The practice of filing a notice of intention (JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd)

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Restructuring & Insolvency analysis: Matthew Weaver, commercial chancery barrister at St Philips Stone Chambers, examines JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd and explains the practical lessons the case offers to practitioners.

Original news

JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd [2017] EWCA Civ 267, [2017] All ER (D) 62 (Apr)

The Court of Appeal, Civil Division allowed the appeal of the appellant property owner against a decision of the High Court refusing to remove a copy of a notice of intention (NoI) to appoint an administrator. Consideration was given to the operation of paragraphs 44(4) and 28(2) of Schedule B1 to the Insolvency Act 1986 (IA 1986).

What are the practical lessons that those advising can take away from the case?

The decision shows that the practice of filing an NoI when there was no one to serve them with or when the subsequent appointment of an administrator was not a settled intention, simply in order to create a moratorium, is at an end. Considering appointing administrators if other options fail is not sufficient. As such, companies seeking re-financing or proposing company voluntary arrangements (CVA) cannot file an NoI to achieve a moratorium while they try to rescue the company in other ways. Any NoI filed in such circumstances stands to be vacated and removed from the court file.

That said, the decision in *Re Cornercare Limited* [2010] EWHC 893 (Ch), [2010] All ER (D) 243 (May)—that multiple NoIs are possible and valid as long as no abuse of process is taking place—remains valid. As such, it is perfectly acceptable for sequential NoIs to be filed if an appointment cannot be made within the ten day period—as long as an appointment remains the directors' settled intention.

What was the background to the case?

The company was a tenant which was behind on its rent. The landlord (the appellant in this case) threatened to take possession of the premises for rent arrears and issued possession proceedings. Prior to issuing those proceedings, the company's director filed a NoI in court and served it on a qualified floating charge holder (QFCH), as required under IA 1986, Sch B1, para 26. This created an interim moratorium for a period of ten business days (or until appointment of an administrator if earlier) pursuant to IA 1986, Sch B1, para 44.

The NoI stated on its face that the director intended to appoint an administrator and was accompanied by a record of the director's decision to appoint administrators. Two further NoIs in substantially the same form were subsequently filed extending the interim moratorium in each case. No appointment of an administrator was subsequently made.

A fourth NoI was duly filed after the director had filed proposals for a CVA with the court. The proposals confirmed that if the CVA was not approved, the directors would put the company into administration. This fourth NoI was in the same terms as the first, second and third, stating an intention to appoint administrators.

The landlord issued proceedings to have the fourth NoI vacated and removed from the court file on the grounds that it was an abuse of process. In short, the landlord's argument was simply that the director did not actually intend to appoint administrators but rather he wanted a CVA to be approved and appointing administrators was only an after-thought.

At first instance, the judge dismissed the proceedings, concluding that NoIs could be filed in circumstances where directors intended to appoint administrators as an alternative to a CVA (or as an alternative to rescuing the company some other way).

What were the legal issues the Court of Appeal had to decide?

This case raised what is an often-discussed issue among insolvency practitioners and lawyers but one which, until now, has not been addressed fully by the courts, namely:

'Does a company [or its director(s)] have to have a "settled intention" to appoint an administrator in order to file a NoI pursuant to IA 1986, Sch B1, para 27?'

This question often raises its head when companies are seeking to have CVAs approved or are attempting to re-finance but want or need the protection of a moratorium until those processes can be completed.

What did the Court of Appeal decide, and why?

On appeal, the Court of Appeal (with David Richards LJ giving the leading judgment) took a different and, it might be said, more straightforward approach. The court was content that when the first three NoIs were filed, the appointment of an administrator was, at most, one of a range of possibilities. By the time of the fourth NoI, the position was that an administrator would be appointed only if the CVA was rejected.

Given those facts, the court was primarily conscious of two things:

- an NoI and the relevant parts of IA 1986, Sch B1 refer repeatedly to an 'intention'—while IA 1986, Sch B1, para 26 refers to the company or director as a person who 'proposes' to make an appointment, this (in light of the repeated references to 'intention') should not be seen as different from 'intend', and
- save for 'eligible companies' (that is small companies as defined by section 382 of the Companies Act 2006), there is currently no means for a company proposing a CVA to obtain a moratorium until the proposal is considered by creditors—a general moratorium is a regular topic of discussion within the Insolvency Service (and there is currently a consultation document in circulation which proposes a wider moratorium for companies seeking a CVA) but as things currently stand there is no general moratorium

The court held that for a company or director to file a valid NoI it is a statutory pre-requisite that there is a 'settled intention to appoint'.

To what extent is the judgment helpful in clarifying the law in this area?

This decision gives much needed clarification on an issue which some insolvency practitioners have wondered about and many company directors have ignored. While some might say that it was always rather ob-

vious that an NoI required an ‘intention’ to appoint, the realities facing companies in financial difficulties means that directors routinely have to consider a number of options (some preferable to others) and, as such, considered filing an NoI appropriate where, if all else failed, administration was the only option. The Court of Appeal has confirmed that this is no longer the case.

In addition, the Court of Appeal clarified an issue that the editors of Sealy & Milman have long since pondered. An NoI is only to be filed if a copy is to be served on a Qualifying Floating Charge holder (QFCH) or a person entitled to appoint an administrative receiver. If there is no person able to appoint either an administrator or administrative receiver (as defined in IA 1986, Sch B1, para 26(1)) to whom a copy of the NoI will be given, no interim moratorium can be created by the filing of a NoI. The company or its directors simply appoints an administrator as and when they are ready to do so in the absence of a QFCH.

Interviewed by David Bowden.

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