Neutral Citation Number: [2022] EWHC 1575 (Ch)

Case No: CR-2020-002595

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

IN THE MATTER OF E REALISATIONS 2020 LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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

Date: 24 June 2022

Before :

DEPUTY ICC JUDGE CURL QC

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Between :

ALASTAIR REX MASSEY AND GEOFFREY PAUL ROWLEY (AS JOINT ADMINISTRATORS OF E REALISATIONS 2020 LIMITED (IN ADMINISTRATION)) — **Applicants**

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Timothy Harry (instructed by **Osborne Clarke LLP**) for the **Joint Administrators**

Hearing dates: 1 June 2022

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APPROVED JUDGMENT

Deputy ICC Judge Curl QC:

1. Two applications made by the joint administrators of E Realisations 2020 Limited (in administration) ("Company") came before me on an urgent basis in the interim applications list on 1 June 2022. I granted the declaratory and other relief sought on that occasion and indicated that I would give my reasons in writing at a later date. This judgment sets out those reasons. I am grateful to Mr Harry of counsel and those instructing him for their written and oral submissions.

2. The Company was known during its trading life as Everest Limited and was formerly the main trading company in the Everest windows and home improvements group. Its directors appointed the administrators on 8 June 2020. As recorded in their proposals dated 15 June 2020, the administrators decided to pursue the objective in para.3(1)(b) of Schedule B1 to the Insolvency Act 1986 ("Act"), namely to achieve 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. This decision was based on the maximum prescribed part being available to the unsecured creditors following the pre-packaged sale of certain business and assets of the Company, which had taken place on 9 June 2020.

3. Both applications before the court concern the administrators' terms of office. The first was issued on 28 April 2022 ("Application 1") and sought a 12 month extension of the administrators' appointment to 7 June 2023 under para.76(2)(a) of Schedule B1 to the Act. The second was issued on 26 May 2022 ("Application 2") and sought, primarily, a declaration that the terms of office of the administrators had been effectively and validly extended to 7 June 2022 by consent under para.76(2)(b) of Schedule B1 and that any defects in compliance with the notice provisions under r.3.54(2) of the Insolvency (England and Wales) Rules 2016 ("Rules") were remedied under r.12.64 of the Rules. In the alternative, Application 2 sought a retrospective administration order under para.13(2) of Schedule B1 such that there would be no intervening period of time between the appointment of the administrators on 8 June 2020 and the present time.

4. Application 1 was issued in the High Court but was transferred to the County Court at Central London by the order of Chief ICC Judge Briggs on 28 April 2022. At a hearing on 24 May 2022, and having been shown the recent decision of Mr Justice Michael Green in *Re Caversham Finance Limited (in administration)* [2022] EWHC 789 (Ch), District Judge Hart identified a possible issue in relation to the previous consensual extension of the administration to 7 June 2022. This concerned the notices required by r.3.54 of the Rules to be given to the secured and preferential creditors in order to obtain their consent to the extension of the administrators' appointment under para.76(2)(b) of Schedule B1 to the Act. District Judge Hart transferred Application 1 back to the High Court for an urgent hearing, recording in the order *"…that a declaration may be required as to whether there has been a breach of rule 3.54(2)…which may be remedied pursuant to rule 12.64…"* Application 2, seeking such a declaration or a retrospective appointment in the alternative, was issued two days later.

5. The concern over compliance with r.3.54(2) of the Rules arises in this way. So far as relevant, paras.76 to 78 of Schedule B1 provide as follows:

> *"76*
>
> *(1) The appointment of an administrator shall cease to have effect at the end of the period of one year beginning with the date on which it takes effect.*
>
> *(2) But—*
>
> *(a) on the application of an administrator the court may by order extend his term of office for a specified period, and*
>
> *(b) an administrator's term of office may be extended for a specified period not exceeding one year by consent.*
>
> *77*
>
> *(1) An order of the court under paragraph 76—*
>
> *(a) may be made in respect of an administrator whose term of office has already been extended by order or by consent, but*
>
> *(b) may not be made after the expiry of the administrator's term of office.*
>
> *…*
>
> *78*
>
> *(1) In paragraph 76(2)(b) "consent" means consent of—*
>
> *(a) each secured creditor of the company, and*
>
> *(b) if the company has unsecured debts, the unsecured creditors of the company.*
>
> *(2) But where the administrator has made a statement under paragraph 52(1)(b) "consent" means—*
>
> *(a) consent of each secured creditor of the company, or*
>
> *(b) if the administrator thinks that a distribution may be made to preferential creditors, consent of—*
>
> *(i) each secured creditor of the company, and*
>
> *(ii) the preferential creditors of the company.*
>
> *(2A) Whether the company's unsecured creditors or preferential creditors consent is to be determined by the administrator seeking a decision from those creditors as to whether they consent.*

(4) An administrator's term of office—

(a) may be extended by consent only once,

(b) may not be extended by consent after extension by order of the court, and

(c) may not be extended by consent after expiry.

(5) Where an administrator's term of office is extended by consent he shall as soon as reasonably practicable–

(a) file notice of the extension with the court, and

(b) notify the registrar of companies.

(6) An administrator who fails without reasonable excuse to comply with sub-paragraph (5) commits an offence."

6. In this case, the administrators made a statement under para.52(1)(b) of Schedule B1 in their proposals dated 15 June 2020 and *"consent"* for the purposes of para.76(2)(b) had the meaning in para.78(2)(b), i.e. the consent of each of the secured creditors and the preferential creditors of the Company.

7. Rule 3.54 of the Rules makes procedural provision for extensions under para.76 of Schedule B1. So far as relevant, it provides:

"3.54— Application to extend an administration and extension by consent (paragraph 76(2) of Schedule B1)

(1) This rule applies where an administrator makes an application to the court for an order, or delivers a notice to the creditors requesting their consent, to extend the administrator's term of office under paragraph 76(2) of Schedule B1.

(2) The application or the notice must state the reasons why the administrator is seeking an extension."

8. Under cover of letters dated 4 August 2020, the administrators sought a number of decisions from the secured and preferential creditors. At that time, the secured creditors of the Company were Barclays Bank Plc ("Barclays") and BECAP12 GP Limited ("BECAP12") and the preferential creditor was the Secretary of State for Business, Energy and Industrial Strategy ("BEIS"). Those letters each included a voting form, on which the creditors were asked, among other things, to give their consent *"[t]hat the period of Administration be extended by up to twelve months, if required."* By the same form, the creditors' consent was also sought to four other matters, including fee approval. The letters to the secured creditors enclosed a copy of the administrators' report and proposals dated 15 June 2020. Although the letter to BEIS did not include those documents, it identified a website where they could be viewed and downloaded.

9. It is accepted by the administrators that no reasons for the contemplated extension were stated in the letters of 4 August 2020 or on the voting form completed by the creditors providing their consents to the extension of the administration, despite the requirement in r.3.54(2) of the Rules that such reasons be given.

10. Each of the creditors provided their consents within a couple of weeks of 4 August 2020. The administrators completed and filed a notice of the extension with Companies House dated 9 April 2021. It will be noticed that this is a gap of around eight months.

11. Rule 12.64 of the Rules provides as follows:

> *"12.64 Formal defects*
>
> *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."*

12. The issue for determination on Application 2 is whether these matters give rise to a defect amounting to a procedural irregularity or a defect going to the fundamental validity of the extension of the administration. Given that Application 2 goes to the question of whether the Company remained in administration at all after 7 June 2021, I will consider Application 2 before considering the request for a further extension of the administrators' terms of office in Application 1.

Approach to defects in appointment

13. The out-of-court process for appointing administrators has generated a number of cases where some defect has given rise to uncertainty over whether or not there has been a valid appointment. As Mann J put it in *Petit v Bradford Bulls (Northern) Ltd (in administration)* [2016] EWHC 3557 (Ch); [2017] BCC 50, [1], there is an *"almost infinite number of ways in which the appointment of administrators can go wrong and require proceedings in the court in order to try and fix the problem."* A number of conflicting first instance decisions, many argued on one side only or reached without citation of relevant prior authorities, exist on a number of aspects of the regime. The authorities up to mid-2020 were carefully analysed in detail by His Honour Judge Davis-White QC (sitting as a High Court judge) in *Re A.R.G. (Mansfield) Ltd* [2020] EWHC 1133 (Ch); [2020] BCC 641, [55]-[88].

14. At the level of general principle, a distinction is to be drawn between defects in procedure (which do not render the appointment a nullity and may be remedied) and defects that go to the fundamental validity of the appointment (which result in an invalid appointment and cannot be cured). This distinction has been widely applied, including by Norris J in *Re Euromaster Ltd* [2012] EWHC 2356 (Ch); [2012] BCC 754 and Marcus Smith J in *Re Skeggs Beef Limited* [2019] EWHC 2607 (Ch); [2020] BCC 43.

15. HHJ Davis-White QC also took this approach in *Re A.R.G. (Mansfield) Ltd*, identifying the following questions that the court should consider:

    i) What are the statutory requirements?

    ii) If they have been breached, is the consequence, as a matter of construction of the provisions, that there is only a procedural defect or is the appointment a nullity?

    iii) If the appointment is subject to a procedural defect, is substantial injustice caused by what would otherwise be its validation under r.12.64?

    iv) If there is such substantial injustice, can this be remedied by court order?

    v) If the appointment is a nullity, can and should the defect be cured by a retrospective order?

16. In *Re Caversham Finance Ltd (in administration)* [2022] EWHC 789 (Ch), Michael Green J accepted a submission that the authorities concerning the out of court appointment of administrators are equally applicable to the out of court consensual extension of their appointment and directed himself according to the cases I have just cited. *Re Caversham* also concerned an issue with the need to give reasons under r.3.54(2) of the Rules. Michael Green J rejected a suggestion that, although the notices themselves did not give reasons, a reference in the covering letters to the administrators' first progress report, which provided such reasons, meant that there had been no defect. The judge held, however, that the failure of the administrators to give reasons in the notice did not result in a nullity and could not have been intended by Parliament to have had that consequence. There was no substantial injustice to creditors and the judge made a declaration that the administrations had been validly extended by consent.

17. The administrators in the case before me submitted that the court should take a similar approach to that taken by Michael Green J in *Re Caversham* and make a declaration that the administrations had been validly extended by consent to 7 June 2022.

Discussion

18. Addressing the issues in the same order as those identified by HHJ Davis-White QC *Re A.R.G. (Mansfield) Ltd* and summarised at §15 above, the answer to the first question is that the relevant statutory requirements are the need to obtain the consent of the secured and preferential creditors for the purposes of para.76(2)(b) of Schedule B1 and to give reasons for the purposes of r.3.54(2) of the Rules.

19. Turning to the second question concerning breach and its consequence, Mr Harry pointed to matters contained in the administrators' proposals and the report they had prepared for the purposes of SIP16 in relation to the pre-pack sale of parts of the Company's business and the reference to those documents in the covering letters dated 4 August 2020. Mr Harry realistically accepted,

however, that similar incidental reference to the progress report in *Re Caversham* had not been sufficient for compliance with r.3.54(2) and did not press the point that this case should be treated any differently. It seems to me that, in any event, the proposals and the SIP16 report were neutral on the question of any possible extension and cannot be said to have contained reasons for it. In my judgment, the requirements of r.3.54(2) were breached in this case.

20. On the face of it, this case would appear to be directly analogous to the facts of *Re Caversham*, in that both concern a breach of r.3.54(2). A possible point of distinction was, however, addressed at the hearing. This arises from the gap in the present case between the creditors' consents having been obtained in August 2020 (two months after the Company entered administration) and the notice of extension being filed in April 2021 (two months before the administration would otherwise have come to an end). Mr Harry candidly submitted that the reason for this gap was that the consents were obtained from the creditors at least partly on a contingent basis, at a time when the administrators had not reached a final decision on whether or not an extension would be necessary. This is why the consents contained the words *"...if required"*: see §8 above. Mr Harry submitted that this approach was sensible in the context of a significant administration, where it was always highly likely that more than 12 months would be required. As a matter of common sense, he submitted, it was sensible for the administrators to get the consents *"in their back pocket"* in the interests of minimising cost and inconvenience to the creditors.

21. I explored with Mr Harry the possibility that it might be said that unless and until a decision to seek an extension has been taken, no reasons for seeking such an extension are capable of being provided, and whether this could be said to be a point of distinction with the position in *Re Caversham*. In *Re Caversham*, although Michael Green J did not accept that the indirect references in the covering letters to the progress report containing reasons meant that r.3.54(2) had been complied with, he observed later that the creditors receiving the notices could have easily found out the reasons had they wanted to. This would appear to contrast with the instant case, where the decision to seek an extension had not crystallised when the consent was sought and neither, it would seem, had the reasons.

22. Although paras.76 to 78 of Schedule B1 do not spell out that any firm decision must have been taken before consent is obtained, it appears from the wording of r.3.54(2) that this was likely to have been the intention of the draftsperson of the Rules. Rule 3.54(2) requires the notice to *"state the reasons why the administrator* <u>*is seeking*</u> *an extension"* (my emphasis). The use of the present tense implies that the administrator must actually have decided to seek an extension at the time when consent is obtained, for otherwise their reasons for doing so are incapable of being stated.

23. There was no comparable discussion in *Re Caversham*, although it appears that there may also have been at least an element of contingency in that case, in that the progress report referred to in the covering letters enclosing the notices and on which the administrators sought unsuccessfully to rely as giving reasons for the purposes of r.3.54(2) by way of indirect reference stated that *"...the administrations are currently due to end on 29 March 2021, albeit it is likely*

that the administrators will request from either creditors or the court that the administrations be extended beyond the initial period...": see [2022] EWHC 789 (Ch). The words *"it is likely that"* indicate that the reasons that could have been given to the creditors for seeking that extension may have had a degree of conditionality about them.

24. Ultimately, I accept Mr Harry's submission that whether or not any reasons that might have been given were conditional or unconditional or non-existent at the time the consents were sought, the defect in this case is a failure to give reasons for the purposes of compliance with r.3.54(2) of the Rules, just as was the case in *Re Caversham*. That rule was not complied with in both cases and in my judgment the possibly contingent nature of any reasons that might have been given (but were not) in this case does not convert the failure to comply with that rule from a procedural irregularity into a matter going to fundamental validity.

25. Having said that, however, it is right to record, as I did at the hearing, that unambiguous compliance with the requirement in r.3.54(2) of the Rules to give reasons for seeking an extension is always likely to be difficult where contingent consents are obtained as a matter of routine at a relatively early stage of an administration and before real thought has been given to whether or not an extension of the administrator's appointment beyond the initial one year period will be required. Further, the practice of obtaining contingent consent may introduce uncertainty in relation to compliance with para.78(5) of Schedule B1, which requires that *"where an administrator's term of office is extended by consent he shall as soon as reasonably practicable…(a) file notice of the extension with the court, and (b) notify the registrar of companies."* Accordingly, the practice of obtaining consent to an extension prior to the decision in question being taken would seem to make clear compliance with the Act and the Rules difficult.

26. I turn now to the third of HHJ Davis-White QC's questions. Having found that the extension of the administrators' appointment was subject to a procedural defect, I must ask whether there is substantial injustice caused by what would otherwise be its validation under r.12.64.

27. In my judgment, there is no substantial injustice. BEIS was paid in full on 28 April 2021 (i.e. prior to the expiry of the first twelve month period of the administrators' appointment) and Barclays was paid in full on 5 May 2022. Both have nonetheless given confirmation in writing on 25 May 2022 to the effect that they supported Application 2. BECAP12 is the only secured or preferential creditor with a remaining interest in the Company and it too has reaffirmed its consent in correspondence dated 25 May 2022. Accordingly, there does not appear to be any other interest capable on any view of being prejudiced by the question over the validity of the extension of the administrators' terms of office to 7 June 2022.

28. Having answered the second and third questions in the way I have, there is no need to go on to consider the fourth and fifth questions.

29. As mentioned at the start of this judgment, I granted the declaration sought by Application 2 at the end of the hearing on 1 June 2022, i.e. that the terms of

office of the administrators were effectively and validly extended to 7 June 2022 under para.76(2)(b) of Schedule B1 to the Insolvency Act 1986 and that any defect or irregularity in respect of compliance with the notice provisions of r.3.54(2) of the Rules is hereby remedied under r.12.64 of the Rules.

30. This leaves Application 1, by which the administrators sought a further extension of their appointment for 12 months until 7 June 2023. As Snowden J, as he then was, recorded in *Re Nortel Networks UK Ltd* [2017] EWHC 3299 (Ch); [2018] 1 BCLC 513, [22]:

> *"The Court's discretion under paragraph 76(2)(a) is not circumscribed in any express way, but it is readily apparent that it should be exercised in the interests of the creditors of the company as a whole, and that the Court should have regard to all the circumstances, including (i) whether the purpose of the administration remains reasonably likely to be achieved, (ii) whether any prejudice would be caused to creditors by the extension, and (iii) any views expressed by the creditors. In that regard, where a company is making distributions to its unsecured creditors within the administration process, it is likely to be appropriate that the administrator's term of office should be extended to allow the distributions to be made, rather than to require the company to go into liquidation, which might well increase the costs or delay the distribution process with no countervailing benefit."*

31. The evidence of the administrators indicates that a number of tasks remain to be undertaken before the administration can be concluded. These include concluding the final aspects of a licence to occupy granted to the pre-pack purchaser in relation to the Company's 21 leasehold properties; dealing with VAT refunds; agreeing the claims of unsecured creditors and distributing the prescribed part to them; making a final distribution to the remaining secured creditor once the prescribed part has been set aside; and dealing with the orderly close of the administration. Further, the administrators have considered and rejected the alternatives to an extension to the administration: liquidation is not in the interests of the creditors on the ground of cost and dissolution is inappropriate because there remain assets to be distributed. Moreover, this is the first time the court has been asked for an extension in what has been a high-profile and substantial administration. For these reasons, I also granted a twelve month extension to the administrators' appointments under para.76(1)(a) of Schedule B1 to the Act.