Discretion or Obligation to Seek Directions: The Administrator and Rejected Proposals

Bolanle ADEBOLA*

Introduction

1 The administration regime was reformed in 2002 to give creditors greater participation in the rescue process. Unlike the administrative receiver who drafts and executes a plan without consulting with the unsecured creditors, the administrator is required to set her proposals before the unsecured creditors for approval. The reformed Insolvency Act 1986 (the “Act”) in Schedule B1 directs the administrator not to deviate from the approved plans unless the changes made are not substantial, the creditors have given subsequent approval or the court has granted its imprimatur, as appropriate. The Act permits the creditors to reject the proposals where the requisite majority is dissatisfied with its contents. It also permits the court to make orders necessary to facilitate the resolution of the situation following the rejection of the proposals. However, Paragraph 55 of Schedule B1 which regulates the post-rejection procedure does not expressly instruct the administrator to seek a court order after the event. Consequently, the paragraph appears open to interpretation. Both insolvency experts and the courts provide contrasting views on the correct interpretation of the paragraph. This paper outlines these opinions. To provide broader understanding of the purport of Paragraph 55, the paper examines the context in which it was introduced. For that reason, it explores the background to its enactment, teases out the purpose of proposals, highlighting their pivotal role in regulating the relationship between the administrator and the unsecured creditors.

2 This article is divided into 2 parts. Part I examines the provisions of the Insolvency Act 1986. It sets out the relevant provisions of the Act and the interpretation given to the provisions by insolvency experts and the courts. Part II delves into the history of Schedule B1 and the changes that took place at the 2002 reforms. It seeks to propose a purposive understanding of Paragraph 55 in light of the spirit of the reforms.
Part I: The Insolvency Act 1986

The Insolvency Act 1986 on Rejected Proposals

3 With the reforms to the Insolvency Act 1986 in 2002, which came into effect in 2003, administration replaced administrative receivership as the regime of choice for the rescue of distressed companies or their businesses under the aegis of the law. Contrary to the administrative receivership procedure, which limited the participation of creditors in the formulation of the rescue plan, the administration procedure generally invites the participation of the body of creditors by requiring a vote on the proposed plan.1 The plan is presented to the creditors as “Administrator’s proposals”.

4 Administrator’s proposals are accorded prime importance by Schedule B1 of the Insolvency Act 1986.2 Paragraph 68(1) instructs the administrator to manage the affairs of the company according to the terms of proposals that have been approved by the creditors.3 The proposals may be those approved by creditors at the initial creditors’ meeting, or those approved at a subsequent meeting after substantial revisions to the original proposals have been made by the administrator.4 The Act specifies the circumstances in which an administrator may execute her proposals without the express approval of creditors. One such occasion is when the administrator executes proposals that have previously been approved by creditors, but subsequently modified with changes that the administrator does not consider substantial.5 The administrator may also execute revised proposals, which have not received subsequent approval of creditors, with the imprimatur of the court. This may be granted if considered appropriate to the present circumstances of the company.6 The administrator may also execute her proposals without the express approval of the creditors when she thinks that the company has sufficient to repay all the creditors in full, or that the unsecured creditors are unlikely to receive distributions.7

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1 With the exception of the circumstances expressly permitted by the law, in which their opinion may not be sought.
3 Schedule B1, Insolvency Act 1986, paragraph 68(1)(a)-(b).
4 Idem. See also paragraphs 53(1)(a)-(b) and 54(5).
5 Ibid., paragraph 68(1)(b).
6 Ibid., paragraph 68(3)(c).
7 Ibid., paragraph 52(1); however, they may receive distributions under the prescribed part.
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5 Within 8 weeks of appointment, the administrator is to draft her proposals for achieving the stated purpose of the administration. After notices compliant with the relevant statutes have been sent, she must present the proposals to the creditors for their vote. The administrator may also send revised proposals to the creditors, if she thinks that the original requires substantial changes before it can be executed. The creditors may approve the original or revised proposals entirely or approve them subject to modifications that are acceptable to the administrator. Alternatively, the creditors may reject the proposals entirely. The administrator is to inform the court, the Registrar of Companies and other prescribed persons on the outcome of the meeting. Though the Act does not expressly instruct the administrator to seek the directions of the court after submitting the outcome of the meeting, it lists the orders the court may make in the circumstances. Paragraph 55(2) states that the court may order the termination of the administrator’s appointment at a specified time, adjourn the hearing, order the winding up of the company if a petition was suspended at the initiation of the administration, or make any order it deems appropriate in the circumstances. The questions that arise in these circumstances, and with which this article is concerned, centre on the nature of the administrator’s duty when her proposals have been rejected: is her duty to seek directions from the court obligatory? Or, is her duty merely discretionary; in which she may choose not to seek the court’s directions?

Expert Opinion on Rejected Proposals

6 Lightman and Moss identify two sources of the administrator’s power to seek directions from the court. One is the express provisions of the Insolvency Act 1986 and the other flows from her status as an officer of the court. The power to seek directions, they assert, should not be interpreted as a duty to seek directions. In effect, in those circumstances, the administrator has the discretion to refrain from seeking directions, and it will not be improper for her to act without directions. Further, they list the circumstances in which the administrator has a duty to seek directions from the court. The latter list includes circumstances in which the administrator’s original proposals or proposed revisions have been rejected by the creditors’ meeting. The Lightman and Moss opinion can be stated thus: when the administrator’s original proposals or subsequent revisions are rejected by the

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8 Ibid., paragraph 49(1), (5).
9 Ibid., paragraph 51.
10 Ibid., paragraph 54.
11 Ibid., paragraphs 53(1) and 54(5).
12 Outright rejection may be premised on the administrator’s rejection of their proposed modifications. Schedule B1, Insolvency Act 1986, paragraphs 53(2) and 54(6).
13 Ibid., paragraph 55(2).
15 Ibid., at paragraph 12-048.
16 Ibid., at paragraph 12-047 (where a list may be found).
17 Ibid., at paragraph 12-047(ii).
creditors, it is mandatory, not discretionary, for the administrator to seek the court’s directions.

7 Sealy and Milman hold a contrary opinion. They observe that the Insolvency Act 1986 gives the court discretionary powers in the event that the proposals or subsequent substantial revisions are rejected by the creditors’ meeting. They construe the court’s ostensible powers to be limited, though broad. They state, for example, that the court may not impose a set of proposals on the creditors to which they have not agreed. They assert, however, that the court’s authority to make an order is premised on the administrator’s application for directions. They insist, nonetheless, that the administrator, though she has a duty to report the rejection of the proposals or revisions to the court, does not have a subsequent duty to seek the court’s directions. Essentially, they argue that the administrator’s duty to file a report indicating the rejection of the proposals, and the court’s power to make an order if one is sought, do not transform the administrator’s discretion to seek directions into an obligation to do so. In the parlance of Lightman and Moss, the administrator’s role in this instance would, in the opinion of Sealy and Milman, fit into the “right to act” column, and not that of a “duty to act”.

The Court on Rejected Proposals

8 Even a cursory census of administration cases reveals that the court has had to determine the administrator’s obligations prior to the approval of proposals many more times than it has had to determine her obligations after her proposals have been rejected. It is settled law that the administrator is not obliged to seek the directions of court merely because proposals have not been approved. The administrator, being a professional and an officer of the court, does not need to consult the court to perform her administrative responsibilities. Most of the decisions to be taken in such instances are commercial in nature, which the administrator is more equipped than the court to take. There have been comparably fewer instances in which the court has been invited to determine the nature of the administrator’s obligations where the proposals have been rejected. The two main cases in which this question has been considered are examined below.

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19 Sealy and Milman, above note 2, at 571.
20 Ibid., at 572.
21 Idem.
23 See also RAB Capital plc v Lehman Brothers International (Europe) [2008] BCC 915, at paragraph 4.
Re Stanleybet\textsuperscript{24}

9 Stanleybet UK Investment Ltd ("SUKI") was placed in administration on the application of one of its creditors.\textsuperscript{25} The administrators, in compliance with the relevant statutory provisions, sent their reports and proposals to the creditors along with a notice for an initial creditors’ meeting. The administrators received two offers to purchase SUKI’s properties, which consisted mainly of shares in other companies. The offerors were both connected parties; one of whom was SUKI’s largest creditor. As a result of the protracted negotiations, the offer from the largest creditor was withdrawn. The administrators proposed to execute the sale according to the terms of the remaining offer, but the largest creditor was unsatisfied with the terms. It claimed that the administrators did not do enough to market SUKI’s assets – the shares. As a result, it voted against the proposals; for which reason, they were ultimately rejected by the initial creditors’ meeting. The administrators believed that their proposals offered the best resolution to the company’s problems. However, the largest creditors, purportedly relying on an alternative expert opinion, did not agree with the proposals. As a result of the impasse, the administrators decided to apply under paragraph 55(2) for the court’s directions.

10 The administrators requested an order terminating their appointment and directing them to place the company in voluntary liquidation.\textsuperscript{26} The court primarily advised itself on its powers according to paragraph 55(2) of the Insolvency Act 1986. It also considered, briefly, the powers of the administrators in those circumstances. It surmised that administrators are not (completely) bound by the decision of the creditors in meeting.\textsuperscript{27} It stated that the administrators could disregard the creditors’ decision and execute the proposals, if they believed that option to be in the best interests of the company as a whole. Notwithstanding this, administrators are to have due regard for the decisions of creditors. Ultimately, the court decided that it could make the order requested by the administrators.\textsuperscript{28}

11 This case focused on the scope of powers granted to the court by paragraph 55(2) of Schedule B1. The question before the court was how it should direct itself when invited by administrators to give directions. Though the court was not invited to decide on the nature of the administrator’s duty after her proposals have been rejected by the creditors, the administrators in this case having already applied for directions, its statements provide pertinent indications of its opinion on the nature of the administrator’s duty. The court asserted that administrators have the right to decide whether or not to go ahead with the rejected proposals after the conclusion of the initial meeting.

\textsuperscript{24} In Re Stanleybet UK Investments Ltd [2012] BCC 550; [2011] EWHC 2820 (Ch).
\textsuperscript{25} Ibid., at paragraph 4.
\textsuperscript{26} Ibid., at paragraph 11.
\textsuperscript{27} Ibid., at paragraph 8.
\textsuperscript{28} Ibid., at paragraph 20.
That put the joint administrators in a quandary. They were not formally bound by the vote at the creditor’s meeting and so could have proceeded with the sale to SIB.29

“It would be unusual, though not legally impossible, for administrators to proceed with a course which 87 per cent of creditors were opposed to.”30

12 The court did not suggest that the administrator may proceed with her decision only after obtaining prior approval from the court. Consequently, it may be inferred that the court in this case shares the Sealy and Milman opinion that the administration has the discretion but not the obligation, to seek directions following the rejection of her proposals.31

Re BTR32

13 BTR (UK) Ltd (“BTR”) was insolvent. Mr Swindell was appointed as administrator by an administration order. Before the initial creditors’ meeting was scheduled, he completed a sale of some of BTR’s assets to ITAS Global Ltd.33 Subsequently, the administrator sent out his proposals to the creditors. In the proposals, he stated that there would be no distributions to unsecured creditors; so a creditors’ initial meeting was not required. Nonetheless, at the request of creditors holding more than 10% of the company’s debts, a meeting was convened. The creditors rejected the administrator’s proposals. In addition, more than 50% of them voted for a resolution to place the company in compulsory liquidation. 8 of BTR’s creditors, who were suspicious of events prior to the commencement of the administration, presented an application to the court for conversion of the administration to compulsory liquidation.34 The administrator also (cross)-applied for directions from the court on whether to permit the administration to terminate automatically following the effluxion of time or whether to petition for winding up.

14 The court was invited to decide on the duty of the administrator when his proposals have been rejected by the creditors, as well as the scope of the court’s powers in that regard. Counsel for the creditors argued that paragraph 55(2) obliges the administrator to seek the court’s directions if the proposals are rejected by the creditors at the meeting.35 In support of his opinion, he cited Lightman and Moss, as well as the opinion of Mann J in Platinum Developers.36 Conversely, counsel for the administrator argued that the duty to apply for directions is discretionary.37

29 Ibid., at paragraph 8.
30 Idem.
31 Sealy and Milman, above note 2, at 572.
32 In Re BTR (UK) Ltd (Lavin v Swindell) [2012] EWHC 2398 (Ch).
33 Ibid., at paragraph 2.
34 Ibid., at paragraph 6.
35 Ibid., at paragraph 57.
36 Platinum Developers Ltd v Assignees Ltd (Unreported) 05/10/2009.
37 Re BTR, above note 32, at paragraph 58.
support of his opinion, he cited Sealy and Milman, as well as the opinion of Sales J in *Re Stanleybet*.

15 After considering the arguments presented to him, Behrens J aligned his view with the perspective that there was an obligation.\textsuperscript{38} He stated that paragraph 55 does not indicate the nature of the administrator’s duty in these circumstances. Nonetheless, he surmised that paragraph 55(2), on which the court’s discretion is based, implies that “there must be a hearing” which can only commence on an application for directions.\textsuperscript{39} He asserted that the administrator was to make the application, but noted that the creditors may do so where the administrator fails to do so.

16 The court also examined the nature and role of proposals in administration. Behrens J observed that the Act directs the administrator to manage the affairs of the company in the best interests of the creditors as a whole, and in accordance with the proposals they approve at a meeting properly conducted. He could not reconcile the argument that the administrator’s duty was discretionary with what he considered as the clear provisions of the law.

> “If, therefore, the proposals are rejected by the creditors it is difficult to see how the Administrator can manage the Company’s affairs in accordance with paragraph 68 without making an application to Court.”\textsuperscript{40}

17 Nevertheless, Behrens J distinguished the circumstances facing an administrator, whose proposals have been rejected at the initial meeting, from those facing an administrator, whose revisions are rejected by creditors at a subsequent meeting.\textsuperscript{41} In his opinion, while the administrator in the former situation has an obligation to apply for directions, one facing the latter may be considered to have a mere discretion to apply for directions. In essence, an administrator whose revised proposals have been rejected may still continue to manage the company according to the original proposals, but one whose initial proposals are rejected must apply to the court for directions.

**Part II: The 2002 Reforms and Changes**

*(Rejected) Proposals, Unsecured Creditors and the Administrator’s Duty*

18 The preceding sub-sections outline the statutory stipulations on the administrator’s duties and how these provisions have been interpreted by insolvency experts and courts. The opinions catalyse further thoughts about the

\textsuperscript{38} Ibid., at paragraph 63.
\textsuperscript{39} Ibid., at paragraph 64.
\textsuperscript{40} Ibid., at paragraph 66.
\textsuperscript{41} Ibid., at paragraph 68.
purpose of proposals and how they ought to regulate the relationship between administrators and creditors. Our understanding of the purpose of proposals that was conceived in the reforms leading to the 2002 reforms, and the role it was hoped they would play, may elucidate our understanding of the administrator’s duty when they are rejected, and clarify paragraph 55. The result of this line of inquiry is also pertinent to another question fleetingly considered in Re Stanleybet and discussed above.42 In the course of resolving the principal matters before him, the judge considered whether or not the administrator could disregard the opinion of the creditors expressed in vote at the meeting.43 It was held that the administrator can.44 The subsections that follow examine the opinion of the Government in relation to the proposals and a statement on the role of proposals.

Understanding Paragraph 55

19 In the late-1990s, the Government sought to reform the insolvency law of England and Wales.45 This effort was congruent with the Government’s vision of an enterprise-driven economy. Pursuant to this, in 1999, a group was commissioned to review the existing insolvency system at the time.46 The review group was to focus, in particular, on the aspects of the law that related to corporate rescue.47 One of the items considered was the relationship and tensions between the allegedly appointor-skewed administrative receivership procedure, and its presumably more collective counterpart: administration.48

20 The review group observed that unsecured creditors were typically unable to hold the administrative receiver to account, despite the novel procedures introduced by the Insolvency Act 1986.49 The Act instructs the administrative receiver to notify and inform unsecured creditors of their appointment and subsequent activities.50 It permits the latter to appoint committees endowed with the power to summon the receiver for some questioning.51 The essence of the provisions, nonetheless, was only to give the unsecured creditors the right to information; they did not give them the right to consultation, or to veto the receiver’s decisions. In any case, committees were rarely established, and so creditors rarely availed themselves of these limited powers.52 The court is another potential source of

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42 See above note 25 et seq. and associated text.
43 Re Stanleybet, above note 24, at paragraph 8.
44 Idem.
47 Ibid., at paragraph 17.
48 Ibid., at paragraphs 72–75.
49 Ibid., at paragraph 68.
50 Insolvency Act 1986, sections 46, 48.
51 Ibid., section 49.
52 DTI Review, above note 46, at paragraph 68.
control over the actions of administrative receivers. The review group observed that
the existing case law on the duties of the receiver showed that the duties, as
enforced by the courts, were inadequate to provide the unsecured creditors with
much control over the choices made by receivers during the pendency of the
receivership.53 The review group recommended collective regimes, under which a
duty of care would be owed to all creditors, and all creditors would be permitted to
participate in the proceedings, as essential to the rescue culture that the
Government sought to champion.54 On this premise, the group recommended that
the right of the floating charge holder to veto the collective administration
procedure in favour of the more skewed administrative receivership ought to be
mitigated.55

21 The Government followed the review with a white paper detailing its proposals
for reform.56 In it, the then Secretary of State for Trade and Industry indicated the
Government’s desire to give greater input to other interests on the fate of the
distressed company.57 Consequently, it proposed that the theoretically more
collective administration regime, albeit its streamlined version, should replace the
more skewed administrative receivership regime as the primary rescue
mechanism.58 As was recommended by the review group, and echoed by the
Secretary of State, the white paper proposed to give greater participatory rights to
unsecured creditors.59 The Government was particularly concerned about the
practitioner’s duty to account to other interests in the company which it believed
has important consequences; in particular, on the receiver’s incentive to maximise
recoveries and minimise the costs of the receivership.60 The Government’s
conception of collectivity was one in which all creditors participated, a duty to
account was owed to all creditors and all creditors could hold the practitioner
accountable for his dealings with the company’s assets.61 Concurrently, the
Government sought to continue to provide the secured creditors with adequate
protection of their interests but with due regard for the interests of other creditors.62

53 Ibid., at paragraph 68.
54 Ibid., at paragraph 72.
55 Ibid., at paragraph 75.
56 The Insolvency Service, Productivity and Enterprise: Insolvency – A Second Chance (Cmnd 5234, 2001).
57 Ibid., in the Foreword.
58 Ibid., at paragraphs 2.5, 2.7 and 2.18.
59 Ibid., at paragraph 2.5.
60 Idem.
61 Idem.
62 Ibid., at paragraph 2.6.
Discretion or Obligation to Act?

22 One may infer from the opinions expressed in the review and the ensuing white paper that the Government intended for proposals to play a pivotal role in administration proceedings. It was intended that the administrator would consult with the creditors who would evidence their opinion collectively, by voting in favour of, or rejecting the proposals. The opinion of the creditors is to play a considerable role in the administration process because it is the main mechanism by which they can, within limit, ultimately control the outcome of the administration by controlling the actions of the administrator. It is particularly because proposals directly influence recoveries, which the Government believed that the creditors should be able to influence, that it is submitted that the intention was not for the administrator to have the discretion to disregard the creditors’ opinion.

23 The Insolvency Act 1986 expressly requires the administrator to act in the best interest of the creditors, but the Government assumed that the creditors would be aware of the outcome that would be in their best interest. Where the creditors and the administrator can reach a compromise, the proposals would typically be passed with modifications. It is typically in the cases where no compromise can be reached between the creditors and the administrator that an outright rejection of the proposals results. Though the administrator may continue to execute basic administrative functions, she ought not to deal decisively with the company’s business in a manner that is contrary to the expressed opinion of the creditors in those circumstances. It follows, converse to the suggestion made in Re Stanleybet, that the administrator ought not to decide unilaterally to execute proposals which have been rejected by the creditors. For these reasons, the administrator should seek the directions of the court.

24 It may be argued, as was suggested by the Re Stanleybet case and the Sealy and Milman opinion, that the opinion that the administrator is obliged to seek directions when the proposals have been rejected is not consistent with the provisions of the Insolvency Act which permit the administrator to act on his proposals without consulting with the creditors. Paragraph 68 permits the administrator to dispose of the company’s assets and even business before the initial meeting is held. In these cases, the administrator can decide not to convene an initial meeting unless requested by the requisite majority or ordered by the court. The administrator does not require the directions of the court to act in these circumstances; a discretion that is authorised by insolvency law and recognised by courts.

25 It is submitted that paragraph 68 and the case law are not inconsistent with the opinion that administrators are obliged to seek the directions of the court in cases

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63 See also Re Transbus International Ltd, above note 22, at paragraph 14.
64 Schedule B1, Insolvency Act 1986, paragraph 56(1)(a)-(b).
65 Ibid., paragraph 68(3)(a); Re T&D Industries plc, above note 22, at 656-657.
where they wish to act contrary to the expressed opinion of the creditors. Paragraph 68 and the listed cases merely indicate the situations in which the administrator can disregard the opinion of the creditors. These instances can be described as the exceptions to the main rule. The Insolvency Act 1986 indicates the circumstances in which the administrator can act in that manner. These are limited to those in which she thinks that the unsecured creditors are out of the money. Interestingly, to emphasise the importance of the opinion of the creditors, the Act also stipulates that even where the administrator thinks that a meeting is unnecessary, she must convene one when so directed by the requisite majority of the creditors. It follows that, if the creditors disagree with the administrator’s proposals at that stage, then she is to seek directions if she is to act otherwise.

Conclusion

26 Though paragraph 55 of Schedule B1 to the Insolvency Act 1986 does not expressly instruct the administrator to seek the directions of the court when her proposals have been rejected by the unsecured creditors, it should be interpreted as requiring her to seek the directions of the court in those circumstances. Contrary to the suggestion of the court in *Re Stanleybet*, the administrator may not act, at her discretion, contrary to the opinion of the unsecured creditors expressed in the vote taken at the creditors’ meeting. The administrator’s proposals were intended to be pivotal to the relationship between the administrator and the unsecured creditors following the reforms of 2002. The Act expresses, quite clearly, the circumstances in which the administrator may act without consulting with the unsecured creditors. Even in those circumstances, the Act empowers the unsecured creditors to demand consultation where desired, by requesting a meeting as long as the statutory threshold is met. It is submitted that paragraph 55 should be interpreted in light of the role played by proposals in the reformed Insolvency Act 1986. For that reason, it should be interpreted as requiring the administrator to seek directions when her proposals have been rejected.
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