personal capacities that a majority of other shareholders will accept it as well, it seems to me that it would be artificial to say that they were under a positive duty to advise shareholders to accept the highest offer. The fact that they would get more money by taking the higher offer is hardly something which needs to be pointed out. I do not think that fairness can require more of the directors than to give the shareholders sufficient information and advice to enable them to reach a properly informed decision and to refrain from giving misleading advice or exercising their fiduciary powers in a way which would prevent or inhibit shareholders from choosing to take the better price. Thus I doubt whether it would have been unfair if the directors, on receipt of the rival bid, had issued a statement saying something along the following lines:

> Shareholders will have received both bids. We think that they contain sufficient information to enable shareholders to reach a properly informed decision and there is nothing which the board wish to add. As individual shareholders, your directors propose to accept the N bid and hope that other shareholders who have no contrary fiduciary duties will have sufficient family loyalty to do so also.

[His Lordship held, however, that the circular which the directors had in fact sent to the members was arguably misleading and that accordingly the petition should be allowed to proceed.]

[15.14] Dawson International plc v Coats Paton plc 1993 SLT 80, [1988] 4 BCC 305 (Court of Session (Outer House))

The facts are immaterial.

LORD CULLEN: At the outset I do not accept as a general proposition that a company can have no interest in the change of identity of its shareholders upon a take-over. It appears to me that there will be cases in which its agents, the directors, will see the take-over of its shares by a particular bidder as beneficial to the company. For example, it may provide the opportunity for integrating operations or obtaining additional resources. In other cases the directors will see a particular bid as not in the best interests of the company …

I next consider the proposition that in regard to the disposal of their shares on a take-over the directors were under a fiduciary duty to the shareholders and accordingly obliged to act in such a way as to further their best interests. It is well recognised that directors owe fiduciary duties to the company. Thus the directors have the duty of fiduciaries with respect to the property and funds of the company …

(p. 765) In contrast I see no good reason why it should be supposed that directors are, in general, under a fiduciary duty to shareholders, and in particular current shareholders with respect to the disposal of their shares in the most advantageous way. The directors are not normally the agents of the current shareholders. The cases and other authorities to which I was referred do not seem to me to establish any such fiduciary duty. It is contrary to statements in the standard textbooks … The absence of such a duty is demonstrated by the remarkable case of *Percival v Wright* **[7.05]**. I think it is important to emphasise that what I am being asked to consider is the alleged fiduciary duty of directors to current shareholders as sellers of their shares. This must not be confused with their duty to consider the interests of shareholders in the discharge of their duty to the company. What is in the interests of current shareholders as sellers of their shares may not necessarily coincide with what is in the interests of the company. The creation of parallel duties could lead to conflict. Directors have but one master, the company. Further it does not seem to me to be relevant to the present question to build an argument upon the rights, some of them very important rights, which shareholders have to take steps with a view to seeing that directors act in accordance with the constitution of the company and that their own interests are not unfairly prejudiced.

If on the other hand directors take it upon themselves to give advice to current shareholders, the cases cited to me show clearly that they have a duty to advise in good faith and not fraudulently, and not to mislead whether deliberately or carelessly. If they fail to do so the affected shareholders may have a

remedy, including the recovery of what is truly the personal loss sustained by them as a result. However, these cases do not, in my view, demonstrate a pre-existing fiduciary duty to the shareholders but a potential liability arising out of their words or actions which can be based on ordinary principles of law. This, I may say, appears to be a more satisfactory way of expressing the position of directors in this context than by talking of a so-called secondary fiduciary duty to the shareholders.

Enforcement

The Panel is responsible for enforcing the rules contained in the Takeover Code. The Panel has power to order compensation in circumstances where a rule requiring the payment of money has been breached and to apply to the court to enforce its rulings and directions (CA 2006 ss 954 and 955). The Panel can also impose a range of sanctions upon persons who breach its rules, including reporting conduct to other regulatory authorities, such as the Financial Conduct Authority.

BIS is responsible for enforcement of other provisions in the Act, including the criminal offences created in connection with unlawful disclosure of information subject to secrecy provisions, bid documentation which fails to meet the standards required by the Takeovers Directive and where a company fails to notify relevant takeover authorities of its decision to opt in or out of the breakthrough provisions.

Further Reading

BOARDMAN, N, 'What the Takeover Directive Means for the UK' (2006) 25 *International Financial Law Review* 174.
Find This Resource

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HOPT, K and WYMEERSCH, E (eds), *European Takeovers: Law and Practice* (1992), especially the chapters by R Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation' and R Cranston, 'The Rise and Rise of the Hostile Takeover'.
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(p. 766) MEJUCQ, M, 'The European Regime on Takeovers' (2006) 3 *European Company and Financial Law Review* 222.
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ROBINSON, W, 'A Change in the Legal Wind—How a New Direction for Corporate Governance Could Affect Takeover Regulation' (2012) 23 (9) *International Company and Commercial Law Review* 292.
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TRIBE, J and ZHAO, J, 'Companies Act 2006 Schemes of Arrangement in Comparative Perspective' (2010) 25 *Butterworths Journal of International Banking and Financial Law* 15.
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VAN DER ELST, C and VAN DEN STEEN, L, 'Balancing the Interests of Minority and Majority Shareholders: A Comparative Analysis of Squeeze-Out and Sell-Out Rights' (2009) 6 *European Company and Financial Law Review* 391.
Find This Resource

Notes:

[1] The other set is in CA 2006 Pts 26 and 27, see 'Arrangements and reconstructions under CA 2006 ss 895–901', pp 744ff.

[2] Paradoxically, however, if this is done by the bidding company exchanging its own shares for the shares of the target company, the former shareholders in the target will end up controlling the bidder.

[3] See CA 2006 Pt 27.

[4] It is required if the creditors' liquidation committee does not give approval: IA 1986 s 110(3)(b).

[5] *Pulsford v Devenish* [1903] 2 Ch 625.

[6] IA 1986 s 111.

[7] [1917] 1 Ch 431.

[8] See 'General issues', pp 739ff.

[9] Moratoria on debts and compromises with creditors (even, occasionally, including compromises that provide for different entitlements than those obtaining on winding up:*Anglo American Insurance Ltd* [2001] 1 BCLC 755) can be agreed under these provisions. However, a quicker and simpler alternative may be provided by company voluntary arrangements (see IA 1986 Pt I and Sch AI: see 'Company voluntary arrangements (CVAs)', pp 769ff).

[10] Such a scheme is also subject to the Takeover Code: see 'Takeovers', pp 753ff.

[11] The court has discretion as to the details of the meetings: *Re T & N Ltd* [2006] 2 BCLC 374.

[12] Companies Act 2006 (Consequential Amendments etc) Order 2008 (SI 2008/948) now enables a liquidator (if the company is being wound up) or an administrator (if the company is in administration) to apply to the court to order a meeting of creditors or members.

[13] CA 2006 s 899(2)(c) and (d) now enable a liquidator (if the company is being wound up) or an administrator (if the company is in administration) to apply to the court to sanction a compromise or arrangement (SI 2008/948).

[14] [1892] 2 QB 573 at 583. This was endorsed in *Re Hawk Insurance Co Ltd* **[15.07]**.

[15] Note that this is not the same question as that arising under CA 2006 s 630, which speaks of rights 'attached to' a class of shares. Section 896 contemplates that creditors, as well as members, may fall into different classes.

[16] [1892] 2 QB 573.

[17] See now the more detailed provisions contained in CA 2006 ss 977(2) and 988.

[18] Or, more accurately, its predecessor in CA 1985 s 425, which is in substantially the same form.

[19] IA 1986 s 111 invokes the arbitration provisions of the Companies Clauses Consolidation Act 1845, and does not specify the basis of valuation.

[20] See the broad and useful discussion in V Finch, *Company Insolvency Law: Perspectives and Principles* (2nd edn, 2009), pp 479–488.

[21] For further reading, see N Boardman, 'What the Takeover Directive Means for the UK?' (2006) 25 (7) *International Financial Law Review* 174; M Mejucq, 'The European Regime on Takeovers?' (2006) 3 (2) *European Company and Financial Law Review* 222.

[22] See K Hopt and E Wymeersch (eds), *European Takeovers: Law and Practice* (1992), especially the chapters by R Romano, 'A Guide to Takeovers: Theory, Evidence and Regulation' and R Cranston, 'The Rise and Rise of the Hostile Takeover'.

[23] PW Moerland, 'Alternative Disciplinary Mechanisms in Different Corporate Systems?' (1995) 26 *Journal of Economic Behavior and Organization* 17.

[24] This restates and amends CA 1985 Pt XIIIA.

[25] See DTI, *Implementation of the EU Directive on Takeover Bids—Guidance on Changes to the Rules on Company Takeovers* (URN 07/659, February 2007).

[26] DTI, *Company Law—Implementation of the European Directive on Takeover Bids* (January 2005).

[27] Further information about the Panel and copies of the City Code on Takeovers and Mergers are available on the Panel's website (www.thetakeoverpanel.org.uk/new/).

[28] See Lord Alexander of Weedon, 'Judicial Review and City Regulators?' (1989) 52 MLR 640.

[29] [1967] 2 QB 864, [1967] 2 All ER 770.

[30] Previously contained in CA 1985 Pt XIIIA.

[31] *Re Sussex Brick Co Ltd* [1961] Ch 289n, [1960] 1 All ER 772n.

[32] Although the pre-emption rights in CA 2006 s 561 have reduced the incidence of such cases.

[33] Note that there is no legal principle suggesting that it is inevitably improper for directors to take action designed to defeat a takeover bid: *Cayne v Global Natural Resources plc* [1984] 1 All ER 245, CA; *Darvall v North Sydney Brick and Tile Co Ltd* (1989) 16 NSWLR 260 at 325. But also see *Re a Company (No 008699 of 1985)* **[15.13]**, and *Dawson International plc v Coats Patons plc* **[15.14]**.

16. Rescue and Insolvency Procedures

Chapter: **(p. 767)** 16. Rescue and Insolvency Procedures
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General issues

When a company is in financial difficulty, various procedures exist to effect either the timely rescue of viable commercial enterprises or the orderly and competent management of the company's affairs before the company's existence is brought to an end (by a process of *liquidation* or *winding up*: the terms are used interchangeably).

That said, it is worth noting that there is no necessary connection between *insolvency* and *winding up*: a very large number of companies are wound up whose balance sheets are in healthy surplus. A solvent company may be wound up because the business opportunity the company was formed to exploit has come to an end, or the members may wish to retire or reinvest their capital in other ventures, or there may be internal disputes. In this chapter, however, we concentrate on liquidations occasioned by insolvency.

With companies in difficulty, the important procedures include:

(i) voluntary arrangements (see 'Company voluntary arrangements (CVAs)', pp 769ff);
(ii) administration (see 'Administration', pp 770ff);
(iii) administrative receiverships (see 'Administrative receivership', pp 779ff); and
(iv) liquidations (including voluntary liquidations by the members[1] or creditors, and court-ordered liquidations) (see 'Liquidation or winding up', pp 788ff).

Each is considered in this chapter. In each case, the governance of the company is assumed by a qualified insolvency practitioner or (in compulsory liquidations, at least at the outset) an official receiver.[2] The role of the directors is, at least temporarily, displaced.

If the rescue procedure envisaged by the voluntary arrangement or administration is successful, or if the company survives receivership, then the company will continue in business. If not, then the company is likely to be put into liquidation. This is a process by which the company's business is wound up, its contracts completed, transferred or brought to an end, and its assets and undertaking realised for the benefit of its creditors and (if there is a surplus of assets over liabilities) its members.[3] Finally, the company must be removed from the register of companies and dissolved.[4]

(p. 768) Insolvency and rescue

There are many ways of defining insolvency. For present purposes it is sufficient to note three. These serve to illustrate that when a company is in financial difficulty a judgement needs to be made about the likelihood of successful rescue, or alternatively the advisability of efficient liquidation.

'Commercial' insolvency

A company may be described as insolvent if it is unable to pay its debts as they fall due. In other words, even though its overall asset position may not be in deficit, it has cash-flow problems which prevent it from paying its way. This is the most common reason for the making of a compulsory winding-up order (Insolvency Act 1986 (IA 1986) s 122(1)(f)). There is a statutory definition of this type of insolvency (and also certain rules and presumptions relating to proof) in IA 1986 s 123(1).

'Balance sheet' insolvency

A company may also be said to be insolvent if the value of its assets is less than the amount of its liabilities. While the company is a going concern, an assessment of insolvency in this sense will depend upon the business judgement of those concerned. For this purpose it is proper to take account of the company's contingent and prospective liabilities (see IA 1986 s 123(2)), although the value of these will necessarily be difficult to estimate. A company which is insolvent in balance sheet terms will not necessarily be commercially insolvent: it may, for instance, have a heavy potential liability in tort and yet for the time being have a perfectly satisfactory cash flow. And, of course, it may happen that if its assets are realised there is in fact a surplus at the end of the day.

'Ultimate' insolvency

This definition of insolvency is based on the final position when the company's assets are sold up, for example by a liquidator, and there is not sufficient money realised to pay the creditors in full. This unhappy result may occur even though the company has previously seemed solvent under definitions (i) and (ii), for assets which are quite reasonably valued highly on a historic cost or going concern basis may fetch very little in a forced sale.

Statutory framework

The principal statute governing the procedures discussed in this chapter is IA 1986. This Act is a consolidation of the Insolvency Act 1985 and those parts of the Companies Act 1985 (CA 1985) which dealt with receivership and winding up. The insolvency legislation of 1985 introduced comprehensive reforms to both the law of corporate insolvency and that of individual bankruptcy—the first major overhaul of either subject for over a hundred years—based largely on the report of the Cork Committee (*Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982)). IA 1986 is supplemented by the Insolvency Rules 1986 (IR 1986) (SI 1986/1925 as amended), which specify the relevant procedural rules and requirements.

IA 1986 has been amended on various occasions, most significantly by:

(i) Insolvency Act 2000, which introduced new rules on company voluntary arrangements, allowing for a moratorium;[5]
(p. 769) (ii) Enterprise Act 2002 (EA 2002), which provided a new regime for administration, restricted the right to appoint administrative receivers, and substantially changed the rules for distribution of company assets on liquidation.

Company voluntary arrangements (CVAs)

One of the most useful rescue mechanisms for a distressed company is the ability to make binding compromises or arrangements with all its creditors. IA 1986 now provides two mechanisms for this.[6] The first is an older, informal and relatively private procedure, open to all companies, introduced by IA 1986 Pt I, ss 1–7, under which a company may seek to achieve an accommodation with its creditors under the supervision of a 'supervisor', being a qualified insolvency practitioner. The arrangement is proposed by the company's directors (or its liquidator or administrator), reported to the court (but court approval is not necessary), and, if then approved by the requisite majority (over 75%) of unsecured creditors and members at separate single meetings, is binding on the dissenting minorities.

Some protection of minorities is provided by IA 1986 s 6, which allows the majority approvals to be challenged in court by anyone entitled to vote in the meetings, or by the supervisor or the liquidator or administrator, on the ground that the scheme is unfairly prejudicial or that there is some material process irregularity[7] affecting either of the meetings.

Although this procedure was a progressive one, enabling companies to continue trading while ensuring creditors received at least part of their debt, it got off to a slow start: only 21 arrangements were recorded in the first year of its operation and, although the number gradually increased, it has never reached more than a few hundred per annum, in contrast with the voluntary arrangement procedure for individuals, which is used in nearly a quarter of all personal insolvency cases. There are two main reasons for this: first, that a CVA cannot be made binding on secured or preferential creditors[8] without their consent; and, secondly, that (contrary to the Cork Committee's

recommendation) the Act originally contained no provision for a moratorium to be put in place while the quite lengthy formalities are gone through: thus one impatient creditor could thwart the whole scheme.

A way round this second difficulty was, eventually, found, and a second option was introduced allowing for CVAs with a moratorium (IA 1986 Sch A1). But this was achieved only at the cost of making the whole procedure more elaborate, public and expensive. In addition, the option is only available to 'eligible companies' (primarily small private companies). The procedure allows for an automatic 28-day moratorium to come into force as soon as the documents containing a proposal for a CVA are filed in court. During this period (which may be extended for up to a further two months), the company may not be wound up and no steps may be taken, at least without the leave of the court, to enforce security over the company's property[9] or to take proceedings against it. The success of the much sought-after provision remains unclear, however. The advantages of the moratorium may be outweighed by the relative complexity (and cost) in terms of the companies which are eligible, the role of the **(p. 770)** supervisor, the restrictions on directors during the moratorium and the possible liabilities of directors and the supervisor for actions taken during the moratorium. In addition, even the advantages of the procedure pale in significance now that EA 2002 permits the appointment of administrators out of court (with their own associated moratorium provisions) (see 'Administration', pp 770ff).

On the other hand, the major attraction of CVAs, in either form, is that the directors remain in post, they retain control over the choice of the supervisor and the supervisor is not required to make a report of unfitness to the Insolvency Service under the Company Directors Disqualification Act 1986 (CDDA 1986).

The under-use of these CVA procedures must be a source of disappointment, particularly since much of the thrust of the reforms proposed by the Cork Committee was the fostering and promotion of a 'rescue culture' for failed (or failing) businesses: whereas the liquidation of a company frequently involves the break-up of its assets, the destruction of its goodwill and business connections, and the displacement of its employees, less drastic (and less costly) solutions can often be found if steps are taken in time to bring the affairs of the company under control with a view to ensuring the survival, if not of the entire concern, at least of the viable parts of it.

Administration

A statutory administration procedure has been in operation since IA 1986 was introduced, but EA 2002 made substantial amendments, and the new rules are now found in IA 1986 s 8 and Sch B1.[10] The amendments introduced fundamental changes in the purpose, appointment and powers of administrators, although the procedure remains open only to companies that are, or are likely to become, insolvent.[11]

Purpose of administration

Administration, after EA 2002, is explicitly designed to rescue an insolvent company, saving it from liquidation if at all possible. The amended IA 1986 Sch B1, para 3(1), specifies a hierarchy of purposes: administrators must perform their functions with the objective of:

(i) rescuing the company as a going concern;
(ii) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up; or
(iii) realising property in order to make a distribution to one or more secured or preferential creditors.

Administrators must pursue (i) rather than (ii) unless it is not reasonably practicable to pursue (i), or unless (ii) would achieve a better result for the company's creditors as a whole. Moreover, administrators may only pursue (iii) if it is not reasonably practicable to achieve the other two objectives *and* the goal is pursued in such a way that it will not unnecessarily harm the interests of the creditors of the company as a whole. In addition, the administrator **(p. 771)** must act in the interests of the creditors as a whole (IA 1986 Sch B1, para 3(2)), and as quickly and efficiently as reasonably practicable (para 4).

Administration orders reflect the philosophical premise, held since the findings of the Cork Committee, that appointing a receiver and manager to a company (as was commonly done by floating charge holders) offered outstanding benefits to the commercial community and public as a whole, advancing the possibility of restoring an

ailing enterprise to profitability, or disposing of a business as a going concern.[12] The administration procedure attempts to mirror this, allowing an ailing company an alternative to liquidation where there is a chance that it may be rehabilitated. In the light of the EA 2002 changes, administration has now largely replaced receiverships, at least for floating charge holders, and has the merit of being conducted in the interest of all concerned rather than only the secured creditor. The process is associated with a moratorium (Sch B1, para 43), so it also provides the company with breathing space, free from creditors' claims, where the administrator can determine the future of the company even where liquidation is inevitable, so that its assets can be realised to better advantage—ideally, by selling the business as a going concern.

Appointment of the administrator

An administrator may be appointed by the court (on the application of the company itself, or its directors, or a creditor)[13] or out of court (which is far more common) by the holder of a floating charge relating to the whole or substantially the whole of the company's property, by the company itself or by the company's directors. An out of court appointment must be reported to the court.[14] In each case, the company must be unable to pay its debts,[15] or likely to become unable to do so.

Pre-conditions for a court order for administration: 'likely' and 'reasonably likely'.

For an administration order to be made by the court, the court must be satisfied that the company 'is or is likely to become' unable to pay its debts (Sch B1, para 11(a)), and that the administration order 'is reasonably likely' to achieve the purpose of the administration (Sch B1, para 11(b)). The next case pre-dates EA 2002, and the previous test was that the order be 'likely to achieve' the set purpose. The courts interpreted this as a requirement that there be 'a real prospect' (see later). It is not clear whether this remains the test, or whether there should be some lower threshold in recognition of Parliament's intention that administration be more readily available, especially as the administrator who cannot achieve the set purpose may always convert the administration into a creditors' voluntary winding up.

Even if this threshold is met, the court has a discretion as to whether to make the order, and will not do so where, weighing all the circumstances, this seems inappropriate (see later).

(p. 772) [16.01] Re Harris Simons Construction Ltd [1989] 1 WLR 368 (Chancery Division)

The facts appear from the judgment.

> HOFFMANN J: The company carries on business as builders. Over the past four years there has been a spectacular increase in turnover, from £830,000 in the year to April 1985 to £17m in the year to April 1987 and £27m in the year to April 1988. Almost all of this increased turnover has come from one client, a property developer called Berkley House plc, with which the directors had a close relationship. Recently the relationship has turned sour. There are disputes over a number of contracts and Berkley House has purported to dismiss the company and require its employees to leave their sites. It is also withholding sums running into several million pounds which the company says are due and in respect of which Berkley House says it has cross-claims. The effect on the company's cash flow has been that it is unable to pay its debts as they fall due and several writs and a statutory demand have been served. If no administration order is made, the company cannot carry on trading. There is no debenture-holder who can be invited to appoint a receiver. The company will have to go into liquidation more or less immediately. The workforce will have to be dismissed and the contracts and work in progress will become a tangle of disputes and probably litigation. The report of the proposed administrator says that in those circumstances it would be extremely difficult to sell any part of the business.
>
> If an administration order is made, the company will have what is usually called a breathing space but unless some source of funding can be found, will continue to have serious respiratory problems with its cash flow. It has however been able to negotiate at least an armistice with Berkley House by which the latter will, conditionally upon an administration order being made, provide sufficient funding to enable the company to complete four current contracts on condition that it quietly removes itself from the other sites in

dispute. It is hoped that the four remaining contracts will produce a profit and that it may thereby be possible to stabilise and preserve a business which can either survive or be sold to a third party. In the meanwhile, it may be possible to arrive at a negotiated settlement of the underlying dispute with Berkley House. The administration order is therefore proposed to achieve two of the purposes specified in section 8(3) of the Act [IA 1986, but prior to the EA 2002 amendments]: '(a) the survival of the company, and the whole or any part of its undertaking, as a going concern;' and '(d) a more advantageous realisation of the company's assets than would be effected on a winding up'…

Section 8(1) gives the court jurisdiction to make an administration order if it '(a) is satisfied that a company is or is likely to become unable to pay its debts' and it '(b) considers that the making of an order … would be likely to achieve' one or more of the purposes specified in section 8(3). I am satisfied on the evidence that the company is unable to pay its debts. Whether the order would be likely to achieve one of the specified objects is not so easy to answer. When the statute says that I must consider it likely, what degree of probability does this involve? In *Re Consumer and Industrial Press Ltd*,[16] Peter Gibson J said:

> As I read section 8 the court must be satisfied on the evidence put before it that at least one of the purposes in section 8(3) is likely to be achieved if it is to make an administration order. That does not mean that it is merely possible that such purpose will be achieved; the evidence must go further than that to enable the court to hold that the purpose in question will more probably than not be achieved.

He therefore required that on a scale of probability of 0 (impossibility) to 1 (absolute certainty) the likelihood of success should be more than 0.5. I naturally hesitate to disagree with Peter Gibson J, **(p. 773)** particularly since he had the benefit of adversarial argument. But this is a new statute on which the judges of the Companies Court are still feeling their way to a settled practice and I therefore think I should say that in my view he set the standard of probability too high. My reasons are as follows. First, 'likely' connotes probability but the particular degree of probability intended must be gathered from qualifying words (very likely, quite likely, more likely than not) or context. It cannot be a misuse of language to say that something is likely without intending to suggest that the probability of its happening exceeds 0.5, as in 'I think that the favourite, Golden Spurs at 5–1, is likely to win the Derby'. Secondly, the section requires the court to be 'satisfied' of the company's actual or likely insolvency but only to 'consider' that the order would be likely to achieve one of the stated purposes. There must have been a reason for this change of language and I think it was to indicate that a lower threshold of persuasion was needed in the latter case than the former. … Thirdly, some of the stated purposes are mutually exclusive and the probability of any one of them being achieved may be less than 0.5 but the probability of one or other of them being achieved may be more than 0.5. I doubt whether Parliament intended the courts to embark on such calculations of cumulative probabilities. Fourthly, as Peter Gibson J said, section 8(1) only sets out the conditions to be satisfied before the court has jurisdiction. It still retains a discretion as to whether or not to make the order. It is therefore not unlikely that the legislature intended to set a modest threshold of probability to found jurisdiction and to rely on the court's discretion not to make orders in cases in which, weighing all the circumstances, it seemed inappropriate to do so. Fifthly, the Report of the Review Committee on Insolvency Law and Practice (1982), (Cmnd 8558), para 508, which recommended the introduction of administratorship, said that the new procedure was likely to be beneficial only in cases where there is a business of sufficient substance to justify the expense of an administration, and where there is a real prospect of returning profitability or selling as a going concern.

Elsewhere the report speaks of an order being made if there is a 'reasonable possibility' of a scheme of reconstruction. I think that this kind of phraseology was intended to be reflected in the statutory phrase 'considers that [it] would be likely' in section 8(1)(b).

For my part, therefore, I would hold that the requirements of section 8(1)(b) are satisfied if the court considers that there is a real prospect that one or more of the stated purposes may be achieved. It may be said that phrases like 'real prospect' lack precision compared with 0.5 on the scale of probability. But the

courts are used to dealing in other contexts with such indications of the degrees of persuasion they must feel. 'Prima facie case' and 'good arguable case' are well known examples. Such phrases are like tempo markings in music; although there is inevitably a degree of subjectivity in the way they are interpreted, they are nevertheless meaningful and useful.

On the facts as they appear from the evidence before me, I think there is a real prospect that an administration order, coupled with the agreement with Berkley House, will enable the whole or part of the company's undertaking to survive or at least enable the administrator to effect a more advantageous realisation of the assets than would be effected in a winding up. Certainly the prospects for the company, its employees and creditors look bleak if no administration order is made and there has to be a winding up. Consequently, although I cannot say that it is more probable than not that one of the specified purposes will be achieved, I accept the opinion of the prospective administrator that 'the making of an administration order offers the best prospect for preserving the company's future and maximising the realisation of the company's assets for the benefit of its creditors.' I therefore make the order.

➢ Note

Other judges, including Peter Gibson J, have since followed the views expressed in this case. In *Re AA Mutual International Insurance Co Ltd* [2004] EWHC 2430 (Ch), [2005] 2 BCLC 8, Lewison J held that the test under the reformed provisions, IA 1986 Sch B1, para 11(a), was 'more probable than not', while for para 11(b) it was a 'real prospect' (as in **[16.01]**).

(p. 774) Powers and duties of the administrator

The first task of the administrator is to formulate a set of proposals for the company which must, within eight weeks, be submitted to the registrar and to the company's unsecured creditors, for approval within ten weeks by a simple majority in value of creditors present and voting in person or by proxy. If the creditors approve the proposals, the administrator must act accordingly. If they fail to approve them, the court may make any order it thinks fit, including terminating the administrator's appointment (Sch B1, para 55).

In the period between the appointment of the administrator and submission of proposals to the creditors' meeting, the administrator may exercise all of the exceptionally wide powers conferred by Sch B1, para 59 and Sch 1 (conferred by Sch B1, para 60). These include the power to sell the company's property (including the power to sell property subject to a floating charge, and, with court approval, property subject to any other charge[17]). Paragraph 59(1) provides that the administrator 'may do anything necessary or expedient for the management of the affairs, business and property of the company'. The administrator can act without the approval of the creditors, or the court, if he considers this is in the best interests of the creditors: *Re Transbus International Ltd* [2004] EWHC 932 (Ch); *Re Osmosis Group Ltd* [1999] 2 BCLC 329. The administrator is deemed to be an agent of the company (para 69).

The administrator also has the benefit of the statutory moratorium (Sch B1, para 43). This prevents a winding up,[18] and prevents anyone taking action against the company, or any creditors from enforcing security, putting in execution, distraining on the company's goods, repossessing goods sold under hire-purchase, conditional sales, chattel-leasing or retention of title agreements, except, in every case, with the consent of the administrator or the permission of the court. The Court of Appeal has given guidance on exercising security rights against companies in administration: *Re Atlantic Computer Systems plc (No 1)* [1992] Ch 505 at 541–544.

Duties owed by the administrator to the company.

[16.02] Re Charnley Davies Ltd (No 2) [1990] BCLC 760 (Chancery Division)

The facts are immaterial.

MILLETT J: It was common ground that an administrator owes a duty to a company over which he is appointed to take reasonable steps to obtain a proper price for its assets. That is an obligation which the law imposes on anyone with a power, whether contractual or statutory, to sell property which does not belong to him. A mortgagee is bound to have regard to the interests of the mortgagor, but he is entitled to give priority to his own interests, and may insist on an immediate sale whether or not that is calculated to realise the best price; he must 'take reasonable care to obtain the true value of the property at the moment he chooses to sell it': see *Cuckmere Brick Co Ltd v Mutual Finance Ltd*.[19] An administrator, by contrast, like a liquidator, has no interest of his own to which he may give priority, and must take reasonable care in choosing the time at which to sell the property. His duty is 'to take reasonable care to obtain the best price that the circumstances permit': see *Standard Chartered Bank Ltd v Walker*.[20]

(p. 775) It is to be observed that it is not an absolute duty to obtain the best price that circumstances permit, but only to take reasonable care to do so; and in my judgment that means the best price that circumstances *as he reasonably perceives them to be* permit. He is not to be made liable because his perception is wrong, unless it is unreasonable.

An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made …

No duty owed by the administrator to creditors.

[16.03] Kyrris v Oldham [2004] BCC 111 (Court of Appeal)

The facts are immaterial.

JONATHAN PARKER LJ:

141 In my judgment it matters not whether one adopts the approach of the House of Lords in *Caparo Industries plc v Dickman* **[8.04]**, or the 'assumption of responsibility' approach which it adopted in *Henderson v Merrett Syndicates*:[21] on either approach the result is the same, namely that, absent some special relationship, an administrator appointed under the 1986 Act owes no general common law duty of care to unsecured creditors in relation to his conduct of the administration.

142 In paras 31–34 of his judgment in *Peskin v Anderson*,[22] Mummery LJ said this:

'31. … [Counsel for the directors] accepted that the fiduciary duties owed by the directors to the company do not necessarily preclude, in special circumstances, the coexistence of additional duties owed by the directors to the shareholders. In such cases individual shareholders may bring a direct action, as distinct from a derivative action, against the directors for breach of fiduciary duty.

32. A duality of duties may exist. In *Stein v Blake* [1998] BCC 316 at pp 318 and 320 Millett LJ recognised that there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to him directly (eg by being induced by a director to part with his shares in the company at an undervalue), as distinct from loss sustained by him by a diminution in the value of his shares (eg by reason of the misappropriation by a director of the company's assets), for which he (as distinct from the company) would not have a cause of action against the director personally.