Article:
Akintola, K. orcid.org/0000-0003-4475-1941 (2018) Liquidator's appointment in voluntary winding-up: can we validly dispense with floating chargee notice? International Company and Commercial Law Review, 29 (10). pp. 632-639. ISSN 0958-5214

LIQUIDATOR'S APPOINTMENT IN VOLUNTARY WINDING UP: CAN WE VALIDLY DISPENSE WITH FLOATING CHARGEE NOTICE?

Kayode Akintola[*]

ABSTRACT

This article argues that failure to give a qualifying floating charge holder written notice of a resolution for voluntary winding up before the resolution is passed will render the office-holder's appointment a nullity. The discussions in this article are based on the recent decision in *Bevan v Walker*.[1]

BACKGROUND

In *Bevan v Walker*, the company was placed into members' voluntary liquidation (MVL) without HSBC, the holder of a qualifying floating charge, being notified of the resolution to wind up the company. The liquidation was subsequently converted to creditors' voluntary liquidation (CVL). The applicants, as joint liquidators in the CVL, brought an application for a declaration that failure to give notice of the resolution to the charge holder had not invalidated the appointment of the initial liquidator under the MVL, and, in turn, their own.

HHJ Purle QC held that while the charge was not enforceable at the time the resolution was passed, that did not dispense with the requirement to give the charge holder written notice of the resolution.[2] However, the judge further held that "… once a

---

[*] Lecturer in International Commercial Law, Lancaster University.

[1] [2018] EWHC 265 (Ch).

[2] *ibid*, para 6. Insolvency Act (IA) 1986, s 84 provides as follows:

> "(1) 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 a resolution requiring it to be wound up voluntarily;
> (b) if the company resolves by special resolution that it be wound up voluntarily; …
>
> (2) In this Act the expression "a resolution for voluntary winding up" means a resolution passed under [either of the paragraphs] 2 of subsection (1).
>
> (*2A) Before a company passes a resolution for voluntary winding up it must give written notice of the resolution to the holder of any qualifying floating charge to which section 72A applies.*

special resolution is passed to wind a company up, that resolution is effective to put the company into liquidation notwithstanding any failure to give notice to a qualifying charge holder."[3] Therefore, the appointment of the initial liquidator and the subsequent appointment of the applicants were valid.[4] In reaching these conclusions, the judge rejected the application of authorities on the invalidity of an administrator's appointment where no notice is given to a qualifying floating charge holder,[5] but relied upon the *Centrebind* decision where a liquidator was held to be validly appointed despite failure to hold a creditors' meeting.[6]

This author has some difficulties with this decision. The difficulties range from an interpretation of the statutory provision in question, including the putative superseding effect of a resolution that is passed in accordance with a company's internal constitution, to indiscriminate reliance on the *Centrebind* decision. Further practical difficulties relate to issues connected to the commencement of winding up (such as avoidance of dispositions) and computation of claims in insolvency. These difficulties, along with some suggestions to deal with them, are discussed in turn below.

THE SECTION 84 INTERPRETATION

The issue of interpretation to be considered here is the requirement in section 84(2A) of the Insolvency Act 1986 that the holder of any qualifying floating charge should be given written notice of the resolution for voluntary winding up before it is passed by the

---

(2B) Where notice is given under subsection (2A) a resolution for voluntary winding up may be passed only–
(a) after the end of the period of five business days beginning with the day on which the notice was given, or
(b) if the person to whom the notice was given has consented in writing to the passing of the resolution …. (Emphasis mine).

[3] Para 9.

[4] Para 11.

[5] For example, *Re Eco Link Resources Ltd* [2012] BCC 731. See para 10 of the judgment.

[6] *Re Centrebind Ltd* [1967] 1 WLR 377.

company.[7] It is not concerned with the trite point of the meaning of the "holder of any qualifying floating charge."[8] This central consideration is particularly pertinent if one considers that in *Bevan v Walker* the judge acknowledged that the facts of the charge in question did not dispense with the requirement to give notice. However, the indispensability of such notice did not preclude the Judge from ruling that the passing of a special resolution to wind a company up is effective to put the company in liquidation when the notice is not given.[9]

There are reasons to suggest that the judge's purposive interpretation of the provision is contradictory and potentially misleading. Section 84(2A) stipulates that written notice of the resolution *must be given before a company passes a resolution for voluntary winding up*.[10] A straightforward construction of the language of the provision suggests that the passing of any resolution for voluntary winding up and its validity is premised on compliance with the requirement of written notice to the floating chargee.[11] The requirement of notice in the provision is akin to a condition precedent and the use of "must" in there suggests the unqualified nature of this requirement. Therefore, failure to give notice of a resolution for voluntary winding up to a qualifying floating chargee should render the purported resolution a nullity and *pro tanto* any liquidator's appointment.[12] Crucially, and in line with part of the Judge's reasoning in *Bevan v Walker,*[13] there is nothing in the provisions that prescribe circumstances in which such notice may not be given to a qualifying floating charge holder.

---

[7] Such resolution being an ordinary resolution under s 84(1)(a) or a special resolution under s 84(1)(b); see IA 1986, s 84(2).

[8] See n.2 above.

[9] See paras 6 and 9 of the judgment.

[10] Inserted by SI 2003/2096 from 15 September 2003.

[11] Support for a straightforward interpretation of a statutory provision can be found in *Commissioner of Police v Cavanaugh* [2005] UKPC 28.

[12] L Sealy, D Milman and P Bailey, *Sealy & Milman: Annotated Guide to Insolvency Legislation 2017* (Sweet & Maxwell: 2017), General Note to s 84(2A),(2B).

[13] Para 6.

Further, a combined reading of the provisions of sections 84(1) and 84(2A) lead to the conclusion that while 84(1) defines the grounds on which a company may be wound up voluntarily, 84(2A) places an unyielding obligation on the company that ought to be complied with before the grounds in 84(1) can be triggered. Therefore, neither the ordinary or special resolution under 84(1) is in itself sufficient to trigger a voluntary winding up and a liquidator's appointment. Indeed, it is for this reason that the passing of the resolution is postponed to either (a) the end of five business days beginning with the day on which notice was given, or (b) the written consent of the qualifying floating chargee to whom notice was given.[14] How then could – as the Judge held – a resolution to voluntarily wind up a company be effective to put the company in liquidation where this notice is not given? Although a voluntary winding up commences at the time of passing a resolution for voluntary winding up and a company *goes into* voluntary liquidation if it passes such a resolution,[15] there is no reason to suggest that Parliament intended for resolutions that disregard salient provisions of the Act to have such effect.[16] Such suggestion would be obtuse.

Clearly, section 84(2A) is designed to enable a qualifying floating charge holder to have a short window to appoint an administrator if the charge is enforceable.[17] This is implicit in the provision's reference to a charge to which section 72A applies. Thus, while that window is open, it is left to the chargee to exercise this option before the company is allowed to pass the resolution. The passing of a resolution before the chargee is given the opportunity to appoint an administrator plainly defeats the purpose of the provision. But what options are open to the chargee where a resolution is passed without the prescribed notice? Judge Purle QC held that:

[14] IA 1986, s 84(2B).

[15] *ibid,* ss 86 and 247(2).

[16] See also n.26 and the accompanying discussions on procedural/formal defects below.

[17] IA 1986, sch B1, para 16.

> "[a] qualifying floating charge holder may well have a remedy if dissatisfied with the result, for example petitioning for compulsory winding-up of the company or applying for a stay of the winding-up so as to enable an administrator to be appointed by the charge holder, *but the validity and effect of the resolution cannot be impugned* …"[18]

Two points should be made in relation to the Judge's reasoning. First, these remedies do not obviously retrospectively validate the wrong done by the company in passing a resolution that does not comply with section 84(2A). If anything, they could reinforce the invalidity of the resolution since the voluntary winding up will be replaced by different proceedings at the behest of the chargee. Second, if it is taken that the judge's examples of remedies capture options that do not necessarily frustrate the resolution and ensuing steps taken in the purportedly valid winding up proceedings, then one needs to consider a situation where the chargee to whom notice ought to be given is dissatisfied with – and perhaps prejudiced by – those steps. In this circumstance, the chargee may very well seek remedy by way of a petition for nullity of the resolution or winding up proceedings. Such relief, if granted, dislodges the validity of such *ex parte* resolution and the liquidator's appointment.[19]

Another point that requires further scrutiny is the judge's perspective that the resolution and accompanying liquidator appointment cannot be impugned "… so long as it is passed in accordance with the company's articles of association."[20] Put differently, do the workings of a company's internal management trump some essential pre-condition set out by insolvency legislation? There can be no doubt that to put a company into voluntary liquidation and other company- or director-led insolvency proceedings, compliance with

[18] *Bevan v Walker*, para 9 (emphasis mine).

[19] But probably not the acts of the liquidator. See IA 1986, s 232; *Cf OBG v Allan* [2008] 1 AC 1, paras 89-92.

[20] *Bevan v Walker*, para 9. For a creditor's attempt to vacate an order to rectify the company's register and resulting MVL, see *Re New Millennium Experience Co Ltd* [2003] EWHC 1823 (Ch).

the rules of internal management (such as the quorum required for resolutions) as set out in the company's articles is essential.[21] This is because the purported resolution will have a bearing on the company's constitution – if not its continued existence.[22] However, compliance with a company's internal rules does not validate non-compliance with a requirement that is *internal* to the Insolvency Act, such as section 84(2A). This, at first reading, may look like an overstatement of the provision. Yet, if we carefully consider the objective of section 84(2A),[23] we will realise that it is *in tandem* with corporate insolvency law's *task* to balance the interests of different stakeholders in an insolvency scenario.[24] Moreover, insolvency legislation is designed to be a framework that commands respect and observance.[25] Therefore, as regards the validity of a resolution to wind up a company and the liquidator's appointment, compliance with both the company's rules on internal management and Insolvency Act's stipulation for prior notice of the resolution to a qualifying floating charge holder is required.

A final discussion to be had under this heading is whether lack of written notice to the chargee is akin to a mere procedural irregularity that should not go to the root of the insolvency proceedings, including the appointment of the liquidator. Indeed, one could contend that section 84(2A) is merely a procedural prescription for engaging the substantive grounds for a voluntary winding up in section 84(1). There is, however, a challenge with reducing this to a mere peccadillo particularly in MVLs where such reduction could aid cowboy directors in winding up the company without the scrutiny of a sophisticated creditor or the court. Furthermore, while the insolvency rules provide that no insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court considers that defect or irregularity has caused substantial injustice which

[21] See *Re Melodius Corp* [2015] EWHC 621 (Ch); *Re BW Estates Ltd* [2017] EWCA Civ 1201.

[22] See Companies Act 2006, ss 17 and 29 on the status of resolutions *vis-à-vis* the company's constitution.

[23] See n.17 above and accompanying discussion.

[24] A contemporary analysis of the tasks of corporate insolvency law will be found in V Finch and D Milman, *Corporate Insolvency Law*: *Perspectives an Principles* (3rd edn, CUP 2017), chs 1-2.

[25] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982), para 198.

cannot be remedied,[26] it is suggested that the afore discussed unqualified nature of the obligation in section 84(2A) renders rule 12.64 inapplicable as no insolvency proceedings – and indeed liquidator appointment – could be said to have arisen due to the resolution being a nullity. As Judge Purle QC said elsewhere of the analogous rule 7.55 of the Insolvency Rules 1986:

> "If a particular appointment is a nullity because some essential pre-condition has not been complied with, then … no insolvency proceedings ever come into being and r.7.55 can have no application."[27]

To suggest that rule 12.64 applies would mean that a chargee who is substantially prejudiced by failure to give notice would have to open proceedings to object to the validity of the purported insolvency proceedings. The time and expense of this additional step could lead to inertia in the secured creditor. Such outcome would plainly be wrong and should not validate the proceedings if Parliament, in introducing section 84(2A), intended for the chargee to have the right of first refusal on the purported proceedings. This analysis on the application of rule 12.64 could be different if notice was given but it was not in writing.

THE CASE LAW INTERPRETATION

As noted in the background above, the judge in *Bevan v Walker* rejected the application of authorities on the invalidity of an administrator's appointment where no notice is given to a qualifying floating charge holder whilst relying upon the decision of Plowman J in

[26] The Insolvency (England and Wales) Rules (IR) 2016, r 12.64 (formerly r 7.55).

[27] *Re Assured Logistics Solutions Ltd* [2012] BCC 541, paras 34-35. See also *Re Melodius Corp*, n.21 above. In *Assured Logistics,* Judge Purle QC went on to hold that the administrators' appointment was valid despite failure to give notice to the companies involved.

Centrebind.[28] Some of these cases, along with their bearing upon the validity of a liquidator's appointment where an *ex parte* resolution for voluntary winding up is passed, will now be examined.

In *Centrebind,*[29] the company wanted to go into creditors' voluntary liquidation under the Companies Act 1948 (CA 1948) with the aim of achieving a going concern sale of the company. This aim was threatened by the Inland Revenue Commissioners' insistence on levying distress on the company's machinery despite knowledge of the proposed winding up. Section 293 of the CA 1948 required the creditors' meeting to be held on the same day as the members' meeting or the day after. The company convened an extraordinary general meeting where a resolution for voluntary winding up was passed and a liquidator was appointed before any creditors' meeting was held. The liquidator then brought an action to stay the distress which was opposed by the Revenue on the ground that the liquidator's appointment was invalid due to non-compliance with section 293. Plowman J held that the liquidator appointed by members could validly act until and unless something is done about that appointment at a creditors' meeting.[30]

This author, respectfully, disagrees with the application of the decision in *Centrebind* to the legal issue raised by the facts of *Bevan v Walker*. To begin with, reliance on Plowman J's interpretation of section 278 of the CA 1948 which required the passing of a resolution in order to initiate a voluntary liquidation is unhelpful. This is because that provision, much like section 84(1) of the IA, merely prescribed the substantive grounds on which the company could be wound up voluntarily.[31] Crucially, the ability of members to pass a resolution under section 278 of the CA 1948 was not shackled by a condition precedent such as the one contained in section 84(2A) of the IA. A reading of sections 293 and 294 of the CA 1948 shows that members could appoint a liquidator in their meeting,

[28] See para 10 of the decision.

[29] [1967] 1 WLR 377.

[30] *ibid,* 379.

[31] See n.14 above and the preceding discussions.

and whose appointment will be valid until the creditors appoint a different liquidator in their meeting. Since creditors could hold their meeting a day after the members' meeting and could accept the nomination made by members, members were statutorily vested with authority to make a valid liquidator appointment by passing a resolution to wind up.[32]

Therefore, under the CA 1948 a resolution was effective without more to put the company in voluntary liquidation. The same cannot be said of the IA – not since the introduction of section 84(2A) and certain provisions introduced on the back of the Enterprise Act 2002.[33] An instructive case on this point is *Re Business Dream Ltd*.[34] Here, the court was asked to determine the validity of a liquidator's appointment in a purported CVL and to sanction certain acts of the liquidator, including a connected sale and disclaimer of leases. Prior to the members passing a resolution for CVL, the directors of the company filed a notice of intention to appoint the liquidator as an administrator. The court held that filing a notice of intention to appoint an administrator triggered the interim moratorium under para 44(4) of Schedule B1 to the IA. Since the resolution for voluntary winding up was passed during the subsistence of the interim moratorium, the resolution of the members was invalid and the appointment of the liquidator was void.[35]

Apart from the inconclusive effect of the passing of a resolution for voluntary winding up under the IA, the differentiation in section 84(2A) of the Act is also marked by the fact that a disgruntled chargee to whom notice ought to be given does not have a unilateral right to appoint a liquidator in a voluntary winding up. His options in this respect relate to other insolvency procedures: the appointment of an administrator or to petition for compulsory winding up.

---

[32] Members could also apply to court to have their nominee act as liquidator or as joint liquidator with the creditors' nominee; see Companies Act 1948, s 294.

[33] *Cf Bevan v Walker*, para 9.

[34] [2011] EWHC 2860 (Ch).

[35] *ibid*, paras 22 and 28. However, the decision in *Re Business Dream* has been disputed on the specific point that the need for court sanction under s 166(2) is wide enough to cover the power of disclaimer under s 178; see *Firmin v Aardvark Tmc Ltd* [2013] EWHC 1774 (Ch).

For the sake of completeness, it should be also be considered whether it matters that the chargee entitled to notice of the proposed resolution is prejudiced by the lack of notice or that the resolution was passed in good faith. Judge Purle QC seemed to suggest that lack of notice should not impugn the resolution and appointment where the chargee is unaffected.[36] The challenge with that suggestion is that there is no such qualification in section 84(2A). The reference to a qualifying floating charge holder there simply relates to the type of debenture(s) held by the secured creditor rather than the jeopardy of the debenture(s).[37] Further, the fact that the resolution and acts of the liquidator in *Centrebind* were done in good faith is sometimes mentioned. Yet, there is nothing in the judgement to suggest that Plowman J was inclined to uphold their validity on this basis. Rather, the point of good faith in *Centrebind* became important as a result of the case's unintended effect i.e. underhanded practice of directors of insolvent companies in convening a shareholders' meeting to pass a resolution for winding up in order to effect a *phoenix sale* of the company's assets without convening a creditors' meeting.[38] Moreover, we have seen in other aspects of corporate insolvency law that the mere existence of good faith will not validate acts done in contravention of the IA.[39]

What then is the impact of a case like *Re Eco Link Resources Ltd* which held that the failure of a second floating charge holder to comply with the precondition to give notice to a prior floating charge holder invalidated the appointment of the administrator?[40] This case is one of a few conflicted first instance decisions on the validity of an administrator's appointment where there is non-compliance with certain provisions of the IA, including

[36] *Bevan v Walker*, para 10.

[37] IA 1986, s 72A(3), sch B1, para 14(2)(3).

[38] Sealy, Milman and Bailey, *Sealy & Milman: Annotated Guide to Insolvency Legislation 2017*, n.12 above, General Note to s 166(1A).

[39] For example, dispositions in contravention of s 127; see *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765.

[40] [2012] BCC 731.

failure to give notice to prescribed persons.[41] The language of the statutory provisions under construction in these cases is not very different from that of section 84(2A).[42] If this is so, Parliament must be taken to intend for the provisions to have similar effects. This author for the reasons adduced in this article maintains that non-compliance with these notice requirements renders the office-holder's appointment a nullity. Nevertheless, it is an unfortunate state of play for our jurisprudence to have these conflicting decisions and for subsequent decisions to arbitrage between them.

CONCLUSION

Insolvency law is not trivial. The opening of insolvency proceedings, along with the appointment of an office-holder such as a liquidator, has significant legal, commercial and emotional ramifications for stakeholders. It is therefore important for office-holders to be confident in the validity of their appointments. Where a resolution appointing a liquidator is a nullity, this could also give rise to practical issues. Since a winding up can *commence* at the time of passing a resolution[43] (with dispositions made after this time void[44]), and a company can *go into* liquidation if it passes a resolution,[45] a subsequently nullified resolution could obscure the ring-fencing of assets and claims in insolvency. It is suggested, therefore, that Parliament addresses concerns raised in this article and the case law by introducing a provision on the effect of section 84(2A) and similar provisions in schedule B1. Where that effect is a nullity, the impact on dispositions and post-resolution/appointment claims should also be clearly stated. In the meantime, office-

[41] *Minmar* [2011] EWHC 1159 (Ch), *Re Assured Logistics Solutions Ltd* [2011] EWHC 3029 (Ch), *Re Euromaster Ltd* [2012] EWHC 2356 (Ch), *Re Care People Ltd* [2013] EWHC 1734 (Ch), *Re Eiffel Steel Works Ltd* [2015] EWHC 511 are examples.

[42] See IA 1986, sch B1, paras 15, 26-28.

[43] *ibid*, ss 86 and 129.

[44] *ibid*, ss 88 and 127.

[45] *ibid*, s 247(2).

holders will be well advised to ensure that there is full compliance with every procedural requirement before they are appointed. After all, who knows what the next judge who will determine the validity of their appointment will decide?