IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2019] EWHC 2370 (Ch)

Nos. 7942/2008
BR-2019-000316

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 20 March 2019

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE)
(in administration)
A N D
IN THE MATTER OF THE INSOLVENCY ACT 1986

Before:

THE HONOURABLE MR JUSTICE HILDYARD

(**In Private**)

B E T W E E N :

(1) RUSSELL DOWNS
(2) GILLIAN ELEANOR BRUCE
(3) EDWARD JOHN MACNAMARA
(The Joint Administrators of Lehman Brothers International (Europe) (in administration)) Applicants

- and -

JULIAN GUY PARR Respondent

MR A. RIDDIFORD (instructed by Linklaters LLP) appeared on behalf of the Applicants.

THE RESPONDENT did not appear and was not represented.

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Note from Judge: I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE HILDYARD:

1 This is an application brought by the joint administrators of Lehman Brothers International (Europe) ("LBIE") for, in effect, two orders: one relating to the resignation of Mr Julian Guy Parr, who is joined as a respondent to the application, and the other for his discharge under or pursuant to para.98(2) of Schedule B1 of the Insolvency Act 1986 (the "Act"). The first such application raises a peculiarity in the interpretation of the new Insolvency (England and Wales) Rules 2016, as they presently stand, which came into force in April 2017 (the "Rules"). It is that aspect of the matter which I shall address first.

2 The position in fact is that Mr Parr has already served notice of his intention to resign under Rule 3.63(1)(a) of the Rules, that notice being dated 1 March 2019, which, so far as he is concerned and so far as the primary submission of Mr Riddiford (who appears on behalf of the joint administrators) goes, entitled him to give notice of his resignation to the court under para.87(2)(a) of Schedule B1, the effective instrument whereby his retirement took effect, which he duly did seven days thereafter. However, the question that has arisen is as to whether, notwithstanding that in the notice that Mr Parr gave on 1 March 2019 he stated that he had no intention of filing with the court an application for permission to resign on the basis that none such was required, the Rules actually impose an inescapable obligation to make an application for permission at least in all cases where the original administration was incepted by order of the court. That issue arises because in Rule 3.63(3) it is specified that any notice of intention to resign must contain, in addition to the matters provided for in Rule 3.63(2), which identify the administration and the date of original appointment, the following:

> "(a) the date with effect from which the administrator intends to resign; or
>
> (b) where the administrator was appointed by an administration order, the date on which the administrator intends to file with the court an application for permission to resign."

3 It will have been noted that Rule 3.63(3) is expressed in mandatory terms and the question arises whether Rule 3.63(3)(b) mandates an application for permission to resign, notwithstanding the fact that the rest of what I might call the architecture of the Rules appears to delineate between resignations on specified grounds which did not require permission, and retirements on other grounds, which do. Just to paint in a little of that detail, Rule 3.62 expressly sets out grounds for resignation which include,

at Rule 3.62(1)(b), the intention to cease to practice as an insolvency practitioner, which is the particular ground relied on by Mr Parr; and in Rule 3.62(2) it provides that the administrator may, with the permission of the court, resign "on other grounds" - my emphasis being my own.

4 Consistently with that structure and moving forward in the architecture, Rule 3.64 identifies the intended or required recipient of any notice, and makes clear that in the case of a notice in respect of an administrator appointed under an administration order, and where notice of resignation is given under para.87(2)(a) of Schedule B1, the effective notice must be filed by filing the notice with the court: see Rule 3.64(4).

5 Thus, as I have said, reading Rules 3.62 and 3.64, and indeed reading Rule 3.63, except for Rule 3.63(3)(b) in the manner in which it is expressed, it envisages that if the administrator resigns on grounds within Rule 3.62(1), the permission of the court is not required, though in other instances not covered by Rule 3.62(1) it would be.

6 The odd man out, if I can put it like that – Rule 3.63(3)(b), in requiring, apparently, permission of the court nevertheless – is also out of step with the previous rules which the new 2016 Rules were brought in to replace, which contained no requirement where the resignation was expressly, as it were, permitted, for the further permission of the court.

7 In the particular case, there is an easy solution to this conundrum. Mr Riddiford's explanation and the application by reference to which he made it asks the court to approve the validity of the notice served, notwithstanding that it states that no application for permission would be made. Alternatively, if I did not think that that was appropriate, for the court's permission in any event. Thus, as I put it to Mr Riddiford, he has, as it were, three arrows. The first is that nothing was required to be stated, so that the notice is valid in any event; second, that something was required to be stated, and the notice should be validated, and, thirdly, that permission should be granted even if it is required.

8 However, as also discussed in my helpful conversations with Mr Riddiford, whilst the situation is straightforward in this case, and though it may, as a practical matter, always be straightforward in that an administrator will seldom retire without seeking discharge, so that the matter will come before the court in any event, it is appropriate for the court to state its view as to whether Rule 3.63(3)(b) does, by what would in effect be a side wind, impose an obligation on a court-appointed administrator always to seek the permission of the court for his resignation. Of course the court, as Mr Riddiford was swift to accept, is always slow and indeed reluctant to gloss the provisions of the Act and the Rules, especially since the latter have been worked over by experienced insolvency practitioners, and a gloss which appears appropriate in one case may nevertheless not accord either with what they envisaged or with the proper response in other less satisfactory or obvious instances.

9 However, especially by reference to the predecessor provisions and by reference to the fact, rightly expressed by Mr Riddiford, that if an application to the court for permission was always required in the case of a court-appointed administrator who wished to resign, one would expect to find express words to that effect in the governing Rule, which is Rule 3.62, I am persuaded that Rule 3.63(3)(b) is to be read

as addressing the position not where the administrator appointed by an administration order does not need permission because he falls under Rule 3.62(1) but only the situation which arises if Rule 3.62(2) applies. In other words, there should be, by way of gloss or interpolation, read into Rule 3.63(3)(b), after the words "an administration order" words such as "and needs permission under Rule 3.62(2)". That, I think, would bring the architecture into cohesive and consistent form, and would be consistent with the previous position. It is probably idle to speculate how, on that view, this glitch has emerged. It may be, as Mr Riddiford postulated, that at some point it was envisaged that the permission of the court would always be required where an administrator was court-appointed, and it was at that time intended to include some such words in Rule 3.62 to make that clear. But on the architecture as eventually adopted, I would myself consider that that is the appropriate interpretation even though it requires a gloss or interpolation. For the avoidance of doubt if a court-appointed administrator were seeking to rely on one of the two grounds set out at Rule 3.62(1)(c) and were in any doubt as to whether those grounds were made out, then the present judgment should not be relied on as entitling such an administrator to rely on his or her subjective judgment in this regard. If the administrator held such doubts then, as an officer of the court, he or she would be bound to put it before the court for their resolution.

10 I should say that, especially having regard to the *ex parte* nature of the application, Mr Riddiford was assiduous to refer me to, in particular, *Lightman & Moss on the Law of Administrators and Receivers of Companies* (6th edn) at Chapter 27 where at footnote 46 it is stated:

> "Note, however, that rules 63(3)(b) and 64(1)(c) imply that a court-appointed administrator cannot in practice resign without the court's permission."

I naturally have been concerned to seek to understand that footnote, and it is readily understandable by reference to the provisions which I have identified, though, as it seems to me, Rule 3.64 does not provide the implication which is apparently referred to in the footnote.

11 Accordingly, and based on my preferred interpretation, the notice given by Mr Parr was entirely correct and needs no validation, and took effect thereafter in accordance with the Rules without the need for court validation. I am given additional comfort in this regard by the saving provision in Rule 1.9(1), though in fact, in light of my preferred interpretation of Rule 3.63, it is unnecessary to consider the effect of that provision in the present case. For the avoidance of doubt and for the reassurance of Mr Parr, who I should have earlier stated sent a letter to the court supportive of the present application in all its limbs, I would be agreeable to the order confirming the effectiveness of the notice. I think that will suffice. I do not think I should go on to give permission because I think that would be inconsistent. But I should indicate for the avoidance of doubt that I would have had no hesitation in giving permission had I considered that to be required.

12 I move, on that basis, to the second limb of the application under para.98 of Schedule B1 for the discharge of Mr Parr. The reason for the importance of that discharge is addressed and explained by Sales J (as he then was) in *Re Hellas Telecommunications*

[2011] EWHC 3176 (Ch). It is that once retired, the retiring administrator would not have access to the funds whereby any liability could be discharged otherwise than out of his own pocket and, save in very exceptional circumstances, that would plainly be wrong as regards claims *in futuro*. As regards notified claims, the discharge sought makes express exclusion and the witness statement in support of the application by one of the joint administrators, that is to say Mr Russell Downs, in his 18th witness statement dated 8 March 2019, also confirms to me that, after no doubt proper investigation, the administrators are satisfied that, save as regards one potential claim which has already been notified to the joint administrators, no other claims are considered to exist or be threatened.

13 In my view, Mr Parr's discharge against all future claims other than the claim notified and any others, if any were to emerge, pre-notified, is plainly appropriate and necessary for his safe retirement. The only other question is as to what, in another case – in respect of another Lehman company, Lehman Brothers UK Holdings Ltd, also in administration –I have described as the clockwork. The point I there made was that notwithstanding the usual practice of stating that the discharge should take effect 28 days after the order, that, as a matter of strictness, that clockwork was only engaged once the conditions for the retirement of the administrator had been fully satisfied. I adhere to that analysis and note that the order proposed adopts it and therefore the clockwork will be engaged as from that date, and, given the exigencies and complications as well as in particular the long-standing nature of this particular administration, I approve the 60-day rule.

14 I should state, as perhaps I should have stated earlier, that the one creditor who has pre-notified a claim, as explained in Mr Downs' 18th witness statement, was personally notified of the intention to make this application and as to the date on which it would be heard I think on at least two occasions: one on 6 March and the other on 18 March, once the day no doubt had been secured. Furthermore, there had been more general notification by way of updates on the website which is the now usual method in LBIE's case for keeping creditors abreast of developments on 21 February, 1 March and 12 March. I also asked for it to be checked that there was no one seeking to make representations but who was deterred by the "in private" signs, and there was no response. Thus, I am fully satisfied that the creditor with the pre-notified claim as referred to above has had every opportunity to object to this application in any of its limbs but, for one reason or another, has not determined to do so.

15 I thus will ask Mr Riddiford just to pilot me through the approved order in the light of what I have said, but the long and the short of it is that I grant both aspects.

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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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** This transcript has been approved by the Judge **

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