

Bernard Matthews Limited, Bernard Matthews Holdings Limited and Pension Scheme

Summary

I have not conducted a forensic investigation of the pension scheme deficit at Bernard Matthews Limited or its parent company Bernard Matthews Holdings Limited as the matters are complex and will require considerable additional time.

Bernard Matthews Limited and related companies are ultimately controlled by Rutland Partners (and related vehicles). On 20 September 2016, partners from Deloitte were appointed Administrators to the Bernard Matthews group of companies. On the same day, the company's business and assets were sold for £87.5 million through a pre-pack arrangement to Amber Residential Developments Limited (now known as Bernard Matthews Foods Limited) and Amber Real Estate Investments (Industrial) Limited. Both of these companies are part of Boparan Private Office, a private investment vehicle controlled by Ranjit Singh Boparan.

A Statement of Affairs has not yet been filed though the Administrators have released "Proposals" which effectively are a fait accompli for unsecured creditors, including pension scheme members.

The Administrators' "Proposals" show that the sale proceeds will be used to make a full payment of £46.6m to lenders Wells Fargo Capital Finance (UK) Limited and PNC Financial Services UK Limited. Rutland has already received £34m and is likely to receive £39m in total. In contrast, the Bernard Matthews Pension Fund, recording a published deficit of £17.5 million which is likely to have grown to £20 million, is set to receive no more than 1p in the pound, or perhaps next to nothing. Unsecured creditors of £39m are unlikely to receive more than 1p in the £. This also includes include £1.381m payable to HMRC for tax and National Insurance Contributions. The Administrators have chalked-up fees of £790,000 at an hourly rate of between £390 and £872 per hour. Another £668,000 in legal and related fees is also expected.

The administration strategy seems to have been carefully crafted to enable secured creditors and controllers of Bernard Matthews to extract maximum cash from the company and dump the pension scheme and other liabilities. No attention has been paid to the hardship caused to retired and existing employees. It is all too easy for companies, their directors and shareholders to extract cash and dump pension obligations to employees, leaving the Pension Protection Fund (PPF) or taxpayers to foot the bill, and effectively boost returns to corporate elites.

Due to the so-called business friendly laws, there has been no discussion with unsecured creditors, who stand to lose the most. Indeed, there is little chance they can do anything to secure their position. This will have an adverse effect on supply chain creditors, many local businesses (farmers, plumbers, electricians, garages, local services), and of course their pension schemes. As the details of business sale remain confidential it is not possible to know whether the outcome is the best or the fairest for all stakeholders.

Recommendations

The Work and Pensions Committee may wish to hold hearings on companies which are being hollowed-out by their controllers who then dump pension scheme liabilities.

Insolvency laws should be changed. In the interest of fairness to creditors, especially unsecured creditors, there should at least be a 14 day notice to raise objections to the proposed business/asset sale and the outcomes of the proposed sale. The Administrator should not be in a position to present a *fait accompli* to creditors.

The Administrators, as in the case of Bernard Matthews, are appointed by the High Court, but thereafter it takes no interest in the proceedings of the administration. The Administrators are left with enormous powers and discretion and may well be swayed by their fees and prior relationships with company directors or parties to the sale/purchase of business. It is not unusual for major accountancy firms to receive business, including insolvency work, from banks. So conflict of interests is inevitable. In the interests of fairness, the Courts (as is the case in many European countries) should oversee and approve the administration process and the outcomes.

All insolvencies are a public matter as they affect a variety of stakeholders. The sale of business/assets agreements resulting from administration and/or liquidation should not be confidential. It is only through an examination of such agreements that anyone can establish the efficiency of administration/liquidation and whether the interests of all stakeholders have been protected. The veil of confidentiality should be lifted.

The pension scheme deficits are partly an outcome of the government's low interest rate policy. Nevertheless, company directors are expected to manage all business, financial, legal, economic and political risks. The current laws invite directors to continue to defer their contractual duty to make good the pension scheme deficits, and then eventually escape liability altogether through processes of administration and liquidation. Such a management strategy should be checked by changing legislation which would require that pension scheme liabilities have a priority over all others i.e. no creditor can be paid before pension scheme deficit is addressed.

In the case of companies with pension scheme deficits, the Pensions Regulator should be consulted before any sale of business, administration or liquidation can be completed. The objective of the Regulator should be to ensure that the employees' interests are protected.

This episode once again raises questions and directors' duties for safeguarding the interests of stakeholders. Section 172 of the Companies Act 2006 requires directors to promote the success of the company, and more specifically states that

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

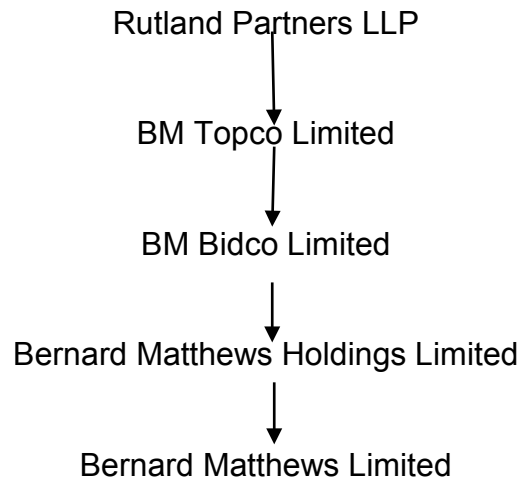
Companies Act 2006, Section 172

The above requires directors to have regard for the interests of the company's employees, but there is no mechanism for checking or enforcing it, especially as employees have been disenfranchised. Given the shareholder primacy, the legal requirements seem to suggest that shareholders need to bring action against directors for failure to consider the interests of employees. Such an action is unlikely and virtually impossible when shareholders and directors are identical.

A fundamental rethink of the nature and purpose of a corporation, its relationship with stakeholders and society, and directors' duties to society and stakeholders is needed. Towards that end, directors' temptation to hollow-out companies and dump pension scheme liabilities can be curbed by putting workers on the boards of companies. This could be in the form of workers on unitary boards, and/or adopting German style two-tier boards for larger companies where the Executive Board is answerable to a Supervisory Board consisting of stakeholders, including employees.

Background

1. Bernard Matthews Limited is part of a complex corporate structure and tracking financial transactions would be very time consuming and difficult. A brief overview of the corporate structure (before administration) is shown below. Bernard Matthews Limited also has a number of subsidiaries in the UK and elsewhere and these are not shown here.



2. The tracing of financial flows at Bernard Matthews Limited would have been aided by the availability of a cash flow statement and details of related party transactions but such information is not provided because the extant accounting standards issued by the Financial Reporting Council (FRC) exempt wholly owned subsidiaries from providing such information. This officially sanctioned layer of opacity has been a recurring feature in all of my investigations for the Work and Pensions Committee.
3. The Companies Act 2006 contains 'true and fair override' provisions i.e. material information should be disclosed even if not specifically required by legislation or accounting standards if the disclosure of that information enhances appreciation of company accounts. Neither the directors of Bernard Matthews nor the auditors PricewaterhouseCoopers (PwC) have exercised the override even though the company accounts suggest that there are considerable related party transactions (e.g. with other companies in the group, Rutland Partners).
4. The information held at Companies House shows that the most recent accounts filed by Bernard Matthews Holdings Limited (immediate parent company of Bernard Matthews Limited) are for the year to 28 June 2015. These were filed on 11 January 2016. The company was making losses but its balance sheet shows that it was not technically insolvent. Whether any related party transactions (e.g. intragroup interest payments, management fees) contributed to the losses is not known. The financial position may have deteriorated after 11 January 2016, but no accounts have been filed since then.
5. Page 2 of the 2015 accounts states that the company's fixed assets (land, buildings, freehold farms) were worth £42.2 million more than stated in the balance sheet, but for some reason the higher valuation is not incorporated in the

balance sheet. May be the amounts are disclosed to appease some lenders who may have been concerned about the charges and security of loans though the exact reasons are hard to discern. The land and buildings may well be of interest to property developers and full or partial liquidation of the company would enable shareholders/directors to realise considerable value.

6. A major change in the finances of Bernard Matthews group of companies occurred in September 2013 when private equity firm Rutland Partners LLP acquired a stake for £25 million. This was accompanied by the creation of a new complex corporate structure as stated on page 1 of the 2015 accounts

On 30 August 2013, the entire share capital of the Company was acquired by BM Bidco Limited, itself a subsidiary of BM Topco Limited, both of which companies were incorporated for the purposes of the transaction. On the same date, BM Bidco Limited received funding by way of loan notes from Rutland, out of the proceeds of which £23.5m was then advanced to the company. The interest on the loan notes, borne by BM Bidco Limited, is deferred until the occurrence of a specified event or 31 August 2019, if later, at which point the loan notes become repayable.

7. Rutland was advised by Deloitte. Private equity firms rarely make long-term commitments and in many cases realise value by breaking-up companies or through asset-stripping.
8. In July 2016, the company sold its German subsidiary, Bernard Matthews Oldenburg, to the Sprehe Group for €14m (about £11 million).
9. At the same time, with PwC's (auditors) help, the company was looking at ways of restructuring (breaking-up the business, selling assets) its business and finding possible buyers. Some 40 suitable (unknown) parties were identified, but negotiations were not fruitful.
10. In July 2016, Deloitte, who had prior relationship with Rutland, were invited to advise Rutland. An administration strategy was worked out and its details are not known.
11. On 26 August 2016 directors chose a "pre-packaged insolvency" route but there was no public information about this choice. The secrecy meant that many creditors continued to transact with the company even though directors had effectively decided to place the company in administration.
12. On 28th August Deloitte were formally approached to help place the company in administration. This process would have enabled shareholders (in this case also secured creditors) to extract value and walk away from the company's liabilities. The "pre-packaged insolvency" route generally bypasses objections from unsecured creditors and the deal can be presented by the Administrator as a fait accompli to creditors. The rationale is that this may somehow enable a company to survive and rescue jobs. The other side of the equation is that the secrecy does not enable anyone to know the true nature of the deal, creditors and not consulted and invariably lose.
13. On 1st September 2016, The Pensions Regulator (TPR) was notified of the potential for a pre-pack administration of Bernard Matthews Ltd by the Pension Protection Fund (PPF). The PPF had been notified of the possibility by the

Scheme trustees (letter from The Pensions Regulator to Frank Field MP, dated 30 September 2016; <http://www.parliament.uk/documents/commons-committees/work-and-pensions/Letter-from-Pensions-Regulator-to-Chair-re-Bernard-Matthews-Pension-fund-30-09-2016.pdf>). This was followed by discussions between TPR, PPF and Trustees, neither of who can veto or delay the process of pre-pack administration. The Regulator notes that “As the law stands corporate transactions can go ahead without TPR being made aware by the parties involved in the transaction or the scheme trustees. Parties may choose to seek clearance but this is a voluntary process”.

14. On 20 September, directors of Bernard Matthews formally placed the company in administration. Upon directors’ application to the High Court, Deloitte were appointed administrators. Recurring losses were given as a key reason for the administration (see <http://www.deloitte-insolvencies.co.uk/a-c/bernard-matthews-limited/uk-insolvencies-bernard-matthews-sip16-statement.pdf>)
15. On 20 September 2016, the company’s business and assets were sold (must have all been prearranged) for £87.5m (there are some cash balances which can be used to pay creditors i.e. there may be more than £87.5m available) to Amber Residential Developments Limited (now known as Bernard Matthews Foods Limited) and Amber Real Estate Investments (Industrial) Limited. Both of these companies are part of Boparan Private Office, a private investment vehicle controlled by Ranjit Singh Boparan. Full details of the sale agreement are not known. The Administrators have published a statement (<http://www.deloitte-insolvencies.co.uk/a-c/bernard-matthews-limited/uk-insolvencies-bernard-joint-administrators-proposals.pdf>) which provides some information about the sale transaction.
16. The administrators say that “The details of the sale are confidential” (page10). So nothing is known about the components of the sale or how the pension scheme liabilities will be addressed.
17. As regards creditors, the Administrators report (dated 3 October 2016) states that on 20 September 2016, the company had four categories of secured creditors totalling £108.6m. Of these
 - First secured: £46.6m was due to Wells Fargo and PNC, which included a £10.3m guarantee by the Matthews family. Wells Fargo and PNC have been paid in full.
 - Second secured: Rutland will receive £39m. £34m has already been distributed.
 - Third secure: the £10.3m guarantee from the Matthews family will not be called and the family will not receive interest of £0.9m of accrued interest.
 - Fourth secure: No payment will be made to address the £17.5m pension scheme deficit at the date of the last account (page 12). This may have risen to £20 million.
- 18 The position of unsecured creditors is as follows:

- £39m (£24m per the balance sheet plus another £15m since then) of unsecured creditors (there may be others; intragroup liabilities of £59m which need to be looked at with a degree of scepticism) may eventually get 1p in the £.
- The unsecured creditors include £1.381m for taxation and social security payments (as per the 2015 accounts). The more recent balance is not known.

The losses to unsecured creditors will result in turbulence and job losses in the supply chain and to local traders (farmers, plumbers, electricians, local garages, etc.)

- 19 By 3rd October 2016, the Administrators charged a fixed fee of £790,000, which can rise. The hourly rate charged by the Administrators and their advisors is between £390 and £872 per hour. Another £668,000 in legal and related fees is also expected. The Administrators' and agents' fees have a priority i.e. they must be paid before anyone else.
- 20 A Statement of Affairs is currently not filed at Companies House and may well be available by the end of October 2016. This may contain further information but is unlikely to provide any comfort to pension scheme members or unsecured creditors.
- 21 If Amber Residential Developments Limited (now known as Bernard Matthews Foods Limited) and Amber Real Estate Investments (Industrial) Limited, or Boparan Private Office had intended to fully honour the pension scheme deficit and reassure employees, they would already have done so. But no statement to that effect can be found.
- 22 Pre pack insolvencies also exist in other countries but have safeguards which curb the Administrator and Liquidator discretion to protect creditors and are generally more transparent. For example, in France a court approval is needed, as is the case in Italy, Czech Republic, Belgium and the Netherlands. In Germany, a Creditors' Assembly needs to approve the arrangement. However, the UK does not require any court approval and the pre-pack arrangement is frequently presented as fait accompli to creditors who need not be consulted. The UK Administrators files are secret and there is no way of knowing whether the best deal has been obtained.
- 23 The Bernard Matthews Administrators have made it clear that they will not be convening a Creditors' Meeting.

Under the UK insolvency laws, the Administrators are not required to convene a meeting of creditors to consider the Proposals for distribution of assets, but may do so if creditors of more than 10% of the total debts so request. In that case, creditors need to make an application and send a deposit of £1,000 towards the cost of the meeting. If no request is received then the Administrators' proposals are deemed to be approved.

The upshot is that the injured parties (creditors, pension scheme members) need to incur costs to have any chance of their voice being heard whilst secured creditors (including shareholders in this case) walk away with large sums and dump liabilities.

Even if some creditors were force a meeting they may well be outvoted by others, especially the secured creditors who stand to gain most from the Administrators' proposals.

Prem Sikka
5 October 2016