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The New UK Corporate Rescue Procedure – The Administrator's Duty to Act Rationally

Rizwaan Jameel Mokal, Reader in Laws, UCL, and Research Associate, Cambridge University, UK

John Armour, University Lecturer and Senior Research Fellow, Cambridge University, UK[1]

Introduction

The corporate insolvency elements of the Enterprise Act 2002 attempt to revitalize the 'rescue culture' in the UK. At the core of the new administration regime introduced by the Act lies a statutory list of objectives available to the administrator, the Insolvency Practitioner presiding over the insolvency proceedings. The insolvency proceedings must be directed towards the pursuit of one of these objectives.[2] As explained below, the list consists, roughly, of the attempt either to rescue the company, or (some of) its business as a going concern, or the liquidation of that business piecemeal for distribution to creditors. The aim of this paper is to consider the standard by which the administrator will be judged in making his choice about which of these objectives to pursue. In particular, how broad is his discretion to choose, and to what extent (if at all) is this discretion subject to legally binding requirements?

The statutory hierarchy

The statute presents the administrator with a hierarchy of possible objectives arranged in descending order of preference and a set of instructions about how he should decide which objective to pursue. He must in the first instance perform his functions with the objective of rescuing the company as a going concern ('the first objective'). He may choose not to pursue this objective, however, if he thinks either that it is not reasonably practicable to achieve it, or that the pursuit of the objective next in the list would bring better returns to creditors as a whole (paragraph 3(3)(a) and (b) respectively). It is only if he thinks that these particular circumstances exist that he may descend a step through the statutory hierarchy and consider the next possible objective. Here, the administrator must perform his functions so as to achieve a better result for the creditors as a whole than would be likely if the company were to be wound up without the benefit of an intervening administration ('the second objective'). This will most often be the case where the statutory moratorium available against secured creditors would allow (much of) the distressed company's business to be sold as an operational unit, thus preserving any going concern value.[3] However, the administrator may take a final step down the hierarchy if he thinks the achievement of neither of the first two objectives is reasonably practicable *and* he would not unnecessarily harm the interests of the company's creditors as a whole in doing so (paragraph 3(4)(a) and (b) respectively). If these particular circumstances exist, the administrator may perform his functions with a view simply to realising the company's property so as to make a distribution to secured or preferential creditors ('the third objective').

The issue considered in this paper is the extent to which a court may review the administrator's decision as to which objective to pursue. At first sight, he seems to have been given a broad discretion in this process. The existence of any of the particular circumstances which need to be present before he may properly move down the statutory hierarchy is, as noted above, apparently established if he 'thinks' that it is. This seems to leave him as the sole arbiter of the propriety

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1 We gratefully acknowledge the help we received from Look Chan Ho and Richard Nolan. The views expressed here are ours alone, as are all remaining errors.

2 Insolvency Act 1986 ('the Act'), Sch. B1 (as inserted by the Enterprise Act, Sch. 16), para. 3. Unless otherwise stated, all references to paragraphs in this paper are references to paragraphs of this Schedule.

3 'Rescuing businesses is exactly the kind of outcome that the second objective is ... intended to recover [sic]. If it is not reasonably practicable to rescue the company, selling the constituent businesses as going concerns will almost always be the next best thing ... the effect of the provision as drafted will be to cover and give priority to business rescues', *per* Lord McIntosh of Haringey, the Minister responsible for steering the Enterprise Bill through the House of Lords; *Hansard*, 29 July 2002: Column 768.

of the chosen objective, subject only to questions of good faith. However, there are several strong reasons for thinking that any suggestion that the administrator's discretion is left unregulated (but for good faith) would be mistaken.

First and most obviously, Parliament has structured the exercise of the discretion through the provision of a *hierarchy* of possible objectives. The legislature clearly intended to prioritize the rescue of the company, or at least its business, over piecemeal realization of the company's assets for the benefit of secured creditors. It is for this reason that lower priority objectives are made available to the administrator *only if* an appropriate combination of the conditions listed in paragraph 3(3)(a) and (b) and (4)(a) and (b) are satisfied.[4] Secondly, the apparently unregulated language of the administrator coming to 'think' that these circumstances are present intersects repeatedly and meaningfully with statements, *not* phrased in terms of his 'thinking', of the duties that must be complied with for there to be a proper exercise of this discretion to choose. The administrator is under an ever-present obligation not unnecessarily to harm the interests of the creditors as a whole. Note that the duty is *not* to refrain from doing what he *thinks* would harm creditors unnecessarily; rather, he must refrain from actions that, quite simply, unnecessarily harm the creditors. Subject to this, and with the exception of the situation where he thinks the achievement of neither of the two higher priority objectives is reasonably practicable, he must perform his functions in the interests of the creditors as a whole. Again, the duty is not to act merely in a way which he *thinks* is in the interests of the creditors. It is clear, then, that the administrator may only select either of the first two objectives while complying with his duty to act in the interests of creditors as a whole, and that this duty is independent of his 'thinking'. It is also clear that he may only choose the third objective while (among other things) complying with his duty not to inflict unnecessary harm to those interests, which duty also is independent of his 'thinking'. The administrator is also under an overall duty to perform his functions as quickly and efficiently as is reasonably practicable.[5] Absent once again is any reference to his 'thinking'.

The administrator as fiduciary

Next, we should note that in exercising his functions, the administrator acts as the company's agent, and is required, upon appointment, to take custody or control of all of the property to which he thinks the company is entitled, and to manage the company's affairs.[6] Unsurprisingly, therefore, the administrator, as a person undertaking responsibility to act on behalf of the company and entrusted with the care of its property and its management, owes fiduciary obligations to it.[7] The degree to which courts are willing to interfere with the decision-making of a fiduciary depends upon the nature of his role – thus, it is a truism that a trustee's actions will be more closely scrutinized than those of a company director. We suggest that, on the spectrum of fiduciary discretions, those exercised by the administrator are more closely aligned with those of a trustee than of a director.[8] Focussing more closely on the nature of fiduciary obligations, it is possible, following Walton J in *Mettoy Pension Trustees Ltd v Evans*,[9] to identify four generic classes into which such an obligation might fall.[10] The first two categories consist of what have come to be called semi- and fully fiduciary powers (roughly, these are powers to determine the destination of some trust property, the preservation for exercise of which the donee of the power is or is not under an obligation to consider, respectively), and the fourth consists of discretionary trusts (where the trustee has the obligation to distribute the property but a discretion to select the object of this bounty from a class of potential beneficiaries defined by the settlor). Walton J's third category ('Category 3') 'comprises any discretion

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4 That there is a hierarchy of possible objectives is clear not just from the structure of the statutory text but also from the legislative history. During the passage of the Enterprise Bill, Ministers stated repeatedly in Parliament that the government wanted 'to put company rescue at the heart of insolvency procedures because we want to save companies which have a decent chance of survival so that they are not driven to the wall unnecessarily'; *Hansard*, 2 July 2002: Column 188 (Lord MacIntosh of Haringey).

5 Para. 4.

6 Paras 69, 67 and 68.

7 A useful recent general description of the factors giving rise to fiduciary obligations may be found in *Peskin v Anderson* [2001] BCLC 372, [34] (Mummery LJ). That the administrator is a fiduciary is confirmed by *Oldham v Kyrris* EWCA [2003] Civ 1506; [2004] BPIR 165, [143] (Jonathan Parker LJ) (the case was decided under the old law, but its reasoning applies equally to the administration regime set up by the Enterprise Act).

8 Most obviously, directors' decisions are not subject to the clear and objective statement of the purposes to be achieved set out in para 3. Be that as it may, the rule in *Hastings-Bass* has now been applied to the decisions of company directors: see *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch); [2004] All ER (D) 230. For a fuller account of the differences between the role and status administrators and directors, see J. Armour and R. J. Mokal, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' (forthcoming).

9 [1990] 1 WLR 1587.

10 Provided by Walton J in *Mettoy Pension Trustees Ltd v Evans*.

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which is really a duty to form a judgment as to the existence or otherwise of particular circumstances giving rise to particular consequences.'[11] The fiduciary here is required, first, to ascertain whether certain facts do or do not exist, and then secondly, to embark upon the course laid down as following from the existence of those facts, or from their absence, as appropriate. It is clear that the most fundamental of the administrator's duties, and the one which will fix the very character of the proceedings – that of settling upon the appropriate objective of the administration – falls squarely within Category 3.[12] The administrator must act so as to rescue the company as a going concern, unless the 'particular circumstances' mentioned in paragraph 3(3)(a) *or* (b) above are present, in which case the 'particular consequence' is that he may properly pursue the second objective. And it is only if the 'particular circumstances' mentioned in paragraph 3(4)(a) *and* (b) are present that the administrator may properly pursue the third objective. It follows, then, that the discretion to settle upon the objective for the administration is subject to the fiduciary duty to ascertain the statutorily defined circumstances which make one or other of the objectives the appropriate one to pursue.[13]

Thirdly, we should notice the status of those affected by the administrator's decision. His decision to opt for a piecemeal liquidation of the company's business instead of trying to save it as a going concern, for example, would have profound consequences for the company's junior claimants, which include its preferential creditors, its general unsecured creditors and even its shareholders. In giving substance to the standard by which a fiduciary's decision making is to be judged, the Court of Appeal has twice placed special emphasis on whether those affected by the decisions are or are not volunteers. In *Kerr v British Leyland (Staff) Trustees Ltd*, where a member of the British Leyland's pension scheme complained that the pension fund trustees had wrongly rejected his claim for incapacity benefit (which, incidentally, makes this a Category 3 case), Fox LJ noted that members of the pension scheme were:[14]

> not volunteers. Their rights derive from contractual and commercial origins. They have purchased their rights as part of their terms of employment. Consistently with that, the power of the trustee to decline acceptance of the claim cannot be simply an uncontrolled discretion. It seems to me that the duty of the trustee was to give properly informed consideration to the application.

This has since been approved and followed by the Court of Appeal in *Stannard v Fisons Pension Trust Ltd*.[15] The administrator's fiduciary duties are of course owed to the company.[16] Yet neither the company, nor those whose interests the administrator is obliged to respect in carrying out his duties (primarily, the creditors) are volunteers in respect of the provision of his services. The administrator's discretion to select the objective of administration also can not therefore be an uncontrolled one, and he too is required to give 'informed consideration' to this question.

The duty to act rationally

Fourthly, therefore, the administrator must choose which objective to pursue *rationally*. Legislative history leaves no doubt but that the administrator's most fundamental decision has been designed to be subject to the rationality test.[17] This is in line with the

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11 Ibid.

12 Interestingly, Ian Dawson suggests that directors of solvent companies do not have Category 3 discretion because, 'whilst part of their job is to form judgments, those will not have particular consequences in the sense described in category 3 because there the consequences were spelt out in the document which imposed the duty'; see 'The Effect of an Unthinking Trustee's Action' [2002] *Conveyancer* 67. Compare the administrator's duty to settle upon the proper objective of the administration, discussed in the text.

13 'The existence of the fiduciary duty on the part of trustees governing the exercise of their fiduciary powers requires trustees to inform themselves of the matters which are relevant to the decision', *per* Lightman J in *Re Barr's Settlement Trusts* [2003] EWHC 114, [2003] Ch. 409, [16], citing *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717. In the latter case, Robert Walker J also stated that such relevant matters 'may not be limited to simple matters of fact but will, on occasion (indeed, quite often), include taking advice from appropriate experts'.

14 Unreported (26 March 1986), at p. 12C-E of the transcript.

15 [1992] 1 RLR 27. This important case is discussed further, below.

16 *Oldham v Kyrris* EWCA [2003] Civ 1506; [2004] BPIR 165.

17 See e.g. *Hansard*, 10 April 2002: Columns 569-70 ('The word "thinks" in those paragraphs means that the administrator will have to reach a considered view [about which objective to pursue]. In such situations, the administrator's decision would be subject to a rationality test by which it would be challenged if it could be shown that no reasonable administrator would have acted in such a way in those circumstances'); 29 July 2002: Column 768 ('The present wording would mean that if the administrator's view were then to be tested, it would be subject to a "rationality" test – that is, his decisions would be subject to successful challenge if it could be shown that no reasonable administrator would have acted in such a way in the particular circumstances of a case.'), and 21 October 2002: Column 1105 ('If necessary, we would expect the courts to assess whether the office holder, in this case the administrator, has been rational in his decision. We are not seeking to apply any other test.').

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position of other fiduciaries, and it is submitted that the courts will draw on the case law providing substance to the rationality test in the context of other fiduciary relationships to flesh out the standard by which the administrator's decision-making is to be judged. Several constituents have been identified of the defect now generically referred to as irrationality. For example, a decision by trustees is irrational if 'it can be shown that [they] considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts ...'[18] Similarly, a decision made by company directors may be challenged if taken without regard to the interests of the company and with a result that no reasonable director would have thought would be in the company's interests.[19] Of particular interest is the line of authority stemming from the decision of the Court of Appeal in *In re Hastings-Bass*,[20] which has recently seen rapid development. The 'rule in *Hastings-Bass*'[21] has been interpreted as providing that 'where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his actions if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought not to have taken into account ...'[22] The rule, then, has two limbs: (i) did the fiduciary take into account an irrelevant consideration or did not take into account one that was relevant? And if so, (ii) would his decision have been different had all the relevant considerations been taken into account, and the irrelevant ones ignored? It is submitted that this rule will apply to the administrator's decision about which objective to pursue.[23]

In fact, the rule in *Hastings-Bass* has been applied to the exercise of Category 3 discretion in a manner particularly relevant to our present concerns. In *Stannard v Fisons Pensions Trust Ltd*,[24] Fisons plc sold the fertilizer division of its business to Norsk Hydro Fertilizers Ltd (NHF). This resulted in a transfer of some 2500 employees of the former – who had hitherto been members of the Fisons Pensions Trust – to the latter, with a consequent transfer of their membership to the NHF pension fund at the end of 1982. The Fisons trustees were required to hand over to the NHF trustees, in right of the transferring employees, assets of such an amount as they, 'after consulting the actuary, decided to be just and equitable'. In making the decision about how much to transfer, the trustees relied on the most recent evaluation of the pension fund, which had been carried out in 1979. What they failed to take into account was the significant rise in the stock market between the date at which the sale was agreed and that at which the assets were transferred. As a result, the transferred employees would have received benefits from the NHF pension fund at inferior levels than would have been the case if the assets transferred had been of the correct, higher, value, and their future claims against the fund would have been less secure. The Court of Appeal agreed with Walton J at first instance that the trustees' decision could not stand. Not only were the trustees required, in order to provide 'properly informed consideration [to the exercise of their discretion as to the correct amount to be transferred, to] give [ ] consideration to the current value of the trust fund and its implications', they needed 'also to know the relevance of the value of the fund to the problem in hand in relation to actuarial principles *and the implications of their decision on future contributions*.' The Court held, finally, that 'it might materially have affected the trustees' decision in December 1982, if they had been properly informed as to the then current value of the fund and the implications of its value'.[25]

The *Stannard* decision has significant implications for the administrator's duty to settle upon the appropriate objective for the administration. The administrator, too, must make his decision subject to the duty to act in the interests of creditors as a whole. It follows that in seeking to decide upon the practicability of different courses of action, he should ascertain and compare the expected values of the company's assets

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18 *Dundee General Hospital v Walker* [1952] SC (HL) 78, 92, *per* Lord Reid, who goes on to say that in this case, 'there was no true decision and the court will intervene'. This case itself concerned a challenge to the exercise of a Category 3 discretion.

19 *Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch 62; *Colin Gwyer & Associates Ltd v London Wharf Ltd* [2003] 2 BCLC 153 at [70]-[95].

20 [1975] Ch 25, 41 (Buckley LJ).

21 See, however, the comments by Jonathan Parker J in *Green v Cobham* (unreported, 19 January 2000), who preferred not to refer to the principle derived from *In re Hastings-Bass* as a rule.

22 *Mettoy* [1990] 1 WLR 1587, 1621. See also e.g. *Re Barr*, [2].

23 Jonathan Hilliard, while observing that 'we must take care here to heed Fletcher Moulton LJ's famous warning in *Re Coomber* [1911] 1 Ch 723, 728 that "[f]iduciary relations are of many different types"' argues that the rule should apply to all fiduciaries since, *inter alia*, it is a solution to the general problem of dealing with flawed decision making; see '*Re Hastings-Bass*: Too Good to be True?' (16 December 2002) <http://www.TrustsTaxEstates.com>. In the context of the pre-Enterprise Act law, see also the interesting discussion of the implications of the rule for administrators in Ian Dawson, 'Administrators' Reprieve' (2002) 5 (Aug) *Insolvency Lawyer* 180.

24 [1992] IRLR 27.

25 *Per* Dillon LJ (emphasis added); note that the emphasized portion of this statement was crucial to the Court's decision.

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(i) if they were to be kept in the ownership of the company, or (ii) if (some of) the assets were to be sold off as a functioning unit, and (iii) if they were to be liquidated piecemeal for a distribution to (primarily) secured and preferential creditors. He should seek to compile predictions of cash flows, to identify the creditors (if any) who might be persuaded to write down a part of their loans or to engage in a debt-for-equity swap, to estimate the level of confidence (if any) that important creditors have in key members of the pre-distress management, and to ascertain the sources and amount of possible funding for the proceedings. Further, he should assess the significance of the appropriate combinations of these factors for his decision about which objective to pursue. In so doing, his duty would be to gather and analyse such information as is *reasonably* available to him. By paragraph 4 of Schedule B1, he is subject to a concomitant duty to act 'quickly and efficiently', which militates against excessive information-gathering exercises.[26] Nevertheless, not to secure all the relevant information reasonably available, or once in possession of it, not to understand how this information affected his choice of objective, would cause the administrator to make a faulty decision in breach of his duty to act rationally.

It is important at this point to take note of recent dicta by Lightman J in *Re Barr*. In a judgment seen as attempting to restrict the ambit of the rule in *Hastings-Bass*, his Lordship provided the following gloss: 'it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. *What has to be established is that the trustee in making his decision has … failed to consider what he was under a duty to consider.* If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect.'[27] In the present context, it is submitted that the administrator's duties, as he goes about deciding upon the correct objective, (i) not unnecessarily to harm creditors as a whole, and (ii) to act in their interests as a whole, place upon him the obligation to obtain all of the information reasonably available to him which bears upon the question of how best to serve those interests and to protect them from unnecessary harm. So for example, not to take into account reasonably discoverable factors relevant to determining whether the continuation of the company as a going concern (by preserving for its benefit the specific skills and knowledge of the local market of its pre-distress shareholder-managers, say) would result in better expected returns for its creditors than if the company's business were to be sold off to another company (with little knowledge of and enjoying no goodwill in the market), would be to ignore considerations relevant to serving the creditors' interests, and would thus constitute a breach of duty.[28]

Rationality requirements in public and private law

The conceptual apparatus being employed for the review of fiduciary decision-making bears interesting similarities to the more fully-developed tools used in the judicial review of administrative action. The principles of judicial review specifically require the challenged administrative action to live up to the demands of rationality,[29] and the Court of Appeal has remarked after a review of the relevant case law that it is 'no coincidence that courts, considering the exercise of discretionary powers by those to whom such powers have been entrusted (albeit in different contexts), should reach similar and consistent conclusions, and should express those conclusions in much the same language'.[30] Several first instance courts

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26 Note also Robert Walker J's comments *in Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 'In an imperfect world trustees (like other decision-makers) do often make decisions which are based on less than complete information and less than full analysis and discussion'.

27 *Re Barr*, [23] (emphasis added), citing *Mettoy* [1990] 1 WLR 1587, 1625. It should be noted that this decision has been criticised as departing fundamentally from the true basis of the rule in *Hastings-Bass*: 'The issue from a *Hastings-Bass* standpoint is what the trustee does with the information when he has it, not whether he was negligent in obtaining it …. The additional hurdle for which Lightman J contends creates the wholly undesirable result that relief is available in respect of the acts of the negligent trustee but not in respect of the acts of the careful trustee, even though the substantive basis for impugning the trustee's decision is the same in each case' (footnote omitted); see Brian Green, 'The Law Relating to Trustee's Mistakes – Where Are We Now?' (29 October 2003) <www.TrustsTaxEstates.com>. Be that as it may, the argument in the text here is that the administrator is duty-bound to ascertain and digest all the relevant facts reasonably available to him, with as well as without the gloss provided by *Re Barr* to the rule in *Hastings-Bass*.

28 Note of course that relief may still be withheld in this scenario if the court determines that the administrator would reasonably have acted as he did even if he had been in possession of that information; *Mettoy, per* Walton J.

29 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 (HL) (Lord Diplock).

30 *Edge v Pensions Ombudsman* [2000] Ch. 602, 627-631.

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have expressed similar sentiments.[31] The courts have also been concerned, however, to distinguish the 'much more developed'[32] body of judicial review principles grouped together as representing the requirements of rationality, from the principles applied to fiduciaries by private law.[33] One reason for doing so appears to be that the public law requirements of rationality are more demanding than their private law counterparts, so that judicial review principles *have to be* more developed than those applicable to fiduciaries in order to ensure that those more severe requirements have been satisfied. Two indicia have been identified as marking the two areas apart from each other.[34] The first is the duty to give reasons, which plays a large and important role in ensuring the rationality of administrative decision making. Such a duty is said to have a role only in exceptional instances of the discharge of fiduciary obligations,[35] with at least one distinguished judge having commented upon the 'widely-held view that trustees need not, and if well advised, should not, give reasons. There is probably a lot of good sense in that, in the general run of case'.[36] The second difference is said to lie in whether there is a right vested in the person affected by a decision to be heard by the decision maker. While the person affected by an administrative decision usually has an *independent* right to be heard, the person affected by the decision of a fiduciary may be required to be heard *only insofar as* this is necessary for the fiduciary to become duly informed of matters relevant to the decision: 'The difference between the public law and the trust approach is that the former focuses on the individual's opportunity to be heard before a decision, whereas the trust concept focuses on the information available to the person making the decision.'[37]

Against this background, an analysis of the administrator's position proves instructive. Taking first the duty to give reasons, the administrator is unlike other fiduciaries in having a duty, not merely to *give* reasons, but to *explain* them. After he has picked the objective he will be pursuing, the administrator 'shall make a statement setting out proposals for achieving the purpose of administration. [This] statement must, in particular ... where applicable, explain why the administrator thinks that the objective mentioned in paragraph 3(1)(a) or (b) cannot be achieved.'[38] The administrator must not only make his decision rationally, then, he must also account for his 'thinking'. He must explain the facts, factors and considerations which, in his view, make his decision the appropriate one under the governing legislation. The legislation clearly seems to be shifting the burden of proof from any potential challengers to his decision having to demonstrate that he *failed* to comply with the requirements of rationality, to the administrator having to show that his decision, his 'thinking', *succeeds* in being rational.

Consider now the question of whether those affected by the administrator's decision have the right to be heard. The administrator is clearly under no duty to consult creditors (or indeed members) before reaching his initial decision about which objective to pursue. However, he must then formulate proposals about how he intends to achieve his chosen objective. These must be placed before a creditors' meeting, and significantly, they must be accompanied by the administrator's explanation, if appropriate, of why he thinks one or both of the higher priority objectives cannot be achieved.[39] The creditors will of course have the opportunity to decide whether they consider his proposals acceptable, and in this regard, an important consideration will no doubt be whether

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31 In *Breadner v Granville-Grossman* [2001] Ch. 523, [58], for example, Park J described the rule in *Hastings-Bass* as 'an emerging principle which may be applied to exercises of powers by trustees, and it has obvious affinities to the much more developed area of the principles which courts will apply when judicially reviewing the exercises of statutory powers by public authorities.' See also Sir Robert Walker, 'The Limits of the Principle in *Re Hastings-Bass*' (2002) 4 *Private Client Business* 226, 227-228.

32 Ibid.

33 Lightman J has recently provided a useful discussion of the differences in the court's approach to granting remedies for the breach of fiduciary and administrative duties respectively; see *Re Barr*, [29-30].

34 Systemised by Walker, 'Limits', 228, who stated that the public law analogy for fiduciary decision making 'cannot be pressed far in relation to' the two matters to be identified in the text.

35 Walker, 'Limits', notes that there might 'perhaps' be such a duty 'when pension fund trustees have to determine an issue as to a member's state of health', and cites *Kerr v British Leyland* and *Mihlenstedt v Barclays Bank* [1989] 1 RLR 522 (both of them Category 3 cases).

36 Robert Walker J (as he then was) in *National Trust*.

37 *R v Charity Commissioners for England and Wales, ex parte Baldwin* (2000) 33 HLR 538, [49] (Jack Beatson QC, sitting as a Deputy Judge).

38 Para. 49(2)(b). For the possible interpretations of 'explain' in this context, see R. Mokal, 'Administrative Receivership and Administration – An Analysis' [2004] CLP (forthcoming, December).

39 The administrator is not under a duty to call a creditors' meeting if he thinks the company has insufficient property to enable a distribution to unsecured creditors except of funds ring-fenced by virtue of s. 176A, or if he thinks neither of the two higher priority objectives can be achieved; para. 52(1). However, he must summon a meeting if requested to do so by creditors holding at least 10% of the company's debt; para. 52(2).

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they find his explanation of his choice of objective credible.[40] The administrator, then, is different from many other fiduciaries – and indeed from most administrative decision makers – in not only being under a duty to consult with those affected by his decision, but by also being subject, in his ability to put his decision into action, to the possibility of veto by an appropriate majority of them.

Put these two factors together against the context set by the foregoing discussion and we can see that the administrator's duties to explain his reasons and to consult with those affected by his decision place him close indeed, on the continuum of duty-laden decision making, to those subject to the full-blown rationality requirements of administrative law. One hugely significant potential implication is that the courts might be willing to go some considerable way in holding the administrator accountable on the basis of the 'much more developed' range of requirements drawn from the law of judicial review, even when they would be unwilling to do so with respect to other fiduciaries.[41]

Conclusion

We have argued that, in settling upon the correct objective for an administration proceeding, the administrator owes the distressed company fiduciary obligations. These obligations are shaped by the administrator's statutory duties not unnecessarily to harm the company's creditors as a whole, to act in their interests as a whole, and to perform his functions as quickly and efficiently as is reasonably practicable. In making the selection, the administrator is under the duty to act rationally, which requires him to inform himself of all the facts and factors reasonably available to him that are relevant to his decision, and to act only after taking into account all relevant but no irrelevant considerations. The paper compared the nature of the administrator's role with that of administrative (i.e. public) decision makers. In particular, it highlighted the administrator's duty to explain his reasons for pursuing lower priority objectives, and to consult creditors about his decision. Given that meaningful consultation requires arming the consultees with all the information reasonably available which bears upon their decision, and given that this requirement for the administrator to account for his decision is explicit in the statutory text, we suggested that the decision is likely to be subject to fairly intensive review if challenged.

Notes

40 The administrator may act in advance of the creditors' meeting if he is presented with an opportunity that requires immediate action to be taken (see Sch B1, paras 59, 68(2), and the recent decision in *Re Transbus International Ltd* [2004] EWHC 932 at[13]). It is precisely in this situation that compliance with his duty to act in the interests of creditors is most significant. In ensuring compliance with his duty, the administrator would be well-advised to seek out the opinions of as many of the creditors as he is able to consult in the time available: *Re T & D Industries* [2000] 1 BCLC 471.

41 These requirements are discussed in Mokal, 'Administrative Receivership and Administration'.

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