Feature

KEY POINTS

- Administrators have power to make payments to employees furloughed under the government's *Coronavirus Job Retention Scheme* (CJRS).
- Administrators adopt a contract of employment when their conduct amounts to an election to treat the continued contract of employment as giving rise to super-priority.
- It is an objective question of law whether the conduct of administrators amounts to such an election.
- Administrators will adopt a contract of employment if they make an application under the CJRS in respect of that employee.
- Administrators will adopt a contract of employment if they pay a furloughed employee.
- The effect of a contract of employment being "adopted" by administrators under para 99 of Sch B1 is that wages and salary (including holiday pay) of a furloughed employee will have super-priority for payment in an administration.

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Adopting the contracts of furloughed employees: the decisions in *Carluccio's* and *Debenhams*

Two early cases have illuminated aspects of the interaction between the British government's Coronavirus Job Retention Scheme and the statutory regime under the Insolvency Act 1986. Glen Davis QC considers the decisions of Snowden J in *Re Carluccio's Limited* and of Trower J and the Court of Appeal in *Re Debenhams Limited*.

The lock-down restrictions to combat the spread of coronavirus, announced by the British government on 16 March 2020 and subsequently enforced under The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and equivalent legislation in other parts of the UK, had the immediate and inevitable consequence that many companies were or were likely to become insolvent.

While the economic consequences were significantly mitigated by the government's Coronavirus Job Retention Scheme (CJRS), a number of companies also needed to seek the protection of administration under the Insolvency Act. That immediately gave rise to questions about the interaction between the CJRS and the statutory insolvency regime, in particular whether contracts of furloughed employees will be "adopted" so that they enjoy super-priority under the Insolvency Act. Some of these questions have been resolved by two early cases, one of which has reached the Court of Appeal.

THE CORONAVIRUS JOB RETENTION SCHEME

The CJRS was announced on 20 March 2020 and has since been given statutory force by a Treasury Direction to HMRC of 15 April 2020 made under ss 71 and 76 of the Coronavirus Act 2020 (Direction). Under the CJRS, the government covers 80% of the salary of a furloughed employee registered under a qualifying PAYE scheme on or before 19 March 2020, up to £2,500 per month, with associated Employer's National Insurance contributions and minimum automatic enrolment pension contributions. The employee's "reference salary" for these purposes only takes account of "regular" salary or wages, as defined in the Direction. An employee must be furloughed for a minimum of 21 days, and the employee must have been instructed to cease work "by reason of circumstances arising as a result of coronavirus or coronavirus disease".

The CJRS originally covered the three-month period from 1 March to 31 May 2020. It has since been extended to the end of October. On 12 May the Chancellor indicated that furloughed workers would be able to return to work part-time from the beginning of August, with employers prospectively being asked to pay a percentage of salaries.

ADOPTION AND SUPER-PRIORITY

The effect of para 99 of Sch B1 of the Insolvency Act (see extract in Box 1) is that administrators are given an initial period of 14 days to consider whether or not to adopt the contracts of employees. Since the House of Lords decision in *Powdrill v Watson* [1995] 2 AC 394 (*Paramount*), it has been understood that an employee's contract of employment is adopted if their employment is continued for more than 14 days after the appointment of an administrator.

If a contract of employment is adopted, wages or salary (including holiday pay and contributions to an occupational pension scheme) payable under the contract are afforded super-priority over other expenses of an administration (including the remuneration and expenses of the administrator, which rather tends to concentrate administrators' minds) and floating charge security.

In the context of an insolvent company hoping to benefit from the CJRS, it is therefore vitally important to understand what steps will (and what steps will not) constitute adoption of the relevant contracts of employment.

CARLUCCIO'S

Re Carluccio's Limited [2020] EWHC 886 (Ch) was the first case to consider how the CJRS operates in this context. This was a decision of Mr Justice Snowden on an urgent application for directions by recently appointed administrators of the well-known chain of Italian restaurants.

Carluccio's operates more than 70 branches with around 2,000 employees.

All its restaurants were closed as a result of the restrictions announced on 16 March 2020, which left the company with no money to pay wages, and it entered administration on 30 March. The administrators' strategy was to mothball the business and to seek a sale. They wished to retain employees but were only able to do so if the costs would be met by the government. They therefore needed to know urgently where they stood in relation to the CJRS by 13 April, when the initial 14-day period expired.

The judge gave relevant directions at the end of the hearing on 9 April, followed by his written judgment on 13 April. The urgency meant that there had been insufficient time to join representative employees to the proceedings (although the court did receive submissions from Unite the Union). Strictly, therefore, the decisions and directions would not bind affected employees or the government, but the judge considered it obvious that the administrators should be able to take advantage of the benefits of the CJRS if at all possible (and provided they believed that to be in the best interests of the administration), and he considered that the court should do what it could to give a view of legal issues to assist the Administrators. As he put it:

> "The COVID-19 pandemic is a critical situation which carries serious risks to the economy and jobs in addition to the obvious dangers to health. I think that it is right that, wherever possible, the courts should work constructively together with the insolvency profession to implement the Government's unprecedented response to the crisis in a similarly innovative manner."

The CJRS had been announced on 20 March but at the time of the application to Snowden J and when he handed down his judgment, no legislation had yet been laid, and not even any draft legislation or regulations had been published. All the administrators and the court had to go on was the description of how the CJRS would operate from government guidance which had been published on 26 March 2020 and updated on 4 April 2020 and then on 9 April 2020 (after the conclusion of the hearing).

The judge recognised that the CJRS would potentially apply to companies in administration. The Scheme Guidance published by the government referred to employees being "rehired"; the judge accepted that this meant that furloughed employees could be transferred to a buyer and would be able to resume work in the business when restrictions on restaurants were lifted.

The Scheme Guidance was explicit that the grant would be paid into the employer's bank account and accounted for as income of the employer. As such, any grant monies paid would constitute assets of the company in administration. Under the insolvency legislation, administrators are not free to dispose of the assets of the company in administration as they see fit but must do so in accordance with the insolvency legislation and, in particular, by making payments in the order of priorities prescribed in that legislation.

The judge recognised that there are readily-available techniques to ensure that monies lent or payable to a company in financial difficulties can be held on trust so they do not form part of the insolvent estate but are available to make specific payments, but the Scheme Guidance did not mention the word "trust" and the grant monies were simply to be paid into the company's account without any requirement for segregation. While leaving open the possibility that the legislation might provide for a trust or some other mechanism (which has not happened to date), the judge considered that, for the administrators to be confident that they will be able to make payments to furloughed employees, a mechanism to justify payment of such wages and salary in priority to other

BOX 1:

Schedule B1, para 99 of the Insolvency Act 1986 deals with charges and liabilities on an administrator's vacation of office.

Paragraphs 99(3) to (5) provide:

"(3) The former administrator's remuneration and expenses shall be–

(a) charged on and payable out of property of which he had custody or control immediately before cessation, and

(b) payable in priority to any security to which paragraph 70 applies.

(4) A sum payable in respect of a debt or liability arising out of a contract entered into by the former administrator or a predecessor before cessation shall be–

(a) charged on and payable out of property of which the former administrator had custody or control immediately before cessation, and

(b) payable in priority to any charge arising under sub-paragraph (3).

(5) Sub-paragraph (4) shall apply to a liability arising under a contract of employment which was adopted by the former administrator or a predecessor before cessation; and for that purpose–

(a) action taken within the period of 14 days after an administrator's appointment shall not be taken to amount or contribute to the adoption of a contract,

(b) no account shall be taken of a liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the adoption of the contract of employment, and

(c) no account shall be taken of a liability to make a payment other than wages or salary.

(6) In sub-paragraph (5)(c) "wages or salary" includes—

(a) a sum payable in respect of a period of holiday (for which purpose the sum shall be treated as relating to the period by reference to which the entitlement to holiday accrued),

(b) a sum payable in respect of a period of absence through illness or other good cause,

(c) a sum payable in lieu of holiday,

(d) ... and

(e) a contribution to an occupational pension scheme."

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claims against the Company would need to be found under the insolvency legislation.

The judge considered that the only realistic candidates were paras 99 and 66 of Sch B1 of the Insolvency Act, with para 99 being "the provision which is specifically designed to deal with the ability and obligation of administrators to pay wages or salary to employees in an administration", and para 66 a general provision enabling administrators to make payments to deal with particular difficulties which may arise in an administration.

Shortly after their appointment, Carluccio's administrators had written to all those employees whose services were not immediately required, offering to continue to employ them on varied terms so as to take advantage of the CJRS (Variation Letter). By 7 April 2020, 1,788 employees had received the Variation Letter. Some 1,707 employees had accepted its terms, four had rejected it and stated that they wished to be made redundant, and 77 had not responded.

A preliminary question was whether the contracts of employment had been amended by the Variation Letter?

The judge considered that there was a variation where the employee had expressly agreed to its terms, and that would also be the case where an employee who had not yet responded subsequently agreed to it. In such cases, he said, the varied contracts would mean that the company cannot be liable for wages or salary in any amount which exceeds the amount of the grant paid to the Company under the Scheme in respect of the employee, and the Company would not be obliged to pay the employee before receipt of the grant funds.

The position was less clear where employees had not responded. Although his attention was drawn to authority considering when there would be an implied variation of an employment contract (*Abrahall v Nottingham CC* [2018] ICR 1425 CA), the judge considered that the current situation was very different to the "normal background" in which an employee continues to attend for work after a variation has been proposed. The employees of Carluccio's were unable to attend for work and there was no other conduct on their part from which he could infer consent. While he left open the possibility that there could be inference of consent if the facts were different, he did not consider that variation could be established for non-responding employees on the present facts of the case before him. (Judgment in *Carluccio's* pre-dated publication of the Direction, para 6.7 of which requires an agreement in writing between employer and employee for an employee to be furloughed (see Box 2 overleaf)).

The judge rejected an argument that a contract which provides for the employee to be furloughed could never be adopted, because the employee would not be providing services to the company in administration. Even in normal circumstances there are situations where an administrator might not require an employee to work but it would nonetheless be appropriate to continue to pay them.

The judge also emphasised that it was very clear from Lord Browne-Wilkinson's speech in *Paramount* that promotion of the rescue culture is an important consideration when interpreting the Insolvency Act. A conclusion that contracts of employment could not be adopted because furloughed employees could not provide services would have the unwelcome result that the main statutory provision dealing with the issue of employment in administrations would have no application and would not enable furloughed wages or salary to be paid as the CJRS plainly envisages.

The judge's analysis, following *Paramount*, was that the appointment of an administrator does not terminate a contract of employment. The contract continues and liabilities under it continue to arise. But adoption requires some additional conduct by the administrator, amounting to "an election or decision" that the liabilities under the continued contract will have a priority ranking.

The contracts of Carluccio's employees who had consented had been varied. They now only required payment of wages and salary at a level equal to the grant received under the CJRS, and only at the time the grant was received. That position had been arrived at within the first 14 days from commencement of the administration. It could not amount to adoption of the varied contract.

However, as and when the Administrators made an application under the Scheme in respect of those employees or made any payment to them under their varied contracts, this *would* amount to adoption of the varied contracts of employment. Alternatively, if the Administrators were to make payments of wages to the furloughed employees from another source prior to the receipt of monies from the Scheme, that too would amount to adoption of the varied contract.

Contracts of employees who had objected to the variation would not be varied or adopted but would be terminated, and those employees would be made redundant.

If employees who had not responded did so within the first 14 days, they would be in the same position as other consenting employees. If they did not accept the offer to vary within the 14-day period, mere failure on the part of the administrators to terminate those contracts would not mean that the administrators would be treated as adopting them. The unvaried contracts would continue, but the employees could not attend for work, and nothing would be said or done by the administrators that could amount to an election to treat the unvaried contracts as having super-priority. The administrators would not have to dismiss those employees.

If an employee belatedly chose to accept the terms of the Variation Letter, this would have the effect of varying the employment contract, but would not amount to adoption, because it would not be an act of the administrators. Adoption would occur when the administrators acted on the varied contract, by making an application under the CJRS or by paying wages.

Given the conclusions he had reached under para 99 of Sch B1, the judge did not need to express concluded views on the potential applicability of para 66, but he indicated that he was attracted by the possibility that it might be an appropriate way to fill any gaps or deal on an ad hoc basis with any particular issues of detail which might arise.

DEBENHAMS

A matter of days later, related questions came urgently before Mr Justice Trower on another application by administrators for

directions, in *Re Debenhams Retail Limited (in Administration)* [2020] EWHC 921 (Ch).

Debenhams' employees had already been furloughed at the time administrators were appointed on 9 April 2020. The hearing (on which only the administrators appeared) took place on 15 April, and judgment was handed down on 17 April. As in *Carluccio's*, the court derived its understanding of the CJRS from the Guidance published up to that date.

The company in administration is part of a group which operates 142 department stores in the UK. Even before the COVID-19 crisis, it experienced significant trading difficulties. As part of a group restructuring in 2019 it had proposed a CVA which was challenged by its landlords: see *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2020] BCC 9). The government's restrictions on non-essential businesses meant all its stores had to close; an on-line business continued to trade but was considered vulnerable.

Debenhams had some 15,000 employees, the majority of whom had already been furloughed when administrators were appointed. As in Carluccio's, the Administrators were concerned to clarify their position regarding adoption of contracts of employment within the first 14 days of the administration.

Before the administration, the company had written to some 13,000 store-based employees informing them that they were being furloughed. They were told they would not be carrying out any functions of their employment while they were furloughed and that they would be subject to the CJRS. Each employee was also told that they would receive 80% of their usual monthly wages up to a cap of £2,500 per month but that the Company would not pay any additional amounts to any employees. A further 867 employees were subsequently placed on furlough, and it was anticipated that further groups of employees would also be furloughed.

Employees were not initially asked whether they consented to these furloughing arrangements. After their appointment, the administrators had sent out 13,070 letters by email seeking consent. By the date of the hearing, consents had been received from just over 12,700 employees, with four objections and 359 who had not responded.

The administrators remained concerned about the effects of adopting the contracts of consenting employees. In particular, sick pay and holiday pay would qualify for super priority under para 99, but it was not clear how they would be taken into account when quantifying the capped 80% of wages eligible for the government grant. Subject to prospective reductions (insofar as employees consented only to receive the 80%), the estimated liability was over £3m per month. If that amount had to be paid with super-priority, the court was told that the administrators might well have no alternative but to dismiss the furloughed employees, which would significantly affect the viability of a possible rescue of the company.

The question raised in Debenhams was therefore whether the employment contracts of those furloughed employees would be adopted (within the meaning of para 99(5) of Sch B1) if they remained furloughed and the administrators took no further action in relation to them except to communicate to confirm the terms of their continuing employment and seek any required consent, and to pay them the amounts to be reimbursed under the CJRS.

Trower J said he agreed with Snowden J's analysis in Carluccio of the general effects of para 99 of Sch B1 and the authorities on the meaning of the word "adoption". However, the Debenhams administrators argued that Snowden J had not explained why the acts of making an application under the CJRS and making a payment under varied contracts of employment constituted adoption of those contracts, and that there was no reason why such payments could not be justified under para 66 of Sch B1 (ie as payments likely to assist achievement of the purpose of administration).

Trower J rejected these arguments. He "inclined to the view" that in the normal case it is perfectly appropriate to identify para 99 of Sch B1 not just as the source of the obligation to pay wages as a super-priority administration expense but also as the statutory basis for the administrator's ability to do so. He also thought that the administrators' submission had missed the point; it was clear that Snowden J had considered that the contracts

BOX 2:

The Coronavirus Job Retention Scheme is set out in the Schedule to The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction, made by the Treasury on 15 April 2020 in exercise of the powers conferred by ss 71 and 76 of the Coronavirus Act 2020.

It includes the following provisions:

1.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.

…

Furloughed employees

1.1 An employee is a furloughed employee if-

(a) the employee has been instructed by the employer to cease all work in relation to their employment,

(b) the period for which the employee has ceased (or will have ceased) all work for the employer is 21 calendar days or more, and

(c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

…

1.7 An employee has been instructed by the employer to cease all work in relation to their employment only if the employer and employee have agreed in writing (which may be in an electronic form such as an email) that the employee will cease all work in relation to their employment.

of employment would be adopted by the acts of participation in the CJRS and payment.

Trower J went on to consider points raised in Debenhams which had not been advanced in Carluccio. The administrators argued, based on a close analysis of the speech of Lord Browne-Wilkinson in Paramount, that adoption requires some conduct sufficient to constitute an election by them.

Trower J agreed, but it seemed to him that Lord Browne-Wilkinson contemplated that, by continuing to cause the company to treat a person as an employee by any action taken subsequent to the expiry of the 14 days period, the contract of employment will have been adopted for the purposes of para 99 of Sch B1. He considered his conclusion supported by *Re Antal International Ltd* [2003] 2 BCLC 406 (Re Antal), in which administrators had discovered the existence of employees a few days after the 14 day period had expired but had then done nothing amounting to an election to continue the contracts, and were held not to have adopted them.

Applying his analysis to the facts of the case before him, Trower J held that, by causing the Company to make an application under the CJRS, and in making payment to the furloughed employees of a capped 80% of their contractual entitlements, the Administrators would be engaging in positive conduct which presupposed that the contracts of the furloughed employees continue to exist and treated that as being the case. He explained:

> "As I understand the structure of the JRS and the steps which must be taken to claim under it, it would not be possible for the Administrators to participate without electing to treat the relevant contracts of employment as continuing. It would also be contrary to the purpose of the JRS, which is designed to facilitate employee retention and requires the relevant employees to continue as such."

Nonetheless, the Administrators relied on what they asserted to be the absurdity of contracts of employment being adopted when services were not being provided under them and went on to submit that the underlying purpose of the CJRS would be undermined if the contracts were to be adopted under the circumstances.

Trower J accepted that policy considerations are relevant to the true construction of the word "adopted" in para 99, but he did not accept that the absence of services being provided under a contract of employment is, of itself, a good reason why those contracts should not be treated as being adopted.

Trower J did not consider that the mere fact that the CJRS is designed to try and prevent employee redundancy in the context of companies driven into financial distress by the COVID-19 pandemic can of itself prevent the contracts of employment from being adopted if that is the consequence of construction of para 99 in accordance with established principles. Those established principles of construction required the court to consider whether the acts of participation in the JRS and payment to the furloughed employees constituted an election to treat the continued contract of employment with the company as giving rise to a separate liability in the administration. In his judgment, they did.

Debenhams' administrators had sought a declaration which the judge declined to grant. He instead gave directions that they were at liberty to act on the basis that they would be taken to have adopted any contract of employment between the Company and its employees in circumstances where, in respect of any particular employee or employees, at any time after 14 days from the time of their appointment:

- the Joint Administrators caused the Company to make payments to such employee or employees under and in accordance with their employment contracts including in respect of amounts which may be reimbursed to the Company by a grant under the CJRS; or
- the Administrators made an application in respect of such employee or employees under the CJRS.

THE *DEBENHAMS* APPEAL

An urgent appeal against Trower J's decision was heard by the Court of Appeal on 22 April. The appeal was dismissed on 24 April, and reasons were given in a judgment given by Lord Justice David Richards on 6 May 2020 (*Re Debenhams Retail Limited (in Administration)* [2020] EWCA Civ 600.

On the appeal, the administrators' arguments focussed on the consequences of making payments to furloughed employees of amounts which might be reimbursed under the CJRS. They did not address the effects of making an application under the Scheme.

As in the hearing below, the central question was the proper interpretation and application of Lord Browne-Wilkinson's speech in Paramount. The administrators submitted that, for contracts of employment to have been adopted, it is necessary to demonstrate words or conduct on the part of the administrators which, objectively construed, evidence an election on the part of the administrator to treat the liabilities arising under the contract of employment as enjoying super-priority. Such an election was to be judged objectively, not by reference to subjective intentions of the administrator. David Richards LJ characterised this as involving "an objective assessment of the administrator's state of mind, judged by his words and conduct".

On that footing, the administrators contended that Snowden J had correctly analysed Paramount but had misapplied the test in Carluccio's. They said Carluccio's administrators did not need to make any election to treat the liabilities as having super-priority. Either making application under the Scheme or paying remuneration to furloughed employees were entirely explicable without any election to treat liabilities as having super-priority, because the remuneration would be reimbursed or funded by the government and the payments thus had no impact on the administration estate. They also contended that in Debenhams Trower J had applied the wrong test.

The Court of Appeal did not consider that the first-instance judgments in Carluccio's and in Debenhams displayed any significant difference in approach, although they were expressed in different terms reflecting different submissions made for the administrators in the two cases. They also said that the administrators' submissions on the appeal misunderstood the approach taken

by Lord Browne-Wilkinson in Paramount, explaining:

> "When Lord Browne-Wilkinson referred at p.449A-B to 'some conduct by the administrator or receiver which amounts to an election to treat the continued contract of employment as giving rise' to super-priority, he was not introducing as a relevant factor the intentions of the administrator, even if objectively determined. He did not, as Mr Smith submitted, require the conduct of the administrator to evidence an election by the administrator. It is a question of law: is the conduct of the administrator such that he must be taken to have to accept that the relevant amounts falling due under the employment contract enjoy super-priority? It is a wholly objective question, focussed entirely on the conduct of the administrator. As Lord Browne-Wilkinson repeatedly said, the issue is whether the officeholder has 'continued' the employment of the relevant employees. This is the essence of the test propounded by him. If the officeholder has continued their employment, in other words has taken active steps to continue their employment, that necessarily results in super-priority for the relevant liabilities under the contracts of employment. As earlier noted, and by contrast, doing nothing involves no continuation by the administrators of the employment."

The Court of Appeal also approved the summary of the effects of *Paramount* in *Re Antal*, where Laddie J had said that what Lord Browne-Wilkinson was pointing out was that it was important to find some conduct on behalf of the administrator or receiver which could be treated as an election or could be regarded as him exercising a choice as to whether or not the contracts of employment were to be adopted.

Whether administrators have continued the employment of furloughed employees is an issue to be decided by reference to the evidence before the court in a particular case. The Court of Appeal identified three factors which tended to support that conclusion in the case of *Debenhams*:

- the administrators would continue to pay the wages and salaries of the furloughed employees up to the limits of the CJRS, and the employees' entitlement to those payments was derived exclusively from their contracts;
- furloughed employees who had accepted continuation of their employment on these terms (and other employees who did not treat their contracts as terminated by reason of the Company's failure to pay their full contractual remuneration) would remain bound by their contracts of employment, save only as regards the obligation to be available for work during the furlough period. They remained bound by duties of loyalty and would be obliged to provide their services to the Company as and when it is able to re-open its stores;
- in continuing to pay the furloughed employees, the administrators were acting with the objective of rescuing the Company as a going concern, and in the interests of the Company's creditors as a whole.

The administrators relied on three principal points for the opposite conclusion:

- the employees would not be providing any services to the Company;
- while furloughed, the employees' remuneration was limited to what was covered by the CJRS, so that "as a matter of economic substance" the Company was the conduit for government funds;
- any decision whether to terminate the contracts of furloughed employees would only be made only once the CJRS had ended. What that decision would be, as regards any employees, was presently impossible to predict and will depend on the circumstances when the Scheme ends.

The Court of Appeal accepted that the fact that the furloughed employees were not carrying out any work for the Company (and were not permitted to do so under the terms of the CJRS) was a significant factor and one which distinguished the present case from *Paramount*, but they did not regard it as in itself sufficient. They endorsed an example given by Snowden J in *Carluccio's* of an employee with particular skills so that it was important not to terminate his employment contract in the interests of the administration although he was not required to attend the premises to work; in such a case (as the administrators had accepted), the contract of employment would have been adopted although no services were provided.

The Court of Appeal did not consider that the fact that the employees' remuneration was limited to what was covered by the CJRS, so that the economic effect on the administration was neutral, assisted the administrators' argument. The furloughed employees remained employed and were paid the remuneration due under their contracts, subject to the maximum under the CJRS. The remuneration was an expense of the Company and the government grants were income of the Company. As they observed, the government could have devised a furlough scheme which did not involve using the employer as the conduit for the remuneration, but it did not do so.

Finally, the Court of Appeal were not persuaded by the factor that any decision to terminate the furloughed employees' contracts was postponed until after the Scheme has ended. In the meantime, the Court of Appeal said, the administrators had themselves taken steps to keep the contracts in being.

Having considered the competing factors, the Court of Appeal found that the Debenhams administrators had clearly adopted the contracts of the furloughed employees.

The Court of Appeal disagreed with one aspect of Snowden J's analysis in *Carluccio's*. The judge had identified para 99 of Sch B1 as the source of the administrators' authority to pay wages or salaries in an administration. The Court of Appeal considered that para 66 of Sch B1 was "an appropriate and perhaps the most obvious source of authority for these payments" (although it may well be the case that authority can also be derived from para 99). However, this was not an essential part of the judgment and did not affect the conclusion.

Feature

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The effect of the Court of Appeal's decision that the contracts of employment had been adopted in *Debenhams* was somewhat mitigated by the agreements which had been reached with the vast majority of employees to vary those contracts. Wages or salary in excess of the amounts payable under the CJRS would not enjoy super-priority. However, entitlements to full holiday pay would or might enjoy super-priority and over a three-month period would amount to some £1.28m.

Overall, there is perhaps nothing surprising in the Court of Appeal's decision. It represents the application of the principles we all thought we understood from *Paramount* to the new insolvency normal of the Coronavirus crisis and the realities of the CJRS.

The Court of Appeal also said that they could see that there may be good reasons of policy for excluding action restricted to implementation of the CJRS from the scope of "adoption" under para 99, but such exclusion cannot be accommodated under the law as it stands. In other words, it would require legislation.

LOOKING FORWARD

We can expect many more companies to enter administration as the full economic consequences of the lock-down become clear, and most new cases will be like *Debenhams*, with employees already furloughed.

Unless the government accepts the invitation to change the law, administrators will adopt the employment contracts of furloughed employees, and the extent to which relevant liabilities enjoy super-priority and need to be funded will depend on the scope of contractual variations the employees are prepared to agree. ■

Further Reading:

- What is left of the floating charge? An empirical outlook (2015) 7 JIBFL 404.
- High Court rejects landlord challenge to Debenhams' CVA (2019) 11 JIBFL 762.
- LexisPSL: Restructuring and insolvency: UK FAQs: Furloughing and administration.