OUTER HOUSE, COURT OF SESSION

[2024] CSOH 12

P94/24

NOTE BY LORD BRAID

In the Note of

CHAD GRIFFIN AND THOMAS CAMPBELL MACLENNAN as joint administrators of ALEXANDER INGLIS AND SON LIMITED

for

orders in terms of paragraph 79 of schedule B1 to the Insolvency Act 1986

Noter

Noter: Tosh; Burness Paull LLP

9 February 2024

Introduction

[1] The noters are the joint administrators of Alexander Inglis and Son Ltd (the company), having been appointed as such by the company's directors on 12 May 2021. Their term of office has previously been extended to 11 February 2024, when it will expire.

The orders sought

[2] The noters seek four orders: (1) that their appointment as joint administrators should cease with immediate effect; (2) that they be discharged from liability in respect of their actions as joint administrators, again with immediate effect; (3) that the company be wound up under the provisions of the Insolvency Act 1986 and the noters appointed as joint

liquidators; and (4) that the remuneration of the noters as joint liquidators shall be fixed as 20% of the value of any assets of the company realised by them.

[3] There is nothing unusual about the first and second of those orders, which I accept are appropriate in the circumstances of this case. However, I invited counsel for the noters to address me on the third and fourth orders sought, which raise points on which there is no Scottish authority (or at least, none to which counsel could refer me).

Background

[4] The background to the note can be stated briefly as follows. The purpose of the administration, to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up first (without being in administration), has been achieved. The noters have concluded their investigations into the company and have realised all knowns assets. Those assets include a potential claim against the company's auditors. That claim has been assigned to a specialist litigation investment company subject to an agreement that if the claim is successful, a percentage of the sum realised will be returned to the company. The noters have adjudicated upon preferential and unsecured claims. A dividend of 100 pence in the pound has been paid to the preferential creditors; and a dividend of 1.82 pence in the pound to unsecured creditors for the prescribed part. The noters have produced the requisite progress reports and have prepared a statement indicating that they consider the company should now be wound up under the provisions of the 1986 Act to allow them to: support the claim against the company's auditors by providing financial analysis and information, as required, to enable that claim to be pursued; finalise and pay any administration expenses; finalise VAT and corporation tax returns with HMRC; and distribute remaining funds to the floating charge holder. Notice

of the intention to make this application (and, specifically, of the intention to have the noters appointed as liquidators, and to ask the court to approve remuneration at 20% of the amount recovered) was given to the directors (as the persons who appointed the noters) and creditors of the company on 9 January 2024, when responses were invited by 16 January 2024. No response was received from any creditor, other than the floating charge holder, which signified its consent to the proposed course of action.

The legislation

[5] Paragraph 79(4) of schedule B1 to the 1986 Act provides:

> "On an application under this paragraph the court may—
>
> (a) adjourn the hearing conditionally or unconditionally;
> (b) dismiss the application;
> (c) make an interim order;
> (d) make any order it thinks appropriate (whether in addition to, in consequence of or instead of the order applied for)."

Rule 3.57 of the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 provides as follows:

> "(1) An application to court by the administrator under paragraph 79 of Schedule B1 for an order ending an administration must be accompanied by—
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> (a) a progress report for the period since—
>
> (i) the last progress report (if any), or
> (ii) if there has been no previous progress report, the date on which the company entered administration;
>
> (b) a statement indicating what the administrator thinks should be the next steps for the company (if applicable); and
>
> […]

(2) Where the application is made other than because of a requirement by a decision of the creditors—

(a) the administrator must, at least five business days before the application is made, deliver notice of the administrator's intention to apply to court to—

(i) the person who made the administration application or appointment, and
(ii) the creditors; and

(b) the application must be accompanied by—

(i) a statement that notice has been delivered to the creditors, and
(ii) copies of any response from creditors to that notice.

(3) Where the application is in conjunction with a petition under section 124 for an order to wind up the company, the administrator must, at least five business days before the application is made, deliver notice to the creditors as to whether the administrator intends to seek appointment as liquidator."

Rule 5.26 of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 provides:

"(1) This rule applies where the liquidator is appointed by the court under section 138(5) (no person nominated or appointed by creditors and contributories), 139(4) (different persons nominated by creditors and contributories) or section 140(1) (winding up following administration or CVA).

(2) The court must not make the appointment unless and until the person being appointed liquidator has lodged in court a statement to the effect that that person is qualified to act as an insolvency practitioner in relation to the company and consents to act as liquidator.
..."

Rule 7.11 of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 provides:

"(1) The liquidator's claims for the outlays reasonably incurred and for the liquidator's remuneration must be made in accordance with this rule (and subject to rules 7.12 to 7.15).

(2) The liquidator may within 14 days after the end of an accounting period submit to the liquidation committee or, if there is no liquidation committee, to the court in respect of that period and any other previous accounting period in which no submission has been made under this paragraph—

(a) the liquidator's accounts of the liquidator's intromissions with the company's assets for audit;
(b) a claim for the outlays reasonably incurred by the liquidator and for the liquidator's remuneration (where the liquidator intends to submit such a claim in respect of that accounting period); and
(c) where funds are available after making allowance for contingencies, a scheme of division of the divisible funds (unless rule 7.31(8) applies).

[…]

(7) If the liquidator makes a submission under paragraph (2) to the liquidation committee or, if there is no liquidation committee the court, within 6 weeks after the end of an accounting period—

(a) the liquidation committee or, as the case may be, the court—

(i) may audit the accounts; and
(ii) must issue a determination fixing the amount of the outlays and remuneration payable to the liquidator; and

(b) the liquidator must make the audited accounts, scheme of division and the determination available for inspection by the creditors and contributories.

(8) Subject to paragraph (9), the basis of remuneration must be fixed—

(a) as a percentage of the value of the company's assets which are realised by the liquidator;
(b) by reference to the work which was reasonably undertaken by the liquidator and the liquidator's staff in attending to matters arising in the winding up;
(c) as a set amount.

(9) The basis of remuneration may be fixed as any one or more of the bases set out in paragraph (8)(a) to (c) and different bases may be fixed in respect of different things done by the liquidator."

[6] In addition to the foregoing provisions, section 122 of the 1986 Act sets out the circumstances in which a company may be wound up by the court, including that it is unable to pay its debts (which, by virtue of section 123, is deemed to be the case if it is proved to the satisfaction of the court that it is unable to pay its debts as they fall due). Section 124 sets out who may present a winding-up petition. Section 138, headed "Appointment of liquidator in Scotland" provides, by subsection (1) that where a winding-

up order is made by the court in Scotland, a liquidator shall be appointed by the court at the time when the order is made; and, by subsection (2), that the liquidator so appointed (referred to as "the interim liquidator") continues in office until another person becomes liquidator in his place under that section or section 139; and the remaining provisions of section 138 contain the mechanism whereby the interim liquidator is replaced by the liquidator (which can be, and in practice almost always is, the interim liquidator). In short, the liquidator can either be chosen by the company's creditors or creditors and contributories (subsections (3) and (4)), or, failing any nomination by them, by the court (subsection (5)). Section 138 therefore uses "liquidator" in two senses: the subsection (1) sense of interim liquidator appointed by the court; and the subsection (5) sense of the liquidator nominated by creditors or appointed by the court. Section 139 is immaterial for present purposes. For England and Wales, section 136(1) and (2) together provide that when a court in that jurisdiction makes a winding-up order, subject to section 140, the official receiver becomes the liquidator of the company and continues in office until another person become liquidator under the provisions of the Act. Finally, it is worth setting out the provisions of section 140, insofar as material, in full:

> **"140 Appointment by the court following administration or voluntary arrangement**
>
> (1) Where a winding-up order is made immediately upon the appointment of an administrator ceasing to have effect, the court may appoint as liquidator of the company the person whose appointment as administrator has ceased to have effect.
> (2) ...
> (3) Where the court makes an appointment under this section, the official receiver does not become the liquidator as otherwise provided by section 136(2) and section 136(5)(a)"

It should be noted that although section 140 extends to Scotland, section 138, in contrast to section 136(1), is not made subject to its terms.

The issues

[7] There are three issues before me: whether it is competent to apply for a winding-up order by note, rather than by petition; whether, when invoking section 140, the court must appoint an interim liquidator; and whether, in this case, it is appropriate to approve, in advance, the liquidators' remuneration at 20% of the assets recovered in the liquidation. I will deal with each in turn.

Whether competent to apply for a winding up order by note, rather than petition

[8] Rule 3.57(3), above, plainly envisages that the normal, or at least a, route into liquidation following administration will be by means of a winding-up petition presented under section 124. While section 140 provides for the administrator to be appointed as liquidator, it is neutral as to the route into liquidation. Counsel for the noter primarily founded upon the width of paragraph 79(4) which allows the court to make any order in the administration, which, he submitted, must include an order for the company to be wound up. He also drew my attention to English authority, *Re Graico Property Co Ltd (In Admin)* [2016] EWHC 2827 (Ch), in which Norris J held that the scope of paragraph 79(4) was entirely unrestricted and the court did have jurisdiction to wind up a company even in the absence of a petition, provided that one or more of the circumstances in section 122 existed and provided that the order had some relationship to the discharge of the administrators and to the termination of the administration.

[9] I agree with that approach. Notwithstanding the terms of rule 3.57(3), which refers to an application for an order ending an administration being accompanied by a petition to wind up the company, paragraph 79(4) is in unrestricted terms and entitles the court to make any order it thinks appropriate, in addition to, in consequence of, or instead of the order applied for. That could scarcely have been in wider terms, and it is impossible to read that provision as excluding the power to make an order winding the company up. That said, it would be going too far to hold that the power is entirely unrestricted: for example, it is doubtful that the court could make an order winding up the company if none of the circumstances set out in section 122 were made out, although in that event it is unlikely that the court could conclude that a winding-up order was appropriate. Further, as will be seen, I do not consider that the power is so wide as to entitle the court to innovate upon the provisions of the 1986 Act insofar as they govern the conduct of a liquidation. However, in the circumstances of the present case, I am entirely satisfied that a winding-up order is appropriate. It would be futile, and detrimental to the company, to require the noters to go to the additional expense of presenting a winding-up petition when the paragraph 79(4) route is available, and where there is a clear and obvious link between the exit from administration and entry into liquidation.

[10] Accordingly, I find that it is both competent and appropriate for the noters to proceed by way of note, and for the court to make an order winding the company up.

Must an interim liquidator be appointed?

[11] The answer to this question is less straightforward. In England and Wales, it is clear from the terms of sections 140(1) and (3), to which section 136 is expressly made subject, that the court has the power to bypass the normal procedure for the appointment of liquidators

prescribed by sections 136 and 139. Support for that view, if it is needed, can be found in *Re Exchange Travel Holdings Ltd & Ors* [1992] BCC 954 at 958H to 959A. The problem in Scotland arises because, as previously pointed out, section 138 is not made subject to section 140; and while the court is empowered by section 140 to make a winding-up order, section 138 on the face of it mandates that the person appointed as liquidator is to be an interim liquidator, further procedure then being required before that person can become the liquidator.

[12] The exercise is essentially one of construction. Was it Parliament's intention that in Scotland the "liquidator" that the court was empowered to appoint was merely to be an interim liquidator, in a section 138(1) sense; or was he or she to be a liquidator in a section 138(5) sense? Both species of liquidator are, after all, appointed by the court, but at different stages in the process.

[13] Two considerations persuade me that the latter view is correct. First, section 140 applies equally to Scotland as to England and Wales. There appears to be no legislative intention that the normal procedures should be bypassed in the latter jurisdiction but not in the former, nor would there be any sensible or rational purpose in treating the two jurisdictions differently. The difficulty arises only because the Scottish term for the interim person in control of the company includes the word "liquidator", whereas no room for ambiguity arises in England and Wales, where it is the Official Receiver who is appointed at the winding-up stage. Second, rule 5.16 of the Insolvency (Scotland) (Receivership and Winding Up) Rules 2018 equiparates the appointment by the court of a liquidator under section 138(5) with an appointment under section 140.

[14] Thus, notwithstanding that, unlike section 136, section 138 is not expressly made subject to section 140, which is likely to be down to drafting oversight, I have come to the

view that section 140, properly construed, does empower the court to appoint the administrators as liquidators, not as interim liquidators, the legislative intention being to bypass the trouble and expense which would be incurred if the normal procedures had to be utilised.

[15] The power to appoint the noters as liquidators in that sense is of course a discretionary one. In the circumstances here, I am satisfied that it is appropriate to make that appointment. The chances of the creditors wishing to appoint a different person or persons as the liquidator must be vanishingly small, where the creditors have already had intimation of the administrators' intention to have themselves appointed and have raised no objection, and appear to be entirely happy with the conduct of the noters as administrators thus far; the more so, where the only creditor with an interest has reached an agreement with the noters as to the basis of their remuneration, hardly redolent of a desire to appoint someone else as liquidator.

[16] For all of these reasons, I will not only make a winding up order but will appoint the noters as liquidators of the company.

[17] For completeness and to deal with a subsidiary submission made by counsel for the noters, had I reached the contrary view, that section 140 did require the court to appoint an interim liquidator, I would not have been persuaded that the power in paragraph 79(4) was wide enough to allow me to innovate upon the provisions of the 1986 Act. That can be tested by asking what the position would be if the administrators proposed, for some reason, to appoint a person other than themselves to be the liquidator. By virtue of paragraph 79(4) that would be a competent order for the court to make, but the effect of section 140 would then be that the normal procedures could *not* be bypassed; and the

liquidator appointed in those circumstances would require to be an interim liquidator (or, in England and Wales, the Official Receiver).

Is it appropriate to approve the liquidators' remuneration at 20% of the recoveries?

[18] By way of general introduction, there is no doubt that the basis of a liquidator's remuneration may be fixed as a percentage of the value of the assets realised: rule 7.11(8) of the Receivership and Winding Up Rules makes that clear; and until relatively recently the remuneration of office-holders was in general determined on a percentage basis: see *Brook* v *Reed (Practice Note)* [2012] 1 WLR 419, at paragraph 8. However, rule 7.11 also makes clear that a liquidator's claim for remuneration must be made at the end of each accounting period (if made during an accounting period, in respect of that period, the claim is for an interim determination). If the remuneration is fixed by the creditors, the rules make provision for recourse to the court, which is the final arbiter. When the court comes to consider remuneration it must have regard to all of the circumstances of the case: *Mirror Group Newspapers plc* v *Maxwell* [1998] BCC 324, Ferris J at 338. It has been judicially recognised that, at least in the case of easily realised assets, remuneration on a percentage basis can lead to disproportionately high remuneration: *Brook* v *Reed*, above, at paragraph 9.

[19] The noters' justification for seeking this order is that it will enable them to make further distributions to creditors without delay, and will avoid the need to find creditors willing to form a liquidation committee, and the need and consequent expense of a further application to this court for approval of remuneration. Further, a fee of 20% is said to be appropriate because it takes into account the risk that, if the claim against the company's auditors is unsuccessful, the noters will not be entitled to any remuneration for their time and trouble during the liquidation. In relation to that last point, I would observe that it may

explain why a percentage approach is justified, but it in no way justifies the level of that percentage. Counsel for the noters emphasised that the only creditor likely to receive any future distribution, the floating charge holder, consents to the proposal.

[20] For a number of reasons I am unwilling to grant this part of the note.

[21] First, I do not consider it competent to do so. The rules do not permit a claim for remuneration before the work in question has been done, let alone before the company has even been wound up. Where a winding-up order is made under paragraph 79(4), the ensuing liquidation is one which is governed by the terms of the 1986 Act and of the rules made thereunder, which cannot, in my view, be circumvented, or innovated upon, by the power to make "any order" at the conclusion of the administration.

[22] Second, even if it were competent, I do not consider it would be appropriate to fix the liquidators' remuneration in advance, particularly not on a percentage basis and particularly not in this case. No real attempt, other than in the most general terms, has been made to predict the amount of work which the noters, as liquidators, will be required to carry out. There is no basis on which the court can possibly assess whether a percentage fee of 20% will represent fair remuneration for the degree of time and effort expended by the liquidators in advancing the claim. Where the court is required to have regard to "all the circumstances" in fixing remuneration, it is hard to see how that could ever be achieved in advance of the circumstances having occurred.

[23] Third, to the extent that I do have information, I remain to be satisfied in any event that a percentage fee of 20% would not result in disproportionately high remuneration. While I accept that the noters will be undertaking a degree of risk by acting on a speculative basis, inasmuch as they will be devoting resource to the litigation without any guarantee that they will be paid anything, they are not incurring any risk in relation to the claim itself,

in that any litigation would be undertaken by the funders to whom the claim has been assigned and who will be the prime movers in bringing the claim and incurring a potential liability in expenses. The noters' role will be restricted to providing such assistance as they can. Counsel for the noters resisted a suggestion by me that they would be taking a back-seat role; but nor, to pursue that analogy, can they be said to be in the driving seat. They might devote a great deal of time and effort to assisting the progress of the claim to a successful conclusion; or they might not. The reality is that at this stage, we simply do not know.

[24] Counsel for the noters laid much emphasis on the agreement by the secured creditor, the only creditor with a real interest, to the proposed percentage and told me that the figure was the product of negotiation between it and the noters, who must therefore have sought a higher figure than 20%. Counsel submitted that the secured creditor would be the one to suffer financially should the remuneration not be approved at this stage, since the expense of presenting a future application for approval of the liquidators' remuneration might require to be presented to the court. Several answers may be given to that objection. There may not require to be an application to the court at all. Where remuneration is to be a percentage of any recoveries, and there is only one asset, there should in any event be no more than one application, at the conclusion of the liquidation. There is no particular reason why that should be a particularly expensive exercise - although there is a practice of remitting to a reporter, that is not an inviolate rule and that practice may well not be followed in a case such as this, where remuneration is sought on a percentage basis. Finally, the objection overlooks that, for aught yet seen, the outcome of any application to the court might be that the claim for remuneration at 20% of recoveries is not approved, which would be to the secured creditor's benefit. As Lord Malcolm observed in *Liquidator of St Margaret's*

School, Edinburgh, Ltd, Noter 2013 SLT 241 at para [29], the liquidator is an officer of the court and it is appropriate that the court should have the ultimate decision on appropriate remuneration.

[25] In summary, if there is agreement between the liquidators and the creditors as to the basis of remuneration, the court may not require to become involved at all; but if the court is being asked to fix the liquidator's remuneration, that requires to be done at the appropriate time, which is not now; a decision can only be reached in the future, in light of all the circumstances.

[26] Finally, counsel for the noter invited me, if refusing that part of the note, to grant leave for the question of remuneration to be revisited by motion in this note. Initially I was sympathetic to that, but on reflection I do not consider that to be appropriate either. This note has been presented by the noters as administrators of the company. Following the making of the winding-up order, they will become the liquidators and, as is implicit in what I have already said, it is appropriate, and proper, that future claims for remuneration should follow the usual course of any liquidation, rather than in a note pertaining to an expired administration.

Disposal

[27] For the foregoing reasons, I have granted the first three orders sought. I have refused the fourth order, to fix the noters' remuneration; and I have declined the invitation to grant leave to revisit that issue by motion in this note. The expenses of and incidental to the note are to be expenses in the administration.