Neutral citation number: [2019] EWHC 3499 (Ch)

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

Case No: CR-2019-MAN-001146

Courtroom No. 42

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Monday 11th November 2019

Before:
HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

IN THE MATTER OF KEYWORKER HOMES (NORTH WEST) LIMITED

Between:

(1) JEREMY WOODSIDE
(2) CHRISTOPHER RATTEN
(Joint Administrators of Keyworker Homes (North West) Limited)

Applicants

\- and -

KEYWORKER HOMES (NORTH WEST) LIMITED

Respondents

MISS CARLY SANDBACH appeared on behalf of the Applicant

The Respondent did not appear and was not represented

APPROVED JUDGMENT

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JUDGE HODGE QC:

1. This is my extemporary judgment in the matter of Keyworker Homes (North West) Ltd. This is an application made by the purported and joint administrators of Keyworker Homes (North West) Ltd, Mr Jeremy Woodside and Mr Christopher Ratten, to which the company is the sole respondent. The applicants are represented by Miss Carly Sandbach (of counsel) who has produced an extremely detailed written skeleton argument in support of the application.

2. In summary, the applicants are concerned as to the validity of their appointment as administrators of the company. On 7 November 2019 they issued an application seeking a declaration that they were validly appointed on 25 October 2019. Alternatively, they seek a declaration, pursuant to paragraph 104 of Schedule B1 to the Insolvency Act 1986, that all acts they have undertaken since 25 October 2019 have been validly undertaken notwithstanding any defect or irregularity in their appointment, and an order waiving any defect or irregularity in their appointment pursuant to rule 12.64 of the Insolvency Rules 2016. In the further alternative, they seek a retrospective extension of time pursuant to CPR 3.10 for filing the notice of their appointment as administrators.

3. The evidence in support of the application is contained within the witness statements of Mr Jeremy Woodside, one of the two purported joint administrators, and Mr Simon Banks, a solicitor with Trowers & Hamlins LLP (who acted in relation to the appointment of the joint administrators) both dated 7 November 2019, together with their respective exhibits JW1 and SMB1.

4. The factual background is extremely simple. On 11 October 2019 at 16.29 a notice of intention to appoint administrators was electronically filed at court on behalf of the directors of the company. The date and time is that endorsed by the court on the face of the notice of intention to appoint. That notice was served upon Lloyds Bank plc as a qualifying floating charge holder and upon the company.

5. Lloyds Bank provided their consent to the proposed appointment on 17 October 2019. On 24 October 2019 at 18.00 a notice of appointment of administrators was electronically filed

at court. A copy of the E-filing Approval confirms that filing was "accepted by the Clerk on 24-10-2019 06:00 PM". The notice of appointment was received back on 25 October 2019 having been endorsed as follows: "This notice was filed ON 25 OCTOBER 2019 AT 10:AM".

6. Miss Sandbach points out that those facts, together with the potential effect of a number of recently reported decisions, have given rise to concerns on the part of the administrators as to the validity of their appointment. Out-of-court appointments, and questions over their validity in the event of non-compliance with all the statutory requirements, have for some time given rise to a significant amount of case law. The introduction of electronic filing, and the apparent conflicts between that regime and the various legislation and practice directions, have generated significant further case law. The decisions comprised within that body of case law are not all consistent with one another. In particular, this application raises a question as to the correct meaning of paragraph 8.1 of the Insolvency Practice Direction and whether it should or does preclude the company or its directors from filing notices of appointment of administrators outside the court's usual counter opening hours by using the courts 24 hours E-filing system.

7. Miss Sandbach suggests that in determining the validity of the administrators' appointment in this case, and what if any relief is to be granted to regularise that appointment, three questions fall to be determined:

> (1) At what date and time is the notice of intention deemed to have been filed?
>
> (2) How is the period of '10 business days' referred to in paragraph 28(2) of Schedule B1 to the Insolvency Act 1986 to be calculated?
>
> (3) At what date and time is the notice of appointment deemed to have been filed?

8. It is necessary to begin by considering the legislative background. Paragraph 22 of Schedule B1 gives both a company and its directors the power to appoint an administrator. By paragraph 26(1) a person who proposes to make an appointment under paragraph 22 shall give at least 5 business days' written notice to - (a) any person who is or may be entitled to appoint an administrative receiver of the company, and (b) any person who is or

may be entitled to appoint an administrator of the company under paragraph 14.

9. By paragraph 27(1) a person who gives notice of intention to appoint under paragraph 26 is to file with the court as soon as is reasonably practicable a copy of the notice and any document accompanying it. Paragraph 28 provides (by sub-paragraph (1) that an appointment may not be made under paragraph 22 unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27 and - (a) the period of notice specified in paragraph 26(1) has expired, or (b) each person to whom notice has been given under paragraph 26(1) has consented in writing to the making of the appointment.

10. By paragraph 28(2) an appointment may not be made under paragraph 22 "after the period of ten business days beginning with the date on which the notice of intention to appoint is filed under paragraph 27(1)". Paragraph 29(1) provides that a person who appoints an administrator of a company under paragraph 22 shall file with the court - (a) a notice of appointment, and (b) such other documents as may be prescribed. Paragraph 30 provides that the appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied.

11. Paragraph 32 requires a person who appoints an administrator under paragraph 22 - (1) to notify the administrator and such other persons as may be prescribed as soon as is reasonably practicable after the requirements of paragraph 29 are satisfied, and (b) commits an offence if he fails without reasonable excuse to comply with that requirement. Paragraph 44(4) applies from the time when a copy of notice of intention to appoint an administrator is filed with the court under paragraph 27(1) until - (a) the appointment of the administrator takes effect, or (b) the period specified in paragraph 28(2) expires without an administrator having been appointed.

12. Paragraph 44(5) provides that the provisions of paragraphs 42 and 43 shall apply (ignoring any reference to the consent of the administrator). The effect of paragraphs 44(4) and 44(5) is that the moratorium on insolvency proceedings and other legal process contained within paragraphs 42 and 43 apply from the time when a copy of the notice of intention to appoint an administrator is filed with the court under paragraph 27(1) until either of the dates

specified in paragraph 44(4)(a) or (b). That is the relevant statutory background.

13. For present purposes, the key provision is paragraph 28(2) whereby an appointment may not be made by the directors of a company "after the period of ten business days beginning with the date on which the notice of intention to appoint an administrator is filed under paragraph 27(1)".

14. The current position with regards to electronic filing and the Insolvency Practice Direction is as follows:

15. Part Two of the Insolvency Practice Direction is headed 'Company Insolvency.' Paragraph 8 is headed 'Administrations.' Paragraph 8.1 reads as follows:

> "8.1 Attention is drawn to para 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 IPD, where a notice of appointment is made using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-para (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 rr 3.20 to 3.22 shall in those circumstances continue to apply.
> 8.2 Paragraph 5.4 of the Electronic Practice Direction 51O provides that 'the date and time of payment' will be the filing date and time and 'it will also be the date and time of issue for all claim forms and other originating processes submitted using Electronic Working'."

16. Paragraph 8.3 deals with applications for the extension of an administration. There are no other paragraphs relating to the administration of companies.

17. Paragraph 2.1 of the current Electronic Practice Direction 51O, headed 'Usage and operation of Electronic Working', provides as follows:

> "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—
> (a) where there is 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;

> (b) where there is 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."

18. By paragraph 2.A2 of the Practice Direction 51O, in the Rolls Buildings Jurisdictions from 1 October 2017 -

> "(a) for a party who is legally represented, Electronic Working must be used by that party to start and/or continue any relevant claims or applications; and
> (b) for a party who is not legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications."

19. By paragraph 2.2B, in the Business and Property Courts District Registries from 25 February 2019, "for a party who is legally represented, as well as for a party who is not legally represented, Electronic Working may be used by that party to start and/or continue any relevant claims or applications". By paragraph 2.2C in the Business and Property Courts District Registries from 30 April 2019, "for a party who is legally represented, Electronic Working must be used by that party to start and/or continue any relevant claims or applications".

20. Miss Sandbach submits that the interpretation and rationalisation of those provisions will be assisted by considering how the legislation arrived at the current position. She has undertaken a survey of the historical position. Historically, and before the introduction of the Insolvency Rules and the Electronic Working Pilot Scheme and the Insolvency Rules 2016, rule 13.13 of the 1986 Rules defined "file with the court" in terms of "deliver to the court for filing". Before 2003, all insolvency proceedings were required to be delivered to the court by 'conventional' means.

21. From 15 September 2003, rule 2.19 of the Insolvency Rules 1986 introduced a special regime for the appointment of administrators by qualifying floating charge holders outside of the usual court counter opening hours. This was first introduced to coincide with section 72A of the Insolvency Act 1986 which, generally speaking, severely curtailed the ability of

a qualifying floating charge holder to appoint an administrative receiver. The new rule permitted a qualifying floating charge holder to file notice of appointment of an administrator, notwithstanding that the court was not open for business, by faxing a designated telephone number. The rule provided that the appointment would take effect from the time and date showing on their required fax transmission report.

22. With effect from 6 April 2010, rule 12A.14 of the Insolvency Rules 1986 was introduced and laid down, for the first time, the circumstances in which (and the means by which) documents might be electronically delivered to the court. The effect of that new rule was seemingly to introduce a general prohibition on filing by electronic means, unless either (1) permitted by another rule, or (2) permitted by a practice direction.

23. At that time there was no statutory regime for the electronic filing of documents otherwise than by a qualifying floating charge holder in relation to the appointment of administrators out of hours. At the same time as Insolvency Rule 12A.14 was introduced, rule 2.19 of the Insolvency Rules 1986 was extended to permit a qualifying floating charge holder to file a notice of appointment out of hours by attachment to an email sent to a designated email address. At that time that was the only way of appointing administrators out of hours.

24. With effect from 16 November 2015, the Practice Direction on Electronic Working was introduced. With effect from 6 April 2017, the new 2016 Insolvency Rules came into force. Rule 1.2 introduced a new definition of "file with the court". It meant "deliver to the court for filing" and references to "file with the court" were to be read as including "submit" and "submission" (with specified exceptions).

25. Rule 1.46 of the Insolvency Rules 2016, provided:

> "(1) A document may not be delivered to a court by electronic means unless this is expressly permitted by the CPR, a Practice Direction, or these Rules.
> (2) A document delivered by electronic means is to be treated as delivered to the court at the time it is recorded by the court as having been received or otherwise as the CPR, a Practice Direction or these Rules provide."

26. On the same day, the Practice Direction for Electronic Working was amended to provide a new paragraph 1.1(2) which provided that: "Electronic Working is a permitted means of

electronic delivery of documents to the court for the purposes of rule 1.46 of the Insolvency (England & Wales) Rules 2016".

27. Thereafter, the Practice Direction on Electronic Working was amended in November 2017 to include, in paragraph 2.1(c), an exception in relation to the filing of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the Insolvency Rules 2016 and the court was closed, in which case the filing was required to be in accordance with rule 3.20 of the Insolvency Rules 2016. Paragraph 2.2 provided that Electronic Working applied to and might be used to start and/or continue (amongst others) insolvency proceedings. As I have already indicated, the Insolvency Practice Direction was updated in April 2018.

28. The Insolvency Rules 2016 provide for the administration of companies in Part 3. In Chapter 3, rules 3.16 to 3.22 relate to the appointment of an administrator by the holder of a floating charge. Paragraph 3.20 relates to an appointment taking place out of court business hours and sets out the procedure for filing notice of appointment with the court either by faxing it to a designated telephone number or by emailing it, or attaching it to an email, to a designated email address. Paragraph 3.21 relates to the contents of such a notice, and paragraph 3.22 relates to the legal effect of the filing of the notice in accordance with rule 3.20. Chapter 4, comprising Insolvency Rules 3.23 to 3.26, relates to the appointment of an administrator by a company or director.

29. Miss Sandbach points out that specific consideration as to the operation and effect of paragraph 8.1 has been given in three recent decisions. She also considers the requirement in paragraph 28(2) of Schedule B1 that the appointment of an administrator may not be made by the directors under paragraph 22 after the period of 10 business days beginning with the date on which the notice of intention to appoint is filed under paragraph 27.1. It seems to me that that is the logical place to begin.

30. Miss Sandbach points out that there are two ways of construing that temporal restriction. The first is what she describes as "the expansive, clear days approach", which involves ignoring in the calculation the day on which the notice of intention to appoint is filed with the court. That approach is said to be consistent with the view of the matter taken by Norris

J in the case of *Re Euromaster Ltd* [2012] EWHC 2356 (Ch), reported at [2013] BLR 466, and also by the Court of Appeal in a judgment delivered by Richards LJ (with the concurrence of Jackson and Flaux LJJ) in the case of *JCAM Commercial Real Estate Property XV Ltd v Davis Haulage Ltd* [2017] EWCA Civ 267, reported at [2018] 1 WLR 24. In both cases, the court effectively allowed ten clear business days after the filing of the notice of intention to appoint for the appointment of the administrator. In neither case, however, would it appear that any express point was taken with regard to the proper approach to the computation of time.

31. In *Re Euromaster Ltd* the notice of appointment had been filed just after the end of the ten-day period and the issue was as to the approach to be taken by the court in determining the outcome of non-compliance with the ten-day window. In the *JCAM Commercial Real Estate* case the issue was as to the director's intention in giving notice and filing notice of intention to appoint an administrator and specifically the effect where the director's intention was conditional on the company failing to obtain a company voluntary arrangement.

32. Miss Sandbach recognises that a more restrictive approach was adopted by Insolvency and Companies Court Judge Burton in the case of *Re SJ Henderson & Company Ltd* [2019] EWHC 2742 (Ch) where the judge would have effectively permitted only nine clear business days for the valid appointment of an administrator. In the present case, Miss Sandbach invites the court to adopt the more expansive interpretation. On that basis, given that the notice of intention to appoint was filed at court on 11 October, Miss Sandbach submits that a notice of appointment, even if filed on 25 October, would have been filed within the period of ten business days.

33. In my judgment, the approach described by Miss Sandbach as the "expansive" approach, effectively allowing for a window of ten clear business days, is the correct approach. Thus, even if the notice of appointment in the present case was only validly and effectively filed on 25 October, in my judgment the administrators' appointment was valid.

34. Paragraph 28(2) of Schedule B1 provides that an appointment may not be made under paragraph 22 after the period of ten business days beginning with the date on which the

notice of intention to appoint is filed under paragraph 27(1). In the present case, the notice of intention to appoint was filed electronically at 16.29 on 11 October.

35. In agreement with the views of Insolvency and Companies Court Judge Burton in *Re SJ Henderson & Company Ltd* at paragraphs 99 to 101, I am satisfied that a notice of intention to appoint may validly be filed out of court office hours through the Electronic Working system. Thus, the period of ten business days began with Friday 11 October.

36. Working forward, the first working day after 11 October was Monday 14 October. The 10th working day after 11 October was Friday 25 October. On the ordinary language of paragraph 28(2), it seems to me that a notice of appointment filed on Friday 25 October is filed within the period of ten business days beginning with 11 October.

37. It is only if the filing of the notice of appointment had been delayed until Monday 28 October that it would have been made after the period of ten business days beginning with 11 October as the date upon which the notice of intention to appoint was filed. In my judgment, on its true construction, paragraph 28(2) gives a window of ten full business days for the appointment of an administrator or administrators to be made.

38. On that footing, it becomes unnecessary to decide whether the notice of appointment was validly filed in the present case on Thursday 24 or Friday 25 October. Nevertheless, because of the uncertainty created by the recent authorities, and because of the full submissions I have received on the point from Miss Sandbach, I proceed to go on to consider that question. That involves consideration of the true meaning and effect of paragraph 8 of the Insolvency Practice Direction currently in force in the light of the observations in the three recent authorities to which Miss Sandbach has taken me.

39. The first of those authorities, decided on 24 January 2019, is the decision of Barling J in the case of *Re HMV Ecommerce Ltd* [2019] EWHC 903 (Ch). In that case notices of appointment were filed by directors by way of e-filing at 5.54 on 28 December 2018. Later in the evening of that day there was a telephone hearing in which, on the application of the administrators, Barling J made an order declaring that they had been validly appointed as such with effect from 17.54 that day, being the time at which the notices had been

electronically filed.

40. Barling J had regard to the Practice Direction 51O, relating to Electronic Working, and also paragraph 8.1 of the Insolvency Practice Direction. Barling J referred to "the somewhat byzantine terminology of that provision" and the concern to which that had given rise as to the validity of the notice of appointment because it had been made outside court opening hours. The appointment in that case had been made by the directors of the company.

41. At paragraph 6, Barling J said that "the curious aspect" of paragraph 8.1 was that it stated that the provisions of the Insolvency Rules 3.20 to 3.22 should, in the circumstances identified in the second sentence, continue to apply. However, as Barling J pointed out, those paragraphs of the rules were only dealing with a notice of appointment filed by the holders of a qualifying floating charge and did not have any relevance to a notice of appointment filed by the company or its directors. Therefore, the concept of those rules "continuing to apply" could only be a reference to a notice of appointment filed by a qualifying floating charge holder.

42. At paragraph 11, Barling J said that he had been invited to find that despite a possible breach of paragraph 8.1 of the Practice Direction, the administrators' appointment was nevertheless effective as from 5.54 pm on 28 December. Even if there were a defect in the appointments, he was asked to grant a declaration under paragraph 104 of Schedule B1 that no act of the administrators was invalid despite such defect. Further or alternatively, if there were a defect which it was necessary to remedy, he was asked retrospectively to extend time for filing the notes of appointment and/or to waive the defect pursuant to rule 12.64 of the Insolvency Rules

.

43. At paragraph 14 Barling J said that the purpose of paragraph 8.1 of the Insolvency Practice Direction was not immediately apparent. The Electronic Working Pilot Scheme itself very clearly indicated that the intention was that documents should be able to be filed electronically at any time, save in specific cases. If the applicants' concern as to the possible meaning of paragraph 8.1 were correct, the provision might detract from that objective.

44. Barling J recorded that counsel had not been able to identify any obvious purpose of paragraph 8.1, save that in removing what would otherwise be the power of directors in the company to file a notice of appointment out of court hours, it would bring their options into line with filings by a qualifying floating charge holder and thereby remove any apparent difference of treatment. However, there was said to be no evidence that that was what was intended, and the two situations were said not be in all respects comparable.

45. At paragraph 15, Barling J was of the clear view that the consequences of non-compliance with the provision in question were not such that it must have been intended that the result of non-compliance should be the total invalidity or nullity of the appointment. The provision did not go to the power to appoint but was one concerning the time from which an appointment would take effect. It was difficult to envisage any circumstances in which failure to comply would give rise to nullity or invalidity so far as the appointment itself was concerned.

46. At paragraph 20, Barling J said that paragraph 8.1 of the Practice Direction was open to more than one interpretation. It might be that it only had application to filings by qualifying floating charge holders, in which case there was no issue in the case before him. However, in case it did also apply to filings of the kind with which he was concerned, namely by directors, it would have been appropriate to grant a "precautionary remedy", either by extending time or by making an appropriate declaration or indicating that the court was prepared to waive any non-compliance with the rule or by granting all of those alternative remedies.

47. In the event, and without hesitation, Barling J granted a declaration that the administration had taken effect at 5.54 on 28 December, when notices of appointment of administrators were first filed. He granted a declaration as to the validity of the steps taken by the administrators since that time; and, for the avoidance of doubt, he extended time pursuant to CPR Part 3 and waived any non-compliance pursuant to rule 12.64.

48. Miss Sandbach points out that applying Barling's J analysis to the facts of the instant case, to the extent that the filing of the notice of appointment at 18.00 on 24 October 2019 was a technical breach of the provisions of paragraph 8.1 of the Insolvency Practice Direction, the

court could and should make an order in similar terms to that in the case before Barling J, to the effect that the administration commenced at 18.00 on 24 October 2019. On that basis, there would there have been no question that the notice of appointment was filed within ten business days beginning with the date on which the notice of intention to appoint had been filed and thus no concern as to the validity of the appointment of the administrators in this case.

49. Barling's J decision was the subject of consideration by Marcus Smith J in the second of the trilogy of cases, *Re Skeggs Beef Ltd* [2019] EWHC 2607 (Ch). That case concerned the appointment as administrators by the holders of a qualifying floating charge. The 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 Rules 2016. Thus, the case is clearly distinguishable from the present situation where the appointment was by the directors of the company and not by qualifying charge holders.

50. At paragraph 4, Marcus Smith J said that in order to understand the applicants' concerns about their appointment, it was necessary to consider first the provisions as they had changed over time regarding the appointment of administrators by the holder of a qualifying floating charge and then the provisions, again as they had changed over time, regarding the Electronic Working Pilot Scheme for the filing of documents. Marcus Smith J considered the provisions in the Insolvency Act and the Insolvency Rules at paragraphs 5 through to 8. He considered the provisions relating to the Electronic Working Pilot Scheme at paragraphs 9 through to 11.

51. At paragraphs 12 through to 17, Marcus Smith J considered the interrelationship between the Insolvency Rules and the electronic filing rules. In the course of doing so, he paused to refer to Barling's J decision and to set out his conclusions in relation to it at paragraphs 15 and 16. At paragraph 12, Marcus Smith J considered there to be two regimes for the electronic filing of documents; one was 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 Rules 2016; the other was a much more wide ranging regime under the CPR in Practice Direction 51O.

52. What is important, to my mind, is that I cannot see that Marcus Smith J gave any

consideration to Insolvency Rule 1.46, and in particular to sub-rule (1) providing: "A document may not be delivered to a court by electronic means unless this is expressly permitted by the CPR, a Practice Direction, or these Rules". At paragraph 13, Smith J said that where the Insolvency Rules specified in great detail a regime for the notification of the appointment of administrators, that regime could not be trumped or overwritten by Practice Direction in the CPR.

53. I would agree with that in so far as it applies to the position of a qualifying floating charge holder, which is expressly governed by Insolvency Rules 3.20, 3.21 and 3.22. I would not however agree in relation to the appointment of administrators by a company or its directors, which is not specifically addressed in the Insolvency Rules. At paragraph 14, Smith J made the point that Practice Direction 51O did no more than permit the electronic filing of documents and the issue of proceedings electronically provided that that was not inconsistent with other rules. He said that where, as here, the Insolvency Rules 2016 specified, in rule 3.20, that notice of the appointment of an administrator by the holder of a qualifying floating charge might be filed electronically or by fax when (but only when) the court office was closed, and then only by following the quite stringent provisions in those Rules, those rules continue to stand and were not overwritten by the Practice Direction. Again, I would agree with that in relation to appointments made by qualifying floating charge holders, but not to appointments made by a company or its directors, which are not addressed by the Rules and where Insolvency Rule 1.46 specifically provides that "a document may not be delivered to a court by electronic means unless this is expressly permitted by the CPR, a Practice Direction, or these Rules". Except in relation to appointments by qualifying floating charge holders, it does seem to me that a document may be delivered by electronic means pursuant to Practice Direction 51O. It was at this point that (at paragraph 15), Marcus Smith J referred to Barling's J decision in the *Re HMV Ecommerce Ltd* case. Since, as Marcus Smith J acknowledged at sub-paragraph 15 (1) of his judgment, in that case the directors of the two companies had electronically filed notices of appointment, Marcus Smith's J observations about Barling J's decision are strictly obiter since (unlike Barling J) he was concerned with the filing of notices of appointment by qualifying floating charge holders.

54. At sub-paragraph 15(5) of his judgment, Marcus Smith J recorded that Barling J had

considered that whilst the 2018 Insolvency Practice Direction had made clear that Practice Direction 51O could not apply to 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. At paragraph 16, Marcus Smith J said that given the material that was before Barling J, it was possible "to have a great deal of sympathy" with that view because Barling J had not been shown "the entire legislative history". However, it seemed to Marcus Smith J to be "absolutely clear", in light of all the material, that notice of the appointment of administrators must be pursuant to the Insolvency Rules 2016 and not pursuant to Practice Direction 51O. If the Insolvency Rules provided for out of court notification of the appointment of an administrator then, provided those Rules were followed, the appointment would be valid. However, if there was no such provision in the Insolvency Rules, then the absence could not be made good by resort to Practice Direction 51O.

55. Marcus Smith J summed up the position at paragraph 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." With respect to Marcus Smith J, I consider that to be not only obiter (because he was not concerned with an appointment otherwise than by a qualifying floating charge holder), but also to be wrong. In my judgment, it is wrong because it does not have any regard to the provisions of Insolvency Rule 1.46, which expressly contemplates that a document may be delivered to a court by electronic means where this is expressly permitted by a Practice Direction. It seems to me that the Practice Direction 51O is such a practice direction. Save in the case of notices of appointment by qualifying floating charge holders, which are subject to the specific regimes set out in Insolvency Rules 3.20 to 3.22, in my judgment the Insolvency Rules do not prevent the electronic filing of notices of appointments. In particular, they do not apply to the filing of notices of appointment by a company or its directors. Therefore, I disagree with Marcus Smith J insofar as he disagreed with Barling J.

56. Marcus Smith J then went on to consider the facts of the particular case before him and he concluded that the case was one of the filing of a notice of appointment in the wrong manner which amounted to a defect or irregularity that was not fundamental and could be cured by reference to rule 12.64 of the Insolvency Rules. In that regard, I agree with

Marcus Smith J's analysis and conclusion.

57. The third in the trilogy of cases is the case of *Re SJ Henderson and Company* (previously cited). That was a decision of Insolvency and Companies Judge Burton. At paragraph 59 and following the judge dealt with the introduction of the Insolvency Practice Direction and specifically paragraph 8.1. She considered whether there had been an error in its drafting and its meaning. The judge rejected the submission that something had plainly gone wrong with the drafting of paragraph 8.1 of the Insolvency Practice Direction. At paragraph 77, the judge accepted that neither the 1986 Act nor the 2016 Rules, nor indeed the 1986 Rules, had expressly disapplied the Practice Direction on Electronic Working, nor did they expressly state that the company or its directors might not file notices of appointment out of court hours. However, the judge said that rule 12.1(1) of the 2016 Rules stated that the provisions of the CPR and any related practice directions applied except so far as disapplied by or inconsistent with the Rules.

58. The judge said that there had been no demonstration of an intention on the part of the legislature to permit the extraordinary power held by qualifying floating charge holders to appoint administrators out of hours to become available to companies or their directors. Interpreting the Practice Direction on Electronic Working in a manner which gave rise to such a power would, in the judge's view, be inconsistent with the Rules.

59. The judge did not consider that the introduction of the Practice Direction on Electronic Working could, without more, have that effect. If correct in this, the wording at paragraph 8.1 of the Insolvency Practice Direction was said to reveal no mistake, and the judge set out her understanding of each of its provisions in paragraph 78. At paragraph 79, the judge said that she was satisfied that this construction:

> "(i) facilitates an interpretation that corresponds to the grammatical meaning of the words used;
> (ii) reflects not only what is expressed but also what may properly be implied (on the basis that the 2016 Rules expressly reserve only to QFCHs the right to appoint an administrator out of hours and thereby indirectly suggest that such a right should be preserved only to QFCHs); and thereby
> (iii) implements the legislative purpose of the 2016 Rules, which empowers only QFCHs to appoint administrators out of hours which was in part to compensate them for the loss of an ability to appoint an administrative

receiver at any time of day or night.’

60. Adopting that interpretation of paragraph 8.1 of the Insolvency Practice Direction, the judge considered the effect on an appointment purportedly made by directors (or their professional advisers) who e-filed a notice of appointment outside of court opening hours. The judge's conclusion was that such an appointment should be construed as taking effect as at the next point in time at which the court office was open.

61. The judge also expressed the view (at paragraph 89) that the e-filing outside of court counter opening hours was not merely a procedural defect. In her judgment, until such time as the legislature created an express power for appointments under paragraph 22 of Schedule B1 to be made out of hours, they simply could not be made, and whether in a curably defective manner or otherwise.

62. I do not agree with Judge Burton’s construction of or approach to the Insolvency Rules and Insolvency Practice Direction. In my judgment, it ignores the fact that Insolvency Rule 1.46 contemplates that a document may be delivered to a court by electronic means if permitted by a practice direction. In my judgment, the Practice Direction on Electronic Working is such a practice direction. Indeed, I find Judge Burton's approach difficult to reconcile with the mandatory usage of Electronic Working by parties who are legally represented in the Rolls Building from 1 October 2017 and in the Business and Property Courts District Registries from 30 April 2019.

63. In my judgment, there is a clear mistake in the actual wording of paragraph 8.1 of the current Insolvency Practice Direction. I endorse Barling's J description of its wording as “byzantine”, but in my judgment sense can be made of it.

64. The first sentence expressly draws attention to paragraph 2.1 of the Electronic Practice Direction 51O. It expressly does so where a notice of appointment is made using the electronic filing system. The Practice Direction does so in a section expressly addressing the administration of companies. I can see no purpose in the first sentence of paragraph 8.1 if, as Judge Burton held, the Practice Direction 51O has no application whatsoever to the appointment of administrators using the electronic filing system. What the second sentence

then goes on to do is to draw attention to the fact that there is an exception in the case of notices of appointment made by qualifying floating charge holders, where the operative provision is not the electronic Practice Direction 51O, but rather rules 3.20 to 3.22 of the Insolvency Rules. As Barling J recognised at paragraph 6 of his judgment in *HMV Ecommerce Ltd*, the second sentence can be intended to have no application to appointments otherwise than by qualifying floating charge holders because otherwise there would be no reason to state that the provisions of Insolvency Rules 3.20 to 3.22, which apply only to qualifying floating charge holders, shall "continue to apply".

65. In my judgment, something has gone wrong with the second sentence at paragraph 8.1, and it is clear exactly what has gone wrong. What has gone wrong is that the second sentence does not make it clear that where it says that 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, it does not make it clear that that is only to apply to the filing of a notice of appointment of an administrator by a qualifying floating charge holder. If the first sentence is construed as applying generally to appointments of administrators, and the second sentence is construed to apply only so as to create an exception in the case of appointments by qualifying floating charge holders, the whole of the paragraph makes complete sense.

66. In the case of *Inco Europe Ltd and Others v First Choice Distribution (A Firm) and Others* [2000] 1 WLR 586, the House of Lords made it clear (at pages 592c to 593a per Lord Nicholls of Birkenhead) that:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words...
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in

> question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation...
> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching... Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation.'

67. In the present case, I am entirely satisfied that the intended purpose of the second sentence of paragraph 8.1 of the Insolvency Practice Direction is to address the special, and exceptional, position of qualifying floating charge holders, which continues to be governed by rules 3.20 to 3.22 of the Insolvency Rules 2016. I am satisfied that, by inadvertence, the draftsman of the Practice Direction failed to make it clear that the second sentence was so limited. If it is not so limited, then the first sentence makes absolutely no sense whatsoever.

68. I am also satisfied that the draftsman of the Practice Direction should have made it clear that 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 by a qualifying floating charge holder, otherwise there would be no point in drawing attention to paragraph 2.1 of that Practiced Direction where a notice of appointment is made using the electronic filing system. The first sentence presupposes that a notice of appointment can be made using the electronic filing system.

69. I am also satisfied that such an implication of words is not at all far-reaching and that this is not something that calls for a strict interpretation of the statutory language. Insolvency Rule 1.46 itself contemplates that a document may be delivered to a court by electronic means if expressly permitted by a practice direction. In my judgment, that is what paragraph 8.1 expressly permits in relation to the appointment of administrators otherwise than by a qualifying floating charge holder.

70. That construction also seems to me to be entirely consistent with the ethos underlying the introduction of Electronic Working and the fact that it has been made mandatory both in the

Rolls Building and in the Business and Property Courts in the District Registries where a party is legally represented. Therefore, and for those reasons, I am entirely satisfied that the notice of appointment that was filed electronically at 18.00 on 24 October took effect when it was filed at court at that time.

71. For those reasons, I will therefore make an order transferring the case which was by mistake allocated a Rolls Building case number when the person filing the notice of appointment clicked on the wrong drop-down box from the Rolls Building to the Business and Property Courts in Manchester. I will declare that the notice of intention to appoint administrators was validly filed by e-filing at 16.29 on 11 October; that accordingly the latest date by which a notice of appointment of administrators could be validly filed pursuant to paragraph 28(2) of Schedule B1 was 25 October 2019; that the notice of appointment of administrators was validly filed by e-filing at 18.00 on 24 October 2019 and that the applicants' appointment as joint administrators of the company accordingly took effect at that time and on that date; and, as a result, that the notice of appointment of administrators endorsed by the court office as having been filed at 10am on 25 October should stand amended to record that it was filed at 18.00 on 24 October.

72. I will also order that the applicants' costs of this application be payable as an expense of the administration of the company. The need for this application was not the result of any error or mistake on the part of those filing the notice of appointment. It was caused by uncertainty in the recent case law to which this judgment has been addressed and which hopefully this judgment may have done something to resolve so that this situation may not arise in the future. Therefore, that concludes this extemporary judgment.

End of Judgment

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