unfair prejudice and the court may, for example, revoke or suspend the approval of the CVA. Otherwise, these creditors are entitled to the dividends payable under the arrangement only. On approval of the CVA, the nominee becomes the supervisor.

Challenge of directors' actions during the moratorium

Any member or creditor can apply to the court for relief on the grounds that the directors are acting in a way unfairly prejudicial to the interests of creditors or members. The court may make an order regulating matters or bring the moratorium to an end. This form of action applies in relation to the acts of directors during the moratorium. The application may be made during or after the moratorium. If made afterwards, the court's order will be to regulate matters and obviously not to bring the moratorium to an end.

Offences by officers of the company

The Schedule provides that if during the 12 months prior to the start of the moratorium an officer of the company has committed certain acts, e.g. fraudulently removed the company's property worth £500 or more or falsified the company's records in relation to its property, he commits an offence, as does an officer who so acts during the moratorium.

It is also an offence for an officer of the company to try to obtain a moratorium or an extension of it by making false statements or fraudulently doing or not doing anything.

Void provisions in floating charge documents

Schedule 1 provides that any provision in a floating charge is invalid if the charge is to crystallise (and therefore become a fixed charge) on the obtaining of, or any action to obtain, a moratorium.

The remainder of the Schedule makes consequential amendments to various parts of the IA 1986, e.g. so that suppliers of gas, water and electricity are not permitted to require a nominee to pay outstanding debts for supply as a condition for supply during the moratorium. There is also a provision that the relevant date for determining preferential claims is the date on which the moratorium comes into force.

Trading with companies that are in a CVA

It is not unusual for creditors to carry on trading with a CVA company. Any new debts will not be covered by the CVA and become, in effect, new liabilities of the CVA company. There are, of course, some concerns about a continuation of trade since, if the company cannot meet its CVA requirements, it will almost certainly be forced into liquidation and the new liabilities, if not paid, may not be met. Set out below are some precautions that a creditor can take in such circumstances:

- where goods are supplied a retention of title clause could be used in the contract of supply to ensure that the seller retains ownership of the goods until they are paid for and if they are still in stock;
- the contract of sale could require cash on delivery;
- an attempt should be made to obtain personal guarantees of the new liabilities from the directors;
- ascertain from the CVA supervisor whether or not the company is up to date with its payments under the CVA;
- it is obviously not wise to carry on trading on the old terms; the terms of trade should be renegotiated.

Following the implementation of the Insolvency (Amendment) Rules 2010, Companies House prescribes the use of the following Insolvency forms within Registrar's Rules for the first time. The forms listed below are to be filed with the Registrar, for all corporate voluntary arrangements:

1 Notice to Registrar of Companies of voluntary arrangement taking effect;
2 Notice to Registrar of Companies of order of revocation or suspension of voluntary arrangement;
3 Notice to Registrar of Companies of supervisor's progress report; and
4 Notice to Registrar of Companies of completion or termination of voluntary arrangement.

The initiation or termination of insolvency procedures involving a European company (SE), or any decision to continue operating the SE, must be notified to Companies House on Form SE WU01.

Administration

The current law concerning administration was introduced with effect from 15 September 2003. Under this regime, a company will usually be described as being 'in administration' – under the old regime a company would be described as subject to an 'administration order'.

Administrator's functions

The functions of an administrator are now contained in Insolvency Act 1986, Sch B1, para 3 (as inserted by Enterprise Act 2002 Part 10). The administrator now has the function of carrying out a single statutory purpose, that is:

- to rescue the company as a going concern;
- if this is not reasonably practicable, to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) – an example would be to allow the company to trade on in administration for long enough to complete a large order; or
- if neither of the above is reasonably practicable and the administrator does not unnecessarily harm the interests of the creditors as a whole, realising the company's property to make a distribution to one or more secured or preferential creditors. Nevertheless, even if there are insufficient funds to pay unsecured creditors the administrator must not unnecessarily harm their interests.

Schedule 1 gives an administrator full management powers which are not available to a liquidator. The case of ***Re Consumer and Industrial Press Ltd*** [1988] BCLC 177, made under previous legislation, gives an example of the second aspect of the single statutory purpose. The company had since 1949 published a magazine. Net liabilities were judged by accountants to be too great to trade out of trouble. The Inland Revenue petitioned for a compulsory winding-up but the directors asked the court to make an administration order which the court did. Administrators were appointed to manage the company so that at least one more issue of the magazine could be published. The court thought that the company might be saved by a voluntary arrangement which an administrator may propose but even if not it would get

a better price for the title if publication continued than if it were sold in a liquidation. This would obviously be to the benefit of creditors.

Comment. The expression 'unnecessarily harming' the interests of the creditors as a whole is not defined and its practical effect is not clear. Presumably if the secured creditors wanted an immediate sale of the secured assets (bearing in mind that in the developed future they will not be able to appoint an administrative receiver) but the administrator takes the view that the market is rising giving a better future realisation for the creditors as a whole, would an immediate sale unnecessarily harm the interests of the creditors as a whole? If the administrator had insufficient funds to carry on the administration and so had to sell the assets presumably he would be in the clear. We may see more applications to the court by administrators seeking the court's assistance. The court will, however, be reluctant it seems to interfere with what is, in the end, a business decision (see ***T & D Industries plc*** [2000] 1 All ER 333: comments made in that case).

Appointment of an administrator by the court

The Enterprise Act 2002 retains with some minor modifications the court route into administration. The court route can be used by the company (by ordinary resolution of the members or a unanimous written resolution), by the directors (by a majority decision at a board meeting or by a unanimous written resolution) or by one or more creditors with no minimum value of debt. A holder of a floating charge must be able to satisfy the requirements of a 'qualifying floating charge'. The most usual applicants for an administration order are the company's directors.

The qualifying floating charge

The requirements are set out in Enterprise Act 2002, Sch 16 which inserts Sch B1 to the IA 1986. Under para 14 of Sch B1:

(i) A qualifying floating charge (QFC) must be created by an instrument that:
- states that para 14 applies to the floating charge;
- purports to empower the holder to appoint an administrator; or
- purports to empower the holder to appoint an administrative receiver.

Note: even those pre-Enterprise Act 2002 floating charges that give power to appoint an administrative receiver will thus give power to apply for an administration order.

(ii) A person will be regarded as holding a qualifying floating charge if he holds one or more debentures of the company secured:
- by a qualifying floating charge that relates to the whole or substantially the whole of the company's property;
- by a number of QFCs that together relate to the whole or substantially the whole of the company's property; or
- by charges (including fixed charges) which together relate to the whole or substantially the whole of the company's property and at least one of which is a QFC.

What is required to satisfy the court in making the order?

The court must be satisfied that the company is, or is likely to become, unable to pay its debts and that the order is reasonably likely to achieve the purpose of administration. A qualifying floating charge holder (QFCH) need only show that the charge is enforceable.

The process is initiated by filing a prescribed form of application with the court. There is no requirement for what was known as a 'Rule 2.2 Report' in support of the application. This form of application replaces the former procedure by petition. The matter of the company's insolvency and whether the order, if made, reasonably achieves the purpose of the administration is expressed in a single-page statement from the proposed administrator. This replaces the old Rule 2.2 Report. The application must be served on the holder of any QFC.

If others apply to the court for an order can a QFCH intervene?

A QFCH can intervene and appoint an administrative receiver (if entitled to do so) or administrator or make a request that a person specified by the QFCH be appointed administrator in the application (see IA 1986, Sch B1, para 36). The court may accept or refuse the QFCH's nominee as administrator (see IA 1986, Sch B1, para 36(2)). In practice the court is unlikely to refuse, especially where the QFCH has chosen an insolvency practitioner from one of the large accountancy firms. However, in this connection the High Court ruling in ***Re Colt Telecom Ltd*** (20 December 2002, unreported), HC is of interest, though not based specifically on the Enterprise Act 2002 provisions. In the case, Jacob J refused to make an administration order because the company was not actually in default to the creditor who was applying to the court. Nevertheless, he went on to say that even if he had had jurisdiction to make the order he would not have done so because the accountant who had made the report to the court in connection with the order was not impartial – he would stand to gain significantly in fees if his report was accepted and he was appointed administrator.

Furthermore, there was a potential conflict of interest in that the firm involved had previously given the company tax advice. The judge also stated that the appointment of an administrator who lacked specialised knowledge of the telecoms industry which was possessed by the company's management would 'almost certainly stop the business in its tracks' and would increase its running costs.

Comment. The judge's comments may become highly relevant in regard to challenges to the appointment of administrators under IA 1986, Sch B1, para 36.

Are there any special features in an application to the court by a QFCH?

A QFCH can make an application to the court for an administration order without having to show that the company is, or is likely to become, unable to pay its debts (IA 1986, Sch B1, para 35). The court must, however, be satisfied that the floating charge is a QFC and has become enforceable. The court may also make an administration order on the application of a QFCH, even where the company is in compulsory liquidation so that the administration takes over.

It is also now open for *any* liquidator to make application to the court for the discharge of the liquidation and the appointment of an administrator.

The fact that creditors object to the making of an administration order is not necessarily a bar. In ***Structures and Computers Ltd*** **v** ***Ansys Inc*** (1997) *The Times*, 3 October the High Court held that where it is satisfied that there is a real prospect of an administration order achieving one or more of its purposes, the court has a jurisdiction to make the order under s 8 of the Insolvency Act 1986 despite the fact that it is opposed by more than half of the company's unsecured creditors.

Notice of application for order

Notice of the application must be given to any person entitled to appoint a QFCH who may intervene (see above).

Notification of appointment

An administrator must:

- advertise the court order of his appointment in the *London Gazette* and in a newspaper circulating in the area where the company has its principal place of business; and
- send a copy of the court order to the Registrar of Companies within seven days with the appropriate forms.

The *Gazette* is published by the Stationery Office, and these notices are included in the *Company Law Official Notifications Supplement* to the *Gazette* which is published on microfiche. Copies may be seen at Companies House search rooms and some of the larger public libraries have copies.

Statements in support of an administration order: restriction orders

Under the Insolvency Rules 1986 Rule 2.2, a petition for an administration order was supported by a report of an independent person to the effect that the appointment of an administrator for the company is expedient. This report could be inspected by creditors and members of the company concerned under Rule 7.31. The report might contain sensitive material and so the court could, under Rule 7.31(5), make an order restricting inspection of the whole or part of the report. The same problems may now apply to the shorter statement by the would-be administrator. Application may be made by the Official Receiver or an insolvency practitioner or any other person having an interest. Under a Practice Direction issued in April 2002 (see [2002] 3 All ER 95) the High Court stated that good reason must be shown for a restriction order otherwise it will not be made. The statement lists as appropriate grounds for a restriction order: information about the perceived market for any assets of the company which it is anticipated could be sold in the administration or the period for which it is anticipated that trading of the company would be continued by any administrator and the prospects for such trading.

The business application. This occurs where, for example, the directors of a company are seeking an administration order and have a supporting statement. They may wish to ensure that their legal and other advisers address the matter of a restriction order on matters that the directors think are sensitive at what is after all *a very early stage* in the proceedings.

Appointment of an administrator out of court

Out of court appointments may be made by qualified floating charge holders and by the company or its directors. Ordinary creditors must seek an appointment through the court. The requirements are as follows:

(a) Appointment by a QFCH

A QFCH must give two business days' written notice to any prior QFCH. This notice is not required if the relevant QFCH has consented to the making of the appointment.

This notice of intention to appoint may be filed in court but this is optional.

What must be filed in court following appointment? The QFCH must file in court:

(i) a notice of appointment;
(ii) a statutory declaration by the appointing QFCH that:
- he is a QFCH;
- the floating charge was enforceable when the appointment was made;
- the appointment accords with the requirements of Insolvency Act 1986, Sch B1.

There must also be filed:

(iii) a statement by the administrator that:
- he consents to the appointment;
- the purpose of the administration is reasonably likely to be achieved.

When is the appointment effective? The appointment takes effect once the above filing requirements have been satisfied. In the case of a QFCH, such as a bank, this filing requirement can be achieved out of court hours by fax.

Notification to the administrator. The fact that the court filing requirements set out above have been complied with must be notified by the QFCH as soon as practicable after completion of filing.

Comment. A lender commits a criminal offence if, in the statutory declaration referred to above, it makes a statement that it does not reasonably believe to be true (see IA 1986, Sch B1, para 18(6)).

(b) Appointment by the company or the directors

Where the appointment is to be by the company or by its directors five business days' notice in writing of intention to appoint must be given to:

- persons having the right to appoint an administrative receiver (where an exception applies);
- persons having a right to appoint an administrator under Sch B1, para 14, i.e. a QFCH (IA 1986, Sch B1, para 26).

The notice of intention to appoint must be filed in court along with a statutory declaration by the appointer that:

- the company is likely to become unable to pay its debts;
- the company is not in liquidation;
- the appointment is not prevented because the company has been in administration instigated by the company or its directors, or subject to a moratorium in regard to a failed company voluntary arrangement in the previous 12 months and that there are no outstanding winding-up petitions in respect of the company and that there is not an administrator or administrative receiver in office.

What else must be filed in court?
- A notice of the appointment; and
- a statutory declaration by the appointer that:
  (a) the appointor is entitled to make the appointment;
  (b) the appointment is in accordance with IA 1986, Sch B1;
  (c) the statements in the statutory declaration filed with the notice of intention to appoint are still accurate.
- a statement by the administrator that:
  (a) he consents to the appointment; and
  (b) that the purpose of the administration is reasonably likely to be achieved. In this connection the administrator may rely on information supplied by the directors unless there is reason to doubt its accuracy.

When is the appointment effective? The appointment of the administrator becomes effective when the above-mentioned filing requirements are completed satisfactorily.

Notification to the administrator. The fact that the court filing requirements set out above have been satisfactorily completed must be notified to the administrator as soon as is practicable.

Comment

(i) Where directors or the company use the out of court route there is a requirement, as we have seen, that notice of intention to appoint an administrator is given to a QFCH. Such a holder then has a period of five business days to appoint its own administrator if it does not consent to the company's or the directors' choice of administrator (IA 1986, Sch B1, paras 14, 26). If the QFCH does not make its own appointment of an administrator the company or the directors can carry on with making their own appointment of an administrator using the out of court route. Nevertheless, *an interim moratorium* on action by creditors including action to enforce a security will commence when notice is given by the company or the directors of their intention to appoint an administrator, i.e. earlier than the actual appointment of the administrator (IA 1986, Sch B1, para 44). However, the moratorium will not prevent the appointment of an administrative receiver where one of the exceptions to the general prohibition on these appointments applies.

(ii) The company or the directors cannot make an out of court appointment if a winding-up petition has been filed. A QFCH is not affected and may proceed with an appointment with the petition being suspended (though not dismissed) if an administration is commenced out of court. By contrast, where the court makes an administration order, the court is required to dismiss an outstanding winding-up petition.

Statement of affairs. Following appointment the administrator will request the company's officers and employees (where necessary) to supply a statement of affairs. This must be done within 11 days of the request. It will be appreciated that the statement of affairs is the starting point of the administration as indeed it is of any corporate insolvency procedure although much of the information may be known in outline at least before the appointment of an administrator. The statement gives particulars of the company's assets and liabilities and details of its creditors and although it is basically the responsibility of the company's directors it is often prepared by the company's accountants.

Administrator's proposals

The following paragraphs of IA 1986, Sch B1 (as inserted by Enterprise Act 2002, Sch 16) apply to the administrator, *however appointed*.

1 As soon as is reasonably practicable, and in any case within eight weeks of the company going into administration (not three months as previously), the administrator must make proposals as to how the purpose of the administration is to be achieved. The statement is sent to the Registrar of Companies, the members of the company and all known creditors (para 49).

2 The administrator must call an initial creditors' meeting as soon as is reasonably practicable, and in any case within ten weeks of the company going into administration, to consider the proposals (para 51). The meeting need not be called if the administrator thinks that there is insufficient property to make a distribution to unsecured creditors over and above the ring-fenced asset distribution referred to below.

3 If there is a request by creditors whose debts amount to at least 10 per cent of the total debts of the company, the administrator must convene a meeting even if the administrator considers that there will be no distribution to unsecured creditors (para 52).

4 Where the meeting is held, the creditors will vote on whether to accept the proposals or whether to modify or reject them. A simple majority in value will decide.
5 The relevant times for sending proposals and convening the initial meeting of creditors may be extended by court order or by the consent of all the secured creditors and more than 50 per cent of the unsecured creditors (para 108(2)). It is an offence for an administrator to fail to comply with the above time periods.
6 Secured creditors vote in terms of the value of any shortfall between the debt and the value of the security but the administrator's proposals cannot include action affecting the right of the secured creditors to enforce the security, unless the secured creditor(s) consent (para 73).

Comment. Since the fact of the administration prevents enforcement of the security without the consent of the administrator or the court, this provision will mean that the administrator will need the consent of the secured creditors before putting the proposals to the initial creditors' meeting.

There is no need for secured creditor consent in regard to those proposals (if any) that relate to a company voluntary arrangement under IA 1986 or a scheme of arrangement under the Companies Acts 2006 Part 26 (ss.895–901) and Part 27 (special rules for public companies).

As reference to these procedures will show, there is secured-creditor protection built into both of them.

Powers and duties of the administrator

The powers and duties contained in IA 1986, Sch 1 are retained, as is the power to act as the company's agent (para 69). In addition, an administrator is an officer of the court *whether appointed by the court or out of court* (para 5).

An administrator may make distributions to secured creditors and preferential creditors and, with the consent of the court, to unsecured creditors (paras 65, 66). This provides a contrast to previous legislation that did not give preference to Crown and employee claims in an administration as was, and is, the case in an administrative receivership and a liquidation. The Crown preference is abolished but employee claims and contributions to an occupational pension scheme will have priority over the claims of a QFCH (para 65(2)).

An administrator retains the right to dispose of property subject to a floating charge as if the charge did not exist. The expenses of the administration rank ahead of the claims of the floating charge holder as regards the proceeds of sale. Other secured assets and property on hire-purchase can be disposed of with the consent of the court (paras 70–72).

Administrator's expenses

These continue to rank in front of the claims of floating charge holders and also have priority over preferential claims. This will relate mainly to employee claims and contributions to an occupational pension fund.

The accountability of an administrator

The accountability of an administrator is as follows:

Creditors and members of the company in administration. These persons can make application to the court where the administrator acts or proposes to act in a way that could unfairly harm their respective interests or where the applicant believes that the administrator is not carrying out relevant functions as efficiently or as quickly as is reasonably practicable (para 74).

Any interested party. These persons can make application to the court where it is alleged that the administrator has misapplied or retained the property of the company or is guilty of misfeasance or in breach of fiduciary duty. So far this aspect of accountability is similar to that under IA 1986, s 212 but now an application can be made while the company is still in an administration instead of waiting until the company has gone into liquidation.

Cessation of an administration

The exit from administration may be achieved in the following ways:

- ***Automatic cessation.*** The appointment of the administrator will come to an end automatically 12 months after the date on which the appointment took effect.
- ***Extension of appointment.*** The period of 12 months can be extended *once only* by a period of up to six months with the consent of the creditors or any number of times by the court on the application of the administrator for such period as the court may determine. Creditor consent means the consent of all the secured creditors and more than 50 per cent in value of the unsecured creditors. Consent may be written or expressed by resolution at a meeting. The above majorities disregard any creditor who does not respond to an invitation to give or withhold consent. The above materials are contained in IA 1986, Sch B1, paras 76–78.

Administration: a timetable of major events

- *Seven days after appointment*: notice of appointment filed at Companies House.
- *Eleven days after administrator's request*: company's officers and employees to provide administrator with statement of affairs.
- *Eight weeks after appointment*: administrator sends proposals to members, creditors and Companies House.
- *Ten weeks after appointment*: first creditors' meeting held unless not required.
- *One year after appointment*: automatic end of the appointment of administrator subject to extension.

Termination of administration through notice to Registrar of Companies

If the company is not rescued, the exit routes from administration are streamlined by provisions relating to voluntary liquidation and dissolution as follows:

(a) *Where funds are available after payment of secured and preferential creditors.* The company can go directly into a creditors' voluntary winding-up. The administrator gives notice to Companies House and the creditors, and files a copy with the court. There is no need to hold a meeting of creditors and the administrator becomes the liquidator unless the creditors put forward a different nomination. The intention is that these procedures will reduce the number of compulsory liquidations that have followed administration.

(b) *If no funds are available for distribution to creditors.* The administrator must, unless the court otherwise orders, give notice to that effect to Companies House. Copies must be sent to creditors and the court. The company will be deemed dissolved after three months from registration of the notice at Companies House, unless an interested person, e.g. a member who believes the company has a good claim for damages against a third party, makes application to the court.

The above provisions are to be found in IA 1986, Sch B1, paras 83–84.

Replacement of administrator

Where a QFCH has used the out of court route, and in the event that there was a prior ranking floating chargeholder entitled to make the appointment, then the prior charge holder can apply to the court for the replacement of the administrator by his own nominee for the office (IA 1986, Sch B1, para 96).

Abolition of Crown preference

Enterprise Act 2002, s 251 abolishes the preferential status of Crown debts. These are debts due to the Inland Revenue, Customs and Excise and social security contributions. Employee claims continue to be preferential, as do contributions to an occupational pension fund. IA 1986, Sch 6 is amended accordingly.

Ring-fencing mechanism for unsecured creditors

In order to ensure that the benefit of the abolition of Crown preference does not go solely to floating chargeholders the Enterprise Act 2002 sets up a mechanism for ring-fencing assets where there is a floating charge that was created after the 2002 Act provisions came into force. The abolition of Crown debts and the ring-fencing applies to all corporate insolvencies, not merely to administration, though it is convenient to deal with it here. The ring-fence arrangements do not apply where the fund is below a minimum to be prescribed and the insolvency practitioner considers that the costs in distributing it would be disproportionate to the benefits. The provision may also be disapplied by the terms of a company voluntary arrangement or by a scheme of arrangement under Part 26 of the CA 2006 (note the changes under ss 899(2) and 901). The court may also disapply it on the application of the insolvency practitioner if he wishes to take this route.

Ring-fencing: the prescribed percentage

Under the Insolvency Act 1986 (Prescribed Part) Order 2003 the following thresholds apply:

- minimum fund for distribution – £10,000;
- prescribed percentage to be calculated on the basis of a sliding scale as follows: 50 per cent of the first £10,000 of floating charge realisations; 20 per cent of floating charge realisations after that;
- up to a maximum ring-fenced fund of £600,000.

The ring-fencing provisions apply to relevant amounts of the company's 'net property'. Net property is defined in Insolvency Act 1986, s 176A(5) (as inserted by Enterprise Act 2002) as the amount of property which would, but for the ring-fencing provisions, be available for the floating chargeholder. Thus, it represents any floating charge realisations.

Important business application

Lenders should check all existing documents to ensure that they cover the new out of court route into administration rather than, for example, referring merely to administration orders and petitions.

Administrator: legal consequences of appointment

Consideration has been given to the appointment of an administrator both in court and out of court. The following materials deal with the main legal consequences of the appointment together with case law on earlier provisions that carries through to illustrate the law.

Suspension of rights

From the presentation of a petition for an administration order and during the period of the administration:

(i) no resolution to wind up the company may be passed nor may the court make a winding-up order (IA 1986, Sch B1, para 40);
(ii) there can be no enforcement of fixed charges or other security over the company's property except with the consent of the administrator or leave of the court (IA 1986, Sch B1, para 43);
(iii) there can be no recovery of property which the company has under a hire-purchase agreement or leasing arrangement and retention clauses are not enforceable except with the consent of the administrator or the court (IA 1986, Sch B1, para 43);
(iv) no other legal proceedings can be commenced against the company except with the consent of the administrator or leave of the court (IA 1986, Sch B1, para 43).

The Court of Appeal has ruled that the administrator's consent or leave of the court is necessary to commence or continue criminal as well as civil proceedings against a company in administration (see ***Re Rhondda Waste Disposal Ltd*** *(in administration)* [2000] EGCS 25). In this case the Environmental Agency wished to prosecute for failure to comply with one of the conditions of a waste management licence. The court gave leave because the pollution was serious.

Consent or leave is also required even if a civil action is not being brought by a creditor but by a claimant suing for alleged breach of a patent (see ***Biosource Technologies Inc*** **v** ***Axis Genetics plc (in Administration)*** [2000] 1 BCLC 286).

In regard to (iii) above the High Court ruled in ***Razzaq*** **v** ***Pala*** [1997] 1 WLR 1336 and ***Re Lomax Leisure Ltd*** [1999] 1 All ER 22 that a landlord's right to forfeit a lease is not in the nature of a security over a company's property in a legal sense. Therefore the moratorium preventing anyone from taking steps to enforce a security over the property of a company while in administration does not bind a landlord. The cases had considerable significance for creditors who initiate an administration, particularly the larger scale administrations where there may be a number of leaseholds among the assets of the company. They have no way of knowing whether the objects of the administration will be achieved since the landlords will be able to frustrate the purpose of the administration by forfeiting leases or by requiring payment of rents for not doing so. Thus placing themselves in a superior position to other creditors since they can achieve payment of arrears of rent or forfeit the lease and market it elsewhere even during the course of the administration.

Landlord's right of forfeiture

IA 1986, Sch B1, para 43(4) prohibits a landlord's right to re-entry by forfeiture of the lease except by leave of the court. Once an administration order has been made or is in force, re-entry by forfeiture continues to be barred except by permission of the administrator or leave of the court.

No inhibition of rescue schemes

In order to prevent the administrator's schemes to save the company or to conduct the company as near as possible as a going concern until liquidation as in ***Re Consumer and Industrial Press Ltd*** (1988), it is sometimes necessary to deal with persons who have charges or other rights over the property of the company and whose consent is required before the property is sold. A rescue package may very well involve such sales.

In this connection IA 1986, Sch B1, paras 70 and 71 provide as follows:

(a) Assets subject to a floating charge can be sold by the administrator and the proceeds used in the business. The permission of the chargeholder is not required nor is it necessary for the administrator to obtain the permission of the court. However, the chargeholder has the same priority as he had before over the assets generally as they may be from time to time and this would include the proceeds of sale and other assets which might be purchased with the proceeds because these would be included in the general assets of the company (para 70).
(b) Assets held on hire-purchase or subject to a fixed charge can be sold but court approval must be obtained and the proceeds *must* be used to pay off the chargeholder or owner. In addition, and so as to ensure that the administrator gets the market price, IA 1986, Sch B1, para 71 provides that the administrator must make up any difference between the sale price and the market price.

The company's contracts

Following the refusal of administrators to complete a contract entered into by the company before their appointment, the High Court was asked to consider in that context its powers of intervention (see ***C E King Ltd (in Administration)*** [2000] 2 BCLC 297).

The judge decided that in general terms it would be inappropriate to make an order requiring the administrators to perform the relevant contract. Administrators were appointed (and expected) to make commercial decisions and where necessary take legal advice. In the end, however, the matter of performing (or not) the company's contracts remains a commercial decision to be taken by the administrators.

Directors and employees

The directors are not dismissed by the appointment of an administrator. However, their powers are suspended and the administrator may remove any director of the company and appoint any person to be a director of it whether to fill a vacancy or as an additional director.

The appointment of an administrator does not operate to dismiss the company's employees. The reason for this is that under IA 1986, Sch B1, para 69 he is said to act as an agent of the company and so there is no change in the personality of the employer. However, an administrator can terminate contracts of employment.

Employees' contracts and the provisions of the Enterprise Act 2002

The provisions of the Insolvency Act 1986 which were relevant stated, in s 19, that nothing done or omitted to be done within 14 days of appointment (of an administrator and by the administrator) shall be construed as 'adoption' (of employment contracts by the administrator). The position where contracts of employment are adopted by an administrator is that sums outstanding called 'qualifying liabilities', i.e. wages or salaries including sickness and holiday pay and contributions to occupational pension funds incurred after the adoption of an employment contract, are payable in priority to the claims of preferential creditors and holders of floating charges and if, at the end of the administration, there are qualifying liabilities unpaid and there are insufficient funds to pay them and the administrator's remuneration and expenses, the outstanding amount is payable in full before the administrator's remuneration and expenses (see below).

A problem for administrators has been whether failure to act during the first 14 days can be regarded as 'adoption' of employment contracts leading to the above mentioned loss of remuneration and expenses. The matter was raised in the High Court under the old law (see ***Antal International Ltd*** [2003] EWHC 1339 (Ch), [2003] 2 BCLC 406).

In this case the administrators asked the court for directions on the matter of the alleged adoption of the contracts of a group of French workers. The company, its auditors and the administrators had originally thought the 12 workers were employed by a subsidiary company but it emerged that they were in fact employees of Antal. This was discovered 16 days after the administrators' appointment. Had the contracts been adopted by inactivity in the last two days? The High Court ruled that they had not. Adoption would only occur when the administrators had done something that amounted to choosing to adopt. The mere keeping on of employees did not amount to adoption. Once the administrators became aware of the French employees they took immediate steps to terminate their contracts under French law.

Antal and Enterprise Act 2002 changes

The Enterprise Act 2002 inserts new provisions in the 1986 Act as Sch B1. Paragraph 99 of that Schedule applicable to administrations on or after 15 September 2003 states that '*action* taken within the period of 14 days after an administrator's appointment shall not be taken to amount or contribute to the adoption of a [contract of employment]'. This seems to cut out all failure to act and is in line with the decision of the House of Lords in ***Powdrill* v *Watson*** [1995] 2 AC 394 (see below).

The decision in *Powdrill* v *Watson*

In ***Powdrill* v *Watson*** [1995] 2 AC 394 the House of Lords ruled that inaction by the administrators after the 14-day period could not amount to 'adoption' of employment contracts. However, their Lordships did also rule that administrators could not actively retain employees after the 14-day period and avoid liability by sending each employee a letter disclaiming adoption. Such a letter was of no effect. That this was the case was also held by the Court of Appeal and that merely allowing employment to continue after 14 days could amount to adoption. This latter ruling, however, was not acceptable to the House of Lords which ruled that some conduct amounting to an election to adopt an employment contract was required.

The position in case law and under insolvency legislation would appear now to be the same.

Pension funds

The High Court has decided that the duty of an administrator to manage the 'company's affairs' – as referred to in Insolvency Act 1986, Sch B1, paras 59 and 68 – includes the trusteeship of any employees' pension funds where the company had previously been the trustee. Furthermore, the administrator could only be reimbursed those costs out of the pension fund to which the company would have been entitled but could make a claim for any costs or expenses incurred in actually running the scheme as costs of the administration generally and not as a specific charge against the trust fund (see ***Polly Peck International plc (in Administration)* v *Henry*** [1999] 1 BCLC 407). Mr Justice Buckley so ruled when dismissing an application by the administrators of Polly Peck International (PPI) for a new trustee, i.e. the Trustee Corporation Ltd to be appointed as trustee of the two pension funds set up by PPI.

IA 1986, Sch B1, para 68 provides that, where an appointment is made in court, the administration order is an order directing that during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person (the administrator) appointed for the purpose by the court. IA 1986, Sch B1, para 59(c) provides that the administrator of the company may do all such things as may be necessary for the management of the affairs, business and property of the company.

Essay questions

1 The prime intention of the Insolvency Act 1986 with regard to companies is to provide various alternatives to the winding-up of an insolvent company.

Discuss. (*The Institute of Chartered Secretaries and Administrators*)

2 Corporate entity and limited liability do not always provide complete protection from personal liability for company directors and shareholders.

You are required to discuss the situations where such persons may be personally liable. (*The Chartered Institute of Management Accountants*)

3 Plym plc is a holding company whose several subsidiaries are all exclusively private companies. The capital structure of the subsidiaries consists of ordinary shares, several classes of preference shares, and debentures. Because of the administrative difficulties caused by the diverse nature of the capital structure of the subsidiaries, the board of directors of Plym plc wish to introduce a simplified system whereby Plym would purchase the minority shares and debentures for cash or in the alternative issue fully paid equity shares in Plym in exchange for the said shares and debentures at an agreed ratio. Preliminary inquiries indicate that there is a substantial minority of members who would neither sell nor exchange their securities for shares in Plym plc.

Advise the directors of Plym plc as to how, if at all, they could achieve their objective in spite of the minority's anticipated refusal to co-operate. (*University of Plymouth*)

4 Discredit Bank plc is a large merchant bank situated in the City of London. The Chairman and Managing Director of the company is Dan, a high-powered executive who is well-respected in the City. Seven other directors sit on the board, including Maggie, the Finance Director. Dan and Maggie, together with some of the other directors, have a shareholding but they do not represent the majority.

Last year, Dan purchased property on Discredit's behalf from Chivers-Benson plc of whom Dan is a director. The property, which was valued by Chivers-Benson, was bought by Discredit for £400,000. Within two weeks of Discredit buying the property, it was sold to Briac Ltd, a subsidiary company of Chivers-Benson, for £100,000.

Last month Dan was approached by Homestore plc for the financing of new shop development in London. Dan informed Homestore that Discredit was not in a position to provide Homestore with financial backing but that he, himself, could provide the finance through the setting-up of a separate company. He persuades Maggie to assist him in the incorporation of Quick Loan Ltd, which, owing to Dan's influence in the City enabling the finance to be provided to Homestore, makes a profit of £70,000 on the deal. Both Dan's and Maggie's shares in Quick Loan have increased in value.

These activities have come to the attention of TCR plc, a minority shareholder. Dan has become aware of TCR's interest and, in anticipation of TCR raising these activities at the next

general meeting, he decides to publish a report, addressed to all shareholders, claiming that all the relevant transactions and decisions involving Discredit were carried out for strict commercial reasons and for the benefit of the company.

Advise TCR, which doubts the accuracy of Dan's statements and considers the report to be misleading, a factor which TCR is convinced is not known to other shareholders who are likely, as far as TCR is concerned, to accept the report's contents. (*University of Greenwich*)

Test your knowledge

Four alternative answers are given. Select ONE only. Circle the answer which you consider to be correct. Check your answers by referring back to the information given in the chapter and against the answers at the back of the book.

1 Bloggs Ltd has recently been made the subject of an administration order. John had previously presented a winding-up petition in regard to Bloggs. What will the effect of the administration order be on John's winding-up petition?

A It will be heard by the court.
B It will be dismissed by the court if the administrator applies to it.
C It will be postponed for 12 months.
D It will be automatically dismissed.

2 Which of the following must be given notice of the intention to appoint an administrator out of court by the directors?

A Unsecured creditors and the company.
B Anyone entitled to appoint an administrative receiver.
C Unsecured creditors.
D Anyone entitled to appoint an administrative receiver or an administrator.

3 Who can fill the office of administrator if there is a vacancy?

A The court.
B The creditors.
C Anyone entitled to appoint an administrative receiver.
D Anyone entitled to appoint an administrative receiver provided the court approves of the appointee.

4 An administrator is taken to have adopted contracts of employment within a stated period after his employment. The period is:

A 28 days **B** 15 days **C** 14 days **D** 21 days

5 A qualifying floating chargeholder is seeking to petition the court for an administration order. Which of the following statements is correct?

A A QFCH cannot petition the court for an order.
B A QFCH can petition but must satisfy the court that the company is unable to pay its debts.
C A QFCH can petition but must satisfy the court that the purposes of an administration can be achieved.
D A QFCH can petition and need only show that the charge is enforceable.

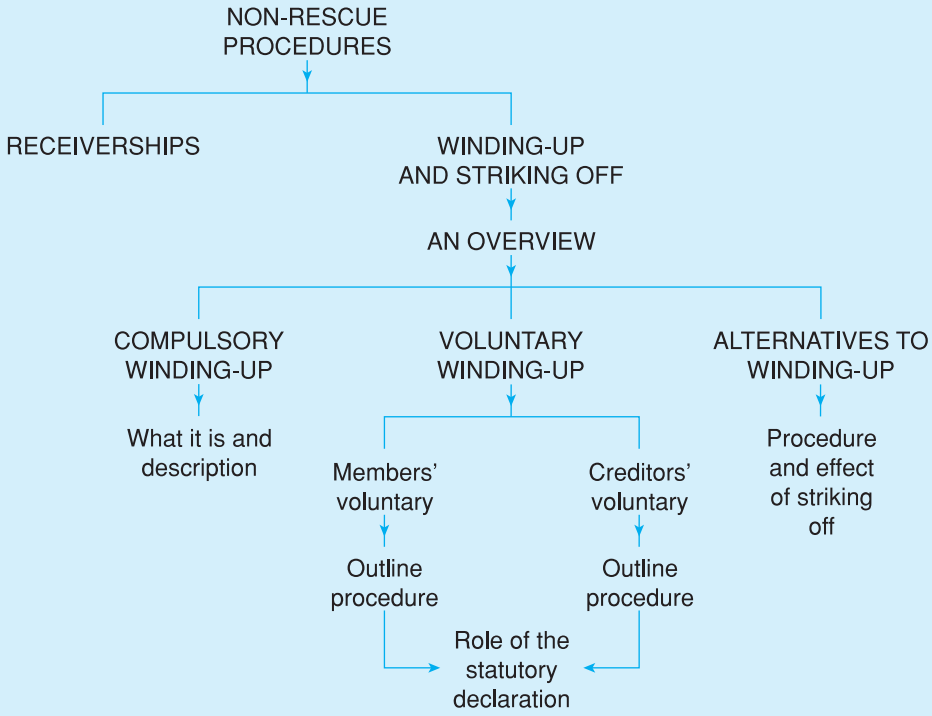
6 Once the court has received a petition for an administration order, when can a liquidator be appointed? He may:

A be appointed if the court consents.
B be appointed if the creditors consent.
C be appointed if the Official Receiver consents.
D not be appointed.

The answers to test your knowledge questions appear on p. 617.

Visit **www.mylawchamber.co.uk/keenancompany** to access study support resources including practice exam questions with guidance, weblinks, legal newsfeed, answers to questions in this chapter, legal updates and further reading.

26 Corporate insolvency – procedures other than rescue



In this chapter we take an overview of corporate insolvency procedures that are not in their major aims concerned to rescue a company from an insolvency situation.

Receiverships

Administrative receivers: the demise of

An administrative receiver was the usual appointment of a bank when a company with an overdraft and/or a loan was in financial difficulties. The bank invariably held a floating charge on the company's undertaking and the function of this type of receiver was to undertake such procedures with the company as would pay off the bank. These receivers were not primarily concerned with company rescue as an administrator is. What is more the existence of the office of administrative receiver inhibited the rescue procedures of an administration because if the company or its creditors tried to make an appointment of an administrator the bank, which had to be notified, would often immediately appoint an administrative receiver and this would in law veto the administration.

The Enterprise Act 2002 inserted provisions into the Insolvency Act 1986 that prevent the holder of a floating charge such as a bank from appointing an administrative receiver except in a restricted number of organisations such as some companies involved in financial market operations. These are beyond the scope of this text and are unlikely to be raised in examinations in corporate law at a non-specialist level.

However, it should be recognised that the ban on the appointment of administrative receivers will not be complete for some time since the relevant provisions of the Enterprise Act 2002 did not come into force until September 2003 and banks that had taken floating charges over continuing overdrafts before that date are still able to appoint such practitioners. However, it is most unlikely that an examiner would see the need or the sense in asking questions on the detail of the law relating to administrative receivers. The office is from the student point of view redundant and no more will be said about it in this text.

Receivers

The practice of appointing receivers without management powers by those who have taken fixed charges over corporate property will continue. These practitioners are in no sense managers appointed to deal with the borrowing company's business and pay off the debt. They are appointed merely to sell the charged property to pay the debt or, for example, to collect income such as rent from the company's tenants (if any) until the debt is paid. They do not have to be authorised insolvency practitioners and the practice is to appoint chartered surveyors to do this work.

Winding-up or striking off

A company's life can be brought to an end by a process known as *winding-up*. This process is carried through by a *liquidator* whose functions are:

(a) to settle the list of contributories;
(b) to collect the company's assets;
(c) to discharge the company's liabilities to its creditors;
(d) to redistribute the surplus (if any) to the contributories according to the rights attaching to their shares of the company's capital.

There are two methods of winding-up:

(i) a compulsory winding-up by the court;
(ii) a voluntary winding-up, which may be either a members' winding-up or a creditors' winding-up.

We shall now proceed to examine the general characteristics of these various types.

Compulsory winding-up

A company may be wound up by the court when a number of situations occur – the most common being when the company is unable to pay its debts.

A petition for winding-up may be presented by the company or by the Department for Business, Innovation and Skills (BIS), but is normally presented by a creditor.

When there is a petition for winding-up, the court is not forced to make an order, but if it does, a liquidator is appointed who realises the assets and pays the creditors, handing over the surplus (if any) to the shareholders. When the company's affairs are fully wound up, the court will make an order dissolving the company. The order is registered with the Registrar of Companies by the liquidator, and the Registrar makes an entry on the Register dissolving the company from the date of the court order.

Voluntary winding-up

A company may apply to the Registrar of Companies to be struck off the register and dissolved. The company can do this if it is no longer needed. For example, the directors may wish to retire and there is no one to take over from them; or it is a subsidiary whose name is no longer needed; or it was set up to exploit an idea that turned out not to be feasible. This may not happen however if the Registrar of Companies has already started dissolution action under s 1000 (power to strike off company not carrying on business or in operation). This procedure is not an alternative to formal insolvency proceedings where these are appropriate. Even if the company is struck off and dissolved, creditors and others could apply for the company to be restored to the register.

Sections 1004 and 1005 of the Companies Act 2006 set out the circumstances in which the company may not apply to be struck off. For example, the company may not make an application for voluntary strike off if, at any time in the last three months, it has traded or otherwise carried on business, changed its name, made a disposal for value of property or rights that, immediately before ceasing to trade or otherwise carry on business, it held for the purpose of disposal for gain in the normal course of trading or otherwise carrying on business.

A company cannot apply to be struck off if it is the subject, or proposed subject, of any insolvency proceedings (such as liquidation, including where a petition has been presented but has not yet been dealt with); or a s 895 scheme (that is a compromise or arrangement between a company and its creditors or members). However, a company can apply for strike off if it has settled trading or business debts in the previous three months.

A company may be wound up voluntarily:

(a) When the period, if any, fixed for the duration of the company by the articles expires, or the event, if any, occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed an *ordinary resolution* requiring the company to be wound up voluntarily. A limitation on a company's duration is in practice very rare.
(b) If the company resolves by *special resolution* that the company be wound up voluntarily for any cause whatever.
(c) If the company resolves by *extraordinary resolution* to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

When a company has passed a resolution for voluntary winding-up, it must give notice of the resolution by an advertisement in the *London Gazette* within 14 days. The voluntary winding-up is deemed to commence at the time of the passing of the resolution.

Withdrawal of application

If the directors wish to withdraw an application, they must withdraw it by sending the 'Withdrawal of striking off application by a company', Form DS02 if they change their mind or the company ceases to be eligible for striking off. This may be because, after applying to be struck off, the company trades or otherwise carries on business, changes its name, for value, disposes of any property or rights except those it needed in order to make or proceed with the application:

- becomes subject to formal insolvency proceedings or makes a s 900 application (a compromise or arrangement between a company and its creditors);
- engages in any other activity, unless it was necessary to make or proceed with a striking off application, conclude those of its affairs that are outstanding because of the need to make or proceed with an application (such as paying the costs of running office premises while concluding its affairs and then finally disposing of the office);
- and comply with a statutory requirement.

Any director of the company may complete and sign the 'Withdrawal of striking off application by a company', Form DS02, and send it to the Registrar. Section 1009 of the 2006 Act contains the full circumstances that mean you must withdraw an application for strike off and question 12 contains information on the offences for failure to withdraw an application.

Objections

Objections or complaints to a voluntary winding up application must be in writing and sent to the Registrar with any supporting evidence, such as copies of invoices that may prove the company is trading.

Some of the reasons could include:

- if the company has broken any of the conditions of its application for example, it has traded, changed its name or become subject to insolvency proceedings during the three-month period before the application, or afterwards;
- if the directors have not informed interested parties;
- if any of the declarations on the form are false;
- if some form of action is being taken, or is pending, to recover any money owed (such as a winding-up petition or action in a small claims court);
- if other legal action is being taken against the company;
- if the directors have wrongfully traded or committed a tax fraud or some other offence (see ss 1004 and 1005 of the 2006 Act).

Offences

It is an offence:

- to apply when the company is ineligible for striking off;
- to provide false or misleading information in, or in support of, an application;
- not to copy the application to all relevant parties within seven days;
- not to withdraw application if the company becomes ineligible.

The offences attract a fine of up to a maximum of £5,000 on summary conviction (before a magistrates' court or Sheriff Court) or an unlimited fine on indictment (before a jury). If the directors breach the requirements to give a copy of the application to relevant parties and do so with the intention of concealing the application, they are also potentially liable to not only a fine but also up to seven years' imprisonment. Anyone convicted of these offences may also be disqualified from being a director for up to 15 years.

Declaration of solvency

Where it is proposed to wind up a company voluntarily, the directors, or a majority of them if there are more than two, may at a meeting of the board make a statutory declaration that they have made a full enquiry into the affairs of the company and have formed the opinion that it will be able to pay its debts in full within a stated period of not more than 12 months from the beginning of the winding-up. To be effective, such declaration must be made within the five weeks before the passing of the winding-up resolution or on that date but before the resolution was passed, and must be delivered to the Registrar of Companies for registration, and must embody a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration, though errors and omissions will not necessarily render the statement invalid. Thus, in ***De Courcy* v *Clements*** [1971] 1 All ER 681, the statement of the company's assets and liabilities was held to be valid even though it omitted to state that a debt of £45,000 was owed by the company to a third party. Megarry J observed that what is now the Insolvency Act 1986 did not require absolute perfection since, among other things, a liquidator who forms the opinion that the company will not be able to pay its debts in full within the period specified in the declaration of solvency must forthwith summon a creditors' meeting and put the matter to them. The creditors can petition for a compulsory winding-up, notwithstanding the voluntary liquidation, and might therefore be regarded as adequately protected. Directors making such a declaration without reasonable grounds are liable to heavy penalties.