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Re Dolfin Financial (UK) Ltd; Dolfin Asset Services Ltd v Stephens (in his capacity as joint special administrator of Dolfin Financial (UK) Ltd) and another

[2023] EWHC 123 (Ch), [2023] All ER (D) 06 (Feb)

The Chancery Judgment held that two applications to compel the respondents to provide information in relation to their post administration remuneration charged under two periods would be dismissed. The court held that there was no jurisdiction to make an order under rule 201 of the Investment Bank Special Administration (England and Wales) Rules 2011. The applications were misconceived.

Catchwords

BANK – ADMINISTRATION – REQUEST FOR FURTHER INFORMATION

Background

Dolfin Financial (UK) Ltd (DFL) was incorporated in November 2010 and traded as an independent wealth-management investment firm. It was regulated by the Financial Services Authority (FSA) and subsequently by the Financial Conduct Authority (FCA). The regulatory regime with which DFL had to comply included the Client Assets Sourcebook (CASS).

Client money balances were held by DFL in segregated accounts. Securities held were kept on a safe custody basis, with the majority held through several sub custodians in electronic form. Some asset forms held included complex bond instruments and assets subject to sanctions. In addition to client assets, DFL held its own assets (the house assets).

In 2019, DFL promoted two new products (the Vostok fund and the Wave fund). Those funds were blockchain projects in which cryptocurrency was to be issued as tokens. In mid-2019, an investment company entered into a sale and purchase agreement to obtain some tokens on a purported promise that there was little or no risk. Subsequently, the Wave tokens decreased in price and increased the number diluting the investment. The investment company did not receive a return and believed it was a victim of fraud. Proceedings were commenced. On 12 March 2021, the FCA imposed restrictions on the bank's regulated activities. In June 2021, it was placed into a special administration and joint special administrators were appointed (JSAs).

Prior to their appointment and following the restrictions imposed by the FCA, the bank planned an orderly wind-down of its business. That included a sale of its clients to another company (Britannia) for an initial consideration of £600,000 and an agreed deferred consideration. A sale agreement was signed on 5 July 2021. Completion took place on 12 July 2021. Britannia did not accept all clients and some clients did not want a transfer. Accordingly, some clients remained with DFL.

Two applications were before the court. The first was made in March 2022 and sought to: (i) compel the respondents to provide information in relation to their post administration remuneration charged during 30 June 2021 and 29 December 2021; and (ii) extend time under r 202. The second application was made in September 2022, in near identical terms.

Issues and decisions

Whether the applications would be allowed. The court considered, among other things, whether there was jurisdiction to make the applications.

The request for further information in respect of remuneration arose due to the circulation of the progress reports in which certain statements were required. The Investment Bank Special Administration (England and Wales) Rules 2011 [SI 2011/1301] (the Rules) required special administrators to provide details of the basis fixed for remuneration and if not fixed, the steps taken to fix. If the basis was fixed, the progress report was to include a statement of the remuneration charged during the relevant periods irrespective of whether payment was made during the period of the report. Similarly, the report had to include a statement of expenses incurred during the period of the report (see [50] of the judgment).

The obligation to provide a statement of the remuneration charged by the administrator during the period of the report was provided by rule 122(1)(f). That obligation arose only if the basis of remuneration had been fixed. If fixed, the obligation endured irrespective of payment. The right of a creditor or client to seek further information pursuant to r 201 of the Rules appeared at first sight to apply only to the statement required under r 122 (1)(g) or (h) (see [51]-[53] of the judgment).

Despite r 201 expressly stating that a request could be made in relation to a statement required by r 122(1)(g) or (h), it also included a reference to remuneration: '… for further information about remuneration or expenses…set out in a statement required by rule 122(1)(g) or (h)' (see [56] of the judgment).

The apparent difficulty of language was reconciled by reading r 201 with an emphasis in the disjunctive. A request might be made in respect of a remuneration statement or an expenses statement produced in compliance with r 122(1)(g) (see [57] of the judgment).

That led to the requirement of a remuneration statement. Rule 201 did not provide a further or new obligation to provide a remuneration statement that floated free of the obligation in r 122(1)(f). The rules were prescriptive so that a special administrator knew with some precision what his or her duties were when producing a progress report. The Rules did not provide that a statement of remuneration needed to be provided where r 122(1)(f) did not apply. Such a free floating requirement would be contrary to the scheme evident from the Rules (see [58] of the judgment).

It followed that a reference to 'remuneration or expenses' in r 201 was a reference to a statement made in accordance with r 122(1)(f) (in respect of remuneration) which only needed to be made once the basis was fixed. That was consistent with r 122(1)(f)(ii) (see [59] of the judgment).

The sub-rule specifically anticipated that the basis of remuneration might not be fixed by the time of the first progress report or subsequent progress reports, but, when it was fixed, the r 122(1)(f) statement had to include the remuneration for the earlier periods. That was consistent with rr 134(1)(j), 135(1)(d) and rule 196(2), (3), (5)-(8).

In the present case, the JSAs had provided information compliant with the industry standard Statement of Insolvency Practice 9 as a matter of good practice, and because they believed that they were bound by their regulatory body to do so (see [60] of the judgment).

The reference to 'remuneration' in r 201 was a reference to r 122(1)(f) and there was no jurisdiction to make an order under rule 201 of the Rules. The applications were misconceived (see [62], [63] of the judgment).

Judgment date
26 January 2023

Judge
Chief Judge Briggs (Insolvency and Companies Court)

Representation
Dan McCourt Fritz (instructed by Stewarts Law LLP) for the applicant.
Jamil Mustafa (instructed by DWF LLP) for the respondents.