Neutral Citation [2019] EWHC 2607 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
INSOLVENCY AND COMPANIES LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 5 October 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

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IN THE MATTER OF **SKEGGS BEEF LIMITED**
AND IN THE MATTER OF **THE INSOLVENCY ACT 1996**

GEORGINA MARIE EASON AND MICHAEL COLIN JOHN SANDERS OF MACINTYRE HUDSON LLP, AS JOINT ADMINISTRATORS OF SKEGGS BEEF LIMITED (IN ADMINISTRATION)

Applicants

-and-

SKEGGS BEEF LIMITED (IN ADMINISTRATION)

Respondent

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Mr Simon Passfield (instructed by **Veale Wasbrough Vizards LLP**) for the **Applicants**
The **Respondent** did not appear and was not represented

Hearing date: 18 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

INTRODUCTION

1. By an application made under paragraph 63 of Schedule B1 to the Insolvency Act 1986, the **Applicants**, Ms Eason and Mr Sanders of MacIntyre Hudson LLP, apply for a declaration that their appointment as joint administrators of Skeggs Beef Limited (the **Company**) was valid and effective from 5:03pm on 10 September 2019.

2. The Applicants were or purportedly were appointed as administrators by the holders of a qualifying floating charge (the **Qualifying Charge Holders**). In order for that appointment to be effective, proper notice of the appointment must be given to the court. Notice was given by the Qualifying Charge Holder but, for reasons that it will be necessary to explore in this Judgment, the Applicants are concerned about the validity of their appointment. Their concern arose out of the fact that the notice of their appointment was not filed in accordance with rules 3.20 and 3.21 of the Insolvency (England and Wales) Rules 2016.

3. Accordingly, the Applicants applied to this Court for declarations that:

   (1) Their appointment was valid and took effect at 5:03pm, on 10 September 2019; and

   (2) All acts by them as joint administrators were not invalid by reason of the failure to file the notice of their appointment in accordance with rules 3.20 and 3.21.

   At an oral hearing, I indicated that I would grant declarations along the lines sought by them, with my written reasons to follow. These are those reasons.

4. In order to understand the Applicants' concerns about their appointment, it is necessary to consider first the provisions, as they changed over time, regarding the appointment of administrators by the holder of a qualifying floating charge and then the provisions, again as they changed over time, regarding the Electronic Working Pilot Scheme for the filing of documents.

THE PROVISIONS IN THE INSOLVENCY ACT 1986 AND THE INSOLVENCY RULES

5. Schedule B1 was inserted into the Insolvency Act 1986 by section 248 of the Enterprise Act 2002 with effect from 15 September 2003. Schedule B1 introduced a wholly new administration regime.

6. Also with effect from 15 September 2003, rule 5(1) and paragraph 9 of Schedule 1 to the Insolvency (Amendment) Rules 2003 introduced a new Part 2 of the Insolvency Rules 1986, which provided that the holder of a qualifying floating charge might file a notice of appointment when the court was closed by:

   (1) Faxing it to the designated telephone number: see rule 2.19(1) of the Insolvency Rules 1986 (as so amended); and

(2) Attaching a statement providing full reasons for the out of hours filing, including why it would have been damaging to the company and its creditors not to have so acted: see rule 2.19(8) of the Insolvency Rules 1986 (as so amended).

7. By rule 2 and paragraph 41(2) of Schedule 1 to the Insolvency (Amendment) Rules 2010, with effect from 6 April 2010, rule 2.19 of the Insolvency Rules 1986 was further amended to enable the holder of a qualifying floating charge to file a notice of appointment when the court was closed by sending it as an attachment to an email to a designated email address.

8. With effect from 6 April 2017, when the Insolvency (England and Wales) Rules 2016 came into effect, rule 2.19 of the Insolvency Rules 1986 was replaced by rule 3.20 of the Insolvency (England and Wales) Rules 2016. The new rule was materially in the same terms as the rule it replaced. It provided as follows:

"(1) When (but only when) the court is closed, the holder of a qualifying floating charge may file a notice of appointment with the court by –

(a) faxing it to a designated telephone number; or

(b) emailing it, or attaching it to an email, to a designated email address.

(2) The notice must specifiy the name of the court (and hearing centre if applicable) that has jurisdiction.

(3) The Lord Chancellor must designate the telephone number and email address.

(4) The Secretary of State must publish the designated telephone number and email address on the Insolvency Service webpages and deliver notice of them to any person requesting them from the Insolvency Service.

(5) The appointer must ensure that –

(a) a fax transmission report giving the time and date of the fax transmission and the telephone number to which the notice was faxed and containing a copy of the first page (in part or in full) of the document faxed is created by the fax machine that is used to fax the notice; or

(b) a hard copy of the email is created giving the time and date of the email and the address to which it was sent.

(6) The appointer must retain the fax transmission report or hard copy of the email.

(7) The appointer must deliver a notice to the administrator of the filing of the notice of appointment as soon as reasonably practicable.

(8) The copy of the faxed or emailed notice of appointment as received by the Courts Service must be delivered by the Lord Chancellor as soon as reasonably practicable to the court specified in the notice as the court having jurisdiction in the case, to be placed on the relevant court file.

(9) The appointer must take to the court on the next occasion that the court is open for business –

(a) three copies of the faxed or emailed notice of appointment;

(b) the fax transmission report or hard copy required by paragraph (5);

(c) all supporting documents referred to in the notice in accordance with rule 3.21(1) which are in the appointer's possession; and

(d) a statement providing reasons for the out-of-hours filing of the notice of appointment, including why it would have been damaging to the company or its creditors not to have so acted.

…"

THE PROVISIONS RELATING TO THE ELECTRONIC WORKING PILOT SCHEME

9. Pursuant to Practice Direction 51O on the Civil Procedure Rules (**CPR**), an Electronic Working Pilot Scheme came into force on 16 November 2015 and provided for a pilot scheme to operate for one year. Paragraph 2.1 and 2.2 (so far as relevant) provided:

"2.1 Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal court office opening hours and on weekends and bank holidays, except where there is –

(a) planned "down-time": as with all electronic systems, there will be some planned periods for system maintenance and upgrades when Electronic Working will not be available; and

(b) unplanned "down-time": periods during which Electronic Working will not be available due, for example, to a system failure or power outage, or some other unplanned circumstance.

2.2 For the avoidance of doubt, Electronic Working applies to and may be used to start and/or continue…insolvency proceedings…"

10. On 29 September 2016, the Practice Direction was amended – by the 86th update to the CPR – to extend the Electronic Working Pilot Scheme from one year to two years: that is, until 16 September 2017.

11. By the 96th update to the CPR, the Electronic Working Pilot Scheme was further extended to 6 April 2018. More significantly, for present purposes, paragraph 2.1 of Practice Direction was amended to add the words underlined and delete the words struck out in the text below:

"2.1 Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal court office opening hours and on weekends and bank holidays, except ~~where there is~~ –

(a) where there is planned "down-time" ~~planned "down-time"~~: as with all electronic systems, there will be some planned periods for system maintenance and upgrades when Electronic Working will not be available; and

(b) where there is unplanned "down-time" ~~unplanned "down-time"~~: periods during which Electronic Working will not be available due, for example, to a system failure or power outage, or some other unplanned circumstance~~.~~; and

(c) where the filing is of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the IR 2016 and the court is closed, in which case the filing must be in accordance with rule 3.20 of the IR 2016."

2.2 ~~For the avoidance of doubt,~~ Electronic Working applies to and may be used to start and/or continue…insolvency proceedings…"

THE INTER-RELATIONSHIP BETWEEN THE INSOLVENCY RULES AND THE ELECTRONIC FILING RULES

12. There are, therefore, two regimes for the electronic filing of documents. A limited, out-of-court hours regime, for the holder of a qualifying floating charge, under what is now rule 3.20 of the Insolvency (England and Wales) Rules 2016; and a much more wide-ranging regime under the CPR in Practice Direction 51O.

13. Where the Insolvency Rules – as here – specify in great detail a regime for the notification of the appointment of administrators, that regime cannot be trumped or overridden by a Practice Direction in the CPR:

(1) The Insolvency (England and Wales) Rules 2016 are a statutory instrument (SI No 1024 of 2016) and were made by the Lord Chancellor in exercise of the powers conferred by sections 411 and 412[2] of the Insolvency Act, with the concurrence of the Chancellor of the High Court (by authority of the Lord Chief Justice under sections 411(7) and 412(6) of the Insolvency Act) in relation to those rules which affect court procedure, and with the concurrence of the Secretary of State.

(2) Practice Direction 51O, by contrast, is made under rules 5.5, 7.12 and 51.2 of the CPR, and the CPR are made under section 1 of the Civil Procedure Act 1997.

These rules constitute separate and distinct forms of secondary legislation and one cannot override the other, although of course one can supplement the other: there are many cases where the Insolvency Rules expressly or implicitly draw on the CPR. Nevertheless, these two sets of rules exist in parallel, equally valid in their own spheres.

14. Practice Direction 51O did no more than permit the electronic filing of documents and the issue of proceedings electronically provided that this was not inconsistent with other rules. Where, as here, the Insolvency (England and Wales) Rules 2016 specified in rule 3.20 that notice of the appointment of an administrator by the holder of a qualifying floating charge may be filed electronically or by fax "[w]hen (but only when)" the court office is closed, and then only by following the quite stringent provisions in those Rules, those rules continued to stand and were not overwritten by the Practice Direction. The Practice Direction was seeking to introduce, by way of pilot, a new means of ordinary filing with the court and did not seek to displace special regimes such as the contained in rule 3.20 of the Insolvency (England and Wales) Rules 2016. The amendments introduced by the 96th update to the CPR – set out in paragraph 11 above – are no more than clarificatory of this basic point, but they put the matter beyond doubt.

15. Pausing there, I should refer to the decision of Barling J in *Re HMV Ecommerce Ltd*, [2019] EWHC 903 (Ch):

(1) In that case, the directors of two companies electronically filed notices of appointment of administrators at 5:54pm on 28 December 2018.

(2) The view clearly taken by the directors was that Practice Direction 51O permitted the electronic filing of such notices. Significantly, the Insolvency (England and Wales) Rules 2016 contain no provision for the out-of-court filing of notices of appointment of administrators by directors: the out-of-court provisions in the Insolvency Rules are expressly limited to notice of appointment of an administrator by the holder of a qualifying floating charge.

(3) In short, the directors saw the Practice Direction as permitting something altogether not permitted by the Insolvency Rules. They were clearly wrong in this view: as the amendment to Practice Direction 51O makes clear (see paragraph 11 above), notice of appointing administrators must comply with the Insolvency Rules to be valid. If the Insolvency Rules do not provide a mode of out-of-court notice, then none exists by virtue of the Practice Direction.

(4) Barling J proceeded on the basis that the law was ambiguous in this regard and that the appointments were thus only potentially defective. He was not shown the amendment to Practice Direction 51O, but only an Insolvency Practice Direction made in 2018 relating to the point (the **2018 Insolvency Practice Direction**). As to this:

(a) On 6 April 2017, the Chancellor, Vos C, issued *Practice Note: Relating to the Practice Direction: Insolvency Proceedings*, [2017] BCC 221. This did no more than note that as a result of the coming into force of the Insolvency Rules (England and Wales) 2016, significant amendments would be required to the earlier *Practice Direction: Insolvency Proceedings*, [2014] BCC 502.

(b) On 25 April 2018, the 2018 Insolvency Practice Direction – *Practice Direction: Insolvency Proceedings*, [2018] BCC 241 – came into force. This was the Practice Direction shown to Barling J. Only paragraph 8.1 is material:

> "Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O – The Electronic Working Pilot Scheme, or to any subsequent electronic practice direction made after the date of this [Insolvency Practice Direction], where an application is made, or intention to appoint an administrator is made, using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-paragraph (c) to notices of appointment made by qualifying floating charge holders, paragraph 2.1 of the Electronic Practice Direction 51O shall not apply to any filing of a notice of appointment of an administrator outside court opening hours, and the provisions of Insolvency Rules 3.20 – 3.22 shall in those circumstances continue to apply."

(c) Barling J referred to the "somewhat byzantine terminology" in this Practice Direction. Not only this, but the fact is that the 2018 Insolvency Practice Direction does not refer explicitly to the primacy of the Insolvency Rules,

but merely makes clear that the provisions of Rules 3.20 – 3.22 "shall in those circumstances continue to apply". Barling J was not shown the legislative history that I have described in this ruling. He therefore said the following about paragraph 8.1:

> "5. The administrators are concerned that the somewhat byzantine terminology of that provision means that the notice of appointment of the administrators in the present case was made in breach of that rule, because it was made under the Electronic Working Pilot Scheme outside court opening hours. These are generally presumed to cease at 4.30pm on a working day, whereas this notice was given approximately one hour and 24 minutes after that time.
>
> 6. The curious aspect of paragraph 8.1 is that it states that the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply. However, those paragraphs of the Rules are only dealing with a notice of appointment filed by the holder of a qualifying floating charge and do not have any relevance to a notice of appointment filed by the company or its directors. So, the concept of those rules "continuing" to apply can only be a reference to a notice of appointment filed by a qualified floating charge holder.
>
> 7. Nevertheless, because there is an ambiguity in the rule, the administrators have quite properly considered that they should remedy any problem in view of the urgency and importance of this administration…"

(5) Thus, Barling J considered that whilst the 2018 Insolvency Practice Direction made clear that Practice Direction 51O could not apply for the notification of the appointment of an administrator by the holder of a qualifying floating charge, it was arguable that Practice Direction 51O could be used to notify the appointment of administrators by the company or its directors.

16. Given the material that was before Barling J, it is possible to have a great deal of sympathy with this view. As I have noted, Barling J was not shown the entire legislative history. It seems to me absolutely clear, in light of all the material, that notice of the appointment of administrators must be pursuant to the Insolvency (England and Wales) Rules 2016, and not pursuant to Practice Direction 51O. If the Insolvency Rules provide for out-of-court notification of the appointment of an administrator, then (provided those rules are followed) the appointment will be valid. But if there is no such provision in the Insolvency Rules, then the absence cannot be made good by resort to Practice Direction 51O.

17. In short, the only way properly to give notice of the appointment of an administrator is by way of the Insolvency (England and Wales) Rules 2016.

THE PRESENT CASE

18. On 10 September 2019, the Qualifying Charger Holders gave notice of the appointment of the Applicants as administrators of the Company. The notice was given at 5:03pm on 10 September 2019, which is the time recorded in the endorsement on the notice completed by the court itself.

19. Unfortunately, the court has been closed since 4:30pm and did not re-open until 10:00am on 11 September 2019. The procedure under rule 3.20 of the Insolvency (England and Wales) Rules 2016 should therefore have been followed. It was not. Instead, the process under Practice Direction 51O was followed.

20. For the reasons I have given, this was the wrong process; and the notice of appointment of the Applicants is defective.

CURING THE DEFECT

21. Defective out-of-court administration appointments can be divided into three categories:

(1) *Cases where the defect is fundamental.* In such cases, the purported administration appointment is a nullity. There are no insolvency proceedings on foot, and so there is nothing that the court can cure.

(2) *Cases where the defect is not fundamental and causes no substantial injustice.* Rule 12.64 of the Insolvency (England and Wales) Rules 2016 provides:

> "No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."

Thus, provided the defect is not fundamental (i.e. not falling within paragraph 21(1) above), so that there are indeed insolvency proceedings on foot, the court must first satisfy itself that the defect or irregularity has caused no "substantial injustice". If so satisfied, then the proceedings will not be invalidated by any formal defect or irregularity.

(3) *Cases where the defect is not fundamental, but substantial injustice is caused.* If the defect – again, not being a fundamental defect within paragraph 21(1) above – is found to cause "substantial injustice", then the court must ask itself whether that substantial injustice can be remedied by an order of the court. Of course, the court will consider, in light of all the circumstances, whether it is appropriate to make a remedial order. If so, then the defect is cured on the court making the order. If the court cannot make a remedial order or does not consider that it is appropriate to do so, then the defect remains uncured.

22. The case law draws a distinction – in the case of notices of appointment of administrators – between:

(1) *The failure to file a notice of appointment in the prescribed form.* This appears to amount to a fundamental flaw which renders a purported out-of-court appointment a nullity: *Re G-Tech Construction Ltd*, [2007] BPIR 1275; *Re Kaupting Capital Partners II Master LP Inc*, [2010] EWHC 836 (Ch); *Re MTB Motors Ltd*, [2010] EWHC 3751 (Ch); and *Re Frontsouth (Witham) Ltd*, [2011] EWHC 1668 (Ch). In short, this is a case falling within that described in paragraph 21(1) above.

(2) The filing of a notice of appointment, in the prescribed form, in the wrong manner. This appears to amount to a "defect" or "irregularity" that is not fundamental, and that can be dealt with in one of the two ways set out in paragraphs 21(1) and 21(2)

above: *Re Assured Logistics Solutions Ltd*, [2011] EWHC 3029 (Ch); *Re Euromaster Ltd*, [2012] EWHC 2356 (Ch).

23. The present case obviously falls into the second of these two classes, and so I must apply the provisions of Rule 12.64 of the Insolvency (England and Wales) Rules 2016. In this case, having considered all of the evidence adduced by the Applicants, I conclude that this is a case of a purely formal defect that has caused no injustice to anyone. In these circumstances, these proceedings are not invalidated and there is no need for me to make any order beyond a declaration to this effect.

24. Accordingly, I declare that the Applicants' appointment was valid and took effect at 5:03pm on 10 September 2019 and that none of the Applicants' acts as administrators of the Company can be invalidated by reason of the defective notice of the Applicants' appointment by the Qualifying Charge Holder.

Postscript

This Judgment was finalised on 5 October 2019, when it was allocated a Neutral Citation Number. Unfortunately, it was not immediately thereafter published. Since 5 October 2019, Mr Passfield (counsel for the Applicants) has drawn to my attention the decision of Insolvency and Companies Court Judge Burton in *Edwards v. SJ Henderson & Company Limited*, [2019] EWHC 2742 (Ch). Given that my order was made on 18 September 2019, and this reserved Judgment completed on 5 October 2019 on the basis of submissions made on 18 September 2019, it is inappropriate for me vary the terms of the judgment I have reached on the basis of this later decision. However, it is appropriate to note that the Judgment was written and finalised without reference to this decision.