SQUIRE SANDERS

APPROVAL OF ADMINISTRATORS' PROPOSALS: WHAT TO DO IN THE FACE OF APATHY?

The Administrators of a group of companies put their proposals before the creditors who failed to approve the proposals. Indeed, they failed to vote at all. The Administrators applied for the proposals to be approved by the Court. It was held that such approval was not required unless the proposals were actively opposed by creditors. In the absence of such approval, the judge considered that the administrators have the power to act in their own discretion. The judge also used the case to comment on the standard form of proposals used by most insolvency practitioners. It was acknowledged that in the absence of creditor approval, administrators are required to obtain Court approval for the basis of their remuneration under rule 2.106 of the Insolvency Rules 1986 ("the Rules") and so it is clear that, whilst the proposals themselves might not require approval by Court order, an application for approval of the basis of remuneration will always be required.

Commentary

The decision is useful clarification of the requirement to apply to Court for approval where proposals are not approved by creditors because no votes are received. The decision made it clear that the Administrators were not to be criticised for applying for directions in the first place. In addition, it gives some indication of the lengths the Court is prepared to go to in using its extensive powers to assist with the effective conduct of administrations.

It is perhaps to be questioned whether the Judge would have reached the same conclusion had the conduct of the administrators been in some way called into doubt or the strategy of the administration had not been quite so commendable. Certainly, the decision gives a wide discretion to administrators to continue with administrations notwithstanding that proposals have not been approved by creditors, albeit that they have not been opposed. Some might argue that there is scope for abuse here but there are still a range of remedies available to creditors to challenge the actions of administrators including actions under paragraph 74 of Schedule B1 of the Rules for unfair prejudice.

The commentary and discussion of the need for or effectiveness of approval of a number of standard proposals is interesting and will no doubt spark some internal discussions amongst insolvency practitioners on whether a revision to their standard form documents is required. Whilst the commentary here is guidance rather than precedent (as the Court was not asked to decide directly on the necessity or otherwise of these proposals), the views expressed by the judge would suggest that whilst background information on issues might be included as a statement in the proposals (as generally required by rule 2.33 of the Rules), the points considered should only be included as "proposals" if they are something stronger than a general, permissive, proposition.

The Facts

If a creditors' meeting fails to approve either the proposals or a revision to the proposals, an administrator has to report this to the Court under paragraph 55(1) of Schedule B1 of the Rules and the Court may make a number of orders including an order that the appointment of the administrators cease to have effect; an order adjourning the hearing; an interim order; an order to wind the company up or any other order that the Court deems appropriate.

In *BTR (UK) Limited, Lavin v Swindell [2012] EWHC 2398 (Ch)*, the Court ordered that paragraph 55(1) of Schedule B1 places a positive requirement on administrators, in circumstances where the proposals have not been approved, to make an application for approval under paragraph 55(2) of Schedule B1 of the Rules. In all the reported cases on this point, the proposals had been actively opposed by creditors, whereas the novelty in the *Parmeko* application was that there was simply inactivity on the part of creditors rather than a rejection of proposals. Following the guidance in BTR, the administrators considered that they were required to apply to Court for directions on what course to follow.

The administrators of the *Parmeko* group of companies circulated proposals on a group basis for approval following a pre-pack sale of the business and assets of the group. The proposals were circulated on the basis that the initial creditors' meeting would be held by correspondence. Following a lack of response, a creditor's meeting was convened to consider a vote on the proposal. Still, no unsecured creditors attended or voted at the meeting. In the absence of approval of the proposals, or the basis of fixing remuneration, the administrators made an application to Court under paragraphs 55(2) and 68(2) of Schedule B1 of the Rules for an order from the Court approving the proposals.

The group proposals were prepared and presented to creditors on a relatively standard basis addressing all of the points required by rule 2.45 of the Rules. Included within the proposals were a number of the general proposals adopted by most administrators as standard, including a proposal that the remuneration of the joint administrators be approved on the basis of time properly spent under rule 2.106 of the Rules.

Approval Not Necessary

The application was considered in the Birmingham High Court before His Honour Judge Cooke. HHJ Cooke gave consideration to the existing precedents in relation to applications under paragraph 55(2) of Schedule B1 of the Rules including the decision of Judge Behrens in *BTR* (see above).

Whilst it was acknowledged that *BTR* did require an application to Court in circumstances where proposals are rejected, and the administrators should not be criticised for having done so in this case, the purpose of the Court's powers under paragraph 55(2) of Schedule B1 of the Rules was only to give directions where there was some real question as to the course the administrator should follow, rather than to seek directions where no effective purpose is served by the directions.

HHJ Cooke found that it was not necessary for the Court to give directions under paragraph 55(2) of Schedule B1 of the Rules where there was no dispute as to what course the administrators should follow. It was unnecessary to incur costs in making an application to Court for approval of the proposals. He did not consider it was required that the Court or creditors confirm that the administrators should continue their functions under Schedule B1 of the Rules.

Preparation of Proposals

Whilst the comments were made in observation, HHJ Cooke considered specifically what should, or could, be approved by the Court or creditors. He expressed the general view that the wording in such proposals was somewhat permissive in nature and perhaps unnecessary.

In that context, it is interesting to note some of the views expressed on the standard proposals:

- In relation to the approval of discharge or release of administrators under paragraph 98 of Schedule B1, unsurprisingly the Judge did not feel that creditors would have the requisite knowledge or understanding to approve such a discharge at the outset of the administration. If this is not approved by creditors, an application to Court is required. The Judge expressed some doubt as to whether such proposal, if approved, could ever really be effective.
- The Judge had further doubts as to whether proposals approving a prospective distribution to secured and preferential creditors, or indeed unsecured creditors, were meaningful or necessary. It was noted that there could be no prospective approval of a distribution to unsecured creditors that the Court would later need to approve under paragraph 65 of Schedule B1 in any event.
- Equally, the Judge expressed grave doubts as to the utility of submitting proposals relating to future exit routes, for anything other than noting a future intention to seek appointment as voluntary liquidators (as is required by the Rules) which could be addressed in a future application to exit.

The Judge did not take into account each specific requirement of rule 2.33 of the Rules, nor did he take into account the use of the proposals as a first communication with creditors. As such, the comments made should perhaps be taken simply as guidance that proposals should be as specific as possible as to what is genuinely anticipated to occur in the administration.

Remuneration

It was acknowledged in the decision that the administrators are required to obtain approval for the basis of their remuneration from the Court under rule 2.106 of the Rules. The basis of the remuneration was duly approved by the Judge and so it is clear that, whilst the proposals themselves might not require approval by Court order, the application for approval of the basis of remuneration will always be required. Whilst, therefore, costs might be reduced by avoiding the need to seek an order under paragraph 55(2) of Schedule B1 of the Rules, they will not be extinguished entirely if administrators expect to be remunerated for their services!

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Sanders.

All Rights Reserved 2013

11754/12/13