

# Peter Hall

Independent Business and Insolvency Advice

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Monday, 16 May 2011

Private and Confidential.

Your ref: FREE037L/PH/7

Our ref:

**Private and Confidential**

**To all known creditors**

Dear Sir/Madame

**Freepower Limited in Administration**

## **Introduction**

1. I was appointed administrator of Freepower Limited (“Freepower” or the “company”) on 12 April 2011 by the directors.
2. I now write pursuant to paragraph 49 (1) of Schedule B1 to the Insolvency Act 1986, to submit my proposals for achieving the objectives of the administration. This report and Appendix A contain the information required by Rule 2.33 of the Insolvency Rules 1986.

## **Summary**

3. The company is developing machines to generate electricity from waste energy. It has so far sold a small number of machines.
4. There is uncertainty over the identification of assets and the quantification of liabilities.
5. Whereas these uncertainties would be a major concern in a trading company, the company is still in the development phase and the delay should not be detrimental to creditors.
6. Financial information will be made available when I have it.

## **Background**

7. The company acquired the business from TTL Dynamics Limited (“TTL”) in 2001.
8. I am advised by the directors that the assets were transferred and that the consideration was deferred.

9. The agreement between the company and TTL was that the assets purchased would revert back to TTL if the consideration was not paid and the company became insolvent (“the transfer back agreement”).
10. I am advised that the consideration was not paid and that TTL gave notice of reversal under the agreement shortly before my appointment. I discuss below my view on the effectiveness of the transfer back agreement.
11. The company has used equity capital raised from shareholders to fund the development.
12. Accounts to 31 May 2009, filed at Companies House, show that the company has raised capital of £7.6m.
13. As far as I am aware, the company does not have any cash in hand.
14. The proportion of capital raised spent on physical assets seems modest in relation to the sums spent on development costs.

#### **Circumstances Giving Rise to the Appointment of an Administrator**

15. The directors have advised that discussions were being held with equity providers up to the date of my appointment.
16. These discussions to raise capital were not successful and creditors, immediately prior to my appointment were commencing and taking action against the company. The directors decided to appoint an administrator to maintain the business as a going concern.
17. The directors filed, in the High Court, a notice of intention to appoint an administrator on 17 March 2011 and a filed a second notice on 30 March 2011.
18. The notice of intention was served on National Westminster Bank (“the bank”) who hold a charge over the company. The bank agreed to the appointment of the administrator.

#### **The Manner in Which the Affairs and Business of the Company have been managed and Financed since the date of the Administrators Appointment.**

19. The directors have not advised me of any outstanding sales orders. Overheads are substantial. Therefore, there seemed little point in my trading the company in administration.
20. Also, because of the transfer back agreement, there was some uncertainty regarding the assets owned by the company at the date of my appointment. I had therefore to be cautious regarding the expense I incurred as administrator, particularly the rent for the premises.
21. The premises in Andover occupied by the company are very large, and at this stage in the development of the company disproportionately large. The rent is some £237k a year.

22. As regards the premises, the directors of the company have continued to occupy them since my appointment and have been negotiating terms with the landlord. I have advised the landlord, who is a substantial creditor, that the company in administration is not occupying the premises and will not be responsible for rent.
23. There are assets of the company, comprising fixed assets and stock and work in progress at the premises.
24. I visited the premises following my appointment and photographed the assets on site. There were two completed machines on site, partly disassembled. I was told by the directors that these belong to third parties.
25. Since my visit, I have been advised that two further completed FP120 machines have been delivered to the site plus a third smaller machine.
26. The directors advise that much of the components and sub assemblies on the premises are the property of the suppliers. I have asked the directors to supply details of all stock and the terms on which it was supplied but this has so far not been received.
27. There is plant and equipment at the site. My valuer has visited the premises but so far has not been able to view all the plant. The valuer has not yet been able to value all the assets as he has not yet been able gain access to all the site. The directors are being asked to assist the valuer in his task.
28. The transfer back agreement is mentioned above. The interpretation of this agreement will determine the assets which are owned by the company and which I can realise. The agreement seeks to transfer back to TTL the assets of the company and by doing so make TTL a priority creditor in the insolvency.
29. TTL does not have a charge over the assets of the company. Therefore, assets that have been acquired by Freepower after 2001 should not transfer back. This should extend to physical assets as well as intellectual property rights.
30. There are patents which have been granted since 2001. There is contradictory evidence regarding the ownership of the patents.
31. It appears that TTL may not own much of value. However, more work needs to be done and more information needs to be collected before the identity and value of assets transferring back to TTL can be determined.
32. If assets were transferred back to TTL, they were transferred back prior to my appointment. Whilst, strictly speaking this was not a 'prepack' transfer, it has similarities. There are rules governing my actions in a prepack situation and in order to keep creditors as informed as possible I have treated this as a prepack for reporting purposes.

33. My treatment of the situation as a prepack has been interpreted as an acceptance of the transfer back agreement. This is a misinterpretation of my position, which is that the transfer back agreement may transfer back some assets but is challengeable.
34. At the time of my appointment the employees had not been paid since before Christmas 2010. If the transfer back agreement was effective the employees would have transferred to TTL prior to my appointment.
35. However, as it was also likely that the transfer back agreement was not effective, the employees were formally made redundant so that the company in administration did not incur wage costs. This also meant that employees were able to make claims against the government for sums due. These claims have now been submitted.

#### **Investigation into the Conduct of the Directors**

36. The administrator is required to investigate the conduct of the directors and send a report to the Insolvency Service.
37. If Creditors have any matters they wish to bring to my attention they should do so in writing as soon as possible.

#### **Financial Position of the Company**

38. There is one secured creditor, National Westminster Bank, who are owed in the region of £80k and have priority to the assets.
39. I would normally attach to this report an estimated statement of affairs to illustrate to creditors the financial outcome. Appendix C does not contain an estimate of assets and liabilities at this stage.
40. The likely outcome will depend on the assets and the liabilities. Whilst I can estimate the level of unsecured creditors, the level of preferential creditors is not clear as this will be determined by the validity of the transfer back agreement and whether claims of employees have transferred to TTL or remain with Freepower. The preferential creditors rank in priority to the secured creditor. Therefore, even the position of creditors is unclear.
41. Again, the identity of assets and their values will depend on the transfer back agreement and what assets there are at the premises. Until I have that information I am unable to estimate the value of realisable assets.
42. I am working to establish the financial position and hope to have more accurate information for the creditors meeting.

43. Normally such issues regarding assets and liabilities would be a major inconvenience to the timely progression of the administration. In this case this is not a major problem because the company is still very much at the development stage and the level of trading is modest.

#### **Objectives of the administration**

44. Paragraph 3(1) of Schedule B1 to the Insolvency Act 1986 (“the schedule”) provides that 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 of the secured or preferential creditors.
45. The administrator should perform his functions in the interest of the company’s creditors as a whole and with the objective specified in subparagraph (1)(a) of the schedule unless he thinks either:
- a. That it is not reasonably practicable to achieve the objective, or
  - b. That the objective specified in paragraph (1)(b) of the schedule would achieve a better result for the company’s creditors as a whole.
46. The administrator may perform his functions with the objective specified in subparagraph (1)(c) of the schedule only if:
- a. He thinks that it is not reasonably practicable to achieve either of the objectives specified in subparagraph (1)(a) and (b), and
  - b. He does not unnecessarily harm the interests of the creditors of the company as a whole.
47. In this case it was not deemed possible to rescue the company as a going concern because the value of the assets is substantially less than the liabilities. The second objective, that of achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up was achievable because the goodwill and assets of the company were sold on the date of my appointment. Also there is a secured creditor.

### **Proposals to achieve the objective of the administration**

48. I propose to continue to work to establish the identity and value of assets owned by the company. When the identity of the assets is established I will commence their realisation.

49. The assets can be separated into:

- a. Physical assets
- b. Intellectual property

It may be the two categories can be realised separately.

50. I also propose to work to establish the level of creditors, in particular with respect to preferential creditors

- a. Make a distribution to preferential creditors if there are any and the secured creditors as funds allow.
- b. Investigate and, if appropriate, pursue any claims that the company may have.
- c. All such other actions and general exercise of the administrators' powers as we consider in our discretion necessary in order to achieve the purpose of the administration.

51. If required by a resolution of the creditors in accordance with paragraph 58 of Schedule B1 to the Insolvency Act, establish a Creditors' Committee. The purpose of the committee will be to represent the interests of the creditors as a whole, and is required to perform certain statutory functions. In addition it may be required to assist the administrator generally acting as a sounding board to obtain views on matters pertaining to the administration.

52. Assuming one is formed, consult with the Creditors' Committee at appropriate intervals concerning the conduct of the administration. In my experience a creditors' committee can be extremely helpful where:

- a. An intimate knowledge concerning the running of the business is required, or
- b. There is substantial dissatisfaction at the director's conduct, or
- c. It is likely that legal action will be required.

53. I will be interested to hear if creditors have issues under the headings above.

### **Exit routes from administration**

54. Legislation provides for several exits from administration:

- a. Automatic end of administration – the appointment of an administrator shall cease to have effect at the end of the period of one year.
  - b. Court ending administration on application of administrator – on application a Court may provide for the appointment of an administrator of the company to cease to have effect from a specified time.
  - c. Termination of administration where objective achieved – if the administrator thinks that the purpose of administration has been sufficiently achieved in relation to the company he may file a notice in the prescribed form with the Court and Registrar of Companies and then the appointment shall cease to have effect.
  - d. Public interest winding-up - this applies where a winding-up order is made for the winding up of a company in administration on a petition presented under either public interest grounds or by the Financial Services Authority.
  - e. Moving from administration to creditors' voluntary liquidation – this applies where the administrator thinks that the total amount which each secured creditor of the company is likely to receive has been paid to him or set aside for him and that a distribution will be made to unsecured creditors of the company.
  - f. Moving from administration to dissolution – if the administrator of a company thinks that the company has no property, which might permit a distribution to its creditors, he shall send a notice to that effect to the registrar of companies and on registration the appointment shall cease to have effect.
  - g. If appropriate at the time to move to a Company Voluntary Arrangement – Any proposal will be subject to creditors' approval.
55. If sufficient funds are realised to enable a distribution to unsecured creditors then as soon as practicable, the administrator proposes that the company is placed in liquidation. It is proposed that the administrator become liquidator without a further resolution of the creditors. Creditors should be aware that in accordance with Paragraph 83(7) to Schedule B1 of the Insolvency Act 1986 and Rule 2.117(3) of the Insolvency Rules 1986, creditors may nominate a different person as the proposed liquidator, provided that the nomination is made after the receipt of the administrators' proposals and before the proposals are agreed by the creditors.
56. However if it becomes unlikely that there will be a distribution available to unsecured creditors then the company shall move to dissolution in accordance with Paragraph 84 of Schedule B1 of the Insolvency Act 1986 at the appropriate time.

### **Administrators' remuneration and disbursements**

57. The administrator's remuneration is determined in accordance with Rule 2.106 of the Insolvency Rules as amended by the Enterprise Act 2002. I set out as Appendix F, as required by Statement of Insolvency Practice 9, a summary of my time costs to date.
58. The Creditors Committee (if any) should determine the basis of the remuneration of the administrator and his staff. The remuneration shall be fixed either
- a. As a percentage of the value of the property with which he has to deal; or
  - b. By reference to the time properly given by the administrator and his staff in attending to matters arising in the administration ("time costs").
59. In arriving at that determination, regard shall be given to the following matters
- a. The complexity (or otherwise) of the case;
  - b. Any respects in which, in connection with the company's affairs, there falls on the administrator any responsibility of an exceptional kind or degree;
  - c. The effectiveness with which the administrator appears to be carrying out, or to have carried out, his duties as such; and
  - d. The value and nature of the property with which he has to deal.
60. It is my normal practice to seek time costs as the basis for my remuneration. In this case I anticipate that the administrator's time costs will be in the region of £20,000 (excluding VAT) for the entire assignment. Out of pocket expenses are charged at cost. Mileage is charged at standard rates, which comply with Inland Revenue limits, or AA recommended rates.
- Set out at Appendix E is a schedule of my firm's normal hourly charge out rates.
61. There is legislation governing the basis of an administrator's fees. Appendix D contains information on how these are set.
62. It is not clear that there will be insufficient property to enable a distribution to the unsecured creditors and in the event that no creditors committee is formed the basis of the administrator's remuneration will be fixed by a resolution of a meeting of creditors'.
63. There have been no receipts and payments. Appendix B is attached to demonstrate this.
64. Appendix E also sets out my policy as regards disbursements.
65. Prior to my appointment the directors met my fees of £5,000 plus VAT for advice and assistance regarding their duties and placing the company into administration.

### **Statement of affairs**

66. A statement of affairs has not been submitted by the directors but a list of the company's creditors including their names, address and details of their debts, including any security held is attached at appendix G. The statement of affairs has not been submitted because the directors were unable to submit the statement of affairs in the time scale prescribed by statute and an extension has been granted.

### **The prescribed part**

67. The company granted a fixed and floating charge over its assets to National Westminster Bank plc, after the relevant date, therefore the provisions of the Insolvency Act 1986 (Prescribed Part) Order 2003 do apply. This allocates a proportion of the assets which are subject to a floating charge, to become available to unsecured creditors.

### **EC Regulations on Insolvency Proceedings**

68. I am required under the Insolvency Rules 1986 to state whether and if so the extent to which the above regulations apply to this Administration. In this particular case the EC Regulations will apply and the proceedings will be main proceedings as provided by Article 3 of the aforesaid regulations.

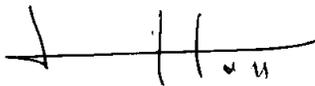
### **Creditors' Meeting**

69. A meeting of creditors is to be convened at these offices on 7<sup>th</sup> June 2011 at 3pm to consider the proposals set out above. I enclose formal notice of that meeting on Form 2.20B together with a proxy form.

### **Conclusions**

70. That concludes my proposals. If you have any queries please contact Katie Young or me.

Yours faithfully, for Freepower Limited

A handwritten signature in black ink, consisting of a series of vertical and horizontal strokes, followed by the initials 'P H'.

Peter Hall Administrator