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

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane
London EC4A 1NL
Dated: 20th January 2021

BEFORE: DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE FRITH

IN THE MATTER OF NMUL REALISATIONS LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

Lee Andrew Causer
Danny Nicolaas William Dartnaill
Ryan Kevin Grant
(in their capacities as the joint administrators of
NMUL Realisations Limited (in administration)) — Applicants

- and –

NMUL Realisations Limited (in administration) — Respondent

Mr Hugh Sims QC and Mr Stefan Ramel (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Applicants.

The Respondent did not appear and was not represented.

Hearing date: 21 December 2020

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APPROVED JUDGMENT

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COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date for hand-down is deemed to be 20th January 2021.

Deputy Insolvency and Companies Court Judge Frith:

Introduction

1 There have been a number of cases concerning the correct approach the Court ought to adopt when dealing with potential defects in the procedure for appointing administrators out of court. This is a case which raises a novel point arising from the inappropriate filing of a notice of satisfaction of a qualifying floating charge on behalf of the Company that created the charge to secure its borrowing in circumstances where in fact, at all material times, a substantial balance remained due. This resulted in a failure to give notice to the holder of a prior security pursuant to paragraph 15 of Schedule B1 of the Insolvency Act 1986 (the **"Act"**).

2 The issue raised is whether such a failure was a fundamental defect which rendered the appointment void *ab initio* or whether it was not fundamental, caused no substantial injustice and could be remedied by an order of the court made pursuant to the provisions of rule 12.64 of the Insolvency (England and Wales) Rules 2016 (the **"Rules"**).

3 On 21 December 2020, I made a declaration that the appointment of Lee Andrew Causer, Danny Nicolaas William Dartnaill and Ryan Kevin Grant (the "**Applicants**") as the joint administrators of NMUL Realisations Limited (the **"Company"**), is valid, notwithstanding a failure on the part of the appointing charge holder to give notice to a prior chargee of its intention to do so under the provisions of paragraph 15 of Schedule B1 of the Act. These are the reasons why I did so.

4 The Applicants were represented before me by Mr Hugh Sims QC and Mr Stefan Ramel. I was assisted greatly by their concise, but comprehensive skeleton argument and their helpful oral submissions.

The Facts

5 The Applicants were appointed the joint administrators of the Company following a notice of appointment to that effect filed by Metro Bank Plc ("**Metro**") on 29 January 2020 pursuant to powers contained in a debenture created in its favour on 5 June 2019 (the "**Metro Debenture**"). Before it went into administration, the Company operated as a motorcycling manufacturer producing motorcycles bearing the well-known brand of Norton.

6 The factual matrix commences on 9 October 2008, when a Mr Stuart Garner was appointed as the sole director of the Company. He was also nominated as the person with significant control, not only of the Company, but also its parent company Norton Motorcycle Holdings Limited ("**NMHL**"). On the same day, the Company, and pursuant to its powers as the trustee of the Moya Pension Scheme ("**MSIPP**"), a company known as Tudor Capital Management Limited ("**Tudor**") entered into a loan agreement pursuant to which Tudor, as trustee of MSSIP, lent the Company a sum not exceeding £1 million at an annual rate of interest of 8% (compound). To secure the performance of its obligations under the loan agreement, the Company

granted a debenture to Tudor in its capacity as the trustee of MSIPP (the **"Tudor Debenture"**), a role that was acknowledged by Tudor when its directors executed the debenture on its behalf in that capacity. The Tudor Debenture was duly validly registered in the Companies Register in accordance with the usual statutory provisions.

7 On 5 March 2013, the two duly appointed directors of Tudor, namely Mr Andrew Meeson and Mr Peter Bradley were convicted of conspiracy to cheat the public revenue and sentenced to terms of imprisonment. On 29 September 2014, confiscation orders were made against them under the provisions of the Proceeds of Crime Act 2002. This course of events followed an investigation by the Pensions Regulator who, on 4 October 2011, gave notice that an order had been made to the effect that Tudor should be suspended from acting as a trustee in relation to trust schemes pursuant to section 4 of the Pensions Act 1995. The effect of such a notice was that Tudor was prohibited from exercising any functions as a trustee of the trust schemes. It is the understanding of the Applicants that these actions were prompted by the initiation of the criminal proceedings against Messrs Meeson and Bradley which ultimately resulted in their conviction, imprisonment and subsequently, the imposition of confiscation orders over their realisable property.

8 Tudor was dissolved on 6 December 2016. On 28 March 2018, the Tudor Debenture was noted as being satisfied at Companies House by virtue of a notice given by Mr Garner in his capacity as the director of the Company as the Chargor. It is this notification that caused the circumstances giving rise to this application.

9 Initially, it appears that Mr Garner, having not heard from either the trustee or anybody on behalf of the MSIPP for some time concluded (wrongly, as it transpired) that the loan had been discharged and the debt due to MSIPP in relation to which security was provided by the Tudor Debenture had been satisfied. Acting pursuant to that conclusion and apparently having taken oral legal advice, he caused the Company to file the notice of satisfaction at Companies House. Such notification having been provided, the Tudor Debenture was recorded as having been satisfied by the Registrar of Companies. In fact, it subsequently transpired that the Company still owed the sum of approximately £1.5 million to Tudor as trustee of MSIPP which was secured by the Tudor Debenture.

10 Mr Garner initially then negotiated a refinancing of the Company by way of a facility offered by Santander Bank UK plc. This in turn led to a further and final refinancing of the Company's liabilities by Metro under the terms of the Metro Debenture.

11 It therefore follows that at the time of the filing of the notice of intention to appoint the Applicants as joint administrators, the only charge showing on the Company's register as being unsatisfied was the Metro Debenture. Both the Santander Debenture and Tudor Debenture were shown as being satisfied in full.

12 Metro served a formal demand for repayment on the Company on 21 January 2020. Having received no satisfactory response, it instructed its solicitors to file a notice of appointment of the Applicants as the joint administrators of the Company which is recorded as having been filed with the court with effect from 10.30 am on 29 January 2020.

13 It can therefore be seen that when the notice of appointment was filed, the Companies Register did not reflect the true position concerning the existence of the outstanding liability still owing on the Tudor Debenture. There was therefore a prior unsatisfied charge which ranked in priority to the Metro Debenture. Consequently, notice of an intention to appoint should have been served pursuant to paragraph 15 of Schedule B1 of the Act. Whilst the checks were made with Santander in relation to any security it held over NMHL and its subsidiary due to the fact that its charge was noted as being unsatisfied in the register, no such checks were made in respect of the Company as to the existence of any continuing debt secured by the Tudor Debenture.

14 At the time of the appointment, it was by no means clear upon whom notice could be served. Tudor as the debenture holder had, after all been dissolved some four years previously. Indeed, in his submissions before me, Mr Sims QC invited me to consider whether this uncertainty disengaged paragraph 15 of Schedule B1 of the Act altogether on the grounds that there was no person upon whom such notice could be given. I will deal with this submission later.

15 In evidence filed before me, the representative of Metro made it clear that it was completely unaware of the outstanding amount due. Had it been so aware, it would have insisted on a deed of priority to ensure that its outstanding debt would be discharged first, notwithstanding the fact that the debenture it relied upon post-dated the unsatisfied Tudor Debenture.

16 The issue as to who was entitled to the benefit of the Tudor Debenture came to light on 30 January 2020, the day after the appointment of the Applicants, when it was discovered that on 6 September 2019, Ms Louise Brittain was appointed as the enforcement receiver (the **"Enforcement Receiver"**) over the realisable property of Messrs Meeson and Bradley for the purpose of enforcing the confiscation orders made against them. The Enforcement Receiver asserted that the benefit of the Tudor Debenture, and the underlying loan made by Tudor as trustee of MSIPP to the Company that was secured by it, formed part of their realisable property that she was appointed to realise. She was supported in this assertion by the terms of the Receivership Order (the **"ERO"**). Paragraph 10 of the ERO defined the Defendant's assets as:

> *"...any property in which the Defendant has any interest or to which the Defendant has any right and any property held by any other person to whom the Defendant has made a gift caught by the Proceeds of Crime Act 2002, including but not limited to all property set or in the Schedules below."*

There was only one asset specifically defined in the schedule to the ERO which provided as follows:

> *"1) The outstanding value of the loan under the original loan agreement plus interest owed to [Tudor] as the trustee of [MSIPP] by [the Company]. The whole amount should be attributed to both Peter Bradley and Andrew Meeson."*

17 It is pertinent to point out that the effect of these provisions appears to be for identification purposes only. The ERO covered any property of Messrs Meeson and Bradley. It is perhaps not surprising that the schedule mentioned only the Tudor loan which should be attributed to both Defendants nominated by the ERO, given that the original legal process commenced with the notice issued and served by the Pensions Regulator in the exercise of regulatory functions. Significantly, the ERO does not vest the assets in the Enforcement Receiver. It merely gives a right to collect the realisable assets of the Defendants for the purpose of enforcing the confiscation orders. The legal and beneficial interests in the assets appear to remain undisturbed.

18 The Applicants and the Enforcement Receiver agreed that the Applicants would endeavour to sell the business and would hold the sum of £1.7 million from the proceeds of any such sale which they would hold until either an agreement had been concluded or in the absence of such an agreement being reached a Court order had been made determining the issue. This has proved to be a sensible course of action as, in the event, the administration has proved to have been very successful in achieving its objectives under the Act. The Applicants successfully disposed of the assets and undertaking of the Company for the sum of some £16 million, which was sufficient to discharge the outstanding amounts due under the Tudor Debenture and the Metro Debenture in full, thereby creating a surplus, and producing the prospect of a dividend being paid to the unsecured creditors.

19 In the event, the Applicants have come to terms with the Enforcement Receiver on her right to receive the amount necessary to satisfy the Tudor loan secured by the Tudor Debenture. Under normal circumstances the unclaimed property of dissolved companies vests in the Crown *bona vacantia*. Following the sale and in order to clarify matters prior to making this application, the solicitors acting for the Applicants wrote to the division of the Government Legal Department (the **"GLD"**) dealing with such matters. In a letter dated 27 November 2020 sent to them the GLD responded as follows:

> "*I note from the enforcement receivership orders dated the 6th of September 2019 that the beneficial assets of [Tudor] and [MSIPP] are to be treated as the personal assets of Peter Bradley and Andrew Meeson. I also note that the schedules to those orders state that the benefit of the loan made by [Tudor] (as trustee of [MSIPP] to [the Company] shall be attributed to those two individuals.*"

Having come to that conclusion, the GLD was therefore satisfied that the beneficial assets of Tudor did not vest in the Crown as *bona vacantia*, but instead formed part of the realisable property of Messrs Meeson and Bradley. In fact, the claim of the Enforcement Receiver had been accepted by the Applicants prior to the receipt of this response and the sum claimed was paid on 20 November 2020. It follows that from the date of her appointment as the Enforcement Receiver, the beneficial interest in the MSIPP loan and the MSIPP debenture formed part of the realisable assets of Messrs Meeson and Bradley which could be realised by the Enforcement Receiver for the purpose of discharging the confiscation orders that had been made against them.

The status of the notice of satisfaction filed by the Company

20 The provisions of the Companies Act 2006 (and its legislative predecessors) make it clear that the discretion of the Registrar of Companies upon receipt of a certificate of satisfaction of a charge is very limited indeed. In short, if a certificate of satisfaction is filed pursuant to section 859L, then by section 859L (5) the Registrar of Companies *must* include a statement of satisfaction in the Register.

21 Mr Sims QC referred me to *Lingard's Bank Security Documents (7th edition, 2019)* at paragraph 3.32 which states as follows:

> "*Section 859L makes provision for the filing of specified particulars and a statement to the effect that either the debt for which the charge has been given has been paid or satisfied in whole or in part or that all or part of the property or undertaking charged by the registered charge has been released from the charge or has ceased to form part of the company's property or undertaking. If such a statement and the relevant particulars are filed using Companies Form MR04 or MR05 respectively, section 859L (5) obliges the Registrar to include a statement of satisfaction or release as the case may be, in the Register.*"

22 It is important to note that the filing of the particulars and statement by the Registrar of Companies is not conclusive. This is also supported by *Palmer's Company Law* at 13.399.60 which states:

> "*The Registrar may, on receipt of a verifying statement in the prescribed form, enter a memorandum of satisfaction or release. A memorandum of satisfaction records either the partial or complete payment of the charged debt. A memorandum of release records either the partial or complete release of the charged property or it ceasing to belong to the company, as the case may be. The Registrar's entry is not, however, conclusive since the statement delivered may be fraudulent. In this case those making it will be guilty of perjury but a subsequent charge relying on it will be postponed. Prospective chargees should therefore always seek evidence that prior chargees have released their security rather than rely upon searches at Companies House. Section 874 does not state who is entitled to apply for the memorandum and it should be amended to require the memorandum to be filed by the charge.*"

23 In *Gough on Company Charges (2nd edition, 1996)* the position is "*... the Registrar accepts as sufficient evidence of satisfaction of a charge the statement of the chargor itself, without any statement from the chargee. If a discharge were wrongly registered through a false statement of the chargor, the chargee cannot lose the benefit of its security. Equally a prospective creditor cannot rely on the memorandum of discharge on the Register. In strict theory, a subsequent creditor must satisfy himself from his own enquiries as to the effective discharge of the previously registered charges. The Registrar's certificate of charge is conclusive in its effect. By contrast, the copy of the memorandum as to the entry of a memorandum of discharge which the Registrar can give to the company, or a certified copy to any person, is not conclusive in its effect*."

24 The authorities support this conclusion in a number of cases such that it is clear that the secured creditor should be recognised as such following the mistaken release of the charge. (See *Andrew Fender (administrator of FG Collier & Sons Limited) –v-*

National Westminster Bank plc [2008] EWHC 2242 (Ch)) and *Lehman Brothers Australia Limited –v- MacNamara & Others* [2020] EWCA Civ 321 and the unreported decision of HHJ Langan in *Re OC Realisations 2011 (in liquidation)*).

25 It is clear that the certificate of satisfaction filed mistakenly by Mr Garner in 2018 does not affect the underlying charge and debt that it secured and the liability of the Company to pay it. It does not affect in any way the obligation to give the holder of such a prior charge the appropriate notice under paragraph 15 of Schedule B1 of the Act, but to whom should such notice have been given? Mr Sims QC invited me to find that in reality there was no one to whom such notice could have been given following the dissolution of Tudor. That in my view is taking the effect of the dissolution too far. The authorities confirm that the liability continues notwithstanding the dissolution of Tudor and so does the security interest. The Registrar of Companies has the obligation to register the notice in the manner indicated above, but it is well known that this is not determinative of the issue of the underlying liability.

26 Under normal circumstances, any party intending to appoint would contact the holder of prior charges to gain either their consent to the dispensation of service or their consent to the appointment, just as Metro contacted Santander in relation to its security over the assets of NMHL. The Applicants' factual case is that at the time of their appointment, neither Metro nor the proposed administrators knew of the existence of the Tudor or of the appointment of the Enforcement Receiver. If they had been aware of these two factual elements, they may have been able to give notice either to the Crown *bona vacantia* or to the Enforcement Receiver in respect of the Tudor Debenture. However, even this may not have obviated the need for directions in any event, because it is still a matter of some conjecture as to whether they fall into the definition of the holder of a qualifying floating charge to whom notice can be given. Whilst the effect of an enforcement receivership order does not vest the assets beneficially in the Enforcement Receiver, the view taken by the GLD on behalf of the Crown *bona vacantia* suggests that *"the benefit of the loan made by [Tudor] (as trustee of [MSIPP] to [the Company] shall be attributed to [the Enforcement Receiver]."* This does not make it clear that, in addition to having the benefit of the loan in the sense of applying the proceeds of repayment against the liability of the confiscation order the legal interest of the Tudor Debenture was effectively transferred from the GLD on behalf of the Crown *bona vacantia* (where it had been held since the date of Tudor's dissolution) to the Enforcement Receiver. It is certainly arguable that it did not.

27 It follows that I find that the party to whom notice should have been given was either the Enforcement Receiver because of the terms of the order of the court set out above, or if the order did not have the effect put forward by the GLD in the letter set out above, it would have been the GLD itself upon whom service should have been made. With hindsight it may have been appropriate to take a pragmatic approach and serve the notice on both the GLD and the Enforcement Receiver, as it would have to be one or the other of those two parties who were entitled to receive such notice, there being no other possible candidates. For those reasons I respectfully do not accept the submission made by Mr Sims QC that there was no one upon whom the notice of intention could have been served. In so doing, it is right that I point out that the evidence filed by the Applicants illustrates graphically the time pressure the

parties were operating under shortly before the appointment was made. I make no criticism of their conduct nor that of their advisers during this time particularly as the Court does have the benefit of hindsight and has knowledge of certain important facts that were not readily available at the time.

28 It is also appropriate to note at this stage that the Enforcement Receiver did not object to the relief sought by the Application. In addition, the conclusions that the Applicants had reached and the consequences that will follow have also been reported comprehensively to all known creditors and shareholders in their progress report that dealt with the period from 29 January 2020 to 28 July 2020. Further, their progress report invited representations to be made within 21 days. No such representations have been received. This is relevant in considering whether any sufficient injustice has been suffered to persuade the court not to exercise its discretion in favour of the Applicants.

29 I should emphasise that it follows that whether or not a court should grant relief under Rule 12.64 will depend entirely on the facts of each case. It is not hard to imagine the court refusing to exercise its discretion for an egregious failure to follow the Rules. Nevertheless, if a party does find itself in a position of uncertainty, an administration application made pursuant to paragraph 12 of Schedule B1 of the Act may prove to be the only route to take to avoid uncertainty relating to the appointment.

What are the consequences of a failure to give notice under paragraph 15?

30 In short, this issue comes down to deciding whether the failure to follow the strict provisions of paragraph 15 of Schedule B1 of the Act is a procedural error which is rectifiable pursuant to the provisions of 12.64 of the Rules or whether it is a defect of such a magnitude that Parliament intended that the failure to provide such notice renders the subsequent appointment a nullity *ab initio* in every case.

31 Mr Sims QC submitted that the court should adopt a purposive approach and each case will of course depend on its own facts. To support this proposition, he invited me to look at the underlying purpose that lies behind this obligation to give notice and to consider what Parliament intended should be the consequences of an accidental failure to do so in light of other reported decisions where notice had not been given as required by the Rules.

32 Paragraph 15 of Schedule B1 to the Act provides as follows:

> "*(1) a person may not appoint and administrator under paragraph 14 unless –*
>
> *(a) he has given at least two business days' written notice to the holder of any prior floating charge which satisfies paragraph 14(2), or*
>
> *(b) the holder of any prior floating charge which satisfies paragraph 14(2) has consented in writing to the making of the appointment.*
>
> *(2) One floating charge is prior to another for the purposes of this paragraph if –*
>
> *(a) it was created first, or*

(b) it is to be treated as having priority in accordance with an agreement to which the holder of each floating charge was a party…"

33 Paragraph 14(2) of Schedule B1 of the Act provides as follows:

"*For the purpose of sub-paragraph (1) a floating charge qualifies if created by an instrument which –*

(a) states that this paragraph applies to the floating charge,

(b) purports to empower the holder of a floating charge to appoint an administrator of the company,

(c) purports to empower the holder of the floating charge to make an appointment which would be the appointment of an administrative receiver within the meaning given by section 29(2), or …"

34 There have been a number of cases over the years which deal with these matters specifically in the context of validity applications where it is subsequently found that the rules have not been followed to the letter. The most recent are the decision of HHJ Davis-White in *Gregory & Ors v A.R.G. (Mansfield) Ltd* [2020] EWHC 1133 (Ch) and the decision of ICC Judge Jones in *Re Tokenhouse* [2020] EWHC 3171 (Ch). Both these cases involved a comprehensive and impressive review of the authorities from which Mr Sims QC extrapolated the following principles.

35 Initially, he drew my attention to the decision of Norris J in *Euromaster Limited* [2012] EWHC 2356 (Ch). In that case the defect considered was a failure to comply with paragraph 28 of Schedule B1 of the Act. In construing the effects of such a failure to comply with that provision the judge approached the issue as follows:

"[17] *I propose to adopt the approach taken by HHJ McCahill QC in Hill v Stokes [2010] EWHC 3726 (Ch) at paragraphs [63] – [67], by HHJ Purle QC in Re Assured Logistics Solutions Ltd [2011] EWHC 3029 (Ch) at paragraph [33], and which I followed in Re Bezier Acquisitions Limited [2011] EWHC 3299 and Re Virtualpurple (supra) (which themselves have been followed by Arnold J in Re Ceart Risk Services [2012] EWHC 1178 and HHJ Purle QC in Re BXL Services [2012] EWHC 1877 (Ch)). This is to focus on the consequences of non-compliance and, taking into account those consequences, to consider whether Parliament intended the outcome of non-compliance to be total invalidity: in short, to ask whether it was a purpose of the legislation that an appointment made in breach of paragraph 28 should be null."*

At paragraph 26 he went on to say:

"[26] *"... in my judgment considerable weight should be given to the consideration that the object of introducing out-of-court appointments was to streamline the process of business rescue: I adhere to the view which I expressed in Re Virtualpurple Professional Services Ltd that it is highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator is automatically invalidated*."

At paragraph 28 he stated:

"[28] *I consider that this distinction is reflected in the terms of Schedule B1 itself as regards appointments by directors. Paragraphs 22 to 25 inclusive specify when it is that the directors or the company have the power to appoint administrators. Paragraphs 26 to 32 set out the procedural requirements for the exercise of the power. The structure of the Schedule suggests (albeit not strongly) that the Court should treat non-compliance with the requirements set out in paragraph 28 as leading to an irregularity rather than the nullity.*

36 This approach was further considered by Marcus Smith J in *Re Skeggs Beef Limited* [2019] EWHC 2607. When considering the approach to be adopted in curing a defect he sought to categorise potentially defective appointments into three categories as follows:
[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."

37 Adopting these principles in his submissions, Mr Sims QC sought to distinguish the obligation to give notice to another secured creditor under paragraph 15 of Schedule B1 of the Act with a failure to comply with paragraphs 16 and 17 (which describe a state of affairs where there is no power to appoint at all such as where the floating charge itself is not enforceable, or there is already in office a provisional liquidator).

38 Paragraph 15 therefore envisages an appointment being made if the procedural step of giving the notice is followed whereas if the circumstances set out in paragraphs 16 and 17 exist, no appointment at all can be made. They represent a state of affairs completely outside the floating charge holder's control.

39 The provisions of paragraph 15 therefore envisage that the state of affairs in paragraphs 16 and 17 are not present and a power of appointment has arisen. In those circumstances, Mr Sims QC submitted that, following *Euromaster,* a breach of the requirement to give notice to prior charge holders will be treated as an irregularity, and as such, it will *prima facie* fall within the second category described by Marcus Smith J in *Skeggs Beef Limited.*

40 Mr Sims QC drew my attention to a decision of HHJ Cooke in *Re Eco Link Resources Limited* [2012] B.C.C. 731. This was a case in which the learned judge took a more prescriptive view of a failure to give notice under paragraph 15. At paragraph 28 of his judgment the learned judge stated:

> [28] "*If one asks the question whether Parliament can fairly be intended to have to have intended that an appointment made in breach of this provision should be invalid, in my view the answer is that Parliament can be taken to have intended that because it is consistent with the purpose of the provision that prior notice should be given in order that the first charge holder may act before the second charge holder does."*

41 However, this case was decided on 2 July 2012, just over a month before Norris J handed down his judgment in *Euromaster* on 10 August 2012. It follows that HHJ Cooke did not have the benefit of the reasoning of Norris J in that case. This issue was considered by ICC Judge Jones in *Re Tokenhouse.* Noting the timing of the two decisions, he concluded in paragraph 28 of the appendix to his judgment that *Euromaste*r supersedes *Eco Link* as follows:

> *[28] "[the decision in Euromaster] supersedes the approach in Re Eco Link Resources Ltd (In CVL) … The First Issue [as the effect of a failure to give notice in accordance with the Rules] should be determined on the basis that paragraphs 26-32 of Schedule B1 prescribe procedural requirements with the result that a breach will "naturally fall to be treated as irregular". It is also highly significant that Sir Terence Etherton when Chancellor approved Mr Justice Norris's … reasoning [in Euromaster] in the case of Re Melodious Corporation …, albeit in the context of Rule 7.55 of the Insolvency Rules 1986 (now Rule 12.65 of the Insolvency Rules 2016) (see paragraphs [73 and 75] of the judgment)."*

42 Therefore, just as ICC Judge Jones, in following the decision of Norris J in *Euromaster* held that paragraphs 26-32 prescribe procedural requirements with the result that a breach will "naturally fall to be treated as irregular", so Mr Sims QC submitted that a breach of paragraph 15 should be treated in exactly the same way. As such, it should be capable of being treated as a formal defect capable of remedy by an order of the Court made under the provisions of Rule 12.64 of the Rules.

43 Mr Sims QC also submitted that the effect of a failure to give notice under paragraph 26 of Schedule B1 of the Act described by ICC Judge Jones on *Tokenhouse* at

paragraphs 42–48 of his judgment apply just as much to a failure to give notice under paragraph 15 and were to be analysed in the light of the following points.

44 First, paragraph 15 confers a right upon the Senior security holder to be given notice of the intention to appoint an administrator by a subsequent security holder. All that the secured creditor can do in default of being given such notice is to make an application to cure the defect, or for other relief, such as to replace the administrators appointed without notice to them with administrators of their own choice. It does not in and of itself give a senior creditor the ability to block the appointment of administrators.

45 Second, just as ICC Jones stated at paragraph 46 of his judgment, *"Nor should the loss of the right to appoint or agree the appointment during the 5 business days be considered a consequence of such significance in the light of the role of administrators, the requirement that they are licensed insolvency practitioners and the role of the court … In particular, whoever appointed the administrators: they will be independent insolvency practitioners; they will be officers of the court; they will be required to act in the interests of the creditors as a whole if they can; they will need to prepare a proposal bearing in mind that the first two purposes of paragraph 3(1) of Schedule B1 will have priority over the third.",* so I should adopt the same approach in this case.

46 Therefore, in my judgment, just as ICC Judge Jones concluded in *Tokenhouse* that the failure to comply with paragraph 26 was not a fundamental defect but an irregularity giving rise to a formal defect that can be remedied by an order of the court under the provisions of Rule 12.64 of the Rules, so I find that a failure to give notice under paragraph 15 can be dealt with in the same way. Whilst I note the Applicants' factual case is that at the time of their appointment, they were unaware of the existence of Tudor and the appointment of the Enforcement Receiver, the Court does have the benefit of hindsight, and as a result, I do find that there was a failure to comply with the requirement to serve a notice of intention to appoint under paragraph 15 on either the GLD or the Enforcement Receiver, but it was not so fundamental in order to make the appointment a nullity *ab initio*.

47 I find that there would be no substantial injustice by the exercise of the court's discretion to make an order under Rule 12.64 of the Rules. The Enforcement Receiver did not object to the relief sought. The GLD conceded that the ERO declared that the benefit of the repayment of the sums due under the Tudor loan as realisable property capable of being applied for the purpose of the confiscation orders of Messrs Meeson and Bradley. The Applicants provided a detailed account of the position and its consequences in their progress report sent to all the stakeholders in the insolvent estate together with an invitation to make representations if any party was discontent. No such representations were made in response to that invitation. The administration was a success, with all classes of creditor apparently benefitting from the outcome. I do not accept that it was the intention of Parliament that in these circumstances such a failure should lead to the appointment being void *ab initio*. It therefore falls into the second category specified by Marcus Smith J in *Skeggs Beef Limited* as a case where the defect is not a fundamental breach but an irregularity which causes no substantial injustice such that the Court can exercise its discretion under rule 12.64 of the Rules.

Disposal

48 For those reasons, on 21 December 2020, I acceded to the application and made the declaration set out in paragraph 3 above. The Applicants were validly appointed notwithstanding the irregularity in the procedure.