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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES



CR-2020-003814

INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF BLENHEIM SHIPPING UK LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986
[2020] EWHC 3707 (Ch)

The Rolls Building
London, EC4A 1NL

Friday, 2 October 2020

Before:

INSOLVENCY & COMPANIES COURT JUDGE CATHERINE BURTON

MR IAN ROBERT

(in his capacity as former-Liquidator of Blenheim Shipping UK Limited (in Liquidation))

Applicant

- and -

BLENHEIM SHIPPING UK LIMITED (in Liquidation)

Respondent

MS M. MACRO appeared on behalf of the Applicant.

J U D G M E N T

INSOLVENCY & COMPANIES COURT JUDGE CATHERINE BURTON:

- 1 This is an application by the former liquidator, Ian Robert, of Blenheim Shipping UK Limited. I describe him as the former liquidator of the company because he has already filed his final receipts and payments account. Section 171(7) of the Insolvency Act 1986 provides that in the case of a creditors voluntary liquidation, the liquidator vacates office as soon as he has sent a final account to the Registrar of Companies.
- 2 On 16 September 2020, shortly after Mr Robert filed his final account, it came to his attention that the company's bankers had been writing to an out-of-date address to inform the company that it was entitled to a refund of £28,851.21. As matters currently stand, and as a result of the filing of the final account, the company appears currently to be in liquidation but seemingly without a liquidator in office and, pursuant to section 201 of the Act, is due to be dissolved in early October.
- 3 Mr Robert applies for an order to defer the dissolution pursuant to section 201(3), and to be reappointed liquidator under section 108.
- 4 Ms Macro's skeleton argument has helpfully drawn my attention to a potential lacuna in the Insolvency Act, which appears to anticipate in the terms of section 201 that the liquidator will still be in office, albeit that this conflicts with the provisions of section 171, where the liquidator vacates office as soon as he has sent his final account to the Registrar of Companies. It is for this reason that an order is sought pursuant to section 108 of the Act, which provides that, "If from any cause whatever, there is no liquidator acting, the court may appoint a liquidator."
- 5 It is in my judgment entirely appropriate that the court should exercise its powers in this case pursuant to section 201(3) to defer the date of dissolution and section 108 to reappoint Mr Robert. By doing so, the monies, which have now come to light, will become available, after the deduction of the liquidator's expenses, for distribution among the company's creditors who, I note have already received a dividend of 63 pence in the pound.
- 6 For the purposes of section 108, and as required by rule 6.22(2), Mr Robert has filed with the court details of his professional qualification and provided his consent to act. I shall now consider the detailed terms of the draft provided by Ms Macro.
- 7 "And upon hearing counsel for the applicant, it is ordered that Mr Ian Robert be reappointed as liquidator of the above-named respondent, company registration number, pursuant to section 108(1) of the Insolvency Act from the date of this order. The date on which the dissolution of the above-named respondent is to take effect be deferred until 8 April 2021 or further order, and time for delivery of the application and this order pursuant to section 201(4) to the Registrar of Companies be extended to fourteen days." Is it not just the order you have to send to the Registrar under section 201?

MS MACRO: Probably is, let me double check.

JUDGE BURTON: I will have a quick look. I might be wrong.

MS MACRO: Yes, section 201(4), "Copy of order to Registrar".

JUDGE BURTON: Yes, and the Act provides for seven days. Why do you seek fourteen?

MS MACRO: Just to ensure that the deadlines are met, just for good order.

- 8 Thank you. "And the applicant do within fourteen days of the date of this order deliver an office copy of the order to the Registrar of Companies. It is ordered that the liquidator or

any contributor or creditor have permission to apply to the court in order to determine any question arising in the voluntary winding up, as there may be occasion-- ". I am prepared to make an order in those terms.

MS MACRO: I am grateful. There is just one matter, and it is just to raise before the court.

Obviously, I have sought the reappointment from the date of this order.

JUDGE BURTON: Yes.

MS MACRO: But given that he ceased office officially on 8 July.

JUDGE BURTON: Yes.

MS MACRO: Just in case anything should arise, whether a retrospective order from 8 July might be more appropriate.

9 I can see why that might be helpful. However, I am very reluctant to make retrospective orders, for all the reasons commented upon by judges who have been urged, in the context of administration, to do so. I have not seen a retrospective order made in relation to the appointment of a liquidator under section 108. Are you able to refer me to any authority for my jurisdiction to make such an order?

MS MACRO: I am not. I would draw the parallel that precisely the court has already done with the administration order, it is a similar power, and to deal with similar situations.

JUDGE BURTON: Yes.

MS MACRO: It is in this situation, there is a lacuna caused by the way that the rules operate with dissolution, and it just seemed in good order that actually there should be no gap where he was not formally in office just in case anything arises. It is more for good order and as a matter of caution.

JUDGE BURTON: Yes.

MS MACRO: But also one thinks about costs and expenses and things like that as well, because obviously there are the costs of this application which would normally be deducted, but some of those costs would have been incurred prior to today's date.

10 If it were the case that the liquidator's departure from office resulted in the refunded monies vesting *bona vacantia*, then I would be particularly concerned. But I think it would be an unjustifiably bold step to take, without any consideration of the authorities, for the court to determine that it may, and should, make a retrospective order under section 108. What I am prepared to do, instead, is to amend the draft order to make provision for the applicant's costs to be paid as an expense of the liquidation.

11 Chapter 6 of the Rules, "Priority of payment of costs and expenses" includes Rule 6.42, "General rule as to priority" of liquidation expenses. Rule 6.42(4) refers to "The expenses, which are properly chargeable or incurred by the liquidator in preserving, realising or getting in any of the assets". Mr Robert has applied to court in order to preserve the company's assets. He was formerly the liquidator, there was a brief gap and by the terms of my order, he is reappointed as liquidator. However, pending dissolution, the winding-up subsisted. In *Re Toshoku Finance UK plc* the House of Lords held that the former liquidation expense rule, rule 4.218 comprises a complete and definitive statement of the liquidator's expenses and that there is no discretion on the part of the court to extend its provisions (although the court may, pursuant to section 156, alter the order of priority of payments). Rule 4.218 provided "the expenses of the liquidation are payable out of the assets in the following order of priority ...". If an item of expenditure did not fall within one of the sub-paragraphs, it was not open to the court to order that it be paid as an expense. By contrast, Rules 6.42 commences: "All fees, costs, charges and other expenses incurred in the course of the winding up are to be treated as expenses of the winding up". It then proceeds, at sub-rule (4) to set out the order of priority in which they may be paid.

- 12 In the same way that there appears to be a lacuna between sections 171 and 108, there is similarly a potential gap between costs incurred in the course of a winding up, as referred to at the start of the rule, and those listed in sub-rule (4) which all refer to expenses being incurred by “the liquidator”. “Liquidator” does not appear to be defined to include a former liquidator. There appears to be no equivalent provision to that found in Schedule B1 which expressly provides that “administrator” includes a reference to a former administrator. For a compulsory winding up, Rule 7.108 expressly includes the costs of a petitioner but makes no reference to the costs of a party who applies for the appointment of a liquidator under section 103.
- 13 In my judgment, despite the restrictive manner in which the House of Lords determined that Rule 4.218 applies, taking into account: (a) the express wording of the new rules 6.42 and 7.108 which both refer to the expenses of the winding up; (b) that the company is still in the course of being wound up; (c) that the costs of a petitioner who applies for the appointment of a liquidator are properly recoverable as an expense; (d) that rule 6.27(7) expressly provides that the costs of *removing* a liquidator under section 108 are not payable as an expense of the winding up unless the court orders otherwise, but that there is no equivalent restriction in rule 6.22 which considers the court’s power to *appoint* a liquidator, and thus, in my mind, implies that it would be open to the court to order that such costs are payable as an expense; and (e) that the applicant’s costs have been incurred in order to secure and preserve a valuable asset for the benefit of the company’s creditor, it is appropriate for me to order that the costs of the application shall be paid as an expense of the liquidation.

MS MACRO: I am grateful.

JUDGE BURTON: If you would like to provide a revised order to include that.

MS MACRO: Yes. I am grateful,

JUDGE BURTON: Thank you very much.

CERTIFICATE

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This transcript has been approved by the Judge.