

## Can a creditor with a disputed debt apply for an administration order? (Berkshire Homes (Northern) Ltd v Newbury Venture Capital Ltd)

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**Restructuring & Insolvency analysis:** The court considered the test applicable when a creditor applies for an administration order on the basis of a debt that the company claims is disputed and/or offset by way of cross claim. The court determined that a creditor has standing to bring the application, despite the fact that the debt is disputed and/or subject to a cross claim. However, where that same debt is relied upon to demonstrate that the company is unable to pay its debts, or likely to become unable to pay its debts, then the debt must be proved on the balance of probabilities. Written by Kate Rogers, barrister at Radcliffe Chambers, London.

*Berkshire Homes (Northern) Ltd v Newbury Venture Capital Ltd* [\[2018\] EWHC 938 \(Ch\)](#)

### What are the practical implications of this case?

They key practical implications are:

- A debt that is disputed and/or subject to a cross claim still gives a creditor sufficient standing to apply for an administration order.
- Where that disputed debt is also relied upon to satisfy paragraph 11(a) of [Schedule B1](#) of the Insolvency Act 1986 ([IA 1986](#)) then the debt must be proved on the balance of probabilities. Proving the debt on the balance of probabilities does not necessarily involve disproving the dispute and/or cross claim entirely. It must follow that a debt can be proved for an administration order to be made despite there being some recognised dispute.
- The onus is on the respondent to prove that the debt is disputed or that a cross claim exists.
- The statutory purpose of the administration pursuant to [IA 1986, Sch B1, para 11\(b\)](#) is irrelevant for the above consideration.
- There is only one purpose of administration—[IA 1986, Sch B1, para 3](#) simply provides a hierarchy of the aims of administration.
- The court considered *Hammonds (a firm) v Pro-Fit USA Ltd* [\[2007\] EWHC 1998 \(Ch\)](#), [\[2007\] All ER \(D\) 109 \(Aug\)](#) and *Fieldfisher v LLP Pennyfeathers Limited* [\[2016\] BCC 697](#) (not reported by LexisNexis®). There was no prima facie reason for importing into administration applications the practice developed in respect of disputed debts/cross claims in the winding up procedure.
- There was no suggestion within the judge's reasoning that he was aligning the test for the purposes of [IA 1986, Sch B1, para 11\(a\)](#) with the test to be considered in respect of disputed debts/cross claims in the winding up court. The court was in fact clear that the applicant had to prove that it was a creditor of an undisputed debt on the balance of probabilities. Once the burden shifted back to the respondent, as in this case, the court did not comment on the standard to be applied.
- A creditors' winding-up petition can be defeated by showing a genuine triable issue (a winding-up petition cannot proceed once a genuine triable issue on substantial grounds is established, except in exceptional circumstances), whereas on an administration application all you need to show is that the company is unable to pay its debts on the

- balance of probabilities, even if a genuine triable issue also exists in respect of the debt. The significance of a 'genuine triable issue' is entirely different between administration and winding up.

## What was this case about?

Newbury Venture Capital Limited (in liquidation) (NVC) applied for an administration order in respect of Berkshire Homes (Northern) Limited (the company) on the footing that it was a creditor of the company and in reliance on [IA 1986, Sch B1, para 12\(1\)\(c\)](#).

There was an inter-company debt showing in the books as owing to NVC. However, the company disputed that NVC was a creditor. The company argued that the debt was disputed and/or it had cross claims exceeding the value of the debt.

The issue for the court was the applicable tests to be applied on a creditor's administration application: (a) as to the standing to bring an application; and (b) as to when the same debt used to give the creditor standing is also used to prove that the company is unable to pay its debts pursuant to [IA 1986, Sch B1, para 11\(a\)](#).

## What did the court decide?

All that is required for standing to bring an application for an administration order pursuant to [IA 1986, Sch B1, para 12\(1\)\(c\)](#) was that the applicant was a creditor and it did not matter that the debt was disputed. The court has jurisdiction to hear the application without having to resolve the dispute about the debt. It is then a matter of discretion whether to make an administration order applying the test in [IA 1986, Sch B1, para 11](#). NVC was clearly a creditor—whether the debt was disputed or not—and therefore had standing to bring the application seeking an administration order.

However, if the same debt that gives the applicant standing to bring the application is also relied upon to establish that the company was, or was likely to become, unable to pay its debts within the meaning of [IA 1986, Sch B1, para 11\(a\)](#), then that debt must be proved on the balance of probabilities (the word 'likely' in [IA 1986, Sch B1, para 11\(a\)](#) meaning 'more likely than not'). The court concluded that, as to the inter-company position, the analysis of NVC was correct and therefore NVC was a creditor of the company in at least some undisputable sum. NVC relied upon the company accounts and the bank statements, which it was said (and which was accepted) could not be challenged. If the company wanted to argue that despite what appeared on the face of it, the debt was disputed and/or there was a cross claim, then that was a matter for the company to prove. The company could not do so. The court concluded that the cross claims were 'tenuous and entirely speculative'. The company was therefore unable to pay its debts, or likely to become so.

The court was also satisfied that the purpose of the administration could be achieved in accordance with [IA 1986, Sch B1, para 11\(b\)](#) and therefore the administration order was granted.

## Case details

- Court: High Court, Business and Property Courts in Manchester
- Judge: His Honour Judge Hodge QC, sitting as a judge of the High Court
- Date of judgment: 14 February 2018

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