Briefing

BURGES SALMON

Corporate Turnaround and Insolvency

Directors can cause a company to challenge the appointment of administrators under a charge - but who pays?

The context - validity of appointment of administrators

The appointment of administrators under a charge prevents a company's directors from exercising any management powers without the administrator's consent.

However, the charge must be enforceable at the time of the administrators' appointment. What happens if the directors dispute that the charge was enforceable? Are they prevented from controlling the company to reject the appointment.

The background

These issues were highlighted in *Closegate Hotel Development v McLean [2013] EWHC 3237 (CH)*. Administrators were appointed by Barclays Bank under a floating charge.

The directors argued that negotiations about repaying the charge were ongoing and the bank had promised not to appoint administrators until those negotiations were completed. As such, the charge was not enforceable at the time of the appointments were made.

The directors issued a claim in the name of the company against the administrators and the bank (resulting in costs for the company).

The issues

Aside from the factual question of whether the bank had agreed or was bound by promises not to appoint administrators, a couple of key legal questions were raised:

- Did the directors have power to make the company issue proceedings after the appointment of the administrators?
- If so, were the costs of bring or defending the action recoverable as an expense of the administration?

What did the court decide?

After appointment of administrators under a charge, directors do not have the power to take any management action which could impede the exercise of similar powers by the administrators. However, they do retain the *"logically prior question of whether administrators have any powers to exercise at all."*

Hence directors can cause the company to challenge the appointment of administrators. Similarly, directors can cause a company to challenge the appointment of provisional liquidators and receivers in the same way.

The position on costs is less clear - the judge did not formally determine whether costs could be recovered as an expense of the administration. However, he did comment that he saw no reason why either party's costs should be an administration expense.

What does this mean for practitioners?

The case is principally a reminder of existing law that directors do have the power to challenge appointment of insolvency practitioners even after that appointment has been made.

However, the potentially more worrying aspect is the treatment of that practitioner's costs in defending such an action. There is a strong risk that, even if the appointment is upheld, not all such costs could be recovered either from the directors or from the administration - leaving the administrator out of pocket.

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