, of the preferential creditors, both HMRC and the Redundancy Payments Service confirm that they have no objection to the proposed extension. The secured creditor, Prudential Insurance Company of America, has confirmed its consent to the extension.

7. In those circumstances, but for the potential flaw, the court would have no hesitation in extending this administration as sought through until 23:59 on 30 March 2025.

8. Therefore, the issue concerns the Barclays security and whether or not under paragraph 78(2)(b), its consent ought to have been obtained as secured creditor to the initial extension. What is meant by "secured creditor" in the context of paragraph 78(2)(b)(i)? Mr Digby, to whom I am grateful for his diligent researches, has been unable to locate any direct case authority on the topic. One would like to think that that was because the matter was clear. By section 248 of the Insolvency Act "In this Group of Parts, except insofar 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 then s.248(b) defines security. The group of parts includes section 8, which gives effect to schedule B1 to the Act, and so the definition is carried into schedule B1.

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.

11. The concern of the administrators derives from the first review of the Insolvency England and Wales Rules 2016. Within the Insolvency Service report is this passage:

> "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 and accordingly the Government has no plan to change its long-standing view on this matter. We will amend rule 15.11(1) to be clearer that where the Insolvency Act 1986, all the rules require a decision from creditors who have been paid in full, notices of decision and procedures must still be delivered to those creditors."

12. This was under a section headed "Creditor approval of proposals and fees". Part 15 of the Insolvency Rules deals with decision making generally. 15.11 is headed "Notice of decision procedures or of seeking deemed consent: when and to whom delivered". 15.11(1): "Notices of decision procedures, and notices seeking deemed consent, must be delivered in accordance with the following table". For administration, and for decisions of creditors within an administration, with a minimum notice period of 14 days, the persons to whom notice must be delivered are "the creditors who had claims against the company at the date when the company entered administration (except for those who have subsequently been paid in full)".

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. It can be noted as well that once it comes to votes on the decision process in an administration, by 15.31(1)(a) they are to be "calculated according to the amount of each creditor's claim…as at the date on which the company entered administration less (i) any payments that have been made to the creditor after that date in respect to the claim". Given that votes are to be treated as reflecting the present position, one can understand why if that present position is zero, because there has been payment in full, there should be no need to engage such recipients because they simply have no interest in the process which is to be undertaken.

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

15. Mr Digby and the administrators have considered what else might be found to justify the Insolvency Service response. I have had my attention drawn therefore to rule 14.1. Part 14 deals with claims by and distributions to creditors in, among other processes, administration. 14.1 is within Chapter 1, "Application and Interpretation". 14.1(1) "This Part applies to…administration". 14.1(3) "'Debt' in relation to decision procedures in respect of…administration, means…any of the following (a) any debt or liability to which the company is subject at the relevant date". The relevant date means for an administration the date on which the company entered administration, that is at 14.1(3)(za)(a).

16. Chapter 2 of Part 14 addresses "Creditors' claims in… administration". 14.3 describes how a creditor proves for a debt: "A creditor wishing to recover a debt must submit a proof to the office-holder". So this Part is directed only at claiming the right to a distribution within relevantly, an administration. Rule 14.1 is not in terms seeking any wider effect. It simply allows claims which existed at the relevant date to be proved; it is then a matter under 14.3 whether or not the creditor submits a proof, and it will be a matter under 14.7 for the office holder to admit or reject the proof. Plainly, where the creditor has received payment in full before this process is undertaken, should they for some reason submit a proof it will be rejected for dividend on the basis that they have already received their money in full. 14.1 therefore does not seem to me to affect the position. Neither do the other provisions within this Part which speak to a particular treatment of secured creditors, for example rule 14.15 dealing with the value of security; indeed that rule contemplates that the value attributable to security may alter during administration.

17. It will be recalled that on 28 July 2022 Barclays confirmed that as it no longer had a secured interest it was not in a position to consent to the administrator's remuneration proposals. This is another example within the Rules of the use of the words "secured creditor." By rule 18.18(4), and again where the administrators have made a statement under paragraph 52(1)(b) of Schedule B1, "the basis of the administrator's remuneration may be fixed by (a) the consent of each of the secured creditors" or, as here, where there is intended to be a distribution to preferential creditors (b) "(i) the consent of each of the secured creditors and (ii) a decision of the preferential creditors in a decision procedure". What is notable about that rule in this context is that those who do not have an economic interest in the administration, being the unsecured creditors, are not being consulted about the remuneration proposals. Their rights have, as it were, already been excluded by the paragraph 52(1)(b) statement.

18. To take a final example of the treatment in the Schedule and the Rules, one can turn to paragraph 98 on vacation of office and discharge from liability. By paragraph 98(2), the discharge of an administrator takes effect, at least where one has been appointed under

paragraphs 14 or 22 and there is no paragraph 52(1)(b) statement, "at a time appointed by resolution of the creditors' committee or, if there is no committee, by decision of the creditors". If there has been such a statement, then the discharge takes effect from the time decided by the "relevant creditors", who are under paragraph 98(3) "each secured creditor… and the preferential creditors of the company".

19. Looking outside the Act and Rules, the cases give some indirect support for the view that for our purposes secured creditor is defined by section 248.

20. Mr Justice Hildyard in *Lehman Brothers Europe Limited* [2020] EWHC 1369 (Ch), accepted that where creditors have been paid, there are no creditors who can resolve to determine the question of discharge under paragraph 98(2). As he said at paragraph 3:

> "The application is being 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 result to determine that matter."

Thus, the administrators could only obtain an effective discharge as and from a date specified by the order of the Court by paragraph 98(2)(c).

21. Neither is the concept of real economic interest which is pointed to by the application of section 248 otherwise unknown in the case law. On the contrary there are a number of cases which have used it as a helpful concept in deciding what to do in the face of various administration situations. Mr Digby has drawn my attention to Mr Justice Norris in *Re Biomethane (Castle Eaton) Limited* at paragraph 22, discussing a backdated administration order and noting that "The only parties with a real economic interest in the administration as I have indicated are… the secured creditors. Both of them are really behind the present application".

22. The concept is also used by Philip Marshall QC, sitting as a Deputy High Court Judge in *Re Burningnight Limited*, [2020] EWHC 2663 (Ch), paragraph 35. That was an opposed administration extension application. He paid particular attention to the views of "Crowdstacker, as the sole creditor with any real interest… at the present time".

23. In *Re Swiss Cottage (38) Properties Limited*, [2022] EWHC 1495 (Ch), a breach of administrators' duties case, Mr Justice Adam Johnson at paragraph 169 considered that "an appropriate point of focus is whether the creditors other than Barclays had any real economic interest in the administrations. That leads one directly to what seems to me to be the real point of contention between the parties, which is their dispute about whether the properties were sold for their proper value".

24. Therefore, as I say, there are supportive tangential authorities.

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. Had I decided otherwise, then I would have determined that it was appropriate to grant a retrospective order back until 31 March 2023, which would have carried this administration over from its initial date of 31 March 2022.

End of Judgment.

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This transcript has been approved by the judge.