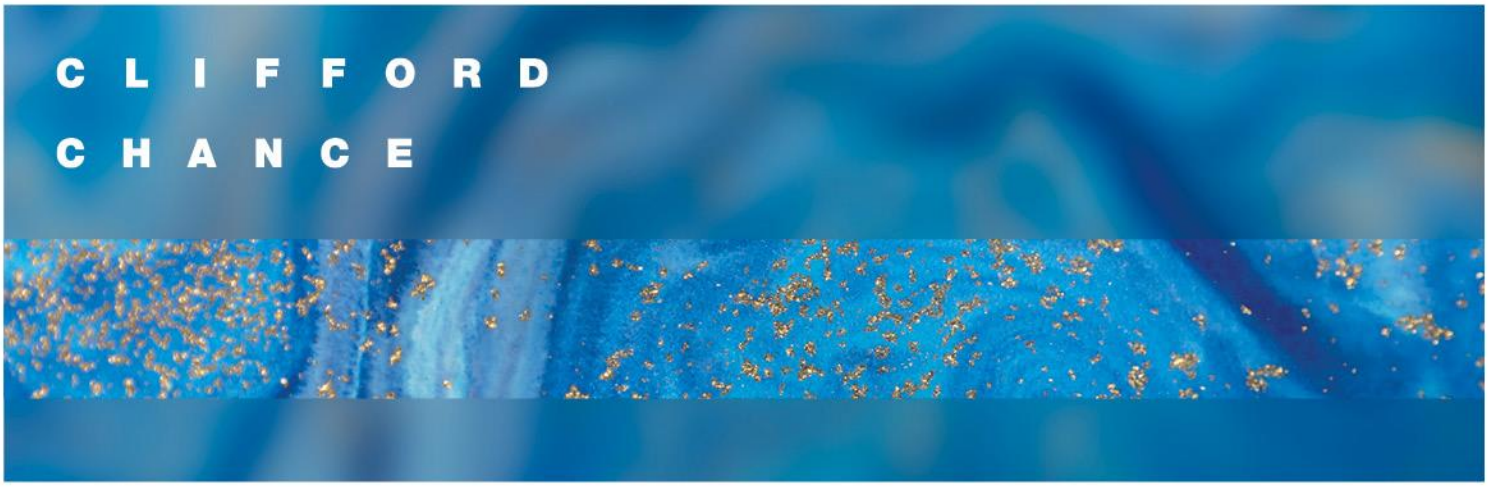


# ADMINISTRATORS OF DEBENHAMS AND THE UK CORONAVIRUS JOB RETENTION SCHEME

This week the UK court has once again demonstrated its efficiency and pragmatism in these most challenging times. On 17 April, *In the Matter of Debenhams Retail Limited (in administration)* [2020] EWHC 921 (Ch), we are provided with a further example of how companies in a formal rescue procedure are seeking the UK court's assistance to facilitate access to the Coronavirus Job Retention Scheme (the "**Scheme**"). The decision enables the administrators of Debenhams to make payments to over 13,070 employees in respect of amounts which may be reimbursed to the company under the Scheme, and for the administrators to make an application to that Scheme. While the directions from the court were not precisely what the administrators asked for, they do offer the administrators some protection against subsequent challenges for the action they have taken in good faith in the context of the administration, which is especially welcome given the launch of the online claim service on GOV.UK on Monday 20 April and the extension of the Scheme to the end of June. Like the Carluccio's decision earlier this week, this may have wider implications for businesses operating in similar circumstances and potential administrators who might be inspired by the court's pragmatic approach to the novel and urgent situation.

The purpose for which the administrators were appointed in this case is to rescue the company as a going concern, in what is described by the administrator as a 'light touch' administration which is designed to protect and retain the value in the business, reduce funding requirements, and maximise the options for exiting administration. Current management retain certain operational powers and the administrators are working with them to stabilise the business during the COVID-19-related uncertainty.

## KEY ISSUE IN THE CASE

The key question the court dealt with was whether employment contracts will be "adopted" by the administrators for the purposes of para 99(5) of Schedule

B1 to the Insolvency Act 1986 where those employees were placed on furlough prior to administration and the administrators take no action other than to pay the employees amounts due to be reimbursed to Debenhams through its participation in the Scheme. Where employment contracts are "adopted", wages and salary enjoy super-priority status (i.e. rank ahead of other expenses of the administration and the provable claims of other creditors).

## DIFFERENCES TO CARLUCCIO'S

Whilst the Carluccio's decision earlier this week addressed similar issues, one of the key differences is that in that case the administrators were seeking directions on the impact of their intention to furlough employees, whereas in the Debenhams case the employees had been furloughed prior to the appointment of administrators.

## APPROACH OF THE COURTS

### What does the decision say?

**Court's directions**

The administrators wanted directions to the effect that (i) their continued communications with employees (including to obtain employees' express consent to the variation of their employment contracts) and (ii) payments to employees of amounts due to be reimbursed to Debenhams through its participation in the Scheme, ought not to amount to the administrators adopting the employment contracts for the purposes of the super-priority ranking. The court declined to make such directions.

Instead, the court provided the administrators with the following directions:

That the administrators will be taken to have adopted the contracts in circumstances where, at any time after 14 days from the time of their appointment, they either:

a) cause the company to make payments to employee(s) in accordance with their contracts of employment including amounts to be reimbursed to the company under the Scheme; or

b) the administrators make an application in respect of such employee(s) under the Scheme.

**Intended effect of the Scheme**

The Scheme is intended to delay the point at which the decisions on redundancies need to be made and to preserve the employed status of workers.

**Adoption of employment contracts in administration**

- The absence of services being provided under a contract of employment is not, of itself, a good reason why employment contracts should not be treated as having been adopted.
- The acts of participation in the Scheme and payment to the furloughed employees are consistent with the administrators treating the contracts as continuing and with the company in administration having continuing liabilities to them. The continued existence of employment contracts gives rise to a separate liability for the company in administration.

**Facts of the case**

- Debenhams has over 15,000 employees.
- On 25 March 2020 Debenhams wrote to around 13,000 employees informing them that they would be furloughed and that they would be subject to the Scheme. Between 25 March and the appointment of the administrators a further 867 employees were placed on furlough. Employees were told that they would receive 80% of their monthly wages up to a cap of £2,500 but that Debenhams would not pay additional amounts to any employees.
- Administrators were appointed on 9 April 2020.
- On 10 April 2020 the administrators requested employee consent by email to the furloughing arrangements and the resulting variation of employment contracts.
- As at the date of the hearing over 12,700 employees had consented, 4 rejected, and 359 had not responded.

- Therefore, such employment contracts are considered to be adopted and the resulting liabilities are subject to super-priority.

## What does the decision not say?

- Interested parties are still at liberty to challenge the acts of the administrators.
- The Government's Scheme guidance does not explain exactly how it should operate in the context of insolvency legislation.
- It does not address the statutory obligations to consult with affected employees who may subsequently be made redundant or TUPE transferred to a purchaser or the extent to which there may be a special circumstances defence available where consultation obligations are not complied with.

## OTHER POINTS TO NOTE

The administrators had sought alternative relief in case the court had held that the contracts of furloughed employees had been adopted pursuant to paragraph 99(5) Schedule B1. This was a direction that the amount payable to furloughed employees would be capped at 80% of wages (subject to the £2,500 cap) on the basis that the employees had impliedly consented to the variation of the terms of their employment contracts as a result of the 25 March communications. However, at the hearing, that relief was not sought given the high number of express consents received.

As mentioned above, the absence of services provided under a contract of employment does not of itself provide a good reason why those contracts should not be adopted in any particular case. In the present case the retention of employees under the Scheme, where they were required not to work, had an important role in ensuring the viability of the future business and continued trading.

The fact that the administrators may not want to incur liabilities which qualify for super-priority does not matter, the ranking flows from the election to do something.

Please see our previous briefing: Administrators and the UK Coronavirus Job Retention Scheme.

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