When one director is not enough…

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Abigal Boura v Lyhfl decision

1. The High Court considered whether one director has standing to apply to court for the appointment of an administrator in circumstances where there is no majority of the board and no valid resolution of the board in favour of the application. *Abigal Boura v Lyhfl Limited [2023] EWHC 2585 (Ch)* (19 October 2023).

Analysis

2. **The Facts.** Ms Boura and Mr Harmer were the sole directors and shareholders of the Company. They were also in a personal relationship which ended acrimoniously in November 2021. The relationship as directors also became acrimonious. Each director claimed that the other had acted in breach of their fiduciary duties. Ms Boura alleged that the Company was unable to pay its debts, and unilaterally applied for an administration order, without the agreement of Mr Harmer or a prior resolution of the board.

3. The statutory provisions identifying who has standing to make an application for an administration order in respect of a company are contained within Schedule B1 of the Insolvency Act 1986 ("**the Act"**). Paragraph 12(1) of Schedule B1 provides that *'an application to the court for an administration order in respect of a company may be made only by (a) the company or (b) directors of the company'*. Para. 105 provides that "*A reference in this Schedule to something done by the directors of a company includes a reference to the same thing done by a majority of the directors of a company.*"

4. **The arguments.** The Respondent, who opposed the making of the order, submitted that "*the directors*" in para.12(1)(b) referred to all or a majority of the directors acting pursuant to a valid board resolution, and that the word '*only*' means that the court has no power to hear the application unless it is made by a person or persons who fall within one of the categories in para.12(1).

5. The applicant submitted that sub-paras. (a) and (b) of para.12(1) make it clear that "*the directors*" must mean something other than "*the company*". Building on this foundation, it was contended that pursuant to the Interpretation Act 1978 the plural includes the singular and hence that the phrase *'the directors'* includes one of two directors. She invited the court to follow the decisions of Marcus Smith J in *Re Brickvest Ltd* [2019] EWHC 3084 (Ch) ("***Brickvest***"), which was itself followed by Fancourt J in *Re Nationwide Accident Repair Services Ltd* [2020] EWHC 2042 (Ch) ("***Nationwide***"). In both cases the court appointed administrators on the application of the sole director.

6. **The Court's Decision.** The court dismissed the application. One of two directors has no standing to apply to court for the appointment of an administrator in circumstances where there is no majority of the board and no valid resolution of the board in favour of the application (at [2]).

7. It was agreed that in *Re Equiticorp International plc* [1989] 1 WLR 1010, a decision of Millett J ("***Equiticorp***"), the court had decided (in relation to s.9, a predecessor of the provision) that the phrase '*the directors*' does not require unanimity among the directors; nevertheless, it is necessary to have a resolution passed by a majority at a properly constituted board meeting. Para.12 of Sch. B1 is modelled on s.9. Further, "*Once a proper resolution of the board has been passed, however, it becomes the duty of all the directors, including those who took no part in the deliberations of the board and those who voted against the resolution, to implement it….*" That had the consequence that any one director had authority to make an application, to implement such a resolution.

8. In *Minmar (929) Ltd v Khalastchi* [2011] BCC 485, a decision of Morritt V-C ("***Minmar***"), the issue was whether an appointment out of court was valid when taken by persons in fact constituting a majority of the board, but without a proper board meeting. Morritt V-C considered the impact of para.105 of Schedule B1, which did not have the effect of dispensing with the usual rules of internal management of the company.

9. The judge thus confirmed that *Minmar* was clear '*not only that a decision of the directors must be a decision of all or a majority or the board, but also that it must be at a properly convened board meeting. It is also clear that he regarded the position as being the same under para.12(1)(b) in this respect as it is under para.22(2).'*

10. *BW Estates*,[1] *Brickinvest* and *Nationwide* all concerned a situation where a sole director had been appointed, in breach of a quorum requirement in the articles for more than one

[1] *Re BW Estates Ltd (No 2)* [2018] Ch 511

director. In *BW Estates*, where the sole director had made an out-of-court administration appointment, the court followed the earlier authorities to hold that the appointment was invalid for non-compliance with the company's articles. In *Brickinvest* (followed in *Nationwide*) the courts reached a different conclusion where the appointment was made in court. The essential reasoning was that, on a court application, the question of standing "*was essentially a discretionary one*" rather than a jurisdictional one, and that the non-compliance could be treated as a procedural irregularity that, under IR 2016, r.12.64, would not necessarily invalidate the proceedings.

11. The judge in *Boura* distinguished *Brickinvest* and *Nationwide*, on the basis that they were dealing with whether "*the directors*" includes the sole director where there is only one, in breach of a quorum requirement (at [20]). But he would otherwise not have followed them. The court has no power to appoint administrators of its own motion, only upon application by one of the permitted categories of applicant; and rule 12.64 could not be used to dispense in advance with jurisdictional requirements.

12. The judge determined for all the reasons set out above that one of two directors has no power to apply to court under para.12(1)(b) for an administration order without the approval of the majority of the directors and without a valid board resolution.

Impact of the decision

13. The Court's decision on the legal question was unambiguous: one of two or more directors cannot make an application for an administration order without the requisite board resolution and approval. It has left open the possibility that the position would be different if all the directors make the appointment but in breach of a quorum requirement in the articles. Even then, the application must be made to the court, rather than under paragraph 22 of Schedule B1.

14. As a question of statutory application, the decision cannot be criticised. But the policy reasons behind the earlier decisions in *Brickinvest* and *Nationwide*, namely that the court may need to act in situations of urgency to protect the company and its creditors, deserve consideration. It would appear that in a future case a director facing that situation may need to consider petitioning to wind up the company (where the court can in a suitable case act on its own motion: Lancefield v Lancefield [2002] BPIR 1108 (Ch)).

15. That begs the further question whether the court might exercise its discretion under section 125 of the Act, to instead make an administration order, where one of the objectives of administration could be achieved.

16. Practitioners will also note the interpretative methodology in reaching that decision. When faced with an ambiguous statutory provision the Interpretation Act may be helpful, but it is necessary to review associated legislation, rules and directives which may shed light on the mechanism of the original provision.

17. Furthermore, authorities that may present as conflicting must be considered in light of all of the relevant facts and how these influenced the ultimate decision. Finally, it is always advisable to check if the judges making more recent decisions referred to or considered the previous cases in question.

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