UK Steelfixers Limited - administration applications and winding up orders

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Case: UK Steelfixers Limited [2012] EWHC 2409 (Ch.), HHJ Purle QC, 23 July 2012: Bowen Travel Limited [2012] EWHC 3405 (Ch.), HHJ Simon Barker QC, 8 Nov 2012

Synopsis: On hearing an application for an administration order, the court retains a discretion whether it should make that order, even where the evidence meets the threshold for an administration order.

Topics covered: Winding up petition; administration application; judicial discretion; s127 IA86; para 13(1) Sched B1 IA86; Liquidation procedure, Administration procedure.

The Facts

In *Steelfixers*, HMRC had petitioned for the company's winding up. Its director sought an administration order with a view to implementing a pre-packaged sale to a company controlled by a former employee, with the consideration payable by instalments. The intended administrator recommended the deal as yielding better realisations than on a liquidation. However, certain post petition transactions in favour of that same employee, which were ostensibly void under s127 IA86 as dispositions of the company's property, only emerged when further evidence was ordered to be provided.

In *Bowen*, a similar situation arose where, after a creditor had petitioned to wind up the company, its directors made an administration application. The proposed administrators, who were initially appointed as interim managers, saw the administration as providing a seamless transition to liquidation, and the petitioner seemed neutral about an administration order. However, the judgment reveals scepticism as to the consistency and credibility of the directors' evidence, concerns about s127, and about who ought to conduct the insolvent company's affairs (noting, without criticism, that the proposed administrators had been appointed administrators to other group companies without recourse to the court). In the event the petitioner withdrew its petition but urged a liquidation.

The issues

The judge in *Steelfixers* was concerned that the s127 issues had been overlooked, and deeply unhappy about the application and the proposed pre-pack. In *Bowen*, the issues were a wider concern about the company's trading and financial history, coupled with reservations as to the quality of the evidence and the appropriate insolvency process, and who should be its stewards.

The Decisions

Notwithstanding that the evidence showed that the administration could deliver better

realisations than on a liquidation, the making of an administration order remained a matter of judicial discretion.

In a very brief judgment, the judge in *Steelfixers* declined to make the administration order sought, instead making a winding up order on HMRC's petition (having ordered it to be transferred to him for that purpose), so that the s127 claims might be considered.

In *Bowen* (at [19]), the judge reiterated the need for the evidence in support of an administration order to be reliable, accurate and complete:

"When the court is asked to exercise its powers under paragraph 13 of Schedule B.1 to the Insolvency Act 1986 by making an administration order, it is, in my judgment, essential that the evidence presented to the court is reliable. Implicit in the noun "reliable" in this context is not only that it is accurate evidence and true insofar as it is factual, but also that (1) a clear account is given of all potentially relevant facts and circumstances, and (2) where explanations are given or judgments, estimates or opinions are stated (a) they should be supported by the underlying material, and not contradicted by it, and (b) they should also be credible in the sense of being realistically likely to be true. Such a requirement should be neither onerous nor unreasonable. It requires no more than that an applicant, who, as a director, should know what has been going on at the company, tells the court the informed truth and does not attempt to mislead, including by omission."

Where the directors' evidence in favour of administration is incomplete or contradicted by the documents, this may reduce the weight which should be placed on the proposed administrators' conclusion that there is a real prospect of the purpose of administration being achieved, although this does not necessarily involve any criticism of the proposed administrators themselves (at [21])

The judge continued (at [20]) to say that the *"first question to be answered is: is there a real prospect that an administration order will produce a better result for the creditors than a winding up? The question...does not lead to an automatic order one way or the other because the court is given the discretionary power to make such an order as is just in all the circumstances of the case:...what order is appropriate?"* In the event, he concluded that liquidation was inevitable and ordered a compulsory winding up ([37] to [39]).

Comment

The scenario is familiar stuff in mid-market administrations, and in all courts, not just the Birmingham District Registry. What was less usual was that the cases received judicial scrutiny because the extant petitions required those seeking administration to come to court (IA86, Sched B1, para 25), instead of using a para 22 filing. It is a timely reminder that the court is not a rubber stamp (with echoes of Judge Purle's scepticism as to para 22 administration filings attributed to him in *DRC Distribution* ([2008] EWCA 448)).

The device of transferring a winding up petition to the judge hearing the administration application and making an order on that petition (as in *Steelfixers*) was appropriate where concerns as to s127 applied. In *Bowen*, the judge based himself on the powers in para 13(1) of Sched B1, rather than the petition which had been withdrawn after the administration application was made but before judgment. However, even without a

pending petition, the court has the power to treat an administration application as a petition to wind up, and to make such an order under para 13(1). The latter rarely occurs, but when it does, the result may be to accelerate a winding up of the company, rather than its administration (with or without a pre-pack), whether the applicant intends it or not.