IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOVENCY & COMPANIES LIST (ChD)
[2022] EWHC 1106 (Ch)

Claim No.: CR-2022-000983

Rolls Building
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Fetter Lane, London
EC4A 1NL

Wednesday, 6 April 2022

IN THE MATTER OF THE INSOLVENCY ACT 1986

Before:

MR JUSTICE FANCOURT

VTB CAPITAL PLC — Applicant

MR D. BAYFIELD QC appeared on behalf of the directors of the company Applicant.

J U D G M E N T

(v i a M S T e a m s)

MR JUSTICE FANCOURT:

1 This is an application issued on 1 April 2022 by the directors of VTB Capital Plc, a company registered in England and Wales, for the appointment of an administrator, in fact three administrators, Messrs Stephen Brown, David Soden and Matthew Mawhinney, all of Teneo Financial Advisory Limited.

2 VTB Capital Plc ("the company") is an investment bank and is ultimately owned and controlled by JSC VTB Bank of St Petersburg in the Russian Federation. The Russian Federation owns just under 61 per cent of the shares in JSC VTB through a Russian holding company, which owns over 96 per cent of the shares in the company. The company is therefore ultimately controlled by the Russian government.

3 Unsurprisingly, therefore, VTB Bank and the company are subject to full blocking sanctions imposed as a result of the recent invasion of Ukraine by Russia. This is the only source of the company's financial difficulties, as it is otherwise clearly solvent and able to conduct its business – though in fact, for commercial reasons owing to difficulties resulting from controls that were imposed following the Russian invasion of Crimea in 2014, the company is in a controlled wind-down of its business in London and was due in any event to conclude that wind-down in the autumn of this year.

4 A recent solvency review conducted under s.166 of the Financial Services and Markets Act 2000 shows that the company has assets of $1,320,000,000 and liabilities of $980,000,000 so a positive and net asset position of about $338,000,000.

5 The company's main correspondent sterling bank account with HSBC is frozen, and it is unable to release that account or open an alternative account from which to make payment of day-to-day liabilities such as staff wages, bills, tax liabilities and so on.

6 Before the administration application was issued, the company had applied to the UK Office of Financial Sanctions Implementation ("OFSI"), an office within HM Treasury, for licence to carry on its activities for the benefit of its creditors. Licences are granted under reg.64 of the Russian Sanctions (EU Exit) Regulations 2019, but the licence in this case was initially refused. As things stand, therefore, the company is unable to pay its debts as they fall due because all its funds are frozen.

7 Were that to continue for any length of time, the company would inevitably have to wind itself up. But as a result of this application having been issued and served on, amongst others, the Bank of England, the Prudential Regulation Authority, the Financial Conduct Authority, and then communications having taken place with OFSI, a general licence in different terms has now been granted, which the directors consider would be adequate for the administrators' purposes were they to be appointed.

8 The administrators also agree that it will be suitable. They consider that they will be able to open a bank account to allow the company in administration to process payments or, alternatively, that they have established that they will be permitted to use the Insolvency Service account for that purpose, on paying certain fees to the Insolvency Service.

9 The terms of the general licence that OFSI has issued allow the company to make payments for its basic needs (under para.4 of the licence) and additionally the company will be permitted to make, receive and process payments in the event that it enters an insolvency proceeding, which is defined as including all insolvency proceedings in the Insolvency Act 1986 and the Banking Act 2009 – and so clearly includes an administration.

10 Paragraph 5.1 of the OFSI licence provides that:

> "Any person including for the avoidance of doubt VTB Capital Plc, and its UK subsidiaries may make, receive or process any payments or take any other action in connection with any insolvency proceedings relating to VTB Capital Plc and its UK subsidiaries, whether prior to or after the commencement of such proceedings, including without limitation an insolvency practitioner for the purposes of his or her functions under or in connection with insolvency proceedings".

11 The inference is that the UK government is content for the company to be able to make and receive payments in the course of its business if its affairs are under the control of a licensed insolvency practitioner and are being conducted principally for the benefit of the company's creditors.

12 The stumbling block in terms of sanctions at present is therefore not OFSI but the American equivalent body, the US Office of Foreign Asset Control ("OFAC"). The administrators say that they could not carry on the administration of the company's affairs without a similar licence being issued by OFAC. One has been applied for but not yet received.

13 OFAC has not indeed indicated that making an administration order will make any difference to its consideration. Nothing has yet been heard from OFAC, but without the grant of an OFAC licence it is pointless to appoint the administrators, because they consider that they will be unable to achieve the objectives of the administration.

14 What is proposed therefore is that the court, if it considers that its jurisdiction to appoint administrators arises and that it should in principle exercise discretion to do so, will declare that it is willing to appoint administrators subject to a licence from OFAC being granted, but no order appointing the proposed administrators will be made until evidence of the necessary licence has been filed at court.

15 So far as notice of the administration application is concerned, the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority were served with the application. The Bank and the PRA have filed notices of non-objection and confirmed that they do not intend to apply for a Bank Insolvency Order. The Financial Conduct Authority has confirmed that it does not intend to make any representations on this application. The Bank has also indicated that it does not intend to exercise a stabilisation power under part 1 of the Banking Act 2009.

16 Mr Daniel Bayfield QC, who appears on behalf of the directors, has shown me s.120 of the Banking Act 2009 which imposes conditions on the making of an administration order. I am satisfied that each of those conditions is satisfied on the facts of this case. Further, none of the regulatory bodies has applied for a special administration order to be made, and therefore

the directors are free to pursue their application for an ordinary administration order under Sch.B1 to the Insolvency Act 1986.

17 It was unnecessary for the administration application to be served on the company itself, since it was made by the directors pursuant to a formal board resolution. There is no qualifying floating charge holder who needs to be notified, and the administrators themselves have waived the requirement for service on them. There is therefore no need for any other party to be served with this application.

18 There is no doubt that the company is insolvent and unable to pay its debts in the sense of s.123.(1)(e) of the 1986 Act, that is, it is unable to pay its debts as they fall due. The obstacle to being able to pay debts as they fall due is banking facilities.

19 The next jurisdictional question is whether the appointment of an administrator will achieve any of the objectives of the administration. These, as is well-known, are:

(a) rescuing the company as a going concern; or

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration; or

(c) realising property in order to make a distribution to one or more secured or preferential creditors.

20 So far as objective (a) is concerned, given that the orderly wind-down of the company's business would be able to continue once an administrator is appointed and given the strong unlikelihood that the current sanctions will have been lifted by autumn 2022, it appears that there is no real prospect of the company's business (or part of it) operating again, standing on its own feet without an administrator in office, before the wind-down is completed. Mr Bayfield accepted that the application therefore could not properly be put on the basis of rescue of the company as a going concern, though he said – and I agree – that it is not impossible that the sanctions regime may change by the autumn such that the intervention of the administrator is no longer needed. But the application was pursued squarely on the basis of objective (b).

21 There is no suggestion that if the company were now wound up the creditors would not be paid, though it was argued that a winding up would be likely to lead to a disorderly wind-down of the company's business with increased costs and delays. It seems to me that that would undoubtedly be likely to lead to a worse result for the shareholders, given the positive net asset position of the company, but would it achieve a worse result for the creditors? Mr Bayfield submitted that the focus of objective (b) is not just the amount of the dividend eventually received by the creditors, though that is an important consideration, but also how soon they would be paid. A payment of £100,000 to creditors today is a better result for them than a payment of £100,000 in a year's time.

22 He therefore was effectively submitting to me that the orderly resolution of the outstanding affairs of the company, so that it can be wound down by this autumn and creditors be paid by then, was a better result for the body of creditors as a whole than a liquidation, which in comparison would be disorderly and prolonged and without the beneficial support of the employees. Further, there must be some risk (because there always is likely to be some risk

in such cases) of realisations not being as successful as was anticipated, with the possibility that creditors cannot be fully repaid.

23 I think that I can accept that the early payment for a range of creditors, including trade creditors, is a relevant consideration, and that it is strongly likely that an orderly wind-down by administrators would be beneficial in terms of earlier payment and is extremely likely to result in payment in full of all creditors, rather than a possibly much later payment and an outside risk (to put it no higher) that there may be a shortfall if the company goes into liquidation. In those circumstances, in the absence of any contrary evidence or argument, I can accept that objective (b) is likely to be achieved by appointing the administrators as compared with the company going into liquidation.

24 The question then becomes one of the court's discretion whether to make an administration order. In my judgment, given that the making of an administration order in these circumstances is effectively being approved in principle by OFSI, by the terms of the licence that it has already granted as a result of the administration application being made, and the fact that the Bank of England and the Prudential Regulation Authority effectively approve the course that is being taken, I should exercise the court's discretion in favour of making the appointment of the three administrators whose names I have already identified. Questions as to whether what is proposed is a means of circumventing sanctions do not arise in view of these approvals.

25 However, although the court is minded to appoint administrators for the reasons explained to me, the appointment should not take effect until it is known whether the licence from OFAC will in fact materialise; and provided that the OFSI licence remains in place at the same time. Otherwise, on the evidence before me, the appointment will be pointless. The order appointing the administrators will therefore not be made or sealed at this time, but only on the filing by CE file by the directors' solicitors of evidence that both licences are in place, assuming that there is no other relevant change in circumstances, in which case the matter should be restored for a further hearing.

CERTIFICATE

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