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No. 209 of 2018

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS AT BRISTOL

INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre

2 Redcliff Street

Bristol BS1 6GR

Thursday, 2 October 2018

Before:

HIS HONOUR JUDGE PAUL MATTHEWS

IN THE MATTER OF TOWCESTER RACECOURSE COMPANY LTD (THE) (IN ADMINISTRATION)

A N D

IN THE MATTER OF **THE INSOLVENCY ACT 1986**

B E T W E E N :

(1) MARK JERMEY ORTON AND WILIAM JAMES WRIGHT
ADMINISTRATORS OF TOWCESTER RACEOURCE COMPANY LIMITED
(THE) (IN ADMINISTRATION)
(2) ALLAN GEORGE BOOTH, KEVIN ACKERMAN
SIMON IAIN NICHOLLS, PETER SPARKES, PREDERICK HATTON FERMOR-HESKETH
FLORA MARY GOODIN AND LORD ALEXANDER HESKETH
The DIRECTORS OF The TOWCESTER RACECOURSE COMPANY LIMITED
(THE) (IN ADMINISTRATION) Applicant

- and -

TOWCESTER RACECOURSE COMPANY LIMITED
(THE) (IN ADMINISTRATION) Respondent

APPEARANCES

MR. J. BAMFORD (instructed by Foot Anstey LLP) appeared on behalf of the Applicants.

The Respondent did not appear and was not represented.

J U D G M E N T

(As approved)

HIS HONOUR JUDGE MATTHEWS:

1 This is an application made under para. 63 of schedule B1 to the Insolvency Act, 1986 by the joint administrators of The Towcester Racecourse Company Limited and some individuals who are the current directors of that company. The respondent is the company itself.

2 The application is for, first, a declaration that the appointment of the administrators as administrators of the company on 21 August 2018 was valid; second, insofar as necessary, an order under r. 12.64 of the Insolvency Rules that any defect in the appointment of the administrators did not invalidate the appointment; third, a declaration, notwithstanding any defect in the appointment of the administrators, that the administrators' acts during the period between 21 August and today are valid and in accordance with para. 104 of schedule B1; and finally an order providing for the costs of the application. There is an alternative application for an administration order but in the circumstances, that does not arise and I say nothing about it.

3 The evidence in support shows that the process being embarked upon in this case of administration is one which is wholly consensual, in the sense that everybody wants it to happen. There are no dissenting shareholders, no dissenting directors, and no dissenting creditors. Everyone who properly ought to be notified of these proceedings has been notified of them. This is a case therefore where everyone is rowing entirely in the same direction. In that sense it is quite different from the case which has been cited to me of *NJM Clothing Ltd, Ross & Higgins v Fashion Design Solutions Ltd and Asis Couture,* case 318 of 2017, decided by His Honour Judge Klein, sitting in the Business and Property Courts at Newcastle on 20 March 2018. That was a case where there was a certain degree of

animosity between the relevant parties, and the matter had to be properly and fully argued out before the judge.

4 In the present case, however, because there is no dissent between those interested and also because I am clear what the result of it ought to be, it is not necessary for me to deal in any great detail with the facts of this case. Nevertheless, I do need to give at least a few words of background explanation. The administrators having been apparently appointed, they asked outside lawyers, in the usual way, to review the validity of their appointment. These lawyers identified two potential problems. This application accordingly concerns those two points.

5 The first point is this. The appointment of the administrators had been decided by the directors. They were accordingly unanimous in wishing to appoint administrators. One of the directors was, however, an "investor director", that is to say, a director appointed to represent the interests of an outside investor in accordance with Art 1.1 of the Articles of Association of the Company adopted on 2 February 2018. In relation to that director, that article, coupled with Art 7.5, provided that, before the appointment of an administrator could be made, the investor director had to provide prior *written* consent. This is an unusual provision, but one which I am satisfied on the evidence before me is entirely required for the protection of the outside investor.

6 Nobody noticed at the time that the directors were meeting that this requirement existed and, therefore, the investor director did not give his prior written consent. As it happens, the evidence (which I accept) is that, if he had been asked, he would have done so. Moreover, since then he has, in writing, ratified and agreed with the appointment of the administrators. Nevertheless, the fact that the requirements of the Articles have not been complied with is seen as a potential defect and potentially leading to the invalidity of the appointment of the administrators.

7 However, Mr. Jeremy Bamford on behalf of the applicants has entirely persuaded me that, the Articles of Association obviously being a contract between the shareholders, the provisions in the Articles for the investor director's prior written consent are contractual provisions for the sole benefit of the outside investor. He refers me to the 32nd Edition of *Chitty on Contracts* at para. 22.46, *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH* [2010] 3 All ER 1 at para. 83, and *Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day,* [2002] All ER (D) 219 (Jul) at para. 64. In these circumstances, I am entirely satisfied that the benefit of the provisions which were not complied with is something capable of being waived by the outside investor and, indeed, as a matter of fact has been waived by that outside investor. So that potential defect falls away. I will grant a declaration to that effect.

8 The second possible problem identified by the outside lawyers arises in a slightly broader way. It affects potentially a greater number of cases, and not just this one. That is that the notice of appointment in para. 8 stated that

> "The administrator's appointment was made on the date and time endorsed by the court below".

9 Now, this form of notice of appointment of an administrator by the directors of a company where a notice of intention to appoint has been given is one which is commonly used. When it is filed at court, there is a box to be completed at the bottom of the second page. This contains the words, "Endorsement to be completed by the court". It also contains the words, "This notice was filed", and then there is a space to be written in. Typically, when it is filed at court, the court officer will endorse it with the date and the time that it was filed. In this particular case someone has handwritten "21 August 2018 at 11.52 a.m." That, as I say, is a form which is commonly used.

10 The format of this form is designed in this way so as to minimise the amount of time that elapses between the moment when the appointment is made by those making the appointment, in this case the directors of the company, and the moment when according to para. 31 of Schedule B1 to the 1986 Act, the appointment actually takes effect. This is because para. 31 says that

> "The appointment of an administrator under para. 22 takes effect when the requirements of para. 29 are satisfied",

and para. 29 requires that

> "(1) A person who appoints an administrator of a company under para.22 shall file with the court, (a) a notice of appointment and (b) such other notices as may be prescribed."

11 Under the old rules, there was no particular problem with formatting the document in this way. As I say, the practice grew up of minimising the period between the time of the appointment and the time when it took effect by making the one effectively the same as the other. However, the recent rule changes have meant that it is now necessary to state in the notice of appointment the date and time when the appointment was made: see the Insolvency Rules 2016, rules 3.24 and 3.25. The question therefore arises whether it is a defect, or even a potential defect, in the appointment for the notice of appointment not actually to say that this appointment is made "on date X at time Y", but to say that it is made "on the date and at the time endorsed by the court in the box below", or words to the like effect.

12 The same issue arose in the case, to which I have already referred, of *NJM Clothing Ltd, Ross & Higgins v Fashion Design Solutions Ltd and Asis Couture,* before His Honour Judge

Klein, sitting in the Business and Property Courts in Newcastle, on 20 March 2018. As I have said the matter was properly and fully argued over a half day and at the end the judge gave a judgment which, if I may respectfully say so, particularly considering that it was given *ex tempore*, is a masterpiece of exposition and analysis.

13 What the judge says, after considering the way in which the legislation is laid out, is that:

> "23. The totality of the language of the Act leads me to conclude that most probably: in a case such as this, first, the directors must resolve or decide to appointment administrators; secondly, they must then give notice of intention to appoint administrators; thirdly, they must appoint the administrators; and then fourthly, and lastly, notice of appointment must be given.
>
> 24. As I say, that seems to me to be the correct statutory structure for the present purposes of schedule B1, but if I need to give a specific reason for that structure I say this. If it was effective to file the notice of appointment before the appointment was actually made, then the result would be an absurd result. Under para.31 of schedule B1 the appointment takes effect when the notice is filed. It would be absurd if the appointment could take effect before an appointment is in fact made and so it seems to me that the language of the Act requires the appointment precedes, even if only momentarily, the filing of the notice of appointment."

14 I interpolate at this point that, although what the judge says is the obvious approach to take and the obvious comment to make in the context of the case before him, it is not logically necessary that the appointment should take place even a moment before the notice is given to the court. It could take place *at the same time*, because the criticism, or rather the absurdity remarked upon, by the judge arises only if the appointment were to take effect *after* the notice was filed. But if they were done at the same moment, that would not happen.

Accordingly, I do not think that the judge's reference to appointment *preceding* filing matters very much. It was sufficient for that case.

15 At all events, the judge in that case then went on to ask himself whether, as a matter of fact, the appointment was made before the notice was made. In that case, the form that was used was, in fact, the same or substantially the same as the one used in the present case. To that extent therefore, the one case can be seen as a precedent for the other. The judge says:

> "33. The next question I have to ask myself is whether, as a matter of fact, the appointment was made before the notice was filed. Again, to be clear, to my mind, this is purely a question of fact but a question of fact in which it seems to me the burden is on Ms. Toman's client, FDS [I interpolate to say that that was one of the respondents and dissenting creditors] to persuade me that, in fact, in time, if only momentarily, the notice of appointment preceded the appointment rather than the other way around."

16 Therefore, again interpolating, the judge is looking to see whether Ms. Toman for the dissenting creditor can demonstrate that the appointment, in fact, took place after the filing of the notice. The judge continues:

> "I say that because it seems to me I am entitled to presume that absent evidence to the contrary, what the directors did in this case was regular.
>
> 34. Ms. Toman rightly points to the language of the notice itself. However, I am not satisfied that the language of the notice is sufficiently precise that it is right for me to conclude, contrary to the presumption of regularity, that whist both the appointment and the filing of the notice were carried out in the same minute, that is at 2.50 p.m. on 17 October, the notice preceded the appointment. To my mind, the notice itself is

sufficiently imprecise that bearing in mind the presumption of regularity to which I referred, the proper conclusion I should reach and I do reach is that whilst both acts were done at 'the same time', the appointment was made momentarily before the notice was filed."

17 The judge there reaches the conclusion that the evidence is not such as to persuade him that the appointment took place after the notice was filed. Therefore, as I read the judgment, Ms. Toman's argument fails. However, the judge goes on to say this:

> "35. On this basis, the only possible defects in the procedure which was adopted in this case were first, that the notice did not specify, save referentially, the date and time of the administrator's appointment and, secondly, the notice did not accurately record the precise moment during 2.50 p.m. on 17 October when the appointment was made and that it was made before the notice of appointment was filed. Most favourably to Ms. Toman, I will assume that both those matters amount to defects."

18 Just pausing there, it is clear, in my judgment, from what the judge says that he is not at all holding that there in fact was any defect. Having reached the conclusion, as a matter of fact, that the appointment at least momentarily preceded the filing of the notice, or at any rate, that Ms. Toman has not persuaded him that the appointment was preceded momentarily or otherwise by the notice of appointment, he is merely saying that he goes on to see what would happen if Ms. Toman were right to say there were any defects, and he refers to two possible ones.

19 He does not, as I read it, actually say that these *are* defects. Instead, he assumes that they are for the purposes of the argument. He goes on then to refer to r. 12.64 of the Insolvency Rules and to set it out. It provides that:

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

20 After considering the part that the potential defects to which he has referred might play, the judge refers to the decision of Norris J in *Re Euromaster Ltd* [2012] EWHC 2356 (Ch). Then he concludes:

> "39. In those circumstances, I have concluded that this is a case in which what is now r.12.64 is engaged. I should add that the defect which I have assumed in this case is not so grave or substantial that it can be said that there are no insolvency proceedings. It seems to me that the proper order in this case is for me to declare, following the approach of Norris J in *Re Euromaster* that Mr. Ross and Mr. Higgins are in office as administrators of *NJM Clothing Ltd* and will continue to be so and that no prior act of theirs in the administration is invalidated by reason only of the defect in their appointment."

So, there, the judge is hypothesising defects, which he then says would not prevent him from making a declaration utilising the benefit of r.12.64.

21 Let me now come back to the possible defects to which the judge referred but without, I think, deciding that they actually were. First of all, the notice did not specify referentially the date and time of the administrators' appointment. I confess that I cannot see why it should not be possible to make a referential appointment, so as to say that this appointment is made from such and such an event occurring in the future. I have seen no authority that

compels the contrary. I can see good reasons, as expressed by Mr. Bamford and to which I have referred, why it should be desirable to make the point at which the appointment is to be made as close as possible to the point at which the court is notified of the appointment having been made.

22 Whether one regards that as being at exactly the same moment or one regards the appointment as having occurred a moment before does not seem to me to be a matter of any great importance. I am reminded in this context of the doctrine of the *scintilla temporis* in land law, criticised by the decision of the House of Lords in *Abbey National Building Society v Cann* [1991] 1 AC 56. Speaking for myself, I do not regard it as a defect in the appointment to specify the moment that the court endorses on the notice filed in court as the point in time at which the appointment is made.

23 Secondly, the criticism is made, or the potential defect is, that the notice did not accurately record the precise moment during 2.50 p.m. on 17 October. Frankly, I regard this as of very little importance. If we are to be reduced to recording the second at which something occurs, for one thing, the clocks in courts up and down the country will have to be a great deal more accurate than they are at present. I do not regard it as a defect that the exact second during the minute when the appointment was made was not recorded.

24 Therefore, for myself, I respectfully do not consider that the two potential defects alluded to by His Honour Judge Klein constitute real defects. But, as I say, I do not think that the judge in that case actually thought they were either. He was simply saying that, even if they were to be regarded as defects, that would not stop him from regularising the position under r. 12.64.

25 In these circumstances, I have no hesitation granting a declaration that the appointment is not invalidated in any way by the use of this particular form and that any other relevant declaration that is needed in order to protect the position of the administrators can be made. I will discuss the exact drafting of the order with counsel.

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