IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (
[2019] EWHC 3298 (Ch)

No. CR-2019-005004

Rolls Building
Fetter Lane
London EC4A 1NL

Tuesday, 30 July 2019

IN THE MATTER OF **BIOMETHANE (CASTLE EATON) LIMITED**
A N D
IN THE MATTER OF **THE INSOLVENCY ACT 1986**

Before:

MR JUSTICE NORRIS

B E T W E E N:

JASON DANIEL BAKER and GEOFFREY PAUL ROWLEY — Applicants

- and -

BIOMETHANE (CASTLE EASTON) LIMITED — Respondent

MR M. ABRAHAM (instructed by Fieldfisher LLP) appeared on behalf of the Applicants.

THE RESPONDENT did not attend and was not represented.

J U D G M E N T

MR JUSTICE NORRIS:

1 Biomethane (Castle Eaton) Limited ("BCE") was incorporated specifically to purchase a part-built anaerobic digestion plant (the "Plant") from a Mr Archard. The sale price was payable by monthly instalments which were secured on the Plant. Mr Archard, as well as being the vendor, owned 51 per cent of BCE, the purchaser. The working capital for the completion of the Plant and its operation, in its partially completed state, was provided by Privilege Project Finance Limited ("Privilege") under a secured loan. The Privilege security took priority over Mr Archard's security.

2 There were difficulties in completing the project. On 14 August 2017, Privilege, as holder of the qualifying charge, appointed Messrs Baker and Rowley to be administrators of BCE. At the time of their appointment there was a shortfall to secured creditors of about £1.73 million. There were also unpaid unsecured creditors of some £3.7 million.

3 Privilege agreed to provide funding for a trading administration so the Plant could be kept in operation: an attractive feature for prospective purchasers. The initial objective was to realise the property and make a distribution to the secured creditors. But after a period of marketing, there were no offers which the administrators of Privilege regarded as realistic. So rather than undertake a "fire sale", such as would happen in liquidation, Privilege and Archard began negotiating to re-finance BCE, with the ultimate objective of trading on and securing sufficient additional finance to pay off the unsecured creditors and to return control of the Plant to the directors of BCE, using para.80 of Schedule B1 to the Insolvency Act 1986.

4 These negotiations for refinancing BCE stalled during the course of July 2018. This made it plain that the administrators would need to extend the administration for a further year. They sought to do so with the consent of the secured creditors under the provisions of para.76(2)(b) of Schedule B1. This provides that an administrator's term of office may be extended for a specified period not exceeding one year by consent. Paragraph 78 of Schedule B1 explains that consent means: (a) the consent of each secured creditor of the company; and (b) if the company has unsecured debts, of the unsecured creditors of the company.

5 Under para.78(2)(a), it is explained that where the consent of the company's unsecured creditors is to be obtained, then the administrators must do so by, "Seeking a decision from those creditors as to whether they consent". The administrators decided to obtain a decision about extending the administration by utilising the provisions of s.246ZF of the 1986 Act, namely a deemed consent procedure. In doing so, they overlooked that although they were to obtain the consent of the unsecured creditors by "seeking a decision" from those creditors, and had used the deemed consent procedure for that purpose, they also had to obtain the consent of each secured creditor. That consent had to be actual consent and the deemed consent procedure was not available to secure it.

6 Nonetheless, the administrators used the deemed consent procedure to obtain the consent both of the secured and of the unsecured creditors. They were thus able to treat the silence of Privilege and of Mr Archard as consent for the extension in their term of office. It is now acknowledged that this was not an appropriate mechanism to use. It might be that the secured creditors had given consent by conduct, particularly because Privilege continued to fund the trading administration, but that is not an argument that has been explored and whilst not ruling it out in another case, I can see that it is appropriate in this case to seek to

remedy the deficiency in the extension of the administration by making an application to the court.

7 Believing that the administration continued to exist, the administrators continued to trade, with funding provided by Privilege. This trading was successful and over the course of the following period, up to the end of March 2019, some £2.8 million was paid to unsecured creditors as a result of BCE's ongoing trading in administration. Meanwhile, the stalled negotiations for the continued funding of BCE, and the repayment of all unsecured creditors, hovered in the background. By mid-March 2019, the position was that the administrators had begun to close down the operation of the Plant, although they continued to sell some of the methane that it had produced. This spurred the negotiations between Privilege and Mr Archard for a refinancing package and in May 2019, Privilege and Mr Archard agreed heads of terms for providing additional funding for BCE. Those negotiations have still not concluded.

8 When it became apparent that the negotiations were due to be completed by early August 2019, the administrators turned to consider a further extension of the administration by applying to the court for an extension. It was at this point that it became apparent that the original extension, procured as it had been by using the deemed consent procedure, had not been effective to obtain the consent of the secured creditors. Out of this discovery arises the applications now before me: first, for the making of an administration order; second, for the making of that administration order retrospectively to the expiry of the original administration; and thirdly, for the grant of an extension to the administration order so made to provide sufficient time for the negotiations between Privilege and Mr Archard to conclude, with the ultimate objective of paying off all unsecured creditors and returning the refinanced enterprise to the control of the directors of BCE.

9 The first question to be addressed is whether I should make a new administration order. I must approach that on the basis of the facts as they are at the date of the application; I so held in *Re Care Letters Partnership* [2011] BCC 957. I require to be satisfied first that the applicants, Messrs Baker and Rowley, are creditors. On 19 July 2019, the firm, of which they are partners, submitted an invoice for their services in the total sum of £88,612.66 inclusive of VAT. That remains unpaid. It has been held that the unpaid costs of persons who think they are administrators, or who were administrators, provide a proper foundation for an application for an administration order or a realisation in the context of administrations; see *Re Elgin Legal Limited* [2016] EWHC 2523 at [8] per Snowden J, who explained of the applicant,

> "His claim as a creditor arises out of the fact that he has unpaid fees due to him in respect of his time in office until 1 March 2016. Although the office holder would benefit from the statutory charge on the assets in his hands to secure payment of that amount as administration expenses, he is also, nonetheless, within the meaning of the word 'creditor' in para.12(1)(c) of Schedule B1 to the Insolvency Act 1986".

10 The bill submitted by FRP on behalf of Messrs Baker and Rowley is in respect of their costs and disbursements up until 13 October 2018, during which time they were in office as administrators under the original appointment. I am accordingly satisfied that they have standing to present the administration application.

11 I must, secondly, be satisfied that BCE is unable to pay its debts as they fall due, or is insolvent on a balance sheet basis. I am so satisfied.

12 According to the "receipts and payments" account for the period from 14 August 2017 down to 23 July 2019 there is an estimated deficiency as regards shareholders of now some £10.1 million. This is an increase over the insolvency as it was at the date of the original appointment of the administrators and arises largely, so far as I can see, from the provision of extra funding by Privilege to fund of the trading administration which has facilitated the payment of so large a part of the unsecured debts. On matters as they stand, it is only the secured creditors who have, at that level of deficiency, any economic interest in BCE.

13 Thirdly, I must be satisfied that an objective of the administration is reasonably likely to be achieved. At its heart, this administration has the objective of making the distribution to the secured creditors, but there is a proposal to rescue the company by refinancing it with the assistance of Privilege. I am therefore satisfied that an objective of the administration is reasonably likely to be achieved. The negotiations between Privilege and Mr Archard are far advanced. Heads of terms have been agreed. If the negotiations fail yet again, there will be a distribution, but that, of course, would be a distribution after realisation (realisation made within the context of the trading administration) which is likely to be preferable realisation made within the context of the liquidation.

14 The threshold requirements for the making of an administration order are, therefore, passed. I see no reason why, as a matter of pure discretion, I should withhold the making of an administration order, so I grant the first of the applications.

15 The second of the applications is that the administration order should have retrospective effect. Paragraph 13(2) of Schedule B1 provides as follows:

> "The appointment of an administrator by administration order takes effect:
>
> (a) at a time appointed by the order, or
>
> (b) where no time is appointed by the order, when the order is made."

16 The general rule under the CPR (as they now are) is contained in CPR 40.7(1). This says,

> "A judgment or order takes effect from the day when it is given. or made, or such later date as the court may specify".

17 A line of authority has developed whereby the express words in para.13(2) of Schedule B1 are to be read as enabling the court to make an order appointing an administrator retrospectively, i.e. at a date earlier than the date of the order. There is a familiar trail of authority. The approach was first adopted by the late Hart J in *Re G-Tech Construction Limited* [2007] BPIR 1275 in a reported but unapproved judgment. It was followed subsequently as providing a pragmatic answer to a difficult problem; but doubts were expressed in *Re Derfshaw Limited* [2011] BCC 631, *Re Frontsouth* [2011] BCC 635, and by me in *Re Care Matters Partnership* [2011] BCC 957, and in *Adjei v Law for All* [2011] BCC 963. Since then, the question has been examined again in *Mond v Syndergy Partners Limited* [2015] 2 BCLC 229 and in *Re Elgin Legal Limited* [2016] EWHC 2523. In each case, the jurisdiction has been examined after hearing argument on one side only and in some of the cases I have noted, the observations have been *obiter* because the decision has in fact proceeded on other grounds.

18 I think the time has come where it must be regarded as settled at first instance (i) that the jurisdiction is available (ii) that extreme caution is required before its exercise and (iii) that frequently, as a matter of discretion, an exercise of the jurisdiction will be withheld. It is

undoubtedly the case that the jurisdiction provides a pragmatic and convenient solution to multiple problems which can be occasioned by defective appointments of administrators. There will come a time where the competing arguments are addressed at a full adversarial hearing, either at first instance or on appeal, but until that occurs, I regard the practice is established at first instance that we treat the jurisdiction as existing and consider, principally, whether to exercise it or not. That is the approach I intend to take in this case.

19 I turn to the question of discretion. Should a retrospective order be made, working on the assumption that I have power to order such a thing? The principal effect of making a retrospective order is, of course, that it will confirm that what everybody thought they were doing during the trading administration following the expiration of the original administration is confirmed to be what they were actually doing. Privilege thought it was funding a trading administration. The administrators thought, when paying off unsecured creditors, that they were making distributions out of a trading administration. The unsecured creditors thought, when they received that payment, that they were receiving their due for them not being preferred in any way.

20 Where suppliers were providing supplies on the basis that they were needed to conduct the trading administration they thought they were entitled to claim the costs of so doing as an expense of the administration and when they received payment for those services, they thought they were receiving payment by way of disbursements as an expense of the administration. A retrospective administration would confirm that that is indeed what was happening.

21 As Snowden J pointed out in *Re Elgin Legal*, one has, however, to look at the interests of all creditors and the detriment to creditors whose position might be adversely altered if a retrospective order were made, because making an order with retrospective effect might have an unequal but potentially unfair effect as between creditors of the company. In particular those creditors whose debts carry interest would, if an order were not to have retrospective effect, be entitled to accrue and to claim interest down to the period of a new administration order and to include that increased amount in any proof of debt in the second administration. However, if the order is made with retrospective effect, such creditors would be obliged to prove their debts by reference to the backdated date of appointment of the administrators (see para.20 of his judgment).

22 There is one such potential issue in the instant case. At the time of the original administration, Mr Archard claimed to have made an interest bearing loan to BCE. In fact during the original administration, Messrs Baker and Rowley rejected that claim and did not admit the debt to proof, so the issue is an entirely technical one in the instant case. On the evidence before me, I do not think that there is anybody who would be prejudiced by the making of a backdated administration order. The only parties with a real economic interest in the administration are, as I have indicated, the secured creditors. Both of them are really behind the present application.

23 The purpose of retrospectivity is often to quieten issues that might otherwise arise: potential claims for preference, or for repayment of sums paid. In this administration, it is well to quieten those doubts and to enable the negotiations for a complete refinancing package to be brought to fruition and for all unsecured creditors to be paid off, the secured creditors making their own economic decisions as to the extent to which they prepared to refinance the ongoing business of BCE. I shall accordingly make the order retrospective in effect as sought. There will arise out of that a few minor adjustments to dates by which actions have to be taken, but I see no difficulty in facilitating those adjustments.

24 This brings me to the last matter before me, which is an application for an extension to the backdated administration order. The retrospective order which I have just indicated I intend to make will expire on 13 August 2019. There is not enough time to complete the negotiations of the refinancing package, nor is there enough time to collect in some outstanding incentive payments arising out of the generation of energy from the Plant. The administrators, therefore, apply for a further 12-month extension.

25 The jurisdiction to extend time, under para.76 of Schedule B1, is entirely unfettered, but normally, as Snowden J pointed out in *Re Nortel Networks UK Limited* [2017] EWHC 3299 at [22], 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 BCE'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. Privilege is funding the trading in administration. The unsecured creditors are gradually being repaid within the administration. The ultimate objective of the administration, which still seems to be reasonably likely to be achieved, is that a refinancing package should be put in place so that any outstanding balance due to unsecured creditors can be repaid, and after discharge of all such payments, and the making of a solvency declaration, the company can return to the control of BCE's directors.

26 There is, therefore, every reason in this case to make an extension to the administration to facilitate the bringing about of that objective. For these reasons, I shall make a new administration order. I shall make it retrospective in effect and I shall then extend it for a further 12 months from its imminent expiry date.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

** This transcript has been approved by the Judge **