JCAM Commercial Real Estate Property XV Limited v Davis Haulage Limited - conditional proposal to appoint cannot found notice of intention

Technical Bulletin No: 756

Case: JCAM Commercial Real Estate Property XV Limited v Davis Haulage Limited [2017] EWCA Civ 267, CA, 11 April 2017

Synopsis: A conditional proposal to appoint an administrator neither entitles nor obliges a company or its directors to give a notice of intention to appoint under para 26 Sched B1 IA 1986.

Topics covered: Administration; administration procedure; directors' notice of intention to appoint

The Facts

A landlord (JCAM) threatened to repossess its tenant's (Davis Haulage) property due to failure to pay rent due. The sole director of Davis Haulage then gave notice of his intention to appoint administrators to the holder of a qualifying floating charge and filed a copy of the notice at court, thereby triggering an interim moratorium. This was followed by the filing of three further notices upon the expiry of each notice. JCAM applied to the court seeking an order that the fourth notice be removed on the grounds that it constituted an abuse of process. In evidence, it was undisputed that the successive notices were given in order to benefit from the interim moratoriums while the director considered how to restructure and save the business. At the time of filing the fourth notice, it was likely that an administrator would only be appointed should the creditors vote against a CVA proposal that had been filed at court the previous day.

At first instance, the High Court held it was not necessary to have a settled intention to appoint an administrator at the time of giving notice of intention to appoint and filing a copy with the court (thereby triggering the interim moratorium). As a matter of statutory construction, the phrase "proposes to make an appointment" in para 26 Sched B1 was not synonymous with having an "intention" to do so. Permission to appeal was granted.

Decision

The CA allowed the appeal and held that a settled intention to appoint an administrator was required prior to giving a notice of intention to appoint and filing a copy of such notice with the court. The court (with David Richards LJ giving the only judgment) gave essentially five reasons for its decision.

First, and contrary to the High Court's lynchpin, the words "proposes" and "intends", in the context of para 26, are synonyms. Although para 26(1) requires notice to be given to a qualifying floating charge (QFC) holder if a person "proposes" to make an appointment, notice is repeatedly described as a notice of "intention" to appoint in the surrounding provisions.

Second, David Richards LJ discussed how, as a matter of ordinary language, there is no significant difference between a person "proposing" and "intending" to do something.

Third, the purpose of the interim moratorium triggered by filing a copy of the notice at court is specific: to protect the company and its assets while the holder of a QFC (who under statute has a prior right to appoint an administrator) to whom notice was given decides whether it wishes to appoint its own choice of administrator. If the legislation envisaged that the company or directors may choose to not appoint an administrator in the event the person with the prior right decides not to do so, then this purpose would appear to fall away.

Fourth, para 26(1) could not have been drafted with the intention of creating a requirement for companies which are proposing a CVA, but which are also considering an administration if the CVA fails, to give notice. This could otherwise result in the holder of a QFC exercising its right to appoint an administrator, thereby frustrating the proposed CVA. The wording appears only explicable if the obligation to notify the holder of a QFC is triggered by a settled intention to appoint.

Fifth, the circumstances in which a moratorium should be available to a company undergoing various insolvency proceedings has been subject to extensive consultation. The legislation currently provides that a company proposing a CVA does not obtain the benefit of a moratorium, except in the strict limited circumstances set out in Sched A1 IA 1986. Accordingly, David Richards LJ stated that paras 26 and 27 cannot have been drafted with the intention of allowing any company proposing a CVA that happened to have granted a QFC to obtain the benefit of a moratorium by the giving and filing of a notice of intention to appoint an administrator.

Accordingly, the court ordered the copy of the fourth notice of intention to appoint to be removed from the court file.

Comment

The case is interesting as it is unusual for a case on administration appointments, or indeed here the simple filing of a notice of intention to appoint administrators, to get to the CA. While the court gave five reasons for reaching its conclusion, it is clear that the ultimate driver of the decision is a policy underpin. The court discussed the various proposals for reforming legislation to include a restructuring moratorium but noted that these had not come to fruition. As the law stands, a moratorium is only available in an administration and it would make a mockery of this if the rule could be circumvented by the continuous filing of notices of intention to appoint administrators while various restructuring options are explored and without there being a settled intention to proceed with the appointment. It is of course perfectly possible to appoint administrators who could put forward a CVA to creditors.

In practice, multiple restructuring options are often pursued in parallel and may include a plan for a CVA and an administration at the same time. This does not however mean that the company or directors need to give notice of their intention to appoint an administrator at this stage. Conversely, it also means that the company will not at this stage benefit from the interim moratorium and may need to hold the ring with contractual standstill agreements. Whether there will be future cases with creditors arguing that a director's intention to file a notice of intention to appoint administrators was not sufficiently "settled" remains to be seen – but the facts of this case were particularly stark as the director did not just file one notice of intention to appoint as he considered a CVA, but four.

A further point of note is that the court refused to delve into whether the filing had amounted to an abuse of process. In the technical sense, it clearly had – as it had to be removed from the file. However, there was no evidence that anyone had done anything without a belief that he was entitled to do so. The court noted that, for the future, it would be clear that a conditional proposal to appoint an administrator does not entitle or oblige a company or its directors to give a notice of intention to appoint administrators under para 26.

The court also did not make any comments about the mere fact that four successive notices of intention had been filed, thus stretching the interim moratorium to a length far greater than the envisaged ten business days. The court had addressed this issue previously in the decision in *Re Cornercare* [2010] EWHC 893 (Technical bulletin 273), and the court here seemed comfortable that, where notices of intention were filed in an abusive manner, this could be dealt with under the court's usual powers of abuse of court process. We are however seeing the theme of successive filings of notices of intention as a potential abuse of process tracking through the authorities, most recently in *South Coast Construction Limited v Iverson Road Limited* [2017] EWHC 61 (Technical bulletin 748).

It is also worth noting that in both the submissions and the judgment, reference was made to the fact that in cases where there is no QFC holder, there is no person to whom notice must be given under para 26(1) and so there can be no interim moratorium. In practice there have been cases where notices of intention to appoint have been filed to obtain an interim moratorium where no QFC holder exists. This judgment very clearly signals that that is an abuse.