All Fair in Love and Liquidation?

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Contentious insolvency analysis

The article examines the investigative duties and impartiality of liquidators following Biscoe and Baxter as Joint Liquidators of Equitable Law Capital Limited v Milner [2021] EWHC 763 (Ch).

ALL FAIR IN LOVE AND LIQUIDATION?

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The authors of this article recently appeared in a 10 day High Court trial in front of Mr. Justice Meade in Biscoe and Baxter as Joint Liquidators of Equitable Law Capital Limited v Milner [2021] EWHC 763 (Ch). The authors represented the 6th and 7th Respondents against whom all claims were dismissed.

This article concentrates on only one of the key areas of the judgment namely the collection of evidence by a Liquidator (or other office holder) and the Liquidator's duty to be fair and impartial.

Background

Equitable Law Capital ('ELC') set up a scheme in 2014 seeking investment for claims against banks for mis-sold investment bonds to be pursued by a claims management company ('CMC'). The loans made by ELC to the CMC for this purpose were covered by an insurance policy in the name of ELC. The Scheme was marketed to potential investors through a marketing brochure.

The FCA investigated ELC from 2015 onwards for potential breaches of FSMA and ELC stopped receiving investments after March 2016. ELC entered into voluntary liquidation in October 2016 and liquidators were appointed. During investigations it became clear that the brochures contained false information, the CMC was pursuing PPI claims rather than bond mis-selling claims and of the £3.3 million ELC received, the parties involved with the scheme received just under £2.2million either personally or into connected companies, compared to only £230,000 received by the investors.

In January 2019, the Liquidators brought an application against 9 respondents including the sole de jure director, individuals involved in setting up the scheme, the marketing agent and the insurance broker. The Application contained allegations of breach of directors duties and fiduciary duties, conspiracy, fraudulent and wrongful trading, dishonest assistance and transactions at an undervalue.

Liquidators duty of impartiality

It was essentially uncontested that the Liquidator had a duty to approach the investigation in a fair and impartial way. The comment from ICC Judge Barber that started this article was an agreed point of law [59].

"A liquidator conducting an investigation into a contentious issue arising in a company's affairs should strive to gather and review all readily available evidence on that issue on an impartial basis. He should be alive to the possibility of conjecture and unsubstantiated opinion. He should re-evaluate evidence as the investigation progresses" - Re Guardian Care Homes (West) Ltd (In Liquidation) [2018] EWHC 2664 at [116].

In post-trial submissions the Authors also relied on the Judge's comments in Re Keeping Kids Company [2021] EWHC 175 (Ch) at [899]-[902], in which the Official Receiver had received criticism about not keeping an open mind in respect of the case against the Respondents.

Findings of failings in respect of investigation and impartiality

The Judge identified at [63] his major concern –

"the one that troubles me the most is iii) – the way that documents were provided. It is the one that has the most direct impact on my ability to make full, accurate and informed findings of fact."

In particular -

a) Failure to seize key documents from ELC and unequal treatment of the Respondents which created difficulties for all sides in identifying when certain decisions were made and by whom and highlighted a key and unjustified gap in the Liquidator's investigation.

"Further, questions 41 to 43 of the Questionnaire identified that ELC had kept accounting records and that statutory records and a minute book had been kept. These should surely have been the first port of call, but Mr Biscoe did not secure them."[67]

"The Liquidators used more care and energy over getting in the documents of the other Respondents than they did of the Milners. They did not obtain Lillie Milner's computers or telephones or the documents identified in Graham Milner's Questionnaire and they did not use their compulsory powers under s. 236 IA86 (which they did with David Clarkson). The explanation was offered that that was because it would not have been possible to go behind a witness statement from the Milners that they had provided everything, but I do not accept that because at the very least the documents identified in the Questionnaire had plainly not been provided." [68]

b) The manner in which the documents from the Milners, who had settled pre-trial, had been provided as forwarded hard copies of emails and screenshots of texts rather than original electronic copies. The Judge said at [71] and [72] -

"Both of these raised the possibility that Lillie Milner could give over materials that were selective, or redacted, or tampered with. I have already said that I think she had the potential positive motivation to try to cast the blame elsewhere. No adequate justification for this approach was given."

c) There were also criticisms of other parties whose disclosure was deemed to be incomplete without any reason. In considering the documentary evidence, the court categorised it according to its source [81-82]

Impact of these findings on findings of fact

The Judge highlighted some of the problems that the inadequate investigation had in relation to him making findings and the impact that had on the Applicant's case at [79] – [83], which required the Judge to consider the variation in quality of evidence when comparing oral testimonies against the documentary evidence, particularly where there were clear gaps in the evidence or where documents had plainly been tampered with.

Takeaways from this case for Liquidators and Respondents

It is no exaggeration to say that the most fundamental reason that the above findings were disastrous on the Liquidator's claims against the 5th, 6th and 7th Respondents is that the lack of basic documents and the severe issues over provenance of documents that were produced severely undermined the case being presented by the Applicants. The issues

The case is a powerful reminder to Liquidators that they are not like a normal Claimant; they have a duty to remain impartial and must be meticulous in their collection of the evidence and objective in their analysis of the evidence as the case progresses. A dogmatic to culpability and a less than thorough and balanced investigation is likely to cause severe problems at trial.