# International Corporate Rescue




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# *Green & Newman v SCL Group Ltd and others* [2019] EWHC 954 (Ch): The English Court Provides Some Useful Guidance on Administrators' Duties

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## Synopsis

In *Green & Newman v SCL Group Ltd and others*,[1] the Court had to decide whether to appoint the incumbent administrators of the Cambridge Analytica group of companies as liquidators in the face of wide-ranging objections by a contingent creditor. In considering the matter, the Court provided some useful guidance to administrators touching upon their decision-making and duties.

## Background facts

The case concerned a number of companies in the group commonly known as Cambridge Analytica, (hereinafter, for ease of exposition, referred to as 'Cambridge Analytica'). The business involved the acquisition of commercial data from multiple vendors, its amalgamation and analysis and the use of the analysis to target and message clients. Cambridge Analytica's clients included political parties and campaign groups who used its services to seek to influence voting behaviour in both the United Kingdom and the United States.

On 10 January 2017, a Professor Carroll submitted a Subject Access Request ('SAR') in England to one of Cambridge Analytica group companies, SCL Group Limited ('Group'), seeking to find out whether it (or any associated companies) held any of his personal data, what was the legal basis for any processing of that data and, for each 'data point', full information as to its source. He did not receive a reply he regarded as satisfactory. Therefore, on 16 March 2018, he issued court proceedings against some of the group companies (including Group and Cambridge Analytica (UK) Limited) founded on section 7 of the UK Data Protection Act 1998. It would seem that Prof. Carroll's legal action had a wider strategic purpose since on his 'crowd funding' website he had solicited donations to fund his campaign to establish the principle that 'companies cannot use personal data in any way they see fit'.

Following allegations over Cambridge Analytica's misuse of personal data of Facebook users in March 2018, the UK Information Commissioner's Office ('the ICO') raided the offices of Cambridge Analytica and seized several servers and significant quantities of evidence (including accounting books and records). The controversy led to a number of Cambridge Analytica's clients cancelling their contracts and seeking the return of payments made. Moreover, Cambridge Analytica's inability to access accounting data meant that it failed to pay debts as and when they fell due. Consequently, each of the group companies applied to enter into administration.

At the conclusion of the hearing of the administration application (which spanned over two-days) on 3 May 2018, the Judge (Hildyard J) found, with some hesitation and 'on balance', that there was a real prospect of a better result for Cambridge Analytica's creditors in an administration (compared to a liquidation) and consequently appointed Messrs. Green and Newman as the joint administrators of each of the group companies ('the Joint Administrators'). The main plan of the Joint Administrators was to effect the sale of all or part of Cambridge Analytica's business.

It quickly became apparent, however, that Cambridge Analytica could not continue to trade because the ICO had seized its laptops and servers such that the sale of the business could not be achieved. Consequently, the Joint Administrators proposed to creditors that the group companies of Cambridge Analytica should be placed into compulsory liquidation and that they, the Joint Administrators, be appointed as Joint Liquidators. The creditors for each of the group companies accepted the proposal. Prof. Carroll voted against the proposal as far as it concerned SCL Elections Limited ('Elections'), the only group company in whose administration he held voting rights as a contingent creditor.

On 11 August 2018 the Joint Administrators presented petitions for the winding up of Cambridge Analytica and their appointment as Joint Liquidators. Prof. Carroll objected to the proposal. He initially

*Notes*

1 [2019] EWHC 954 (Ch).

expressed his objections on the basis that 'he was concerned that the administrators [were] insufficiently objective' and would 'fail to hold the balance fairly as between him ... and the directors/shareholders of Cambridge Analytica who were responsible for their initial appointment'. He subsequently broadened his objections so as to attack both the personal integrity and professional competence of the Joint Administrators. His objections were wide-ranging. Some of those objections are addressed immediately below.[2]

## The objections to the Joint Administrators' conduct

### *The Joint Administrators' alleged failure to disclose Prof. Carroll's pending court proceedings at the time of the administration order*

Since, on the evidence, it was clear that the Joint Administrators only became aware of the court proceedings after the administration order was made, Prof. Carroll mainly argued that the Joint Administrators' duty of candour included a duty to make reasonable enquiries (analogous to the duty of parties applying 'without notice' for interim relief). In this regard Prof. Carroll relied on the case of *Re OGX*[3] (a case concerning an application for recognition of a Brazilian insolvency proceeding under the GB Cross-Border Insolvency Regulations 2006 specifically in order to obtain a stay of a London arbitration, where the judge was not told that the subject matter of the arbitration was not affected by the collective insolvency proceedings in Brazil). He argued that had such investigations been made, the court proceedings would have come to light and the Court would have modified the automatic stay to permit the court proceedings to continue notwithstanding the administration order.

The Judge (Norris J) rejected the submission on the basis that the Joint Administrators had a duty to make reasonable enquiries relating to their ability:

a. to provide a certificate that one of the purposes of the administration was reasonably likely to be achieved; and

b. to perform the duties of their office.

In light of those duties the Joint Administrators were under no duty to make themselves as fully informed about the company's general affairs as the applicant company. As noted by the Judge:

> 'In general (there is always the possibility of an exceptional case) he or she [the administrator] is not before appointment bound to seek out every piece of litigation in which the company is involved and to consider the impact of the statutory moratorium upon it: not least because the alternative will generally be liquidation, which will impose its own stringent moratorium under section 130 [of the Insolvency Act 1986.]'[4]

### *The Joint Administrators' alleged lack of candour concerning the funding of their fees*

The Judge found that it was not unusual, as in this case, for the ultimate holding company (which is also a major creditor) to underwrite the costs of the administration of its subsidiaries in order to obtain the best recovery. The Judge did, however, emphasise that administrators were not the sole judges of what may or may not be material as regards funding and should, where necessary, be prepared to expose their judgement to the consideration of others (including the Court). The Judge found that the Joint Administrators 'belatedly' disclosed the funding arrangement to the Judge hearing the administration application (and, in so doing, belatedly complied with their duty in this regard). However, the Judge did find that the Joint Administrators showed misjudgement in not having volunteered information concerning the funding of their fees earlier in the administration application.

### *The Joint Administrators' alleged incompetence in certifying that there was a reasonable likelihood of achieving the purpose of the administration*

Given the concerns expressed by Hildyard J at the administration application hearing, the Judge found that this allegation potentially had some weight. After eschewing the 'hindsight element' (this is what happened, so it should have been foreseen) the Judge set out the relevant question as follows:

> 'The question for the proposed administrators was whether at the date of the hearing (and in particular on its second day), and looking ahead from the standpoint of their current knowledge, they were able to abide by the statement in their respective consents to act that 'the purpose of administration was reasonably likely to be achieved' i.e. that there was a real prospect of that outcome. This is a question of

**Notes**

2 It was accepted by the Joint Administrators that the identity of the joint liquidators of Elections was the key issue and that to appoint the Joint Administrators as joint liquidators of the other Cambridge Analytica companies simply because Prof. Carroll could not object (because he was not a creditor) would not make sense.

3 [2016] Bus LR 121.

4 At [41] of the judgment.

immediate judgment, where there may be a reasonable difference of view.'[5]

The Judge found that the Joint Administrators had (among other things) acted on information from the directors about 'concrete expression[s] of interest' in the businesses so that they were entitled to form the view they did. The Judge found that the Joint Administrators' view was not 'irrational, perverse or outside the range of views that might be held by reasonably competent practitioners (even if some proposed office holders would have taken a different view)'.[6] The Judge also suggested that in order to prove such a case of incompetence against administrators appropriate expert evidence might be necessary.

### *The Joint Administrators' alleged lack of candour concerning the costs of the administrations*

The Joint Administrators' proposed fees were almost double the fees contained in their initial estimated outcome statement. Prof. Carroll argued that in the circumstances the Joint Administrators had not told the truth about their fees such that they were rendered unfit to be liquidators. The Judge rejected the argument. The Judge found that the increase from the initial estimated fees (based on four days of familiarity of the companies' business) to the actual fees did not mean that the Joint Administrators had not told the truth or lacked candour. Taking a pragmatic approach, the Judge was also comforted by the fact that, in addition to Creditor Committee scrutiny, the approval of creditors was required in any event before the Joint Administrators could draw their fees.

### *The Joint Administrators' alleged actual bias against Prof. Carroll*

Prof. Carroll had requested the provision of all the materials adduced for the administration application. The Joint Administrators' solicitors refused the request on grounds of costs. The Judge found that the Joint Administrators should have disclosed to Prof. Carroll their pre-appointment certificates, estimated outcome statement and skeleton argument relied on at the administration application hearing when asked since such documents were readily to hand. The Judge applied the following test: 'Are the acts of the Joint Administrators disclosed by the incontrovertible parts of the documentary record so perverse that they can only be attributed to bias?' The Judge found that the acts and omissions of the Joint Administrators were equally consistent with the Joint Administrators thinking in good faith (for good reason or bad) that they had a strong case for acting as they did, supported by the majority of the general body of creditors. As such, the Judge rejected the allegation of actual bias by the Joint Administrators against Prof. Carroll.

### *The Joint Administrators' alleged misconduct in not petitioning for liquidation sooner*

The Judge found that the Joint Administrators could have applied for directions from the Court earlier as soon as it became clear that the sale of the business could not occur. However, the Judge found that it was not outside the proper range of decisions for the Joint Administrators to wait for the delivery of the Statement of Affairs in order to ascertain the number and value of creditors and seek their views on the proposal to place Cambridge Analytica into compulsory liquidation.

### *The Joint Administrators' alleged misconduct in relation to Prof. Carroll's Subject Access Request*

On 4 May 2018, the ICO served an Enforcement Notice on Elections requiring it to provide better answers to Prof. Carroll's SAR. The Joint Administrators did not cause Elections to take steps to comply with the Enforcement Notice since (a) they were not themselves 'data controllers' (per *Re Southern Pacific Personal Loans Ltd*);[7] (b) the relevant servers were in the custody and control of the ICO; (c) from 22 May 2018, Elections had no staff; and (d) the costs of complying would have been disproportionate to the value of the assets and would impact adversely on recovery for the general body of creditors. Elections pleaded guilty to a subsequent prosecution by the ICO for not complying with the Enforcement Notice. It was fined £15,00 and ordered to pay in addition £6000 in costs. Prof. Carroll argued that the Joint Administrators were guilty of misconduct in relation to the Enforcement Notice. The Judge found that the attempts at compliance with the Enforcement Notice would have involved Elections incurring costs that would have ranked as an expense of the administration (to the potential detriment of general creditors); in contrast, non-compliance by Elections with the Enforcement Notice had resulted in some minimal costs and an additional unsecured claim. Since there was no evidence that the latter situation would be more burdensome to the creditors than the former situation, the Judge could not find that the Joint Administrators had misconducted themselves.

**Notes**

5 [50] of the judgment.
6 [52] of the judgment.
7 [2014] Ch 426.

### *Outcome*

Having rejected the complaints of Prof. Carroll the Judge stepped back and considered whether it was right in any event to place Cambridge Analytica into compulsory liquidation with the Joint Administrators as the Joint Liquidators. The Judge found that it would be 'conducive to the proper operation of the liquidation'[8] to place Cambridge Analytica into compulsory liquidation and appoint the Joint Administrators as the Joint Liquidators, especially in light of the Joint Administrators' familiarity with the business.

## Conclusion

The case emphasises the generous margin that administrators are afforded by the court in making difficult decisions in the conduct and affairs of a company in administration. It also provides some welcome clarification of the extent to which the administrators have a duty to make reasonable enquiries of a company pre-their appointment as administrators.

*Notes*

8 [91] of the judgment.

## International Corporate Rescue

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