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CURRENT DEVELOPMENTS: CASE COMMENT

When is an administrator an 'officer' of the company?

R (on the application of Palmer) v Northern Derbyshire Magistrates' Court [2023] UKSC 38

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Introduction

When a company becomes insolvent, particularly if it is a large company, this will often mean that there will be a large-scale redundancy process. The requirements of the process can be technical, but there is a list of obligations that must be adhered and these are set out within the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992).

Specifically, when employers propose to make 20 or more people redundant in a period of 90 days or fewer, section 188(1) requires employers to consult with appropriate representatives of the affected employees. The employer, as stated in section 193, is under an obligation notify the Secretary of State of those proposed redundancies. Failure to comply with section 193, would lead the employer to commit an office contrary to section 194 and be liable on summary conviction to a fine.

The extent to which this provision may be applied is found in section 194(3), which states:

> where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributed to neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

In relation to an insolvent company where an administrator would be charged with informing the Secretary of State of redundancies made, the Supreme Court in *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court*[1] had one key question to determine: whether an administrator of a company appointed under the Insolvency Act 1986 is an 'officer' of the company within the scope of 'any director, manager, secretary or similar officer of the body corporate', as per section 194 of TULRCA 1992. As there were no authorities on this matter,[2] it raised the question of how the statutory construction of both TULRCA 1992 and the Insolvency Act 1986 would be undertaken to determine whether 'officer' in this context could be extended to include an administrator.[3]

[†]The author would like to thank the anonymous reviewer for their valuable feedback on an earlier draft of this paper. All errors and omissions remain the author's alone.

[1][2023] UKSC 38 (hereafter *Palmer*).

[2]Ibid, at [20].

[3]Ibid, at [11].

Lord Richards, who gave the sole unanimous judgment, agreed with the judgment of the Divisional Court,[4] that central to understanding the correct application of 'officer' required the role and function of an administrator to be thoroughly appreciated.

An administrator of a company is defined in paragraph 1(1) of Schedule B1 to the Insolvency Act 1986, as 'a person appointed under this Schedule to manage the company's affairs, business and property'. Paragraph 45 goes on to state that an administrator is an officer of the court, whether or not appointed by the court.

To appreciate this in context, the purpose of administration is noted in paragraphs 3(1) and (2), which provide:

(1) The administrator of a company must perform his functions with the objective of –
   (a) rescuing the company as a going concern, or
   (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
   (c) realising property in order to make a distribution to one or more secured or preferential creditors.
(2) Subject to sub-paragraph (4), the administrator of a company must perform his functions in the interests of the company's creditors as a whole.

With this in mind, Mr Palmer had been appointed as one of three joint administrators of West Coast Capital (USC). As part of his role as an administrator, he was responsible for employees and preferential claims. At a later point after his appointment, he handed a letter to employees who were at risk of redundancy, and shortly afterwards, they were handed a further notice and dismissed.

The crucial part of the case was that no notice of the redundancies was given to the Secretary of State within the correct timeframe. Such conduct, it was argued, was contrary to section 194(3) and so criminal proceedings were commenced in the Northern Derbyshire Magistrates' Court by the Secretary of State against both the director of USC and Mr Palmer in his capacity as the administrator.

At first instance, District Judge Davison ruled that an administrator is an officer of a company within the meaning of section 194(3) of TULRCA 1992. Mr Palmer was given permission for judicial review of District Judge Davison's decision, and the Divisional Court[5] upheld the decision below and dismissed the claim for judicial review. Andrews LJ, who gave the judgment of the court, noted the importance of the term 'similar officer'.[6] She explained:

> An administrator would naturally be understood to be a 'similar officer' to a director or manager, as he is responsible for conducting or managing the business of the company as a whole and the functions he undertakes are similar. In practical terms, once the administrator assumes office there is no-one else who could give the statutory notices on behalf of the company, unless they do so under his direction. It is unnecessary to decide whether an administrator is also a 'manager of the company' although in real and practical terms he is undoubtedly carrying out a managerial function in place of the directors, even if all he is managing is the orderly disposal of company assets and the laying off of the workforce.

Within this reasoning, Andrews LJ[7] preferred to take an expansive reading of the scope of TULRCA 1992 and noted that it was clear that an administrator, and no one else, had the day-to-day conduct of the affairs of the company from his time of appointment, including the power to make employees redundant. As such, the administrator was an 'officer' for the purposes of section 194(3). This, it

[4] At [2021] EWHC 3013 (Admin), [2022] ICR 531.
[5] [2022] ICR 531 per Andrews LJ and Linden J.
[6] Ibid, at [130].
[7] Ibid, at [131].

was argued, was surely the intention of Parliament, since anyone with 'control of the corporate entity should be capable of being fixed with personal liability'.[8]

Andrews LJ's functionality approach to the legal question, which has merit, was also clearly influenced by policy considerations that hold administrators accountable for their actions and the implications that could arise if an administrator was not considered an 'officer' in this context. The potential for a legal vacuum – whereby there would be nothing to deter non-compliance since the criminal sanctions would be meaningless where a company was in administration – is a concern that should not be hastily dismissed.[9]

Since there was no authority on the issue, reliance on the Insolvency Act 1986 for guidance was not only inevitable, but essential. Yet, the 'correct' application of 'officer' would not just be settled through statutory construction, but by the interpretation preferred by the Supreme Court who has ultimate decision-making power on appeal on this question.

1. Lord Richards' literal interpretation of the legislation

Through an examination of the Insolvency Act 1986, it was clear in Lord Richards' view that an administrator was not an 'officer' of a company. In support of this view, reference was made to section 251, which defined 'officer' in relation to company insolvency, as including 'directors, manager or secretary', but 'administrator' was not included.[10] Yet, the same section also states that 'director' includes any person occupying the position of director, by whatever name called. As a director is an officer, and at the point of insolvency an administrator displaces management, the argument is not as apparent as Lord Richards may suggest.

Undeterred, Lord Richards goes on to draw distinctions between officers on the one hand, and liquidators, administrators, receivers on the other with reference to section 212. While this does provide for clear contrasts to be made, he particularly notes that subsection (1)(c) identifies a further category of person who is neither an 'officer' nor an administrator, but who 'is or has been concerned, or has taken part, in the … management of the company'. While the list of persons as provided in the subsections does draw distinctions between officer and a liquidator or receiver, the same is not said for an administrator. If the former categories of persons are listed, the absence of administrator is either deliberate or an oversight, either of which leaves the legal question of who is an 'officer' open to debate.

From a review of other statutory provisions, further distinctions comparable to this are noted in section 12(1), in its original form in the Insolvency Act 1986,[11] that required business documents issued by a company in administration to state the administrator's name and that the affairs of the company were being managed by them. Non-compliance with section 12(1) would lead to the company and 'any of the following persons … namely, the administrator and any officer of the company … liable to a fine'.

Similarly, paragraph 45(2) of Schedule B1 to the Insolvency Act 1986 provides '[a]ny of the following persons commits an offence if without reasonable excuse the person authorises or permits a contravention of sub-paragraph (1) – (a) the administrator, (b) an officer of the company, and (c) the company'.

Likewise, paragraph 64 of Schedule B1 provides that a 'company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator'.

Conversely, while the statutory examples may have made it clear to Lord Richards that an administrator is not an officer of the company,[12] there are some authorities that support the alternative view held by the Chancery and Divisional courts.

[8]Ibid, at [129].
[9]Ibid, at [113].
[10][2023] UKSC 38 at [22].
[11]Administration in Part II, sections 8–27.
[12][2023] UKSC 38 at [27].

In *re Home Treat Ltd*,[13] Harman J considered that the direction sought would not have protected the administrators, and so he was prepared to make an order under section 727 of the Companies Act 1985 (now section 1157 of the Companies Act 2006) to relieve any liability for breach of duty. This section is restricted and applies to only 'an officer of a company or a person employed by a company as auditor (whether he is or is not an officer of the company)'. Harman J, therefore, had to ensure that for section 727 to be satisfied, an administrator had to fall within the meaning of an officer of a company.

Despite this pragmatic approach, Lord Richards thought that re *Home Treat Ltd*, had been wrongly decided, stating that:

> the fact that an administrator is an officer of the court and holds the office of administrator in relation to a company is not a sound basis for concluding that the administrator is an 'officer of the company'. In truth, it does no more than state the conclusion.[14]

Lord Richards' literal interpretation of 'officer' can also be seen in his critique of *In re X Co Ltd*, where Parker J[15] provided that a liquidator might be given leave to do a certain act 'on the footing that he is an officer of the company', and reference was also made to statements in notes in *Buckley on the Companies Acts*,[16] that 'semble, a liquidator is an officer within the meaning of this section'.

Yet, reliance on the decision by Parker J in *In re X Co Ltd* is, according to Lord Richards, not as authoritative as one might expect.[17] Not only had an earlier edition of *Buckley*[18] provided a more tentative approach: 'Semble, a voluntary liquidator may be an "officer" within this section', Harman J's reasoning in *In re Home Treat Ltd*[19] wrongly assumes that because an administrator is an officer of the court and holds the office of administrator, then the administrator is an 'officer of the company'.[20]

While this argument at times seems subjective, as an explanation, Lord Richards refers to the decision in the Court of Appeal in *re B Johnson & Co (Builders) Ltd*,[21] which established that a receiver and manager appointed by the holder of a floating charge was not classified as an officer of the company. While the positions of a receiver and an administrator were distinguished, since administration is conceived as a development of receivership, it was not – according to Lord Richards – a surprise that the Insolvency Act 1986 does not treat an administrator as an 'officer' of the company.

The decision of Harman J was followed by Newey J in *In re Powertrain Ltd*,[22] which concerned a claim that a liquidator is an officer of a company for the purposes of section 1157, which would permit liquidators to make distributions to creditors without regard to claims that could yet emerge and for relief as officers of the company. Lord Richards, however, thought this decision was also wrongly decided because it did not properly distinguish between officers of the company, administrators and liquidators for the purpose of section 1157.[23]

He argued that administrators could have been classified as 'agents of the company' having regard to paragraph 69 of Schedule B1 to the Insolvency Act 1986, as decided in *In re Powertrain Ltd* and the Divisional Court's judgment in the present case, but he thought it would be wrong to 'categorise them as officers of those companies'.[24] This approach, however, is no more formalised that the position of

[13][1991] BCC 165.
[14][2023] UKSC 38 at [34].
[15][1907] 2 Ch 92 at 96.
[16]14th edn (1981).
[17][2023] UKSC 38 at [32].
[18]9th edn, 1909.
[19][1991] BCC 165 at 170.
[20][2023] UKSC 38 at [34].
[21][1955] Ch 634.
[22][2015] EWHC 3998 (Ch), [2016] BCC 216.
[23][2023] UKSC 38 at [36].
[24]Ibid, at [41].

the Divisional Court. A preference for an approach is not confirmation that it is the correct legal position.

This can be seen in the meaning of 'officer' in section 194(3) of TULRCA 1992. There is little doubt that if an extended reading was given to 'other similar officer', then this could include an administrator and the lower courts took the correct approach. However, Lord Richards in his view saw 'no scope of such an extended reading … no hint in the language … that an expansive interpretation should be given'.[25]

This position requires some further consideration.

It was argued by counsel acting for Mr Palmer, and quite conveniently one may add, that difficulties may arise if administrators were considered 'officers'. It was said that a dilemma may arise where administrators may either have to act swiftly in the interests of achieving the statutory purposes of administration or comply with the notice requirements of sections 193 and 194 and give priority to the claims of the employees.[26] In practice, such difficulties are not outside the scope of the work typically undertaken by an administrator and as such should not be categorised as something that could lead to dilemmas or abnormal outcomes.

A closer look showed that this dilemma did little to assist with how section 194 should be construed, nor did it render it impractical for the company as employer to comply with the requirement of section 193 of TULRCA 1992.[27] In other words, the objectives of the administrator do nothing to prevent compliance with TULRCA 1992.

2. The alternative 'functional test' as favoured by Lady Justice Andrews

A greater policy issue was considered in the Divisional Court (at [113]), regarding the vacuum of 'responsibility that would fail to protect the interests of workers and … the interests of their representatives and the Secretary of State' if section 194(3) did not apply to administrators.

Andrews LJ's 'functional test' to determine the persons who came within the category of 'other similar officers' remains highly persuasive, since it considers that it was Parliament's intent to hold persons with the responsibility for the day-to-day management and control of the corporate body liable for actions they had brought about (at [48]). In this respect, Andrews LJ's policy consideration was one of accountability, which does not necessarily place a greater or an additional burden on administrators, but rather it acts as a reminder that those that have responsibility also must face the consequences of any actions that may have breached the law.

The test, as Andrews LJ explains, would be applied to someone 'who carries out the types of functions undertaken by the officers of the company who are expressly identified in the same sentence'. Andrews LJ (at [49]) understood this to mean the 'functions undertaken by the individual concerned, not on the duties which they owe'. To that end, an administrator could be readily classified as a 'similar officer' to a director or manager, as he is 'responsible for conducting and managing the business of a company as a whole and the functions he undertakes is similar'.

This approach, however, was rejected by Lord Richards (at [50]), not because of its practicality, which he argued could have been implemented with ease (at [51]), but because he thought that the functional approach was not 'borne out either by the language of the provision or its context'.

If it was intended for a functional test to apply, he argued the position prior to section 194 would have been drafted in such a way as to include this possibility within decisions such as *In re B Johnson*. This argument is, however, flawed since it fails to recognise the realities of what administrators do within an insolvent company, and that language is capable of being broadly conceived.

In this respect, the Divisional Court (see at [131]) attempted to construe section 194(4) in a way that extended the scope of section 193(3), to include 'any individual acting in a sufficiently senior

[25]Ibid, at [43].
[26]Ibid, at [45].
[27]See *In re Hartlebury Printers Ltd* [1992] BCC 428.

managerial capacity', but this was ultimately rejected – again, on the grounds that if this was intended then this would have been stated in section 194(3) and section 193(3) would have been unnecessary.

While the functional test failed because a narrower interpretation of officer was preferred, Lord Richards (at [55]), thought the process to determine whether a person is an 'officer' was 'essentially a constitutional test. Does the person hold an office within the constitutional structure of the body corporate, as is the case with directors, managers and secretaries'. Exactly how this differs from other tests is questionable, but for these reasons he did not consider an administrator an 'officer' of the company and allowed the appeal, quashing the decision of the District Judge.

While the decision will be welcomed by administrators, the level of statutory construction in this case, and the way that this has been undertaken, demonstrates how broadly – or, in this case, narrowly – judicial interpretation may spread. Nonetheless, there remain some unanswered questions that give rise to the possibility of an administrator being held liable for being an 'officer' for the purposes of other legislation, where they occupy a management or senior position in a company. In instances where the statutory provisions are broader, it could be conceived that Lord Richards' literal reasoning may lead to an alternative outcome. However, respectfully, it is policy considerations that concern situations like this that are likely to have influenced Lord Richards reasoning, since he noted that the position of an administrator as conceived by the Cork Committee was significantly different to that of a receiver or manager (at [28]). To that end, he may well have been mindful of creating additional liability for administrators, particularly as large-scale insolvencies have increased in recent years, to prevent opening the floodgates to greater litigation in this field.

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