

HARNEYS

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BVI Administrative Receivership and English Insolvency Law

The nearly simultaneous passing of the Insolvency Act 2003 in the British Virgin Islands (the “**BVI Act**”) and the Enterprise Act 2002 (the “**Enterprise Act**”) in the UK is likely to give rise to some interesting cross border issues for practitioners structuring secured financing transactions and considering steps to enforce security created by debtors with cross border operations.

At a time when, in the UK, secured creditors and their advisors are facing the diminution of receivership as an institution under the Enterprise Act, (with the option of administrative receivership being limited to pre-commencement floating charges and to other specialised corporate financing situations), the BVI Act introduces administrative receivership and administration in a way which borrows from the original English position under the Insolvency Act 1986, with the administration procedure being entirely court driven and the holder of a floating charge having an effective right of veto.

In recognition of the lack of an established set of international rules to govern the interaction of UK insolvencies and insolvencies elsewhere in the world¹, this article seeks to look at some of the practical cross border legal issues which may arise. Given the widespread use of BVI companies with assets and liabilities in the UK, the issues are far from academic and a proper understanding of how the two regimes will interact is essential.

For the purpose of this article, we have taken as our starting point an insolvent BVI company with assets and liabilities in the UK and have focused on the approach an English court might take to the BVI insolvency, and how it might deal with the existence of a BVI administrative receiver. Although in practice, arguments as to the location of the centre of main interest are likely, we have also assumed for present purposes that this is clearly in the UK. We have also ignored transitional aspects.

¹ The EU Council Regulation on Insolvency Proceedings of May 2002 were introduced to improve the effectiveness of cross border insolvency proceedings within the EU. However, they do not harmonize the insolvency laws of member states, but simply provide a framework which allows for separate proceedings in member states concurrently but without competing. This approach is likely to influence the attitude of the English Court to insolvencies outside of Europe.

Relevant substantive BVI provisions

Administration under the new BVI Act is a court driven “breathing space” for an ailing company, during which the rescue of its business (or a part of it) or the disposal of its assets more advantageously than would be the case in a liquidation can be attempted.

The provisions in the BVI Act relating to administration borrow heavily from the English Insolvency Act 1986. An administrator is appointed by order of the court, which must be satisfied that one of the statutory purposes exist. The administrator takes control of the company and must formulate proposals for consideration by the company’s creditors. If these are approved the administrator then manages the company’s business, assets and affairs in accordance with the proposals until the statutory purpose is achieved or the administrator is of the opinion that it cannot be. Administration can be blocked by a secured creditor who has the ability to appoint an administrative receiver and accordingly, this is likely to increase significantly the use of floating charges in financing transactions concerning BVI companies.

At the same time (and again borrowing substantially from the English 1986 legislation) the BVI Act provides a statutory codification and amendment to the existing BVI law of receivers and introduces the concept (which is new to the BVI) of an “administrative receiver”. The administrative receiver is a receiver of the whole or substantially the whole of the business undertaking and assets of a company, appointed by a floating charge holder (or in some circumstances by the court).

The majority of differences between BVI administration and administrative receivership and (pre Enterprise Act) English administration and administrative receivership are technical. It follows therefore that English Judges dealing with BVI administrations and administrative receiverships should be at home with the concepts used in the BVI Act, and conflicts between the two jurisdictions should, in principle, be capable of resolution with a degree of predictability.

In broad terms, the ability of a holder of a BVI floating charge to block a BVI administration should be considered to be the same as that of an English floating charge holder (pre Enterprise Act) in respect of an English administration. However, it is of note that the BVI Act specifically recognises the validity of a “lightweight” floating charge; an administrative receiver being defined as “*a receiver of the whole, or substantially the whole of the business, undertaking and assets of a companyappointed out of court or on behalf of the holder of a debenture or other instrument of the company secured by a floating charge, whether or not that debenture or other instrument is also secured by one or more security interests.*”. Although arguably this does not take the position significantly further than *Re Croftbell Ltd [1990] BCC 78* (where the Court held that that a charge which was expressed to extend to future assets was to be treated as a floating charge, even though at the time of its creation the company had no assets of the class in question), this statutory recognition provides a degree of certainty, and reinforces (if reinforcement is necessary) that BVI administration is not to be considered as a procedure which can be imposed without the consent of a floating charge holder, still less as the default

insolvency procedure. The “effective veto over the appointment of an administrator²” which the Enterprise Act has sought to diminish in the UK is a central feature of the BVI Act.

Finally, as regards a BVI company whose centre of main interests is in England, the impact of administration now being available as a BVI procedure is of limited significance, because it has always been available in England under section 426 of the Insolvency Act 1986. This was the case even before *Re Brac Rent-a-car International Inc. [2003] EWHC (Ch) 128*, which effectively expanded the jurisdictional reach of the UK courts as it applied the EU Regulation to non EU incorporated companies.³

The position in the UK as a result of the Enterprise Act

However, the more restricted position and powers of administrative receivers under the Enterprise Act is likely to have a bearing on the attitude of the English Court to Administrative Receivers appointed in the BVI acting or seeking to act in relation to assets in the UK, and it is worth looking briefly at the position now under the Enterprise Act.

Whilst it is right that the Enterprise Act was intended to heralded the diminution of administrative receivership as an insolvency regime, the reforms under the Enterprise Act are in fact quite subtle, and they effectively merge administration and administrative receivership procedures, rather than bringing an end to administrative receiverships altogether.

The new administration procedure in fact imports many of the benefits that floating charge holders enjoyed under the administrative receivership regime. For example, a floating charge holder can still appoint an Insolvency Practitioner out of court, but now as an administrator (Insolvency Act, Schedule B1 paras 14-21). A floating charge holder can also intervene in respect of other parties’ applications in order to ensure that they have their own practitioner appointed, subject only to a right of refusal by the Court. Further, the new three limbed “purpose” of administration also accommodates the interests of the floating charge holder, by providing that where it is not reasonably practicable to save the company, or achieve a better result for the creditors as a whole than would be achieved under a winding up, the administrator may pursue the sole objective of realising property in order to make a distribution to secured or preferential creditors. There are carve outs from the Act that recognise special cases where administrative receiverships still plays an important role; for example, capital markets, private/public partnerships, utility projects, financial markets and large project finance arrangements. Section 72G of the Act inserts a new Schedule 2A to allow for further exceptions to be created.

² Paragraph 641 of the Explanatory Notes to the Enterprise Act 2002.

³ This purposive interpretation was followed in *Re Salvage Association [2003] EWHC 1028*. Likewise, see *Re Ci4Net.Com Inc (20 May 2004)*, a case in which a creditor had placed 2 group companies into administration in the UK and the companies argued that they were respectively incorporated in the US and Jersey and so the centre of main interests was not in the UK. The Court held that the centre was in the UK and there was no reason to suppose that the presumption that the centre lies in the place of incorporation is particularly strong.

In addition, the effect of an appointment of an administrative receiver (pursuant to a pre-Enterprise floating charge) is that an administrator may not be subsequently appointed (Schedule B1 Insolvency Act, Paragraphs 17(b), 25(c) and 39). The converse also applies however- an administrative receiver must vacate if an administrator is appointed (Paragraph 41, Schedule B1). Therefore, save for the changes made to the exit routes from administrations, the Enterprise Act does not give rise to major innovations or changes in respect of the interaction of the different insolvency procedures. Administrations and administrative receiverships remain mutually exclusive procedures. The most significant changes relate to the rights of floating charge holders to instigate a particular procedure, and there is undoubtedly a move towards a more collective procedure in the Enterprise Act. The “top slicing provisions” in the Enterprise Act (section 251) are an obvious erosion of floating charge holder rights and what is likely to happen is that charge holders will seek to enforce their security without appointments or will insist on charges on fixed assets as a condition of lending instead of having floating charges.

Tools available to the English court

Against this backdrop, it is perhaps worth considering the basic tools available to an English Court when considering or assisting a BVI insolvency:

- (a) Section 426 of the Insolvency Act 1986⁴. These provisions permit the UK Court to offer assistance to the BVI Court. Although the UK enjoys a discretion in such applications and may think it appropriate to reject a request for assistance (*Hughes v Hannover Ruckversicherungs AC* [1997] BCC 921). the policy of judicial comity is however the starting point on any request under Section 426, and the position appears now to be that it would require something extraordinary to refuse a request for assistance. *England v Smith (Re Southern Equities Corp)* [2001] Ch 419. In *Re Trading Partners Ltd* [2002] BPIR 605 the English court acceded to a request from the BVI court to allow liquidators to take advantage of section 236 of the Insolvency Act in order to gain access to documents in the possession of administrative receivers of a related company.
- (b) Making an administration order in England in relation to the BVI company.
- (c) Making an ancillary winding up order in respect of the BVI company in England.
- (d) Appointing of a receiver⁵.
- (e) Promoting a scheme of arrangement or CVA.
- (f) Granting interim relief under section 25(1) of the English Civil Jurisdiction and Judgments Act 1982 and Ord 11 r.8A.

⁴ The BVI was designated for the purposes of s. 426 by the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI1986/2123)

⁵ *Re kooperman* [1928]W.N.101

Recognition in England of BVI Administrative Receiver

The starting point for any analysis of how an English court would deal with a BVI administrative receiver must be Rule 161(2) of Dicey & Morris which summarises the decisions in *Cretanor Maritime Co. Ltd v Irish Marine Management Ltd*. [1978] 1 W.L.R. 966, *Re C.A. Kennedy Co. Ltd. and Stibbe-Monk Ltd.* (1976) 74 D.L.R. (Ontario), *Banco de Bilbao v. Sancha and Rey* [1938] 2 K.B. 176. It provides that

“A receiver appointed otherwise than under the law of any other part of the United Kingdom in respect of the property of a corporation having created a charge which, as created, was a floating charge may exercise his powers in England if the exercise of those powers is authorised by the law of the country of incorporation.”

The primary justification for this is that a receiver appointed under a charge acts as the agent of the company which created that charge, and it is for BVI law to determine who is entitled to act on behalf of the BVI company.

Assuming therefore that the relevant BVI charge is a valid contract according to English conflict of law rules (which in the case of a BVI company giving a BVI law governed charge seems clear) it is difficult to see how the BVI administrative receiver could not be recognised by an English court.

However, a receiver’s authority will be recognised in England only to the extent that his powers are consistent with English law. Where his powers are consistent, then as between the receiver and other claimants, priority between them will be governed by English law, even if the English creditors will be prejudiced by the recognition of the receiver’s powers.

However, the key lies in the words “to the extent his powers are consistent with English law”. The fact that a BVI administrative receiver will be recognised is not the same as saying that his appointment as such necessarily has the same consequences in England as it would have in the BVI, in particular, the ability to prevent an administration order being made. Whilst a BVI receiver should be entitled, prima facie to exercise the same powers over UK assets as he possesses in relation to BVI assets, the exercise by a BVI administrative receiver of his powers may not be consistent with English law.⁶ Accordingly, it remains arguable that the appointment of a BVI receiver would not prevent an administration order in England.

The appointment of a receiver under an English Law Floating Charge over a BVI Company

Section 72A of the Insolvency Act (introduced by the Enterprise Act) curtails a floating charge holder’s entitlement to enforce security through the appointment of an administrative receiver, and the section does not contain an express exception to this

⁶ see Section 72 Insolvency Act 1986 in this regard in relation to Scottish receiverships.

general prohibition in relation to the appointment of administrative receivers for non-UK companies.

However, whether this prohibition bites in relation to an English Floating Charge over a BVI company may depend on whether a BVI company is a “company” for these purposes⁷.

Unfortunately there is conflicting case law on the meaning of “company” in this part of the Act. The general rule of interpretation that the word ‘company’ does not encompass foreign companies can be displaced by context, and was held to be so displaced in the context of administrative receivers in *Re International Bulk Commodities Ltd. [1993] Ch77*. In that case, the Court held that since a foreign company could be wound up under the provisions of Part V of the Insolvency Act 1986, a receiver of it could be an administrative receiver.⁸ However, the decision in *Re International Bulk Commodities* is not without its critics and the later decision in *Re Devon and Somerset Farmers Ltd [1994] Ch57* (to the effect that an industrial and provident society cannot go into administrative receivership, because it is not a company) is difficult to reconcile with it.

Accordingly, if a BVI Company is a “company” within this part of the Act, then arguably Section 72A bites in relation to an English Floating Charge in respect of that company’s property, and with it the prohibition on appointment of an administrative receiver. It would follow that an English floating charge holder over a BVI Company (where the charge is created post commencement of the Enterprise Act) could not appoint an administrative receiver over the company.

The appointment of a receiver under a BVI Law Floating Charge over a BVI Company

However, a properly drafted BVI law floating charge is, as a matter of both BVI law and English law, perfectly capable of covering assets of a company both present and future irrespective of where the property and assets are located⁹.

The question arises therefore whether a BVI floating charge is a “qualifying floating charge”, under Section 72A of the Insolvency Act, such as to disable the BVI charge holder from appointing an administrative receiver over assets in the UK.

Section 72A (3) provides that the “holder of a qualifying floating charge in respect of a company’s property” has the same meaning as in Paragraph 14 of Schedule B1 of the Act. Paragraph 14 provides, inter alios, that a floating charge qualifies if created by an instrument which by its terms purports to empower the holder of the floating charge to appoint an administrator or an administrative receiver of the company.

⁷ Section 254 of the Enterprise Act gives the Secretary of State the power to provide for a provision of the English Act to apply to a foreign country but no statutory instrument has yet been made.

⁸ The debenture in that case was secured by a floating charge in the English form however, and the Court did not consider the position where the debenture is governed by foreign law.

⁹ *British South Africa Co. v De Beers Consolidated Mines Ltd. [1910] Ch 353.*

A BVI floating charge will not purport to empower the holder to appoint an English (or for that matter BVI) administrator. However, might it purport to empower the holder to appoint an administrative receiver within the meaning given by Section 29(2) of the English Insolvency Act?

Whilst the definition of administrative receiver under the English and BVI Acts are, as already noted, extremely similar, they are different creatures created under different statutes of different jurisdictions. Just as Section 29 does not apply to receivers appointed under Scottish law, it is suggested that the prohibition in section 72A on the appointment of an “administrative receiver” cannot encompass/prevent the appointment under a BVI floating charge of an administrative receiver over a BVI company.

That this is/should be the case is strengthened by the existence of provisions of the Enterprise Act empowering the Secretary of State to bring in by statutory instrument provisions dealing with companies incorporated outside Great Britain.

However, even if Section 72A does not prohibit the appointment of a BVI administrative receiver over a BVI company with assets in the UK, it is arguable that the powers of an administrative receiver appointed under a debenture governed by BVI law will be limited to those not inconsistent with English law and as a matter of conflict of laws, a BVI appointed administrative receiver may be precluded from exercising powers in England which are conferred by the BVI Act if those powers are inconsistent with English law.

Whilst the appointment of a BVI administrative receiver will not of itself prevent an English court from making an administration order or prevent the out of court appointment of an English administrator, the question of how an English administration would then work if a BVI administrative receiver was in place needs to be addressed.

It seems to us that to answer that question one must first consider the powers and status of a BVI administrative receiver as a matter of BVI law. Assuming there are no provisions to the contrary in the floating charge a BVI administrative receiver will have those powers set out in Schedule 1 to the BVI Act. These are similar to those contained in Schedule 1 to the English Act and it is clear from their extent that once a company goes into administrative receivership the control of its management passes from the directors to the receiver¹⁰. However, how does this sit alongside an English administration? Will the English Court allow a BVI administrative receiver to take control of assets in the UK which would otherwise be under the control of the English administrator? Our view is that the answer is likely to be yes. The English courts have a long tradition of giving effect to the powers and privileges of foreign insolvency appointees and the fact that we are here dealing with receivers rather than for example foreign liquidators does not impact on the basic principle of comity involved. The fact that an administrative receiver would not be appointed if the governing law of the charge was English law is immaterial.

¹⁰ *Re Joshua Shaw & Sons Ltd (1989) 5BCC 188*