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Case: Counsel General for Wales & ors v Allen & ors, Re Baglan Operations Limited (in compulsory liquidation) [2022] EWHC 647 (Ch); 21 March 2022; Sir Alastair Norris

Synopsis: This High Court decision analyses the scope of a liquidator's powers when promoting a "beneficial winding up" under Schedule 4, paragraph 5 IA 1986 and concludes that, on the facts of this case, the purpose of the liquidation encompassed not just the financial benefit of creditors but also health, safety and environmental concerns. Consequently, the Official Receiver was ordered to continue supplying power to certain applicants for a period in order to guard against the risk of significant environmental damage. The Insolvency Service announced on 7 October 2022 that the appeal by the applicants, for which permission had been granted by the Court of Appeal, had been discontinued, and that the Official Receiver had disclaimed any interest in the site (which has been deenergised and disconnected from the National Grid).

Topics covered: **Compulsory Liquidation, Liquidator's Powers; Winding Up Arrangements**

Comment

The case involved a challenge to the liquidator's proposal to disconnect an on-site connection (the Private Wire Network) at a 525 MW plant at Baglan Bay (the Baglan Plant), which fed energy to Baglan Energy Park, the Mardon Park and other local customers. The case concerned the scope of a liquidator's power to continue trading in liquidation and the meaning of "so far as may be necessary for [the company's] beneficial winding up" and whether the Official Receiver acted properly in disconnecting this Private Wire Network.

This issue has become more acute in a small number of recent cases in which there has been a wider public interest aspect to the appointment of the Official Receiver to wind up a company, namely SSI, Carillion, British Steel and Thomas Cook. In these types of public interest cases, it is common for the Official Receiver to trade the business for a period, notwithstanding that in the legislation, compulsory liquidation is primarily conceived of as a procedure to break up the company, sell the assets, and distribute the proceeds. One way in which this statutory intention manifests itself is in the mandate that a liquidator may only trade the business 'so far as may be necessary for *[the company's]* beneficial winding up' but there are other, relevant factors such as the absence of a statutory duty to consider rescue; the treatment of employment contracts; and the limited stay protection.

Interestingly, instead of analysing the meaning of the key phrase 'necessary for the beneficial winding up' in the context of compulsory liquidation as a break-up procedure, in this case Sir Alastair Norris starts from the proposition that while break-up will normally be the purpose of a compulsory liquidation, it need not be. This leads him to consider the purpose of the Baglan Plant liquidation and to give it a wider purpose, including managing health and safety environmental concerns. He then reads 'beneficial winding up' in the context of this wider purpose.

This is the first important point in the judgment: according to the judge the purpose of a compulsory liquidation need not be confined to gathering in and realising the company's assets and distributing the proceeds but instead may be wider. Where the purpose is wider, the scope of 'beneficial winding up' may accordingly be wider. This will undoubtedly be important for the Government in future 'public interest' cases but it also suggests that liquidators and their advisers may want to exercise care in how they describe the objectives of a liquidation in the relevant court and other documentation.

Secondly, the reference to *Ex Parte James* is also of importance. As Sir Alastair Norris notes, *Ex Parte James* [1874] LR 9 Ch App 609 has recently been given a new lease of life by David Richards LJ (as he then was) in the Court of Appeal in *Lehman Brothers Australia Limited v MacNamara* [2020] EWCA Civ 321 (see bulletin number 898). Before *Lehman*, practitioners might have been forgiven for considering a claim based on *Ex Parte James* to be the last refuge of the desperate applicant. David Richards LJ arguably gives the principle a more vigorous role and the judge echoes that here, with a suggestion that a liquidator winding up the owner of a residential nursing home may legitimately decide to trade the business until re-housing arrangements are in hand in order to achieve '*vacant possession in a fair, principled and honourable way*'. What is not clear here is the extent to which a liquidator could (or should) use creditors' assets to trade the business in this way. In the *Baglan* case itself, the Welsh Government indemnity meant that discussion of financial costs was not as detailed as it might have been. The question may be more acute where the estate has assets which can be realised and distributed but where issues of this type arise.

Overall, Sir Alastair Norris reaches his decision primarily because the Official Receiver was appointed not only for the financial benefit of creditors, and because severance of the power supply would increase the risk of severe flooding and the discharge of untreated waste into the local area. We will need to wait and see what importance is placed upon the wider considerations touched on by the judge in subsequent liquidation cases. It could be that *Baglan* is mostly confined to its facts and largely mobilised in the context of what we have called here 'public interest' cases.

Finally, we note that permission was granted to appeal to the Court of Appeal with regards to whether the Official Receiver's interpretation of para 5 Sched 4 IA 1986 (power to carry on trading) was incompatible with the European Convention of Human Rights. However, the urgency of the appeal diminished when an alternative power source became available much earlier than originally predicted, and the Official Receiver was able to disconnect the relevant supplies. The Insolvency Service announced on 7 October 2022 that the the appeals had been discontinued by the applicants.

The Facts

Baglan Operations Limited (the Company) owned the Baglan Plant which fed energy to Baglan Energy Park, the Mardon Park and other local customers. The Baglan Plant was near the end of its working life and had been "mothballed". Once it ceased to generate electricity the Company lost its revenue stream. It subsequently imported electricity for its own use and to supply to its customers. The Company was placed into liquidation on 24 March 2021. No private insolvency practitioners would accept the appointment given the absence of funding for the liquidation process and the health and safety risks relating to

decommissioning the plant, and so the Official Receiver remained as liquidator, assisted by the appointment of special managers from Interpath Advisory.

The Official Receiver had the benefit of an indemnity from the Department for Business Energy and Industrial Strategy (BEIS), which referred amongst other things to ensuring *"that the [Company's] site and operations be secured and that health and safety concerns associated with the site can be addressed"*.

By these two applications the applicants sought to prevent the respondent Official Receiver from disconnecting the Private Wire Network and completing the winding up of the Company until such time as the applicant local customers had managed to secure an alternative electricity supply. In the meantime they sought to secure the continued supply of electricity by the Company. The applicants included the Welsh Government, Welsh Water and a commercial operator. The applicants contended that by disconnecting the Private Wire Network, the Official Receiver would cut the power to on-site waste water treatment and pumping stations in Baglan Energy Park, which was third-party land not under the Official Receiver's remit. The pumping stations were essential to flood defences and environmental protection in the area. The applicants asserted that should Baglan Energy Park lose power, there would be a significant risk of flooding and foul sewage being discharged into Swansea Bay, which would lead to severe environmental damage.

On the other hand, the Official Receiver contended that (i) he had no discretion to continue trading the business where doing so was not necessary for the closure of the Baglan Plant and that (ii) he had no duty to continue to trade for the benefit of commercial third-party businesses or to step into the shoes of the Welsh Government to discharge its duties to maintain flood defences or to mitigate the wider effects of the liquidation.

The Official Receiver noted in particular that under Sched 4, para 5 IA 1986, which permits the liquidator *"to carry on the business of the company so far as may be necessary for its beneficial winding up"*, a liquidator is required to only permit the continuation of a company's business for the purpose of ensuring the realisation and distribution of the company's assets to its creditors.

The Official Receiver therefore argued that he was legally disabled from taking into account the potential for environmental damage when deciding when to disconnect the Private Wire Network, as that damage would not happen on the Company's own land but on third party land.

Decision

First Sir Alastair Norris held that the applicants had standing to apply for court intervention to reverse the Official Receiver's decision. S168(5) IA1986 provides that *"If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the actual decision complained of and make such order in the case as it thinks just"*. The court ruled that on the facts of the case, the applicants came within the narrow class of persons being directly affected by a power exercised during the liquidation which they would otherwise have no opportunity to challenge.

On the subject of the applicable test, the judge reaffirmed that applicants under s168(5) IA 1986 are normally required to show that a liquidator's act or decision under challenge was

either taken in bad faith or "perversity" (*Re Edenote Ltd* [1996] BCC 718). However, in cases concerning the extent of an office-holder's powers this is not the relevant test. In other words, while perversity is relevant in the context of a liquidator's commercial decision, it is not the right test where the question is one of legal interpretation (the court referred to the case of *Hellard v Michael* [2010] BPIR 418).

The judge then turned to the functions of a liquidator in s143 IA 1986 to get in and realise the assets and distribute the proceeds, but noted that it has '*long been recognised*' that this is not a complete statement of the Official Receiver's role.

The judge stated that the Company's "*beneficial*" winding up is not confined to benefit in purely financial terms but that "beneficial" here means "of advantage to the persons in whose interests the liquidation is being undertaken". Moreover, while the purpose of a compulsory liquidation will generally be getting in and realising the assets and distributing the proceeds, in exceptional cases it may be different.

Finally, the judge drew on the principle in *Ex Parte James*, suggesting the existence of an obligation on a liquidator to achieve the purpose of the liquidation in '*a fair, principled and honourable way*'. He gave the example of a liquidator of a residential nursing home who trades the business for a period of time to achieve vacant possession in such a way.

Applying these principles to the facts before him, he arrived at the conclusion that the Official Receiver should take into account broader environmental factors when deciding whether to continue the supply of power.

The Official Receiver had been appointed for purposes going beyond gathering in and realising the assets and distributing the proceeds. These additional purposes included safely decommissioning the Baglan Plant. Moreover there was no expected financial return to creditors (the assets were to be disclaimed, not realised), and therefore the persons in whose interests the liquidation was being undertaken was a wider group than just the Company's creditors. It followed that the purpose of the winding up included public health and safety. The creation of wider environmental risks by ceasing supply '*would not ... accord with the standards of right-thinking people*'. Crucially, by the time of the hearing the Welsh Government had offered indemnity protection against costs, albeit that the judge accepted that there were a range of non-financial risks in continuing to supply which '*no indemnity can satisfactorily address*'. The indemnity avoided having to decide whether assets that would otherwise be distributed to creditors should be used to safeguard environmental risks.

However, the court did confirm that continuing to trade for the purposes of supplying electricity on a commercial basis did not fall within the remit of "beneficial winding up". In doing so, the judge supported the Official Receiver's decision to disconnect one of the local customers, Sofidel. He noted that Sofidel was simply a commercial customer and had no duties to discharge to residents in the locality. Moreover, the Welsh Government indemnity would not cover the costs of supply to Sofidel.

The judge therefore decided that the Official Receiver in Baglan was mistaken as to the scope of his powers. He considered whether to ask the liquidator to revisit his decision but instead decided to modify the Official Receiver's decision in order to provide maximum protection under the relevant indemnities. Ultimately, the court ordered that the Official Receiver continue supplying the Welsh Water and the Council facilities until 18 April 2022, as opposed to the Official Receiver's original decision to terminate the power supply on 14 January 2022.

Finally, the court rejected the applicants' argument that the Official Receiver's interpretation of Sched 4, para 5 IA 1986 was inconsistent with Articles 2 and 8 of the European Convention on Human Rights. The Welsh Government subsequently appealed this part of the decision, although for the reasons given in the Comment section, the appeals were ultimately withdrawn.

The views expressed in this Technical Bulletin do not necessarily reflect those of individual members of the Technical Committee, or the members of the Insolvency Lawyers' Association as a whole.



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