

Article by Stephen King, partner and head of Dispute Resolution and Andrew Willan solicitor in Dispute Resolution at Payne Hicks Beach first featured on Growth Business UK online on 29 October 2015
<http://www.growthbusiness.co.uk/growing-a-business/business-regulations/2496051/from-bad-to-worse-how-administration-turned-even-uglier-amid-legal-battles.shtml>



From bad to worse: how administration turned even uglier amid legal battles

When a company goes under the administrators are responsible for selling the assets, but how far do those responsibilities stretch? This salutary tale explores that question



Legal battle: What is within the remit of administrators?

By **Stephen King and Andrew Willan**

Date: 29 October 2015

The fallout from the demise of Julie Davey's property development business has spawned some intriguing litigation involving insolvency practitioners. Ms Davey is suing administrators from the accountancy firm BDO following the demise of her business, Angel House, alleging that the administrators engaged in a "light-touch administration" and failed to pursue the best price for the company's assets.

It is alleged that administrators abused their legal powers to help Dunbar Bank, a subsidiary of the insurance company Zurich, to foreclose on borrowers "aggressively" to the detriment of creditors and shareholders. The claim is reportedly valued at £50 million.

Article by Stephen King, partner and head of Dispute Resolution and Andrew Willan solicitor in Dispute Resolution at Payne Hicks Beach first featured on Growth Business UK online on 29 October 2015
<http://www.growthbusiness.co.uk/growing-a-business/business-regulations/2496051/from-bad-to-worse-how-administration-turned-even-uglier-amid-legal-battles.shtml>

The claim serves as an important reminder of the risk of professional negligence claims faced by administrators and raises several significant questions regarding the respective roles of administrators and creditors or shareholders.

An owner of a business may feel bitterly aggrieved if they think a secured creditor has prematurely appointed administrators for what might be the creditor's own commercial purposes when the consequence as they see it is their life's work brought to an abrupt end and the assets sold in a fire sale.

Where an administration is alleged to have been "light-touch", what administrators' duties are engaged?

Once appointed, administrators are officers of the court and therefore under a general duty to behave fairly and honourably. As professionals, administrators are under a further obligation to exercise reasonable skill and care in the discharge of their duties. An administrator is also an agent of the company with a duty to manage its affairs and business.

>See also: 'Sub-prime Unicorns' risking long-term futures

The Insolvency Act 1986 specifically provides that administrators must carry out their functions in the interests of creditors as a whole, perform their functions as quickly and efficiently as is reasonably practicable and manage the affairs of the company in accordance with the proposals approved at creditors' meetings.

As with lenders who owe a duty to borrowers to obtain the best price reasonably obtainable on a sale of mortgaged property, administrators are obliged to achieve a fair and reasonable price when disposing of assets.

In practical terms, policing this duty is far from straightforward. Ascertaining what a fair price should be for assets of uncertain or diminishing value can be problematic and, where time and resources are scarce, it can be even harder to establish whether a fair price was achieved.

In these situations, administrators often have little choice but to sell assets quickly and efficiently, particularly in circumstances where there is pressure to sell a business as a going concern in order to save jobs.

The court tends to place reliance on the expertise and experience of impartial administrators and will therefore generally sanction any commercial decisions taken unless such a decision has been based on a misapplication of law or is conspicuously unfair to a particular creditor.

The discretion afforded to administrators in terms of commercial decision-making is epitomised by pre-pack sales without the need to even consult creditors or obtain Court approval.

However, by no means does this equate to carte blanche to do with assets what the administrators please; the duty to act in the best interests of creditors still applies and wherever possible it should be ensured that assets are fully and transparently marketed.

Sensible precautions

Other sensible precautions to take to avoid accusations of failing to achieve the best price include taking independent advice from specialist valuers and investigating thoroughly the nature and extent of the asset in question.

>Related: Pursuing legal action for a contract dispute

The options under the Insolvency Act 1986 for challenging the conduct of an administrator include, for example, an application to court alleging misfeasance and/or seeking the removal of an administrator from office.

During an administration, a creditor or shareholder of the company can challenge the administrator by applying to court on the grounds either that (1) the administrator is acting in a way that unfairly harms

Article by Stephen King, partner and head of Dispute Resolution and Andrew Willan solicitor in Dispute Resolution at Payne Hicks Beach first featured on Growth Business UK online on 29 October 2015
<http://www.growthbusiness.co.uk/growing-a-business/business-regulations/2496051/from-bad-to-worse-how-administration-turned-even-uglier-amid-legal-battles.shtml>

the interests of the applicant or (2) the administrator is not acting as quickly or as efficiently as is reasonably practicable.

Again though, where there are sound commercial reasons concerning the interests of the creditors as a whole, applications are likely to face an uphill struggle.

Various parties, including subsequent administrators and creditors, may apply to court alleging misfeasance. This may include, for example, allegations that the administrator has misapplied property of the company or has breached a fiduciary or other duty. The quantum of such claims can be substantial especially if future loss of value is argued, though such damages claims can be speculative.

If an application alleging misfeasance is successful, the court will not award compensation to an individual creditor. Instead, any payment awarded will be to the insolvent company for distribution to creditors as a whole.

Whether there is an abuse of the administrators' powers will depend on the particular circumstances of each case. The courts are understandably reluctant to interfere with commercial decisions and this is reflected in the relatively small number of successful claims brought against administrators in this context.

However, claims such as that brought against the partners of BDO serve as a reminder that administrators must exercise caution when disposing of assets and, insofar as possible, take steps to ensure that the best price reasonably obtainable is achieved.

Stephen King is a partner and head of dispute resolution at Payne Hicks Beach. **Andrew Willan** is a solicitor in the dispute resolution team at Payne Hicks Beach

Further reading: Employers split of future of tribunal fees

- See more at: <http://www.growthbusiness.co.uk/growing-a-business/business-regulations/2496051/from-bad-to-worse-how-administration-turned-even-uglier-amid-legal-battles.shtml>



Stephen King
Partner, Dispute Resolution



Andrew Willan
Solicitor, Dispute Resolution