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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building,
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 08/09/2020

Before :

THE HON. MR JUSTICE FANCOURT

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IN THE MATTER OF NATIONWIDE ACCIDENT REPAIR SERVICES LIMITED
AND IN THE MATTER OF NATIONWIDE CRASH REPAIR CENTRES LIMITED
AND IN THE MATTER OF NETWORK SERVICES (NATIONWIDE) LIMITED
AND IN THE MATTER OF MOBILE VEHICLE REPAIRS LIMITED
AND IN THE MATTER OF NATIONWIDE FAST FIT PLUS LIMITED
AND IN THE MATTER OF SEWARD ACCIDENT REPAIR CENTRES LIMITED
AND IN THE MATTER OF JUST CAR CLINICS LIMITED
AND IN THE MATTER OF HOWARD BASFORD LIMITED
AND IN THE MATTER OF JUST CAR CLINICS GROUP LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

The Applicants

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Mr Glen Davis QC (instructed by **K&L Gates**) for **the Applicants**

Hearing dates: 3 September 2020 (by telephone)

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

1. On 3 September 2020, at 11.56 pm, following an urgent hearing on the telephone, I made an order appointing Rachael Wilkinson and Robert Lewis, both of PricewaterhouseCoopers LLP, as administrators of each of the nine named companies in the title to these proceedings ("the Companies"). The application was, as is conventional, made without notice, although certain interested parties had been given informal notice earlier in the week of the likelihood of such an application. Mr Glen Davis QC represented the single director of the Companies other than Howard Basford Ltd, as applicant for administration orders, and Howard Basford Ltd itself on its own application.

2. This judgment gives, in summary form, my reasons for acceding to the applications and making an order appointing administrators of the Companies. I address at the end the circumstances of alleged particular urgency and the way in which the applications were made.

Reasons for Appointment

3. Nationwide Accident Repair Services Ltd ("NARS") is a non-trading holding company for the group of Companies. The principal trading company is Nationwide Crash Repair Centres Ltd ("NCRC"). NCRC employs 2890 people and provides central support services for the other Companies. The other Companies in the group are either trading subsidiaries or provide services for the group or are property holding companies. The group provides car crash repair facilities and its principal customers are insurance companies.

4. The group traded with the benefit of facilities provided by Barclays Bank plc and Investec Bank plc. NARS was the borrower and most of the companies in the group are guarantors of the secured debt owed to the banks. £31.7 million is currently outstanding under the facilities

5. NARS, NCRC, Network Services (Nationwide) Ltd and Nationwide Fast Fit Plus Limited were all participating employers in the group's defined benefit pension scheme, though this was closed to new accruals as long ago as 2006. The pension scheme has an historic deficit of £48.48 million on an accounting basis, which will increase to £117.5 million on a fully funded "buy out" basis for the purposes of section 75 of the Pensions Act 1975.

6. The group has been in default under its banking covenants since 20 May 2020, as a result of which the facilities are now frozen save to the extent of cash in its current accounts. On 10 July 2020, the group was advised by PwC that it was or was likely to become insolvent. NCRC and the other group companies currently have insufficient cash to meet the current liabilities accrued as at 1 September 2020 and there will no longer be a cash positive balance in the current accounts enabling the group to continue to trade. The group has been hit hard by the consequences of the Coronavirus pandemic and as a result has lost, or is on the verge of losing, some of its principal insurer customers.

7. The evidence is clear that each of the Companies is very substantially balance sheet insolvent and that the Companies are each unable to pay their debts as they fall due,

taking into account future and contingent liabilities. There is no doubt that the first jurisdictional condition for appointment of an administrator (insolvency of the Companies) is met.

8. Since mid-April 2020, Mr Michael Alfred Wilmshurst, who is now the sole director of each of the Companies, has been working with PwC to seek to rescue the Companies' business. The evidence of Mr Wilmshurst and of Mr Lewis is that various options have been explored in detail, including further funding from the banks and from the Companies' ultimate parent, a company owned by funds administered by the Carlyle Group, which holds the shares in NARS through a Holdco and Bidco structure (arising from a scheme of administration sanctioned in 2015), to finance continued trading or an operational restructuring, or further debt from third parties, but without success. Other options were also considered but ultimately the conclusion was reached that only a sale of the business was viable.

9. Stephens Europe Ltd were engaged on 24 June 2020 to seek a buyer. Although a large number of parties initially expressed interest, only two bids made it through to the final stages, one of which would have involved Investec, one of the secured creditors. Both offers were in principle acceptable to the secured creditors, subject to final negotiations. On 30 August 2020, Redde Northgate were granted a period of exclusivity for negotiations, which resulted in a deal finally being agreed early in the evening of 3 September 2020.

10. In summary, if the sale to Redde Northgate proceeds, there will be an immediate return to secured lenders of about £26.7 million, with further contingent, deferred consideration of £5 million, and nothing for unsecured creditors other than a share of the statutory prescribed part. Materially, this would result in a payment into the pension scheme of about £96,000. Of the 2890 employees, the jobs of 2350 will be preserved and transfer under the TUPE Regulations.

11. If the sale does not proceed, the Companies will be forced immediately to enter liquidation. The intended administrators are only willing to be appointed on the basis of a pre-pack sale of the Companies, as a trading administration is unrealistic. Given the absence of funds to pay current debts, including those of essential suppliers, I am satisfied on the evidence that there is now no time for an alternative deal to be negotiated. The business of the trading Companies is imminently at risk of collapse. On a winding up, the secured creditors would be likely to receive a return of £19 million with an even smaller share for unsecured creditors and the pension scheme likely to receive only £23,000 from the estate of NCRC. On a liquidation, the jobs of all employees would be lost and the amount of preferential claims in the insolvency of the Companies increased.

12. The evidence of Mr Lewis is that he is satisfied that the statutory objectives of an administration are likely to be achieved. I accept that evidence on the basis of the figures above, which demonstrate a better return to the body of creditors as a whole and/or the likelihood of the realisation of assets for distribution to secured creditors. Accordingly, the second jurisdictional condition is clearly satisfied in this case.

13. I turn then to the question of whether, as a matter of discretion, I should make an order appointing administrators.

14. The Applicants have properly drawn to my attention a potential legal difficulty arising from the fact that Mr Wilmshurst is the sole director of the Companies. The Articles of Association of each of the Companies other than Howard Basford Ltd arguably require a quorum of at least two directors. The relevant Articles are, to a degree, inconsistent on this question and it is therefore possible that, correctly construed, Mr Wilmshurst does not have authority to resolve on behalf of those Companies to seek the appointment of an administrator. The Carlyle group, which controls the relevant Companies, has been invited but has declined to appoint another director or to amend the Articles, and indicated through solicitors that the company controlled by Carlyle will not sign a shareholder's resolution to appoint an administrator or consent to NARS' director making an appointment.

15. I am however persuaded that, on the strength of the decision in Re Brickvest Limited [2019] EWHC 3084 (Ch), in particular at paras 13-21, and as a matter of principle, that is not an impediment to a single director making an application to the court as "the directors of the company", under para 12(1)(b) of Schedule B1 to the Insolvency Act 1986, where he is the sole director, or an impediment to the court making an order where it is otherwise appropriate to do so. The plural form in para 12(1)(b) will include the singular, by virtue of section 6 of the Interpretation Act 1978. Each director of a company, including a single director, has a duty owed to the company and its creditors to cause a company to cease trading where it is clearly insolvent and to instigate an appropriate insolvency process. Where a better result for a company's creditors will be achieved by an administration, a director must be entitled – if not bound – to apply to the court for that relief, if an administrator cannot be appointed out of court or for some other reason it is necessary or appropriate to apply to the court. If the application is made in circumstances in which the board of the company could not resolve to appoint an administrator, that is a matter that the court can take into account in the exercise of its discretion, though it is likely to be outweighed by other relevant considerations in many cases, particularly where, as here, an administration order will result in a better return for creditors and there is no other realistic alternative to a winding up.

16. It seems to me that is a case in which a director is the sole appointed director of a company, and that director has standing to apply to the court for an administration order by virtue of para 12(1)(b) of Schedule B1, even if under the internal governance of the company he could not alone pass a resolution of the company to make such an application. The Court will then exercise its discretion, taking into account all relevant circumstances, which may include the reasons why there is a sole director and the effect of the company's articles as to the relevant powers of its board.

17. On the facts of this case, Mr Wilmshurst is not at fault for the absence of a quorum of directors (if more than one is required) and clearly owes a duty to the creditors of the Companies to take urgent steps to protect their interests. The Companies are balance sheet insolvent to a very marked degree and are now wholly unable to pay all their debts as they have fallen and will fall due. There is no realistic alternative to a sale to Redde Northgate other than winding up all the Companies, which will result in a substantially reduced distribution to the body of creditors. The outcome for the unsecured creditors, in particular the pension fund, is little short of disastrous in either case, but marginally better if administrators are appointed to effect the agreed sale. Perhaps the most material consideration is that, by appointing administrators, 2350

jobs may be saved, at least in the short term, at a time of looming economic crisis and potential financial hardship to anyone made redundant.

18. For those reasons, I decided on 3 September 2020 to accede to the applications to appoint administrators of each of the Companies, with a view to their being able to complete the pre-pack sale to Redde Northgate.

The Conduct of the Applications

19. As I have indicated, the sale was negotiated between 30 August and 3 September 2020. The court was notified on 1 September 2020 that an urgent application might need to be made that day, or out of hours. No other details or information was provided at that stage. The Court was informed that, if no hearing was required by 8 pm that day, the matter could be heard at 9 am on 2 September (though the Court had not previously suggested that a 9 am hearing was a possibility). In the event, nothing further was heard from the Applicants' lawyers after 1 September 2020 about a hearing in this matter until, at 7:52 pm on 3 September, an email was sent without prior warning to the duty judge's clerk asking for an urgent hearing that evening. It attached weighty bundles, a skeleton argument and a certificate of urgency. The skeleton argument and the certificate explained the urgency but neither suggested nor gave any reason why a hearing that evening was necessary.

20. Having been told that the applications would be heard at 10 am the following morning, the Applicants' lawyers then indicated at 9.16pm that they were "informed" that the deal which has been agreed with the purchaser (conditional on administration appointments being made) was only available to be completed that night, and that Mr Wilmshurst and the proposed Administrators believed that the purchaser would pull out if they could not complete by 11.59 pm. It transpired, in a conversation between me and Mr Davis after I had been sent that warning, that a deadline of 11.59 pm on 3 September 2020 had been included by agreement in the contract documents that had been negotiated over the previous days.

21. I make no criticism of Mr Davis, who conducted communications with the Court and staff and the hearing itself with utmost courtesy and tact. However, it is wholly unacceptable for clients and lawyers and other professionals acting for them to negotiate terms that have the effect of presenting the Court will an artificial ultimatum and require important matters affecting the livelihoods of thousands of people to be decided under undue pressure of time. There was, objectively, on the evidence filed, nothing in the circumstances of the Companies' affairs that required the applications to be heard at 9pm on 3 September rather than 10 am on 4 September. The need was created only by the terms that were agreed with the buyers.

22. If, which is unclear, the deadline was inserted in the contracts at an earlier stage, the Applicants should have sent the draft application documents to the Court much earlier, with the caveat that the deal had not yet been finally concluded and might not be, but drawing attention to a likely deadline for completion that might necessitate an urgent hearing. If the parties agreed the deadline for the appointment of administrators when terms were finally agreed they were wrong to do so. The exercise of the Court's discretion in such important matters is not to be treated as if it were a rubber stamp. Intending applicants must expect that time required properly to prepare and conduct a fair hearing and reach a decision will not be abridged solely to accommodate their preferences.