OUTER HOUSE, COURT OF SESSION

[2023] CSOH 79

P187/23

NOTE BY LORD BRAID

In the cause

SPORTSDIRECT.COM RETAIL LIMITED

for

orders under paragraphs 88 and 95(b) of Schedule B1 to the Insolvency Act 1986 to remove **ROBERT JAMES HARDING** and **GAVIN GEORGE SCOTT PARK** as joint administrators of **GOALS SOCCER CENTRES PLC**

Noter

Noter: Ower, KC; Brodies LLP

15 November 2023

Introduction

[1] This case called before me for a hearing on the noter's application for orders under paragraphs 88 and 95(b) of Schedule B1 to the Insolvency Act 1986 Act, respectively removing the existing administrators of Goals Soccer Centres plc (the company), and appointing a replacement administrator. I granted those orders, but as the circumstances giving rise to them are unusual, and there is a dearth of Scottish authority on removal of administrators, I agreed to set out in writing my reasons for doing so.

[2] At the outset, I should record that the noter made clear that it did not make any attack on the administrators' integrity or their conduct of the administration (beyond

disagreeing with them as to the appropriate exit route from administration), nor should any such criticism be inferred from the making of these orders. That is one of the factors which makes the application unusual. The administrators themselves have said in terms that they are neutral as to whether the orders should be granted. They did not oppose the petition, nor lodge answers although their solicitors did make informal representations in a letter sent to the court for my attention. I shall comment on the content of the letter, and the weight to be accorded it, below.

Background

[3] The company was incorporated in 1999 and operated five-a-side football centres in numerous locations across the UK and the USA. It was an Alternative Investment Market company, listed on the London Stock Exchange. In or around 7 March 2019, it made an announcement to the market that it was investigating certain financial irregularities in respect of the financial year ending 29 December 2018. Joint administrators were appointed on 31 October 2019 following the filing of a Notice of Appointment of Administrator by the company's directors. (One of the original administrators was subsequently replaced by one of the present incumbents, but nothing turns on that.) Prior to the appointment, the company was required to make a number of statements to the market about its financial position. In particular, it disclosed that there had been a substantial mis-declaration of VAT and that the investigations being undertaken had disclosed alleged improper behaviour.

The administration

[4] Following the discovery of the financial irregularities, the original administrators had been retained to assist the company with an options planning exercise. As part of that

process, the directors of the company determined that the best way to realise value in the company for the benefit of creditors was by way of a pre-packaged sale. Immediately following their appointment, the administrators effected a sale of the business and the majority of the company's assets to Northwind 5S Limited, providing full details of the pre-packaged sale to creditors in their SIP 16 Statement, which was enclosed with a Statement of Proposals dated 7 November 2019. The noter's understanding (which appears not to be a matter of controversy) is that the company's books and records were transferred to Northwind as part of the pre-packaged sale (and remain available only because the noter is meeting Northwind's ongoing storage costs pending resolution of the present application); and that no imaging of the Company's servers was undertaken. In other words, the books and records are not presently available to the administrators.

[5] As regards realisations, the company's secured creditor, Bank of Scotland Plc, was owed £30.5m at the date of the administrators' appointment. To date, following realisations by the administrators, it has received £25.9m, leaving a shortfall of more than £4.5m, and there is currently no prospect of any distribution to unsecured creditors of the company. The noter is one such creditor, with a claim of approximately £2.4 million, being more than 10% by value of the total outstanding creditor claims. The total shortfall is likely to be in excess of £20m.

[6] As to what investigations have been carried out into the reasons for the company's collapse, the administrators carried out certain investigations and identified potential claims against two of the company's former directors, and against its auditors but concluded that the prospects of realisations from the former were limited, and that the cost of pursuing the latter was outwith the Bank's "appetite to fund". These claims have been assigned to the noter (including claims against all the directors). As yet no recoveries have been made. The

noter is hampered in its progress of these claims by the absence of the company's books and records. It also avers that as a creditor, it has limited visibility as to the investigations undertaken by the administrators and relies on the information provided to it by the administrators, via the six-monthly progress reports to creditors. Based on what information it does have, the noter has concerns regarding the level and scope of the administrators' investigations into the affairs of the company and potential claims.

Ending the administration

[7] The administrators consider that the purpose of the administration has been achieved and, accordingly, that it ought to be brought to an end. In their Statement of Proposals, they advised creditors that, following the realisation of assets and resolution of all matters in the administration, they would implement the most appropriate exit route to formally conclude the administration of the company. The possible exit routes included compulsory liquidation. However, in the most recent progress report for the period to 30 April 2023, the administrators advised creditors that they considered the purpose of the administration to have been achieved, and that they intended of to exit the administration by way of dissolution.

[8] The noter does not agree that moving the company from administration to dissolution is appropriate at this time. It wishes further investigations carried out, to ensure proper accountability of those responsible for the company's downfall and for the loss to creditors, and considers that this would be best achieved by the company moving from administration to compulsory liquidation, thus allowing for a thorough review of the investigations undertaken by the administrators and for such further investigation and enquiry as may be required, all of which it is prepared to fund. If fruitful, such

investigations could lead to recoveries on a scale which would benefit the general body of creditors. That being so, it considers that the most appropriate exit route would be to place the company into compulsory liquidation. It has made detailed averments about the correspondence passing between its agents, and those acting for the administrators, since as long ago as August 2022. It is unnecessary to narrate that correspondence in detail, but, in summary, the noter's agents have repeatedly made the noter's position clear, and have explored the possibility of the noter funding the administrators to carry out further investigations, or alternatively appointing another office-holder to do that work. At one time, the administrators were amenable to their carrying out further investigations, subject to agreement being reached over funding, but no such agreement could be reached. Following the first such request, in August 2022, the administrators petitioned the court to extend their period of office until 31 October 2023, which was granted. The correspondence resumed with the noter's agents letter to the administrator's agents dated 27 March 2023, asking whether the administrators would be prepared to seek a decision from the creditors that would oblige them to make an application under paragraph 79(2)(c) of Schedule B1 of the 1986 Act that would bring the administration to an end and seek the appointment of a liquidator. There then followed discussions between the noter and the administrators regarding how the administration should be brought to an end. On 16 August 2023, the noter's agents wrote to the administrators' agents expressing an understanding that the administrators were content to cooperate with the noter's proposed course of action, namely that the administration be brought to an end, the company enter compulsory liquidation and the appointed liquidator be an officeholder nominated by the noter. That letter outlined the process and timeline by which this would be achieved and asked the administrators to confirm the noter's understanding of the position and that the administrators would start to

prepare the necessary statutory documentation. On 28 August 2023, the administrators' agents advised that the administrators "neither support nor oppose" the noter's proposed course of action but that the administrators considered the appropriate way forward for the company would be to move from administration to dissolution under paragraph 84(1) of Schedule B1 of the 1986 Act; for the administrators to be comfortable in making an application under paragraph 79 of Schedule B1, they would require details of what the possible future claims were and why those claims would be best investigated and brought by a newly appointed liquidator. On 30 August 2023, the noter's agents explained that it was not possible for the noter to set out in detail what those possible future claims might be as that would be for the proposed liquidator to establish having been given access to the company's books and records. The noter's position continued to be that given the circumstances of the company's insolvency, further investigations ought to be carried out to establish the existence of any possible future claims in the interests of the company's creditors as a whole, which investigations the noter was willing to fund. On 4 September 2023, the administrators' agents advised the noter's agents that the administrators remained of the view that insufficient information had been provided in order to allow proper consideration of the noter's proposal; that an application to the court for liquidation would be challenging to justify; and that appropriate way forward for the company was to move to dissolution under paragraph 84(1) of Schedule B1 to the 1986 Act. The letter noted that the administrators were prepared to revisit their position on receipt of the clarifications sought and an agreement to provide advance funding of £25,000 plus VAT, with any unused balance being returned to the noter on the completion of the application to the court. Further discussion regarding funding took place but the parties could not reach agreement, the net result of which was that the noter decided to proceed with the present application.

[9] Despite the fact that the noter is aware that it might not directly benefit, ultimately, it has taken the view that the only appropriate course of action is to seek to have another office-holder appointed and for them to underwrite the costs and expenses of that exercise. Hence, it has made the present application.

The law

Removal of an administrator

[10] Paragraph 88 of Schedule B1 is short and to the point: "The court may by order remove an administrator from office." That is in extremely wide terms. It applies to any administrator, however and whenever appointed. Where an administrator is removed from office, both the administration itself, and the office of administrator, continue in being by virtue of paragraph 1(2)(d) of schedule B1.

[11] Although there is no Scottish authority as to how the apparently unfettered discretion conferred by paragraph 88 should be exercised, there is a plethora of cases from south of the border. A useful summary of the reported cases is found in *Re Fox Street Village Ltd (in admin)* [2020] EWHC 2541 (Ch) (HHJ Halliwell), from paragraph 61:

> "61. Paragraph 88 of Sch.B1 provides that "the court may by order remove an administrator from office". Although expressed in general terms, the jurisdiction to make such an order is not unqualified. In *Re St George's Property Services (London) Ltd (in admin.)*; *Finnerty* v *Clark* [2011] EWCA Civ 858; [2011] B.C.C. 702, Mummery LJ stated, a [15], that '… the court must have good grounds for making such an order'. He endorsed Sir Andrew Morritt's observation that 'what is good or sufficient must be ascertained by reference to the purposes of the office and the facts of the case'. No doubt, this includes circumstances in which administrators are culpable for a failure to comply with their statutory functions and duties. It can also include cases in which they are exposed to an irreconcilable conflict of interest and duty, for example where it is alleged that they negotiated a pre-pack transaction for the sale of company assets at an undervalue, see for example, *Clydesdale Financial Services Ltd* v *Smailes* [2009] EWHC 1745 (Ch); [2009] B.C.C. 810 and *Ve Vegas Investors IV LLC* v *Shinners* [2018] EWHC 186 (Ch).

62. If administrators must themselves investigate and review their own conduct, this can be enough to warrant an order for removal. However, as Warren J noted in *Sisu Capital Fund Ltd* v *Tucker* [2005] EWHC 2170 (Ch); [2006] B.C.C. 463 at [114], it is not unusual for accountants who have previously been advising a group of creditors to be appointed as office-holders. Where they thus become exposed to a conflict, it is necessary to consider whether the conflict can be managed without removal from office, *Sisu Capital* (above) at [108]. This can be seen in the approach taken by the Court of Appeal in *Re St George's Property Services (London) Ltd (in admin.); Finnerty* v *Clark* ...where the administrators were appointed, out of court, by a debenture holder. When the administrators declined to take proceedings against the debenture holder on the grounds that the underlying loan was an extortionate credit transaction, Registrar Derrett made an order removing them. However, Sir Andrew Morritt, the Chancellor, allowed their appeal on the basis that there was no good reason for removal. His decision was affirmed by the Court of Appeal. The administrators had apparently taken into consideration the wishes of the unsecured creditors but decided against bringing the claim after receiving independent legal advice.

...

64. No doubt, in considering whether there are 'good grounds' for removing an administrator from office, the court can take into consideration his conduct generally. If an appointment is made with an improper motive and the administrator colludes with the persons who appointed him to achieve it, this could also constitute good grounds for removal. However, as a general rule, the grounds for removal must arise from the conduct of the administrator or matters personal to him."

[12] Senior counsel for the noter submitted, and I accept, that the following principles can be derived from this case:

(i) although expressed in general terms, the jurisdiction to make an under paragraph 88 order is not unqualified – the court must have good grounds for making such an order;

(ii) what is "good or sufficient" must be ascertained by reference to the purposes of the office and the facts of the case; if the administrators would be required to investigate themselves or review their own conduct, this can be enough to warrant an order for removal (although it will be necessary to consider whether the conflict can be managed without the removal from office); and

(iii) as a general rule, the grounds for removal must arise from the conduct of the administrator or matters personal to him (but this is not invariably the case).

[13] It is fair to record that many of the reported cases dealing with paragraph 88 applications are, like *Fox Street Village Ltd* itself, in circumstances where the conduct of the administration is contentious and contested and often the paragraph 88 application is linked with applications under paragraph 74 (unfairly harming the interests of the applicant) or paragraph 75 (misfeasance) of Schedule B1. The applicant is often very unhappy with some action, proposed course of action or indeed inaction of the administrators or feels that the administrator is hopelessly conflicted.

[14] However, it is clear from the authorities that the grounds for making the order need not exclusively relate to conduct of the administrator to the extent that it is necessary to demonstrate some form of misconduct or unfitness. In *Clydesdale Financial Services Ltd* v *Smailes* [2009] EWHC 1745 the applicant sought to investigate the conduct of administrators and others in the period prior to their appointment (when they were advisers to the company leading to a sale of the company's assets in a pre-package administration). Removing the administrators in that case, David Richards J decided that there must be a good ground for removing an administrator, but the ground need not involve misconduct, personal unfitness or imputation against his integrity ([14] and [30]) and the person applying has only to show that the evidence raises a serious issue for investigation ([26]) – in that case, the terms and circumstances of the pre-package sale – even though there was no guarantee that any investigation would disclose anything untoward. Two further points are worth noting about the case. First, a significant body of creditors favoured the removal, and second, the administrators had proposed that they convene a creditors' meeting to consider

a voluntary winding up, but the judge did not agree that would be a more appropriate alternative to a change of administrators.

[15] *Ve Vegas Investors IV LLC* v *Shinners* [2018] EWHC 186 (Ch) is also worthy of mention. In that case, too, the applicants, who were creditors of the company, wanted to remove and replace the administrators, so that new administrators would investigate potential claims against the company's directors the administrators' firm, regarding a pre-pack sale of the company's business and assets. In particular, it was argued that the administrators should be removed because of their conflict of interest. Mr Registrar Jones found that it was only necessary for the court to decide whether there was a "serious issue for investigation", not whether the claims identified for investigation had merit (paragraph [18]). He also observed (at paragraph [35]), under reference to *Re Edennote Ltd, Tottenham Hotspur plc* v *Ryman* [1996] BCLC 389 (CA), at 725, that removal would have an impact upon the administrators' professional standing and reputation [although whether that is so must depend upon the circumstances in which the application is made]; and at paragraph [36], that "as a matter of policy, it should not be easy to remove an office-holder simply because conduct has fallen short of the ideal", but that it was not a case where "removal will or should encourage unjustified applications or cause office-holders to have to look over their shoulders (see *AMP Music Box Enterprises Limited* v *Hoffman* [2002] BCC 996)". As in *Smailes*, one of the factors which the court took into account was the view and wishes of the majority of the creditors.

Replacement administrator

[16] Paragraph 95 of Schedule B1 provides:

> "The court may replace an administrator on the application of a person listed in paragraph 91(1) if the court—
>
> (a) is satisfied that a person who is entitled to replace the administrator under any of paragraphs 92 to 94 is not taking reasonable steps to make a replacement, or
>
> (b) that for another reason it is right for the court to make the replacement."

[17] The need for replacement can arise in situations other than removal by the court, for example, where the administrator dies or resigns. Upon removal by the court, it is hard to think of a situation where the court might not think it right to replace the administrator.

Submissions for the noter

[18] Under reference to the authorities, senior counsel submitted that there were good and proper reasons for removal of the administrators, and replacement by the noter's proposed appointee. She acknowledged that the circumstances were unusual and not on all fours with any of the English authorities. She stressed that the noter made no criticism of the administrators, and that the noter's preferred route had been an exit into compulsory liquidation. In support of her submission, she prayed in aid the following factors:

(i) The company was a plc in administration, itself unusual.

(ii) The noter was owned by Frasers Group, also a plc.

(iii) The noter had invested substantial sums in the company on the basis of reports and information which showed that the company was healthy, when it was not; and there had been admitted financial irregularities; there remained questions to be asked and answered; the administrators themselves had implicitly accepted

this, given that the only reason for their not seeking an exit into liquidation was the inability to reach agreement over funding.

(iv) The level of realisations already made was in excess of £23m; that was all transactional; thus far, nothing had been recovered from claims which the company might have had.

(v) The noter had sought to persuade the administrators that the appropriate exit route was compulsory liquidation, which efforts had seemed likely to bear fruit until recently.

(vi) The liquidators professed themselves to be neutral; and in any event, "wanted out": this was not a case where administrators wished to remain in office.

(vii) The noter was willing to, and would, fund the additional costs incurred by a replacement administrator; there would be no prejudice to the general body of creditors, who could only benefit, should further enquiries lead to further claims which were successful.

(viii) The claims which had been assigned would be considerably easier to pursue if the books and records could be recovered; which an administrator could achieve more easily than could the noter itself.

(ix) The alternative to the application being granted was that the company would be dissolved, meaning that any claims would be lost forever. Even if it were restored to the register of companies, and then liquidated, certain claims, for example in relation to unfair preferences or gratuitous alienations, which might currently exist, would not revive.

(x) The circumstances were so unusual that granting the application would not result in an opening of the floodgates.

The Pinsent Masons letter

[19] Pinsent Masons, the administrators' solicitors, wrote to the court by letter dated 6 October 2023, stating that the letter was for my attention prior to the hearing. (As it happens, for reasons I need not go into, the letter was not brought to my attention until after the hearing was under way; which if nothing else may illustrate the risks in a party who wishes to be heard hanging its hat on a letter to the court.) The letter stated that "fundamentally the administrators take a neutral stance", that it would therefore not be appropriate to lodge answers, as it would incur unnecessary costs to the administration, but that they wished to "offer assistance" to the court in dealing with "an unusual application" (to be fair, senior counsel for the noter had described it as such at an earlier hearing) and that the administrators' position as to the "progress of and proper next steps in the administration, and their concerns as to the purpose and effect of the note" was recorded in the letter.

[20] The letter proceeded to narrate the history of the administration, and referred to the assignation of claims to the noter, from which no recoveries had been made, and to the correspondence between the administrators' and the noter's respective agents. It observed that the noter had not been able to articulate the claims which it now wished to investigate. Under the heading "Purpose and Effect of the Note" the letter then observed that paragraph 88 applications typically followed a challenge to an administrator's conduct under paragraph 74 of a claim of misfeasance under paragraph 75, and that it

> "could also be made on a 'stand-alone' basis at a very early stage in the administration if the applicant alleged that the administrator had been inappropriately appointed".

In the following paragraph, under reference to *Smailes*, and despite the professed neutrality, the letter then appeared to present an argument that no good reason had been shown for removal. Finally, the letter narrated the administrators' concern that the purpose of the note was to enable the noter to pass the high threshold of an application under paragraph 74 or 75 via a circuitous route, and as such, cast doubt upon the noter's motives in making the application.

Decision

[21] I will deal first with the Pinsent Mason letter. While it is the practice of the court in certain types of petition to have regard to informal objections lodged by way of letter (generally by members of the public who might not know how to go about lodging answers) and while it is sometimes helpful and courteous to inform the court that answers are not to be lodged to a petition which might otherwise have been thought to be contentious, or indeed to impart information to the court which it might not otherwise have, I do not consider that the letter falls into any of these categories. Rather, it is, despite the assertion of "fundamental" neutrality (which implies that there might be degrees of neutrality: as to whether that is possible, I share the same doubts as Mr Registrar Jones in *Ve Vegas Investors*, above, para 3) apparently a back-door attempt to be heard in opposition to the application. However, officers of the court, such as administrators, who are legally represented, are well able to lodge answers and to instruct counsel, and if they wish to be heard in opposition to a petition, or to advance reasons as to why it should not be granted, that is the course they should take. As regards the references to authority in an attempt to be helpful, senior counsel for the noter was well able to undertake this task. However, insofar as the letter

appears to suggest that an application which did not challenge the administrator's conduct or claim misfeasance could only be made on a stand-alone basis at a very early stage in the administration, and then only if the administrator had been inappropriately appointed, it is, with respect, simply wrong: there is no such restriction to be found either in the legislation or in the case law. If a party truly wishes to assist the court by reference to authority, the appropriate course is to instruct counsel (or a solicitor advocate) to appear at the hearing. For all of these reasons, while I have read the letter, I have attached no weight to it and I specifically attach no weight to the suggestion that the note may have been presented for an improper purpose; that is very much a suggestion which, if it was to be advanced, ought to have been advanced in formal answers. In any event, senior counsel for the noter reassured me at the hearing that the noter has no ulterior motive.

[22] That all said, and as senior counsel for the noter acknowledged, there must be a good and sufficient reason for making a paragraph 88 order, and the court should be slow to make an order if it might "open the floodgates" or lead to a flurry of applications for the removal of administrators who are, after all, officers of the court. However, essentially for the reasons advanced by senior counsel, I came to the view that the circumstances here were sufficiently unusual as not to entail that risk and to be unlikely to be repeated. The combination of the extent of the company's debts, the admitted mis-declaration of VAT and financial improprieties, the fact that the company was a listed company in which the noter made a significant equity investment in reliance on (i) audited financial statements and (ii) representations to the market about the performance and health of the company, and the current non-availability of the company's records, make it hard to conclude that the noter's wish to have further investigations carried out is an unreasonable one, particularly having regard to the additional factors that the administrators themselves have no wish to continue

in office and are neutral as to whether the application is granted or not, and that there is no prejudice either to the administrators or to the general body of creditors in keeping the administration alive. While it would be going too far to say that a majority of creditors support the application, the creditors were made aware of it and none has objected to it, nor is there any reason why any of them should object. As for the point that the administrators' reputation might suffer through removal, I do not see why that should be so, given their neutrality, the unique circumstances where the administration would otherwise come to an end, and as this opinion makes clear, the absence of any imputation on their integrity or conduct. It was not suggested that the pre-packaged sale was a matter of concern, nor that the administrators have a conflict of interest such as to constitute a reason for their removal.

[23] As regards the noter's motives for making the application, in at least one case there was a criticism that the paragraph 88 application was precipitate (see *TPS Investments (UK) Ltd (In administration)* [2018] EWHC 360 (Ch)); although that could hardly be said here, where the administration is due to come to an end, and where the noter has made extensive attempts to persuade the administrators not to dissolve the company. In another case the applicant was possibly motivated by a desire to obstruct and delay the proper investigation by the incumbent office-holders of a claim (see *Re Angel Group Limited* [2015] EWHC 2372 (Ch). Again, that is not the position in this case. I accept the assurance of senior counsel on its behalf that there is no ulterior motive, and it is significant that the noter has attempted to reach an agreed solution with the administrators, which foundered only through inability to reach agreement on funding.

[24] The one factor which did give me pause for thought was the inability of the noter to specify any particular claim (beyond those which have already been assigned to it) which might be uncovered by any further investigations. However, I accept that the assigned

claims may be easier to pursue if the books and records are made available and if further investigations are made. In any event, given the size of the shortfall, and the extent of the noter's loss, I consider it reasonable in all the circumstances that the noter has the opportunity of testing the administrators' conclusion that there are no further assets to be realised or enquiries to be made, in the absence of any prejudice to any person occasioned by their having that opportunity.

[25] For all these reasons, I decided to grant the application for removal. That being so, and in the absence of any objection to the replacement, I also granted the application to replace the administrators, it being right to do so, that application standing or falling with the other. No issue arose over the suitability of the proposed replacement.