PITFALLS IN ADMINISTRATIONS

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Purpose/Themes

Looking at several recent cases and anticipating potential problems as well as showing how the changes introduced by the Insolvency Rules 2006 have solved some of the problems under the 1986 Rules.

Looking at practical problems which IPs can face and the potential/necessity for court involvement.

Introduction

New Pt 15 of the Insolvency Rules 2016 makes some fundamental changes in the way decisions are made/meetings are held in relation to the various insolvency regimes. The focus is on moving the rules into line with modern technology and so the rules now allow for virtual meetings and electronic voting.

Two examples of potential problems.

A. Administration Proposals/Pre-Packs/Rejection of Proposals

1. By way of one example – in an administration what happens in the unlikely event that the proposals are voted down? One might assume that there will be more creditor involvement with the introduction of remote/electronic voting.

2. Paragraphs 49 to 55 of Sch B1 to the Insolvency Act 1986 provide the statutory framework for such a situation.

3. The first point to note is that following a rejection of the proposals there is a mandatory reporting procedure – so the office holder must pursuant to para 55 (1)(a) report the decision to the creditors, the Registrar of Companies and the Court as soon as possible.

4. Ordinarily an application to the Court under 55(1)(a) and 55(2) will follow.

5. Para 55 provides:

> Failure to obtain approval of administrator's proposals
> 55(1)This paragraph applies where an administrator reports to the court that—
> (a)an initial creditors' meeting has failed to approve the administrator's proposals presented to it, or

(b)a creditors' meeting has failed to approve a revision of the administrator's proposals presented to it.

(2)The court may—
(a)provide that the appointment of an administrator shall cease to have effect from a specified time;
(b)adjourn the hearing conditionally or unconditionally;
(c)make an interim order;
(d)make an order on a petition for winding up suspended by virtue of paragraph 40(1)(b);
(e)make any other order (including an order making consequential provision) that the court thinks appropriate

Whether an Application to Court is Necessary?

6. It was the view of the HHJ Behrens in Lavin v Swindell [2012] EWHC 2398 (Ch) that if the proposals are rejected the matter must come before the Court for hearing and that it was difficult to see how the administrator could comply with his duty to manage the company's affairs without making such an application. If they failed to do so then a creditor could make the application.

7. Re Parmeko Holdings Ltd (in liquidation) and other companies - [2014] All ER (D) 39 (Jan). 2 years after Swindell HHJ Cooke found that an application for directions should not be made in circumstances where there would be no effective purpose in the court giving directions. In that case no creditor attended the meeting of creditors. This was a case, in the judge's words, of "creditor apathy." A report should still be prepared and sent to Court, but that report might address whether any useful function would be served by having a hearing and if not, the office holder ought to be justified in continuing the administer the estate in line with the proposals – probably confined to the no votes situation as opposed to the rejection by creditors.

The Court's Approach Upon Such an Application

8. Re Stanleybet UK Investments Ltd [2011] EWHC 2820 (Sales J). The Company (SUKI) SUKI was a holding company owned in equal shares by Stanley International Betting Limited ("SIB") and Elsports Investments Limited ("Elsports"). Elsports is wholly owned by the estate of the late Lord Steinberg ("the Estate"). The Estate was SUKI's largest creditor (87%).

Per Sales J at para 8

"The joint administrators proposed to proceed to sell the STS shares, i.e. to the only extant offeror, SIB, on these terms. However, the Estate was not satisfied that the joint administrators had taken sufficient steps to market SUKI or the STS shares so as to get the best price. Therefore, the Estate voted down the joint administrators' proposals at the creditors' meeting on 2 September. That put the joint administrators in a quandary. They were not formally

bound by the vote at the creditor's meeting and so could have proceeded with the sale to SIB. On the other hand, they had a responsibility to have regard to the views of creditors and were entitled to give considerable weight to the views of the substantial majority creditor about how to proceed. It would be unusual, though not legally impossible, for administrators to proceed with a course which 87 per cent of creditors were opposed to. The position was complicated because the joint administrators believed they had taken reasonable steps to market the STS shares in the short period of time before financial pressures on STS combined with uncertainty about its ownership meant that its business was put in jeopardy and lost value."

Ultimately by the end of the case the Administrators changed their position as to the sale of the shares and joined with the Estate in proposing an exit into liquidation, but the general point to take away is that Sales J recognised that the Administrators are not formally bound by the outcome of a creditor vote on proposals, rather they are required to carry out their office as they reasonably saw fit (though that usually would mean giving very great weight to the views of the creditors).

9. Re Pudsey Steel Services ltd, Re [2015] BPIR 1459. HHJ Behrens at para 11 applying Stanleybet stated that the Court shouldn't regard itself as bound by the decision of creditors upon proposals put forward by an administrator. Following a failure by the creditors to approve proposals in respect of the Administrators' remuneration, the Court made an order fixing the basis of the administrators' remuneration.

10. I'll now sketch out the facts of the case I was involved in as a case study:

i. Prior to the administrators' appointment the Company sought offers for the sale of the business. An offer was received from a connected company;

ii. The Administrators were appointed by the directors/the company;

iii. Shortly after appointment the business was duly sold;

iv. The Report and Statement of Proposals was circulated including the usual pre-pack statement pursuant to SIP 16;

v. A majority of the creditors voted against approving the proposals (save in respect of two ancillary matters – fixing of the basis of remuneration and approval of category 2 disbursements);

vi. Thereafter the Administrators took the view that it remained expedient to collect the deferred consideration payable in respect of the sale of the business.

11. In the result:

- The Judge was comfortable placing the company into dissolution – there was no other appealing route – and giving the administrators their discharge;

- What the judge did have a problem with was the recovery of the pre-administration costs/ preparing the pre-pack – he initially doubted whether the Court could under para 55 order something (t) that the creditors had specifically voted against;

- Also concerned that the terms of the letter to creditors informing them of decision to go to Court to seek directions should make very clear that the direction being asked for was one that would be contrary to what the creditors decided when the voted down the proposal;

- Ultimately judge stated *very considerable weight needs to be given to the views of the creditors when considering a proposal that the court should sanction something that has been refused by the creditors, but there is no necessary reason that court should refuse simply because the creditors had refused;*

- Held: the pre-administration remuneration was allowed.

12. Lessons:

Office Holder Perspective

- Don't assume the proposals will necessarily pass;
- Be aware of the duty to report to Court;
- Be aware that it is likely to be necessary to apply but not always e.g. in the "creditor apathy" case;
- Consider seeking an order from the Court going back to creditors to put fresh proposals;

- Do not underestimate the application – it is not a procedural tick box exercise; The Court may want to hear from creditors and it will be concerned not to undermine their wishes.

Creditor Perspective

- Voting does matter;
- Can apply for directions if the office holder is not doing so.

B. Creditor Notification

13. All Leisure Holidays Ltd [2017] EWHC 870 (Ch), a case decided in 2017 before the 2016 rules came into force, concerned four travel companies within the same group:

-three entered into a pre-pack administration in January 2017;
-the fourth entered into administration at a later date (with a subsequent asset sale)

Future bookings were to be honoured under the sale agreements. There were **14,222** customers. 10,000 of those customers had provided their email addresses to the travel companies either directly or via agents.

The administrators made an application to court seeking permission to:

1. send notifications relating to the conduct and progress of the administration by email rather than by post to those customers who had provided email addresses;

2. send one notification to all customers informing them that all reports would be uploaded onto a website; and

3. to make limited disclosure in the statement of affairs as permitted under Rule 2.30 of IR 2016. It was argued that there could be data protection breaches and the customers could suffer harassment from 3rd party travel companies if full disclosure were given. I am not going to focus on this point for today's purposes.

14. The basis for 1 and 2 were to save excessive costs.

15. Rules 12A.10 under the 1986 rules provided for electronic delivery where the intended recipient had consented to such. The Court held that the provision of the email address at the time of booking amounted to such and it was appropriate to send a notice to all creditors by email to say that further bulletins/updates would be posted on a website. Under the new rules….

Rule 1.45 provides

Electronic delivery of documents

1.45.—(1) A document is delivered if it is sent by electronic means and the following conditions apply.

(2) The conditions are that the intended recipient of the document has—

(a)given actual or deemed consent for the electronic delivery of the document;

(b)not revoked that consent before the document is sent; and

(c)provided an electronic address for the delivery of the document.

(3) Consent may relate to a specific case or generally.

(4) For the purposes of paragraph (2)(a) an intended recipient is deemed to have consented to the electronic delivery of a document by the office-holder where the intended recipient and the person who is the subject of the insolvency proceedings had customarily communicated with each other by electronic means before the proceedings commenced.

(5) Unless the contrary is shown, a document is to be treated as delivered by electronic means to an electronic address where the sender can produce a copy of the electronic communication which—

(a)contains the document; and

(b)shows the time and date the communication was sent and the electronic address to which it was sent.

(6) Unless the contrary is shown, a document sent electronically is treated as delivered to the electronic address to which it is sent at 9.00 am on the next business day after it was sent.

16. This introduces a concept of deemed consent which by virtue of the communications that customarily took place between the company and the creditor prior to liquidation.

17. New r 1.49(2) provides

Use of website by office-holder to deliver a particular document (sections 246B and 379B)

1.49.—(1) This rule applies for the purposes of sections 246B and 379B(3) (use of websites).

(2) An office-holder who is required to deliver a document to any person may (except where personal delivery is required) satisfy that requirement by delivering a notice to that person which contains—

(a)a statement that the document is available for viewing and downloading on a website;

(b)the website's address and any password necessary to view and download the document; and

(c)a statement that the person to whom the notice is delivered may request a hard copy of the document with a telephone number, email address and postal address which may be used to make that request.

(3) An office-holder who receives such a request must deliver a hard copy of the document to the recipient free of charge within five business days of receipt of the request.

(4) A document to which a notice under paragraph (2) relates must—

(a)remain available on the website for the period required by rule 1.51; and

(b)be in a format that enables it to be downloaded within a reasonable time of an electronic request being made for it to be downloaded.

(5) A document which is delivered to a person by means of a website in accordance with this rule, is deemed to have been delivered—

(a)when the document is first made available on the website; or (b)when the notice under paragraph (2) is delivered to that person, if that is later.

18. So, under the 2016 Rules no need applications 1 and 2 in All Leisure Holidays . However, the 2016 Rules throw up two potential new problems:

(i) There is still uncertainty as to how to communicate with those customers who had opted to receive communications by post instead;

(ii) One would expect to see some litigation as to the determination of what the "customary" method of communication was.

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