Neutral Citation Number: [2020] EWHC 1135 (Ch)

Insolvency – Administration – Extension of administrator's term of office

Coronavirus Pandemic – Guidance on preparation for remote hearings

Case No: 3007 of 2016

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester M60 9DJ

Date: Monday 11 May 2020

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

IN THE MATTER OF TPS INVESTMENTS (UK) LIMITED (In Administration)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

MARK GRAHAME TAILBY

Applicant

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MR IAN TUCKER (instructed by **Howes Percival**, Leicester) for the **Applicant**
There was no respondent to the application

Hearing date: Thursday 7 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HODGE QC

- Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on Monday 11 May 2020.

His Honour Judge Hodge QC:

1. This is my judgment on an application (pursuant to paragraph 76(2) of Schedule B1 to the Insolvency Act 1986 (as amended)) made by the sole administrator of TPS Investments (UK) Limited for a nine months' extension to his term of office (to 10 February 2020). It is supported by the 8th witness statement of the administrator, Mr Mark Graham Tailby, dated 8 April 2020, together with Exhibit MGT 8, and a short witness statement from Mr Hope Wilson, a trainee solicitor, dated 23 April 2020 evidencing, and exhibiting (as Exhibit HW1), emails from the legal representatives of the company's secured creditor, and also the entities asserting a prior interest in the company's assets, indicating their consent to the proposed extension and confirmation of their non-attendance at the hearing. Beyond the fact that this is the fifth application to the court for such an extension, there is nothing unusual about the present application, which is not opposed. Mr Ian Tucker (of counsel) appeared for the applicant. The application was listed for 30 minutes in the Applications List in Manchester at 10.30 am on Thursday 7 May 2020. In the usual course (prior to the extended hearing times required for remote hearings due to the Coronavirus pandemic), it would have been listed for about half that time; and I would have proceeded immediately to deliver a short, extemporary judgment setting out my reasons for acceding to the application. But there is nothing usual about the present times. At the conclusion of the hearing, I announced that I would grant the application but that I would reserve my judgment, to be handed down remotely at 10.30 am on the next court sitting day, Monday 11 May, because I wanted to incorporate some general guidance on preparation for the remote hearings of short applications. I emphasise that nothing in this judgment is intended to be in any way critical of the legal representatives in this, or in any other, case. Rather, it is intended to be of assistance to the legal profession generally in the difficult circumstances in which this court appreciates, and acknowledges, that they are currently operating, in many cases at home and away from their offices and chambers, and without their usual support staff and machinery.

2. On 19 March 2020 the Lord Chief Justice delivered a message (Civil & Family Courts – Covid-19) in which he said that:

> "We have an obligation to continue with the work of the courts as a vital public service, just as others in the public sector and in the private sector are doing. But as I have said before, it will not be business as usual … The rules in both the civil and family courts are flexible enough to enable telephone and video hearings of almost everything … The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely …"

Since then, all those who contribute to the administration of justice - the legal professions (barristers, solicitors, legal executives, para-legals and support staff), the court staff and the judges - have been working immensely hard, and with great initiative and creativity, to ensure that, even if it is not "business as usual", the Business and Property Courts nevertheless remain able to continue to transact the business of dispensing justice. To that end, the Business and Property Court Judges in Manchester have issued guidance on hearings before the s.9 Specialist Circuit Judges and District Judges during the Covid-19 Pandemic. At paragraph 7 it is clearly stated that;

> "Unless otherwise proposed or directed, electronic bundles should contain only the documents which are **essential** for the hearing …" [Emphasis supplied]

The word "essential" was chosen advisedly, in preference to alternative formulations, such as "that which is reasonably required", which appears, for example, in CPR 35.1 (the duty to restrict expert evidence). One (accurate) dictionary definition of "essential" is "indispensable or important in the highest degree"; and that is the notion which the guidance was, and is, seeking to convey. The intention underlying the use of the word "essential", and the rationale for the restriction, was to relieve the burden cast, not only upon the judges of assimilating material in often user-unfriendly electronic bundles, but also upon the legal professionals, and any support staff, responsible for compiling the electronic bundles, by reducing the volume and scope of the documentation to be included within them.

3. How is the instruction to restrict the electronic bundle to "only the documents which are essential for the hearing" to be followed? It seems to me that this is probably best achieved by engaging the advocate who will present the application in court at an early stage of the process of preparing for the hearing. Only they can know how they will wish to present the application to the judge, and what material will be required to this end. When I first started in practice at the Chancery litigation Bar in 1980, it was still (just about) common practice for trial counsel to be instructed to prepare an Advice on Evidence before the preparations for trial had begun. Under the current practice, trial counsel are frequently involved in advising on witness statements for trial. In the relatively new world (for some) of electronic bundles and remote hearings, if counsel is to be briefed to present the application, then they should be retained in sufficient time to enable them to advise as to the contents of the electronic bundle. Under the current guidance (now helpfully set out in the Covid-19 Notice at the top of the revised standard-form Manchester Chancery email acknowledgment):

> " …
>
> 2. **Electronic bundles** should be emailed to the designated email address for hearings given by the Judge no later than 3 business days before the hearing.
>
> 3. **Skeleton Arguments** and copies of authorities should be emailed to the designated email address no later than 2 business days before the hearing.
>
> … "

The reason for these time limits is that the skeleton argument will need to refer to the relevant pages of the electronic bundle; but that should not dictate the time at which the advocate is first retained for the hearing, or prevent him from having any input into the contents of the electronic bundle. Paragraph 3 of the Manchester Judges' guidance already strongly encourages the parties

> "… to discuss and agree the best means for holding a remote hearing (including the provision of electronic bundles, skeletons and authorities and for recording the hearing) and, so far as possible, to do so before any application or request for a hearing and well in advance of any scheduled hearing."

This is all part of the parties' duty (under CPR 1.3) to "help the court to further the overriding objective".

4. In the instant case, for an unopposed hearing listed for thirty minutes, all that it was essential for the court to receive were the application notice itself, the administrator's supporting witness statement (with its exhibit) and the short witness statement of the trainee solicitor, exhibiting emails from the legal representatives of the company's secured creditor, and the entities asserting a prior interest in the company's assets, indicating their consent to the proposed extension and confirmation of their non-attendance at the hearing. Instead, the court received a "Core" bundle (in PDF format) of some 105 pages, which included no less than four previous witness statements from the administrator (his 3rd, 5th, 6th and 7th), made in support of the four previous applications for extensions of his term of office. The respective exhibits to the various statements were apparently contained in a shared file, and the court also received (by separate email) an invitation to access the shared file (although the access key was only supplied by a further email sent a day or so later and, when the court tried to use it, the court was unable to access the shared file). None of this might have mattered had the "Core" Bundle been readily accessible, but it was not. There was no searchable contents tab. There was no sequential page numbering throughout the bundle. Rather, each of the documents – the application notice, the two alternative draft orders, the six witness statements, and the 52 pages of copy correspondence - were each separately paginated, making it impossible for the court to scroll down and identify any particular document by the page number within the PDF file. It was only with the assistance of the page numbering contained within Mr Tucker's helpful written skeleton argument that the court was able to identify individual relevant documents within the "Core" Bundle.

5. In summary, therefore, there are two relevant lessons to be learned from the present case. First, engage the advocate who will be conducting the actual hearing at an early stage to advise as to what documents are "essential" so that they can be included, and all other documents excluded, from the hearing bundle. Secondly, provide a searchable index to the bundle if this is possible; but, if it is not, ensure that all the pages of the bundle (including any index and divider pages) are individually, and sequentially, paginated so that it can be readily searchable by scrolling down the file. Any reader not involved in this particular case can stop here.

6. The company was placed into administration by an order of this court, made on the application of its sole director, on 11 November 2016. Originally there were two administrators but Mr Tailby's joint administrator, Mr Courtman, resigned on 25 October 2018 leaving Mr Tailby as the sole administrator. By then, the term of the administration had already been extended by twelve months with the consent of the company's creditors. There have been no less than four previous court extensions of the administrator's term of office, for two successive periods of three months each, and then for two successive periods of six months each. The current extension expires on 10 May 2020. Although the present extension application was only issued on 14 April 2020, and thus within the one month period prescribed by paragraph 8.3 of the Insolvency Practice Direction, it had been sent to the court office on 8 April 2020 and therefore nothing turns on the fact that it was strictly issued less than one month before the current expiry of the administrator's term of office. It is the fifth

application to the court for an extension and, if granted (as I am satisfied that it should) it will take the currency of the administration to 4 ¼ years.

7. So far as relevant to the present application, the company had two properties, both of which were subject to charges in favour of Hutchinson Telecom FZCO ("Hutchinson"), which (acting through its appointed receivers) has sold one of them and is in the process of selling the other. Three related entities ("the Alpha Companies"), now themselves in administration, assert a trust interest over these assets with priority to Hutchinson's charge and also to the proceeds of insurance claims in relation to one of the properties presently held by the administrator. There are pending applications, issued by the administrator, acting in his capacity as the liquidator of two associated companies, seeking directions as to the application of various realisations in which the essential issue will be as to the validity of the Alpha Companies' trust claims. Both Hutchinson and the Alpha Companies have been served with, and consent to, the present application, although a minor issue arises in relation to Hutchinson as to the appropriate form of the recitals to the extension order.

8. As Mr Tucker points out in his helpful skeleton argument, on applications of the present kind, four questions tend to arise:

   (1) Why has the administration not yet been completed?

   (2) Is any other alternative insolvency regime more suitable?

   (3) Is the extension sought likely to achieve the purpose of administration?

   (4) If an extension is appropriate, for how long should it be granted?

9. The administration of the company has not yet been completed for two reasons. First, because it retains the title to an extremely valuable, but complex, development opportunity. Conduct of the sale has been given to the fixed charge-holder since February 2018 and it is not clear when the sale will complete, nor whether there will be any, and if so what, surplus. Secondly, the issue of the Alpha Companies' trust claims has yet to be resolved. This will impact on the application of the proceeds of the insurance claim and the proceeds of sale of the property, as well as impacting on whether there is any surplus.

10. No other alternative insolvency regime is more suitable: a move to creditors' voluntary liquidation under paragraph 83 of Schedule B1 is not possible as it is not yet known whether there will be any assets to make a distribution to unsecured creditors. The cost of compulsory liquidation is prohibitive, involving as it does administrative expenses, statutory payments and charges, the calling of creditors' meetings, the conduct of investigations, and regulatory and reporting obligations. The most proportionate and cost effective way for the company to remain "alive" is for it to remain in administration. The administrator is therefore faced with the choice of whether to dissolve the Company, on the basis of bare assertions previously made by Hutchinson to the effect that the equity in the remaining property will be swallowed by its charge, or to continue in administration. Any receipt from the sale of the remaining property would assist in achieving the second, or at least the third, in the statutory hierarchy of the purposes of administration.

11. Mr Tucker acknowledges that the statutory regime contemplates the conclusion of administrations within 12 months of the administrator's appointment, and that an 18 months extension has now been obtained, unusually over four applications. The administrator is not content, based on the evidence that he has seen, that there is no prospect of any surplus; it may well be a breach of duty to dissolve the company based on Hutchinson's assertions alone. Given the minimal costs that will be incurred in waiting for the sale of the remaining property, the court accepts that it is appropriate that an extension should be granted, and that the extension of nine months that is sought is long enough to allow a sale to progress. Hutchinson has previously confirmed that they are in the course of a formal marketing campaign in relation to the remaining property and that they have received a number of expressions of interest. The pandemic means that no realistic time-frame can now be put forward, and any attempt to do so would be entirely speculative. The court has a discretion as to whether to grant an extension and, if it chooses to do so, as to its duration. In the circumstances, the court accepts that a nine months' extension is appropriate. The court notes that the only parties with any actual, or contingent, interest in this administration all concur in that course.

12. The only remaining issue relates to the recitals to the order and whether to record the Alpha Companies' consent to the application. Hutchinson opposes the inclusion of this recital, and asks for their correspondence, and proposed draft order, to be drawn to the court's attention (as Mr Tucker has done). Hutchinson contends that the Alpha Companies have not filed any proof of debt in the administration and so they have no standing. In fact, the Alpha Companies contend that they have a proprietary interest in various assets, with the result that they do not fall within the administration. It would be inconsistent with this position to then file any proof of debt in their capacity as an unsecured creditor. Mr Tucker also suggests that Hutchinson's opposition may be to prevent any point being taken in due course that it has tacitly agreed that the Alpha Companies have any interest in the company's administration as a result of their trust claim. He points out that on any view the Alpha Companies have a contingent interest. The administrator considers it appropriate to record their consent, and he does not consider that, on any sensible consideration, the proposed wording prejudices Hutchinson.

13. The court agrees. The order proposed by the administrator merely records the fact of the Alpha Companies' consent to this order, without any acknowledgment of their status, which remains a matter for future determination in the pending litigation. That consent is a matter of fact, and the Order should reflect it.