HISTORICAL SEMINAR MATERIAL

Challenging an Out of Court Administrator Appointment

Appointment restrictions, invalidity, procedural irregularity and urgent relief

Alexander Heylin and Adam Porte

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Challenging an ‘Out of Court’ Administrator Appointment

Alexander Heylin and Adam Porte
ahe@no5.com | apo@no5.com

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Challenging an ‘Out of Court’ Administrator Appointment

Alexander Heylin
ahe@no5.com

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1. Appointing an Administrator ‘Out of Court’
   Power to appoint (Insolvency Act 1986, Schedule B1, paragraph 14)

2. Challenging an ‘Out of Court’ Administrator Appointment – How?
   ‘3 Restricting Paragraphs’ (Insolvency Act 1986, Schedule B1, paragraphs 15, 16 and 17)
   Procedure (standing and ‘legitimate interest’)

3. Challenging an ‘Out of Court’ Administrator Appointment – Why?
   Invalidity of appointment (“fundamental breach” v “irregularity”)
   Indemnity (Insolvency Act 1986, Schedule B1, paragraph 21)
   Statutory declaration (Insolvency Act 1986, Schedule B1, paragraph 18)

Appointing an Administrator ‘Out of Court’

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Appointing an Administrator 'Out of Court'

- Administration is an insolvency process in which administrators are appointed over the company.

> "The purpose and aim of of an administration is to act with speed to enable an independent insolvency practitioner as administrator to present proposals to be approved or rejected by creditors to achieve: (i) the **rescue** of a company which is or is likely to become unable to pay its debts as a going concern; or (ii) a **better result for such a company's creditors** as a whole than will be likely if the company is wound up; or (iii) to **realise its property to make a distribution** to one or more secured or preferential creditors (see paras 3, 11, 49 and 53(1) of Sch.B1)."

Re Tokenhouse VB Ltd (formerly Vat Bridge 7 Ltd) [2020] EWHC 3171 (Ch) (ICC Judge Jones, para 17)

Appointing an Administrator 'Out of Court'

- Administrators can be appointed **'out of court'**.
    - 'Out of court' = **extra-judicial** (in other words, not by a court order).

- One way in which a company may be put into administration is by the **holder of a qualifying floating charge** over all, or substantially all, of the company's assets **exercising a power to appoint an administrator** over the company.
    - "The statutory power of the holder to appoint an administrator is exercisable extra-judicially and is thus distinct from the rights of a creditor and, indeed, other classes of applicant to apply to the court for an administration order."

Secure Mortgage Corp Ltd v Harold [2020] EWHC 1364 (Ch) (HHJ Halliwell, para 21)

Appointing an Administrator 'Out of Court'

- *Insolvency Act 1986, Schedule B1, paragraph 14*

1. **The holder of a qualifying charge in respect of a company's property may appoint an administrator of the company**.
2. For the purposes of sub-paragraph (1) a floating charge qualifies if created by an instrument which –
   a. states that this paragraph applies to the floating charge,
   b. purports to empower the holder of the floating charge to appoint an administrator of the company,
   c. purports to empower the holder of the floating charge to make an appointment which would be the appointment of an administrative receiver within the meaning given by section 29(2), or…
3. For the purposes of sub-paragraph (1) a person is the holder of a qualifying floating charge in respect of a company's property if he holds one or more debentures of the company's secured –
   a. by a qualifying floating charge which relates to the whole or substantially the whole of the company's property,
   b. by a number of qualifying floating charges which together relate to the whole or substantially the whole of the company's property, or
   c. by charges and other forms of security which together relate to the whole or substantially the whole of the company's property and at least one of which is a qualifying floating charge.

Challenging an ‘Out of Court’ Administrator Appointment – How?

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Challenging an ‘Out of Court’ Administrator Appointment – How?

- Despite appearances, the Insolvency Act 1986, Schedule B1, paragraph 14 power is **not unlimited**.

- Schedule B1, paragraphs 15, 16 and 17 (known as the **3 Restricting Paragraphs**) restrict the power of a qualifying floating charge holder (**QFCH**) to appoint administrators.
    - “The statutory power of the holder to appoint an administrator…is only exercisable subject to specific statutory conditions. The floating charge must be enforceable (para 16) and the appointment does not take effect until the procedural requirements are satisfied (paras 18 and 19).”

Secure Mortgage Corp Ltd v Harold [2020] EWHC 1364 (Ch) (HHJ Halliwell, para 21)

Challenging an 'Out of Court' Administrator Appointment – How?

3 Restricting Paragraphs

Insolvency Act 1986, Schedule B1, paragraph 15

1. A person may not appoint an administrator under paragraph 14 unless –
   a. he has given at least two business days' written notice to the holder of any prior floating charge which satisfied paragraph 14(2), or
   b. the holder of any prior floating charge which satisfies paragraph 14(2) has consented in writing to the making of the appointment.
2. One floating charge is prior to another for the purposes of this paragraph if –
   a. it was created first, or
   b. it is to be treated as having priority in accordance with an agreement to which the holder of each floating charge was party.
3. ...

Challenging an ‘Out of Court’ Administrator Appointment – How?

3 Restricting Paragraphs

Insolvency Act 1986, Schedule B1, paragraph 16

An administrator may not be appointed under paragraph 14 while a floating charge on which the appointment relies is not enforceable.

Insolvency Act 1986, Schedule B1, paragraph 17

An administrator of a company may not be appointed under paragraph 14 if –

a. a provisional liquidator of the company has been appointed under section 135, or
b. an administrative receiver of the company is in office.

Challenging an ‘Out of Court’ Administrator Appointment – How?

<u>Insolvency Act 1986, Schedule B1, paragraph 15</u>

- Relevant where there is a ‘prior floating charge’

<u>Insolvency Act 1986, Schedule B1, paragraph 17</u>

- Applies where:
    - a provisional liquidator has been appointed for the company; or
    - an administrative receiver of the company is in office

Challenging an 'Out of Court' Administrator Appointment – How?

<u>Insolvency Act 1986, Schedule B1, paragraph 16</u>

An administrator may not be appointed under paragraph 14 while a floating charge on which the appointment relies is <u>not enforceable</u>.

- Key issue is whether relevant floating charge is 'enforceable'

"…concerned with the question whether the chargee has a right to enforce, rather than with the question whether there are free assets to which the chargee can have recourse for the purposes of enforcement."

"depends upon whether the chargee has a present right to enforce, rather than upon the question whether enforcement has actually taken place."

SAW (SW) 2010 Ltd v Wilson [2017] EWCA Civ 1001 (Briggs LJ, paras 33 and 34)

Challenging an 'Out of Court' Administrator Appointment – How?

<u>Insolvency Act 1986, Schedule B1, paragraph 16</u>

- QFCH does not have to be in a position to realise, for its own benefit, some assets of the company to which it attached

"…it is…nothing to the point that the existence of prior fixed charges over the assets subject to a floating charge may mean that the floating charges cannot take the usual practical steps towards enforcement, such as taking control of and selling the relevant property. The power to appoint administrators is in my judgment itself a means of enforcement.."

SAW (SW) 2010 Ltd v Wilson [2017] EWCA Civ 1001 (Briggs LJ, para 35)

Challenging an ‘Out of Court’ Administrator Appointment – How?

<u>Insolvency Act 1986, Schedule B1, paragraph 16</u>

1. Conditions precedent to enforcement must be satisfied; and
2. a debt must exist

“A floating charge is in my judgment enforceable if any condition precedent to enforcement has been satisfied (such as an event of default) and there remains a debt for which the floating charge stands as security.”

SAW (SW) 2010 Ltd v Wilson [2017] EWCA Civ 1001 (Briggs LJ, para 33)

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Challenging an 'Out of Court' Administrator Appointment – How?

<u>Insolvency Act 1986, Schedule B1, paragraph 16</u>

- Enforceability is judged objectively, in all the circumstances

"…the question whether the floating charge is or is not enforceable within the meaning of para.16 is to be assessed objectively and that such an assessment involves consideration of all the circumstances including the terms of the debenture or other security document between the parties, any collateral contract or agreement, whether between the parties or between the floating charge holder and a third party, any promissory estoppel, and any statutory provision"

Arlington Infrastructure Ltd (in administration) v Woolrych [2020] EWHC 3123 (Ch) (para 50)

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Challenging an 'Out of Court' Administrator Appointment – How?

<u>Procedure</u>

- An applicant must have standing and a 'legitimate interest'
- Who has standing?
  - Company purportedly put into administration
  - Director(s) of the company purportedly put into administration
    - May depend on whether the director(s) own(s) shares in the company
    - Absence of standing might not be fatal (*Minmar (929) Ltd v Khalastchi* [2011] EWHC 1159 (Ch))

- 'Legitimate interest' in bringing the proceedings

  "It would be inappropriate to try to define the categories of interest which can be advanced. It will depend upon the facts and circumstances of the application…"

  Re London Oil and Gas Ltd [2020] EWHC 35 (Ch)

Challenging an ‘Out of Court’ Administrator Appointment – Why?

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Challenging an 'Out of Court' Administrator Appointment – Why?

- Breach of the limitations in the 3 Restricting Paragraphs could result in the **invalidity** of the appointment.

- Parties are seeking an **invalid appointment declaration**, for the court to **set aside** the purported appointment and **indemnity** (Insolvency Act 1986, Schedule B1, paragraph 21).

- In relation to the paragraph 16 restriction, whether or not the appointment is rendered invalid depends on the **nature of the non-compliance** with paragraph 16.

Challenging an ‘Out of Court’ Administrator Appointment – Why?

- If the breach is “**fundamental**”, eg the purported appointee had no power of appointment in the first place, the purported appointment will be <u>**void**</u> (*Glint Pay Ltd (in administration)* [2020] EWHC 3078 (Ch)).
- But if the breach is “merely an **irregularity**” that is “**capable of being cured or ignored**” (*Arlington*, para 59), the appointment might <u>**not**</u> be invalid.

Note: In *Glint*, it was held that a breach of paragraph 16 is <u>**always**</u> a fundamental breach. However, in *Arlington*, it was held that a breach of paragraph 16 is <u>**not**</u> always a fundamental breach.

Challenging an 'Out of Court' Administrator Appointment – Why?

- ***<u>Insolvency Act 1986, Schedule B1, paragraph 18</u>***

    1. A person who appoints an administrator of a company under paragraph 14 shall file with the court –
        a. a notice of appointment, and
        b. such other documents as may be prescribed.
    2. The notice of appointment must include a **statutory declaration** by or on behalf of the person who makes the appointment –
        a. that the person is the holder of a qualifying floating charge in respect of the company's property,
        b. that each floating charge relied on in making the appointment is (or was) enforceable on the date of the appointment, and
        c. that the appointment is in accordance with this Schedule…

Challenging an 'Out of Court' Administrator Appointment – Why?

<u>Insolvency Act 1986, Schedule B1, paragraph 18</u>

- Requires a statutory declaration that each floating charge relied upon was enforceable at the date of the appointment

- Paragraph 18(7) provides that:

  A person commits an **offence** if in a statutory declaration under sub-paragraph (2) he makes a statement (a) which is false, and (b) which he does not reasonably believe to be true.

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Alexander Heylin
ahe@no5.com

No5 BARRISTERS CHAMBERS

Challenging an 'Out of Court' Administrator Appointment: Injunctive Relief

Adam Porte

apo@no5.com

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Introduction

- Alex will deal with the ‘how’ and ‘why’ of a substantive challenge to an out of court appointment.
- The impact of an appointment is significant and difficult to undo.
- For this section, the question is what steps can be taken where appointment is threatened or has happened.
- That distinction is crucial.

The Basics

- Alex will deal with the substance, for now it is sufficient to know that one key issue in respect of an out of court appointment is enforceability.
- In summary – the appointment of an administrator is invalid if your floating charge is not enforceable.
- Ordinarily enforceability is simple to demonstrate. Until it isn't.
- What can be done if a floating charge holder seeks to appoint an administrator, but the company says there is an issue with enforceability and therefore the right to validly appoint?

Injunctive Relief

- The obvious answer in the absence of any agreement between the parties, is to apply for injunctive relief.
- The precise nature of the relief depends on whether the application comes before or after appointment.
- For reasons that will become clear, before appointment is comfortably the better approach.

The Relevant Test

- Those familiar with applications for injunctions will no doubt think this is obvious.
- Spoiler: it is what you think it is.
- But…injunctive relief within insolvency proceedings can apply a different test. Consider an application to restrain advertisement of a winding up petition.
- *BCPMS (Europe) Ltd v. GMAC Commercial Finance Plc [2006] EWHC 3744 (Ch)*
- The argument raised, and why it was rejected.

The American Cyanamid Principles

- *American Cyanamid Co v Ethicon Limited [1975] AC 396*
- Serious issue to be tried.
- Whether damages would be adequate.
- The balance of convenience.

The Phlo State

- *Phlo Technologies Ltd v Tallaght Financial Ltd (t/a Cubefunder)* [2025] EWHC 1405 (Ch)
- The facts.
- The relief sought.
- Applying American Cyanamid considering BCPMS. No serious issue to be tried?
- The usual warning about full and frank disclosure.

The Timing Issue

- The application in Phlo happened before the appointment actually happened.
- A few hours can make all the difference. Once appointment happens, life becomes more difficult.

What’s the Problem with Waiting?

- An injunction can be granted quickly, and so long as it is in place, an administrator cannot be appointed.
- The challenge to the enforceability of the charge can take place without the administrators being in limbo as appointed but unable to act.
- To restrain an administrator after appointment is evidently a far more interventionist step.
- Once appointed, the company is on the back foot seeking to unwind something that has already happened.
- The challenge itself may take months or years to determine.

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