

# Review



## Background

Super Aguri F1 Limited used to race a team in the Formula One Motor Racing Championship. For some twelve months prior to the administrators being appointed on 6 May 2008, the directors of Super Aguri had been trying to seek investment into Super Aguri or affect a solvent sale of the business but without success. Super Aguri was making heavy losses and was only able to trade through the continued financial support of Honda, who also provided engines and gearboxes to Super Aguri. Following the withdrawal of Honda's support, when it became clear such investment or sale was unlikely, Super Aguri had no alternative but to enter into a formal insolvency process.

Super Aguri carried out research and development, testing and various other projects for Honda. As a result of the relationship between the two, Honda was the largest creditor in value of Super Aguri, being owed approximately £45m, 86% of the total indebtedness of Super Aguri. Even so, Honda did not have a qualifying floating charge and was not therefore required to be served with any notice of intention to start insolvency proceedings.

## Insolvency Proceedings

The directors decided to appoint administrators over Super Aguri in an out of court appointment made under Paragraph 22 of Schedule B1 to the Insolvency Act 1986. Immediately following the administrators' appointment, Honda contacted the administrators to express its unhappiness at Super Aguri having entered administration. Honda considered the administration process to be misconceived and an abuse of process, arguing that Super Aguri should have been placed into liquidation so that the majority of creditors by value (i.e. Honda) could be given the opportunity to appoint liquidators of their choice.

At various points during the early stages of the administration, Honda threatened to make applications to Court but did not in fact ever do so. In the meantime, the administrators made necessary redundancies and continued to manage the slimmed down business whilst negotiations with interested parties continued. A buyer was found for part of the business but the sale was not completed before the creditors' meeting.

Honda, exercising its rights as majority creditor in value, rejected the administrators' proposals and voted in favour of moving Super Aguri to a creditors' voluntary liquidation and for insolvency practitioners from another firm to be appointed as joint liquidators. As the creditors refused to approve the resolution that the administrators be remunerated on a time cost basis, they had no alternative but to apply to Court to have their remuneration fixed pursuant to Rule 2.106(2) of the Insolvency Rules 1986. In any such application, *Practice Statement: the Fixing and Approval of the Remuneration of Appointees* (2004) [2004] BCC912 applies.

## The Fight over Costs

A detailed bill of costs was drawn up by the administrators and an application was made to court to fix the costs. The liquidators were granted permission to be added as a party. However, unusually neither of the liquidators gave evidence relying instead on witness statements on their behalf being served by their solicitor.

The application to fix remuneration effectively became an assessment of the overall reasonableness of the work done by the administrators. Whilst the liquidators did challenge the amount of time spent on the administration and the categories of fee earners used to carry out certain tasks, undoubtedly the biggest criticism of the administrators was that they had accepted the appointment as administrators at all (in the light of the major creditor's opposition) and then proceeded with a strategy within the administration for approximately 8 weeks whilst trying to achieve the statutory purpose.

After a three day trial followed by written closing submissions, judgment was handed down by Mr Registrar Jacques on 26 October 2010. The judgment was overwhelmingly in favour of the administrators who were awarded 95% of the remuneration claimed. The Registrar disallowed a small part of the remuneration to reflect some duplication and the fact that an element of work done by a senior manager could have been carried out by a more junior member of staff.

The case is noteworthy for a number of reasons set out in the judgment of the Registrar.

- 1 The liquidators relied on their solicitor serving evidence in the proceedings and giving oral evidence on their behalf at trial. The Registrar said that he was more than a little surprised that neither of the liquidators assisted the Court by providing written evidence as to their approach or practice within the liquidation. Their evidence could have offered support for the otherwise unsupported assertions of their solicitor as to the proper approach the administrators should have taken, the number of office holders required, the level of staff required, the complexities involved or any other matters on which they could have given evidence to assist the Court in carrying out the task of fixing the administrators' remuneration.
- 2 In the absence of any attack on the administrators' professional integrity, the Registrar said it was not for him sitting in his Court to challenge the administrators' signed certificate confirming that in their opinion, it was reasonably likely that the purpose of the administration would be achieved.
- 3 However desirable it may be in any given case, there is no statutory duty on directors or proposed administrators to consult with a company's creditors before appointing or accepting an appointment as administrators. Directors are not obliged to abide by the creditors' expressed preference for a creditors' voluntary liquidation and they are not obliged to seek the direction of the Court before making an appointment of administrators.
- 4 The judgment suggests that if a majority creditor has good grounds to object to administration, it should apply to the Court for an order ending the administration or removing the administrators. If it does not do so, the Court is unlikely to allow it raise the point indirectly in a challenge to the administrators' remuneration.
- 5 Despite the outcome of the creditors' meeting being a foregone conclusion in the light of the major creditors' hostile approach throughout, the administration was on any view, a high profile, complex and difficult administration that required the full time attention of professionals who had previous personal experience of dealing in that type of business. The administration was conducted in an atmosphere akin to trench warfare. The administrators were respected professional men who when faced with an implacable opponent, were perfectly entitled both for the benefit of the other creditors and the protection of their own professional reputation, to deal with all steps necessary to move from administration to liquidation as fully and carefully as they did. The final cost of the administration may have been high, but the root cause of this expenditure was not the administrators' profligacy but the creditor's hostile attitude towards them.
- 6 The Registrar also confirmed that in accordance with the case of *Cabletel Installations Ltd* [2005] BPIR 28, it was perfectly legitimate to make a charge for support staff such as secretaries and cashiers provided that the charges for such secretarial, administration and cashiering services were not already incorporated in the normal fee earner rate. In this particular case, the administrators had confirmed that the rates were not included. The administrators preferred to charge separately for such services because it was fairer to charge the time at the rate that is appropriate to the cost of the service provided rather than inflating fee earner rates.

## Summary

Whilst the facts of the case were extreme and unusual, there are several points which are likely to have wider implication. The case confirmed that a major creditor cannot prevent a company going into administration and there is no obligation on directors to consult creditors prior to appointment of administrators. Finally the case gives useful guidance to insolvency practitioners upon which they can rely to support a claim for proper remuneration.

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