Neutral Citation Number: [2019] EWHC 2742 (Ch)

Case No: CR-2018-008813

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

IN THE MATTER OF S.J. HENDERSON & COMPANY LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
London, WC2A 2LL
Date: 18 October 2019

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

(1) NICHOLAS JOHN EDWARDS **(2) GRAHAM BUSHBY** **(as joint administrators of S.J. Henderson & Company Limited (In Administration))**	**Applicants**
- and -	
S.J. HENDERSON & COMPANY LIMITED (IN ADMINISTRATION)	**Respondent**

- -

Rowena Page for the **Applicant**

Hearing date: 10 October 2019

- -

Case No: CR-2019-006647

AND IN THE MATTER OF TRIUMPH FURNITURE LIMITED

Between :

(1) HUW POWELL **(2) KATRINA ORUM** **(3) PAUL DAVID WOOD** **(as joint administrators of Triumph Furniture Limited (In Administration))**	**Applicants**

(4) ANDREW CLIVE JACKSON

- and -

TRIUMPH FURNITURE LIMITED (IN ADMINISTRATION) **Respondent**

- -

Emily Gailey for the **Applicant**

Hearing date: 11 October 2019

- -

Approved Judgment

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

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton:

1. I am asked to consider two applications, each brought urgently before the Court, as a result of concerns on the part of the administrators of each respondent company regarding the validity of their appointment. The first application concerns S.J. Henderson & Company Limited where Ms Rowena Page of counsel appeared before me on 10 October 2019. The following day, Ms Gailey appeared in the ICC Urgent Interim Applications List on behalf of the joint administrators of Triumph Furniture Limited.

2. Both applications concern the correct interpretation of paragraph 8.1 of the Insolvency Practice Direction (which was introduced with effect from 4 July 2018) ("IPD") in particular, whether it should be interpreted to preclude a company or its directors from filing notices of appointment of administrators, outside of the court's usual counter-opening hours, by using the court's 24-hour e-filing system.

S.J. Henderson & Company Limited

3. By their application, Mr Edwards and Mr Bushby seek:

    i) a declaration that the First Applicant and Duncan Robert Beat, both then of RSM Restructuring Advisory LLP ("Original Joint Administrators") were validly appointed as administrators of S.J. Henderson & Company Limited ("SJH") on 1 November 2018; alternatively

    ii) a declaration pursuant to paragraph 104 of Schedule B1 to the Insolvency Act 1986 ("Act") that all acts of the Original Joint Administrators and of the Applicants since 1 November 2018 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 (England and Wales) Rules 2016 ("2016 Rules"); and

    iii) in the further alternative, a retrospective extension of time pursuant to rule 3.10 of the CPR for filing the notice of appointment of administrators.

4. Finally, they seek, in so far as there is found to be any irregularity or procedural error in the administrators' appointment, for the Court to grant appropriate relief to validate the actions taken to date.

S.J. Henderson – Background

5. SJH operated in the building and construction industry. From mid-2017 it experienced financial difficulty, resulting, on 3 October 2018, in its directors passing a resolution to appoint administrators of the company and authorising any director of the company to sign any documents required to place SJH into administration.

6. On the same date, pursuant to the provisions of paragraph 26 of Schedule B1 to the Act, Thomas James Henderson, one of the company's directors, made a statutory declaration on a notice of intention to appoint an administrator ("First NoIA"). The First NoIA was addressed to National Westminster Bank plc as a person who was or may have been entitled to appoint an administrative receiver or administrator of SJH under paragraph 14 of Schedule B1 to the Act.

7. Paragraph 27 of Schedule B1 provides that a person who gives notice of an intention to appoint an administrator under paragraph 26 shall, as soon as reasonably practicable, file with the court, a copy of the notice and any document accompanying it. Rule 3.23(1) sets out the information which a notice of intention to appoint administrators must contain and Rule 3.23(2) prescribes that where the company's directors intend to make the appointment, the notice must be accompanied by a copy of the decision of the directors.

8. On 4 October 2018, a copy of the First NoIA was e-filed at court. At 8.18am on the same date, an e-filing submission confirmation form was generated which stated that the notice was submitted at 8.18am.

9. The effect of Paragraph 44(4) of Schedule B1 is to create, from the time when a copy of the notice of intention to appoint an administrator is filed with the court, a moratorium preventing the steps set out in paragraphs 42 and 43 from being taken against the company or its assets without the permission of the court. The moratorium remains in place until the appointment of the administrator takes effect or the period specified in paragraph 28(2) expires without an administrator having been appointed.

10. Paragraph 28(2) of Schedule B1 provides that an appointment of administrators by the company or its directors may not be made after the period of ten business days, beginning with the date on which the notice of intention to appoint is filed with the court under paragraph 27(1).

11. Following the e-filing of the First NoIA on 4 October, the tenth such business day was Wednesday 17 October 2018. By then, SJH had not yet completed its stated intention to appoint an administrator.

12. On 18 October 2018 the directors e-filed a further notice of intention to appoint an administrator with the court ("Second NoIA") supported by a copy of minutes of a further meeting of the directors of the company. The meeting is stated to have taken place on 17 October 2018 and the minutes record that the directors again resolved to appoint the Applicants as joint administrators of SJH.

13. The Second NoIA was addressed to the same bank and an e-filing submission confirmation was generated, stating that it had been submitted at 7.35am on 18 October 2018.

14. Pursuant to paragraph 28(2) of Schedule B1, the tenth business day (beginning with the date on which the notice of intention to appoint was filed with the court), after which an appointment of administrators may not be made, was 31 October 2018.

15. Paragraph 29 of Schedule B1 provides:

> "(1) 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.
>
> (2) The notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment—
>
> (a) that the person is entitled to make an appointment under paragraph 22,

(b) that the appointment is in accordance with this Schedule, and

(c) that, so far as the person making the statement is able to ascertain, the statements made and information given in the statutory declaration filed with the notice of intention to appoint remain accurate.

(3) The notice of appointment must identify the administrator and must be accompanied by a statement by the administrator

(a) that he consents to the appointment,

(b) that in his opinion the purpose of administration is reasonably likely to be achieved, and

(c) giving such other information and opinions as may be prescribed.

(4) For the purpose of a statement under sub-paragraph (3) an administrator may rely on information supplied by directors of the company (unless he has reason to doubt its accuracy).

(5) The notice of appointment and any document accompanying it must be in the prescribed form.

(6) A statutory declaration under sub-paragraph (2) must be made during the prescribed period.

(7) A person commits an offence if in a statutory declaration under sub-paragraph (2) he makes a statement

(a) which is false, and

(b) which he does not reasonably believe to be true".

16. On 31 October 2018, Thomas James Henderson made a statutory declaration on a Notice of Appointment of Administrators ("NoA"). Paragraph 1 of the NoA stated:

> "The directors of the company (the appointer) has appointed the following named persons as administrators of the company: Nicholas John Edwards and Duncan Robert Beat both of RSM Restructuring Advisory LLP and notice that this appointment has been made is hereby given."

17. Paragraph 8 of the NoA stated:

> "The administrators' appointment was made on 31 October 2018 at 14:00".

18. On 1 November 2018 at 6.03am, the directors e-filed the NoA appointing the Original Joint Administrators. On the second page of the NoA, is a box stating:

> "Endorsement to be completed by the court.
> This notice was filed 1st November 2018 at 6.03am".

19. An e-filing submission confirmation was also generated by CE-file stating that the NoA was submitted at 6.03am.

20. At 9.44am on 1 November an e-filing service email was sent to the Applicant's solicitors stating:

> "This is a notice to inform you that the filings listed in CR-2018-00813 (Matter No. [*reference*]) have been accepted by the Clerk on 01-11-2018 09:42 AM".

21. Paragraph 31 of Schedule B1 states that the appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied.

22. On 21 January 2019, the Original Joint Administrators' proposals were accepted by creditors.

23. On 28 May 2019, they circulated their first progress report to creditors.

24. On 19 June 2019, pursuant to a block transfer order, Mr Beat, one of the Original Joint Administrators, was replaced by the Second Applicant as joint administrator of SJH.

Triumph Furniture Limited

25. The Applicants in this matter comprise the joint administrators of Triumph Furniture Limited ("TF Administrators" and "TF" respectively) and its sole director. They seek:

    i) a declaration that the TF Administrators have been validly appointed, notwithstanding a possible breach of paragraph 8.1 of the IPD (if necessary, by waiving any procedural defect under Rule 12.64 of the 2016 Rules);

    ii) a declaration that the actions of the TF Administrators made pursuant to the notice of appointment filed on 8 October 2019 are valid in any event, notwithstanding a possible breach of paragraph 8.1 of the IPD; or, in the alternative;

    iii) an order that the TF Administrators be appointed as administrators of TF with retrospective effect from 9.29am on 8 October 2019 pursuant to paragraph 13 of Schedule B1 to the Act.

Triumph Furniture Limited - Background

26. TF was incorporated on 5 April 2011 and manufactured office and shop furniture.

27. On 4 October 2019, Mr Jackson, as sole director of the Company, resolved, as a result of the company's "present financial difficulties" to appoint the TF Administrators as administrators of TF.

28. On 7 October 2019 Blake Morgan LLP ("BM") sent a notice of intention to appoint administrators on behalf of TF to each of Lloyds Bank plc, Aldermore Bank Plc and Conance Limited informing them that it had been filed at court at 8.06am that morning. On the same day, each recipient of the notice, endorsed a copy of it to signify their consent to the proposed appointment of the TF Administrators as administrators of TF.

29. At 9.17am on 8 October 2019 BM received a NoA, signed by Mr Jackson. At 9.29am on the same day, BM e-filed the NoA, together with supporting documents with the court.

30. The filing of the NoA was confirmed by the court at 10.22am and the NoA was endorsed as having been filed with the court on 8 October 2019 at 9.29am.

31. Considering that all of the requirements of paragraph 29 of Schedule B1 to the Act had been complied with, the TF Administrators subsequently took control of the company, and, having concluded that a sale of whole or part was not possible, closed down most of the business and made over 200 employees redundant.

32. Shortly afterwards, the possible defect in relation to paragraph 8.1 of the IPD was identified and this application was made, as a matter of urgency, on 9 October, being the day after the TF Administrators' appointment.

The applications

33. By the time Ms Gailey appeared before me in relation to the TF Administrators' application, I had already had the benefit of Ms Page's submissions, the day before, in relation to the SJH application.

34. I thank Ms Page for her skeleton argument and thorough, written submissions provided shortly after the hearing.

35. Having already heard Ms Page, and noting that broadly the same issues were to be raised in relation to the TF application, I invited Ms Gailey to address me on those parts of her skeleton argument which diverged from those of Ms Page, and in particular, in relation to the alternative relief sought in the form of a retrospective appointment of the administrators.

S.J. Henderson & Company Limited

36. Ms Page submits that the meaning and effect of paragraph 8.1 of the IPD is ambiguous. She submitted that the substantial body of case law that applies to statutory construction is likely to assist the Court in the instant case. I concur: In *Viera v The Commissioners for HMRC* [2017] BPIR 1062 Arnold J stated (at paragraph 83) that the insolvency practice direction then in force "is a form of secondary legislation". Its status, as regards the 2016 Rules is set out in Rule 12.1:

> "The provisions of the CPR (including any related Practice Directions) apply for the purposes of proceedings under Parts 1 to 11 of the Act with any necessary modifications, except so far as disapplied by or inconsistent with these Rules".

37. In *Maunsell v Olins* [1975] AC 373, at 382E, when considering the meaning of the word "premises" in the Rent Act 1968, Lord Reid qualified so-called "rules" of statutory construction:

> > "They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one "rule" points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular 'rule'".

38. Section 9.1 of the leading text, *Bennion on Statutory Interpretation* provides a summary of the approach to interpretation:

> "(1) The primary indication of legislative intention is the legislative text, read in context.
>
> (2) Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner.
>
> (3) The rules, principles, presumptions and canons which govern statutory interpretation are aids to construing the legislative text".

Reading paragraph 8.1 of the IPD in context

39. For the meaning of "context" Ms Page relies on *Attorney General v HRH Prince of Hanover* [1957] AC 435, where the Respondent, a successor to the throne of Hanover in 1837, sought a declaration that he was a British subject within the meaning of the Naturalization Act 1904. Viscount Simmons, resisting the Attorney General's encouragement to discount the words of the statute's preamble, described the duty to consider every word of the statute in context:

> "I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy".

40. Paragraph 8.1 of the IPD must be read in the context of the relevant legislation. Paragraph 18(1) of Schedule B1 to the Act requires a person appointing an administrator under paragraph 14 (namely a qualifying floating charge holder ("QFCH") to "file with the court" a NoA (and other prescribed documents). Paragraph 19 provides that the appointment "takes effect when the requirements of paragraph 18 are satisfied".

41. Paragraph 29(1) of Schedule B1 to the Act requires a person appointing an administrator under paragraph 22 (namely the company or its directors) to "file with the court" a NoA (and other prescribed documents). Paragraph 31 provides that the appointment "takes effect when the requirements of paragraph 29 are satisfied".

42. Prior to the introduction of the 2016 Rules, Rule 13.13 of the Insolvency Rules 1986 defined "file with the court" to mean "deliver to the court for filing".

43. Rule 12A.14 Insolvency Rules 1986 was introduced with effect from 6 April 2010 and laid down, for the first time, the circumstances in which (and means by which) documents may be electronically delivered to court:

> **"**12A.14 - Electronic delivery of insolvency proceedings to courts
>
> (1) Except where paragraph (2) applies or the requirements of paragraph (3) are met, no petition, application, notice or other document may be delivered or made to a court by electronic means.
>
> (2) This paragraph applies where electronic delivery of documents to a court is permitted by another Rule.
>
> (3) The requirements of this paragraph are—
>
> a. the court provides an electronic working scheme for the proceedings to which the document relates; and
>
> b. the electronic communication is-
>
> i. delivered and authenticated in a form which complies with the requirements of the scheme;
>
> ii. sent to the electronic address provided by the court for electronic delivery of those proceedings; and

iii. accompanied by any payment due to the court in respect of those proceedings made in a manner which complies with the requirements of the scheme.

(4) In this Rule "an electronic working scheme" means a scheme permitting insolvency proceedings to be delivered electronically to the court set out in a practice direction.

(5) Under paragraph (3) an electronic communication is to be treated as delivered to the court at the time it is recorded by the court as having been received."

44. I concur with Ms Page that the effect of Rule 12A.14 of the Insolvency Rules 1986 was to create a general bar on filing by electronic means whilst expressly leaving open the possibility for e-filing to be used in future either by the introduction of a new Rule (Rule 12A.14(2)) or by the introduction of a new practice direction (Rule 12A.14(4)).

A special regime for administration appointments by QFCH

45. A special regime was laid down by Rule 2.19 of the Insolvency Rules 1986 to facilitate appointments of administrators by QFCHs outside of the usual court counter opening hours. Rule 2.19 of the Insolvency Rules 1986 was first introduced on 15 September 2003 to coincide with the introduction of section 72A of the Act, which, subject to certain expected cases, severely curtailed the ability of the holder of a floating charge created on or after 15 September 2003 to appoint an administrative receiver.

46. Instead, the initial format of Rule 2.19 of the Insolvency Rules 1986, permitted a QFCH to file a NoA of an administrator, notwithstanding that the court was not open for business, by faxing the NoA to a designated telephone number. The rule provided that the appointment would take effect from the time and date shown on a required fax transmission report.

47. Following revision with effect from 6 April 2010, Rule 2.19 of the Insolvency Rules 1986 was extended to permit a QFCH also to file a NoA out of hours, by attachment to an email sent to a designated email address.

No statutory regime for company or director appointments out of hours

48. Prior to the introduction of Practice Direction 51O of the Electronic Working Pilot Scheme ("PDEW") there were no means by which a director or a company could appoint an administrator outside of court opening hours.

Introduction of the PDEW

The PDEW as originally drafted

49. The PDEW was introduced with effect from 16 November 2015. As its "Pilot Scheme" title suggested, it was initially introduced for one year. Its operative provisions were found at paras 2.1 and 2.2:

"2.1 Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including

during out of normal court office opening hours and on weekends and bank holidays, except where there is –

(a) planned "down-time"…

(b) unplanned "down-time"…

2.2 For the avoidance of doubt, Electronic Working applies to and may be used to start and/or continue CPR Part 7, Part 8 and Part 20 claims, pre-action applications…insolvency proceedings, and arbitration claims in the Rolls Building Jurisdictions".

50. Counsel highlights that in its original format the PDEW did not contain a carve-out for the appointment of administrators by QFCHs in the format set out in the present form of the PDEW at para 2.1(c) ("QFCH Exception").

51. When introduced, the PDEW was expressly stated to constitute an "electronic working scheme" within the meaning of r.12A.14 Insolvency Rules 1986. Para 1.1(2) PDEW as originally drafted read:

"1.1(2) Electronic Working is an electronic scheme for the purposes of rule 12A.14 of the Insolvency Rules 1986".

Amendments to the PDEW

52. The QFCH Exception was introduced to the PDEW in November 2017 by the 93rd Update of Practice Directions. Following amendment, paras 2.1 and 2.2 PDEW now provide:

"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 hour and on weekends and bank holidays, except –

(a) where there is planned "down time:…

(b) where there is unplanned "down time"…

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

2.2 Electronic Working applies to and may be used to start and/or continue… CPR Part 7, Part 8 and Part 20 claims, pre-action applications including applications under rule 31.16, insolvency proceedings and arbitration claims…"

53. The operational period of the PDEW has also been extended on a number of occasions and is currently stated at paragraph 1.1(1)(a) to remain in operation until April 2020.

Introduction of the 2016 Rules

54. The 2016 Rules were introduced with effect from 6 April 2017. Rule 1.2 introduced a new definition:

> " 'file with the court' and similar expressions in these Rules means deliver to the court for filing and such references are to be read as including "submit" and "submission" to the court in the Act (except in sections 236 and 366)".

55. The word "deliver" is defined to be "interpreted in accordance with Chapter 9 of Part 1" namely in accordance with Rules 1.36 to 1.53 of the 2016 Rules.

56. Rule 1.46 provides:

> (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".

57. On the same date that the 2016 Rules took effect, the PDEW was amended to provide a new paragraph 1.1(2) which provides:

> "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 and Wales) Rules 2016".

58. Ms Page submitted that the 2016 Rules were not updated to reflect the introduction of the PDEW. At Rules 3.20 to 3.22 they continue to include the special regime for out-of-hours administration appointments which was previously set out in Rule 2.19 of the Insolvency Rules 1986.

Introduction of the IPD

59. The IPD was introduced in its current form with effect from 4 July 2018 (Practice Direction: Insolvency Proceedings [2018] BCC 421) and included at paragraph 8.1 the provisions, the meaning of which Ms Page submits is ambiguous:

> 8.1 Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O – the Electronic Working Pilot Scheme, or to any subsequent Electronic Practice Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in subparagraph (c) to notices of appointment made by qualifying floating charge holders, paragraph 2.1 of the Electronic Practice Direction 51O shall not apply to any filing of a notice of appointment of an administrator outside Court opening hours, and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply.

60. A point not included in Ms Page's submissions but nevertheless a notable aspect of the context in which the IPD was introduced, is that from 25 February 2019, the ability to file documents with the court electronically, was extended to the Business and Property Courts outside London, to Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle. From 30 April 2019 it became mandatory for

professional court users to issue proceedings using e-filing in respect of any proceedings issued on or after 25 February 2019. The use of e-filing remains optional for litigants in person.

An error in drafting?

61. Parliament is presumed to be rational, reasonable and informed, pursuing a clear purpose in a coherent, principled manner. Ms Page submitted that in applying this principle, it has been said that the Court should be wary of interpreting a provision so as to conclude that Parliament made an error in its drafting. She provided the following extract from Leggatt J's judgment in *R (on the application of N) v Walsall Metropolitan Borough Council* [2014 PRSR 1356]

> "[64] It might be suggested that Parliament when bringing into force the [Mental Capacity Act 2005] may simply have overlooked the reference to the "Court of Protection" in paragraph 44 [of Ch 10 to the 1987 Regulations], and that in these circumstances no inference should be drawn from the omission to amend or update paragraph 44.
>
> [65] That suggestion might have force if ascertaining the intention of Parliament involved a sociological inquiry into what was actually in the minds of individual legislators. However, that would be to mistake the nature of the interpreter's task. When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. That assumption shows appropriate respect for Parliament, enables Parliament most effectively to achieve its purposes and promotes the integrity of the law. In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has. Attributing to Parliament an error or oversight is therefore an interpretation to be adopted only as a last resort."

62. Authority states that this presumption may apply with less stringency to secondary legislation (*R (Skipton Properties Ltd v Craven District Council* [2017] JPL 825 at [60] to [61]). However, in my judgment, to the extent that I am able to do so, I should interpret paragraph 8.1 of the IPD as having the meaning which best explains its wording and should only, as a last resort, conclude that there has been an oversight or an error.

63. *Bennion* further states:

i) at section 9.4, that *prima facie* the meaning of an enactment is taken to be that which corresponds to the grammatical meaning;

ii) at section 9.5, that the meaning to be attributed to a provision consists not only of what is expressed but also of what may properly be implied, whether because such implications are directly suggested by the words used or because they are indirectly suggested by rules or other principles not disapplied by the enactment; and

iii) at section 9.6 that when considering which of opposing constructions corresponds to the legal meaning, the court should assess the likely consequences of adopting each construction both to the parties in the case and

> for the law generally. If on balance the consequences of one construction are more adverse than beneficent, this may militate against that construction. This is supplemented at section 9.7 by an explanation that when considering which of opposing constructions would give effect to the legislative intention, the court should presume that the author intended common sense to be used in construing the enactment. And further, at section 9.9 that an enactment must be construed in such a way as to implement (rather than defeat) the legislative purpose.

The meaning of paragraph 8.1 of the IPD

64. Ms Page submitted that something had plainly gone wrong with the drafting of paragraph 8.1 of the IPD. Her starting point was that prior to 6 April 2010 and up to 16 November 2015, a QFCH (and only a QFCH) could appoint an administrator out of court hours, initially by faxing the NoA to the designated fax machine and latterly by either fax or email. In her submission, from 16 November 2015 onwards, a QFCH preserved these methods to procure an out-of-hours appointment, whilst, by virtue of the introduction of the PDEW, a company or its directors gained a new ability to appoint an administrator out of court hours by e-filing a NoA.

65. Against that contextual background, she interpreted the introduction of the QFCH Exception introduced at paragraph 2.1(c) of the PDEW in November 2017. She said that it was most likely intended to avoid a situation where a QFCH may e-file a NoA as well as filing it by fax or email (using the route prescribed by Rules 3.20 – 3.22), thereby avoiding the risk of two separate filing dates or times arising under each route.

66. On this analysis, paragraph 8.1 of the IPD makes no sense. She submitted, however, that applying the approach laid down in *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 1 WLR 586 (as applied in subsequent cases) the court can take a more purposive approach to construction. Where necessary it can read words into a statute (she referred me to *R (Confederation of Passenger Transport) v Humber Bridge Board* [2004] 2 WLR 98, in which the Court of Appeal read the words "large bus" into secondary legislation which had omitted to include large buses within its definition of goods vehicles). It can also delete words (as the Court of Appeal was prepared to do in *Director of Serious Fraud Office v B (No 2)* [2012] 1 WLR 3188).

67. Ms Page suggested that if the intention of paragraph 8.1 of the IPD had been to remind readers of the interaction between the 2016 Insolvency Rules and the PDEW, that objective could be achieved by making the following, highlighted amendments:

> Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O – the Electronic Working Pilot Scheme, or to any subsequent Electronic Practice Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system. For the avoidance of doubt, pursuant to ~~and notwithstanding~~ the restriction in subparagraph (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 [by qualifying floating charge holders][1], and

[1] Counsel submitted that the words in square brackets are not strictly necessary but would clarify the amended provision for the avoidance of any further doubt.

> the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply.

68. Whilst the retention of a special regime for QFCH is not explained, Ms Page submitted it is possible that was because the PDEW was originally intended to operate only as a pilot and that the authors of the 2016 Rules wished to "future proof" the ability for QFCHs to make out of court appointments in the event that the PDEW was not extended or was revoked. She said that it may alternatively be the case that Rule 3.20 of the 2016 Rules represents a legislative hangover from a time when electronic filing was not widely available and its future not yet known, such that certainty was favoured by the legislature over the risks of assuming there will be further technological progression.

69. Alternatively, again against the contextual background summarised above, she submitted that if the intention behind paragraph 8.1 had been to restrict the ability (gained, according to her submissions, on the introduction of e-filing in November 2015) of companies and their directors to appoint administrators out of court hours, with the result that only QFCHs could do so (and only by using the fax and email methods prescribed by the Rules), amendments along the lines of those highlighted below could be made:

> Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O – the Electronic Working Pilot Scheme, or to any subsequent Electronic Practice Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system. ~~For the avoidance of doubt, and~~ Notwithstanding the restriction in subparagraph (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 [by whomever made][2], and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply to out of hours appointments by qualifying floating charge holders.

What if a mistake has not been made? Re-examining the context

70. It is clear from the decision of Leggatt J in *R (on the application of N) v Walsall Metropolitan Borough Council*, that attributing an error or oversight is an interpretation that should only be adopted as a last resort.

71. Ms Page rightly sought to interpret paragraph 8.1 in context. But is there scope for interpreting the contextual background differently and if so, could that give rise to an interpretation of paragraph 8.1 that more closely follows the natural meaning of the words used and which could be seen to implement rather than defeat the legislative purpose?

72. The appointment of an administrator has very serious consequences: the administrator gains full powers of management; directors may not exercise their powers except with the administrator's consent; he can appoint and remove the company's directors; a moratorium prevents creditors from taking action against the company during the period for which the company is in administration; an administrator has power to deal

[2] Again, counsel submitted that the words in square brackets are not strictly necessary but would clarify the amended provision for the avoidance of any further doubt.

with property which is subject to a floating charge as if it were not so charged and to apply to court for orders permitting him to dispose of goods held by the company under hire purchase agreements and subject to fixed charges.

73. The United Kingdom remains unique among European member states in permitting an administrator to be appointed "out of court" by the mere filing of prescribed documents with the court and without the necessity for there to be a judicial decision.

74. In a European context, it appears even more surprising that such an appointment should be permitted to be made at a time when court staff are not present to check that the forms submitted to make the appointment are complete or even legible. That exceptional right was nevertheless given to QFCHs. It is generally understood that this was because, at the same time as the out-of-court administration procedure was introduced, those holding floating charges over the whole or substantially the whole of a company's property and undertaking, lost the right (save in specified, excepted cases) to appoint an administrative receiver. Formerly, the right to appoint such a receiver could have been exercised without any involvement of the court, simply in writing and at any time of night or day.

75. In my judgment, extending such an onerous power and right (as that held by a QFCH to appoint an administrator out of court hours) to any company or its directors, who never before held such a right, would require clear Parliamentary intention, set out in legislation.

76. I consider that the IPD must be interpreted first by reference to the relevant primary and secondary legislation. Rule 3.20(1) of the 2016 Rules strictly permits only a QFCH to file a notice of appointment with the court by fax or email. It expressly states that a QFCH may do so: "When (but only when) the court is closed". The appointer is required, by Rule 3.20(9) to take to the court, on the next occasion that it is open for business, three copies of the faxed or emailed notice of appointment, the fax transmission report or hard copy email, all supporting documents and, in my mind, significantly, also a statement providing reasons for the out-of-hours filing: "including why it would have been damaging to the company or its creditors not to have so acted".

77. I accept that neither the Act nor the 2016 Rules (nor indeed the 1986 Rules) expressly disapply the PDEW nor do they expressly state that the company or its directors may not file notices of appointment out of court hours. However, Rule 12.1(1) of the 2016 Rules states that the provisions of the CPR and any related practice directions apply except so far as disapplied by or inconsistent with the Rules. There has been no demonstration of an intention on the part of the legislature to permit the extraordinary power held by QFCHs to appoint administrators out of hours to become available to companies or their directors. Interpreting the PDEW in a manner which gives rise to such a power would be inconsistent with the Rules.

78. It follows that I do not consider the introduction of the PDEW could, without more, have that effect. If I am correct in this, the wording of paragraph 8.1 of the IPD reveals no mistake. I have provided my understanding of each of its provisions in square brackets below:

    i) Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O – the Electronic Working Pilot Scheme, or to any subsequent Electronic Practice

Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system.

ii) For the avoidance of doubt, and notwithstanding the restriction in subparagraph (c) to notices of appointment made by qualifying floating charge holders,

[for anyone perhaps wondering whether, despite the fact that legislation makes no provision for it, the PDEW has somehow given companies and their directors the power to appoint administrators out of hours, and even though sub-para (c) of the PDEW expressly contemplates some out-of-hours appointments]

iii) 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

[e-filing shall not apply to any notices of appointment of administrators]

iv) and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply

[and QFCHs should continue to follow the fax and email routes prescribed by the 2016 Rules].

79. I am 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.

Consequences

80. Adopting this interpretation of paragraph 8.1 of the IPD, what is the effect on an appointment purportedly made by directors (or their professional advisors) who e-file a NoA outside of court opening hours – in SJH's case, at 6.03am?

Wright v HMV Ecommerce Ltd

81. I have read with care, the decision of Barling J in *Wright v HMV Ecommerce Ltd* [2019] EWHC 903 (Ch) where he recently considered two rival interpretations of paragraph 8.1 of the IPD.

82. The NoA purportedly appointing the HMV administrators had been e-filed one hour and 24 minutes after the court counter had closed. In declining to reach a final

decision on the correct interpretation of the paragraph, the learned Judge nonetheless granted consequential relief to confirm the validity of the administrators' appointment and the steps taken by them in the administration.

83. In doing so, he considered Rule 12.64 of the 2016 Rules and paragraph 104 of Schedule B1 to the Act which provide, respectively:

> "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".

> "An act of the administrator of a company is valid in spite of a defect in his appointment or qualification".

84. Barling J reviewed several authorities concerning out-of-court appointments where there had been a failure to comply with provisions of the Act or the relevant insolvency rules in force at the time. The authorities to which he referred, included *Re Euromaster Ltd* [2012] EWHC 2356 (Ch); *Re Spaces London Bridge Ltd* [2018] EWHC 3099 (Ch)*; Re Care People Ltd (in administration)* [2013] EWHC 1734 (Ch)*;* and *Re Eiffel Steelworks Limited* [2015] EWHC 511 (Ch). He concluded that the preliminary question for the court to determine was whether the defect in question was such that it must have been intended to lead to the administrators' appointment being a nullity or totally invalid. At paragraph 15 he stated:

> "One should ask whether the particular requirement goes to the very root of the appointment. In my view, that is simply a non-starter in the present case. The provision does not go to the power to appoint; it is a provision which concerns the time from which an appointment will take effect; it is difficult to envisage any circumstances in which failure to comply would give rise to a nullity or invalidity as far as the appointment itself is concerned. Of course, that is not to say that the timing of the appointment is not of considerable importance in relation to acts of the administrators taken after that time".

85. He then considered whether the failure to comply with the relevant provision was inadvertent or whether there was a deliberate breach:

> "It cannot possibly be intended that an inadvertent breach of paragraph 8.1 … could have been intended to result in total invalidity in such circumstances as these".

86. At paragraph 17 of his judgment he explained that the courts will look at the distinction between a provision which restricts the power to appoint and provisions concerning the method and time by which NoAs may be filed, which he concluded were "obviously procedural in nature":

> "Breach of the latter would, at worst, have the effect of rendering an appointment irregular rather than a nullity. The courts have held that the mere fact that the non-compliance relates to a time limit does not of itself compel the conclusion that the defect is fundamental, and the purported act a nullity. It is obviously not inconceivable that failure to observe a time limit could have that effect, but in a case where the consequences of such a failure are, as in this case, wholly trivial, it is inconceivable that the effect could be such as to render any act subsequently

> taken on the strength of the filing as a nullity. In fact, here no consequences whatsoever are discernible".

87. His order declared that:

    i) 'if the filing of the Notice of Appointment at 5.54pm on 28 December 2018 was a technical breach of the provisions of paragraph 8.1 of the [IPD] the defect does not affect:

        a) the validity of the appointments of the Administrators;

        b) the time and date at which the appointments took effect, namely 5.54pm on 28 December 2018; nor

        c) the validity of any act of the Administrators from 5.54pm on 28 December 2018 onwards'.

88. He further ordered that if the filing was a technical breach, to the extent necessary, the defect was waived pursuant to Rule 12.64 of the 2016 Rules and/or the time for filing the NoA by the e-filing system be extended to 5.54pm pursuant to CPR Rule 3.1.2(a).

89. It will be apparent, in the light of my interpretation of paragraph 8.1 of the IPD, that with the greatest of respect to the learned Judge, I do not agree that the e-filing, outside of court counter opening hours, by a company or its directors of a NoA of appointment gives rise, as he held, to an appointment that takes effect at the time the notice was filed, but which was potentially subject to a procedural defect. In my judgment, until such time as the legislature creates an express power for appointments under paragraph 22 of Schedule B1 to be made out-of-hours, they simply cannot be made, whether in a curably defective manner or otherwise.

90. Furthermore, again with respect to the learned judge, I do not consider that it would be a proper application of CPR Rule 3.1.2(a) notionally to extend time for e-filing to permit a company or its directors to e-file a NoA outside of the court's usual counter opening hours.

91. At paragraph 14 of his judgment, Barling J explains that the authorities indicate that the starting point is to identify the purpose of the relevant provision. He expressed some difficulty in this task because he considered the purpose of paragraph 8.1 of the IPD to be not immediately apparent:

> "The Electronic Working Pilot Scheme itself very clearly indicates that the intention is that documents should be able to be filed electronically at any time, save in specific cases. If the applicants' concerns as to the possible meaning of paragraph 8.1 are correct, the provision may detract from that objective".

92. He commented that counsel had not been able to identify any obvious purpose of paragraph 8.1 save as to "removing what would otherwise be the power of the directors and 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 (see paragraph 2.1 of the Practice Direction) and thereby remove any apparent difference of treatment".

93. It is with reluctance that I stray from the approach taken by Barling J but I consider that this paragraph amply explains why I feel compelled to do so. He had only one

counsel before him, limited time and I anticipate that in those circumstances, he did not have the benefit of submissions from counsel which were as expansive as those made to me. In consequence, he used as his starting point, the apparent intention of the PDEW to expand e-filing to all and any insolvency-related notices, and then sought to understand why the IPD potentially limited such filings. For the reasons I have set out above, in my view, the correct approach is to go back to the intention of the legislature, as set out in the Act and the insolvency rules and to interpret the practice directions in their shadow.

S.J. Henderson & Company Limited

94. I accept that the decision of the directors of S.J. Henderson & Company Limited to appoint administrators or the Company was intended to safeguard the interests of its creditors at a time when the Company was under considerable pressure from creditors. The e-filing of the NoA outside of court counter-opening hours was permitted by the machinery of the e-filing system and the court staff accepted it 18 minutes before the usual court counter opening time of 10am. Court staff work for many hours beyond counter-opening times. It would be an absurdity if they were not able to process any documents e-filed overnight for fear of exceeding the scope of their authority.

95. Consequently, whilst I note that the court staff sent an email stating that the NoA was accepted at 9.42am, in the absence of any legislative power enabling the directors to make an appointment that early in the morning, in my judgment it could not take effect until the court counter formally opened for business. In London, that is 10am. I understand that it may be different in some or all of the District Registries.

96. Mr Edwards' witness statement explains that nothing of any great consequence in relation to the appointment occurred before 10am but I shall nevertheless invite counsel to confirm that this is the case when handing down this judgment and provide her with an opportunity to seek an appropriate order consequent upon it.

97. However, in the course of preparing this judgment, an additional point has caught my eye. At paragraph 14, I calculated that pursuant to paragraph 28(2) of Schedule B1, the tenth business day (beginning with the date on which the notice of intention to appoint was filed with the court), after which an appointment of administrators may not be made, was 31 October 2018. The NoA was completed by SJH's director on 31 October 2018 and stated that the Original Administrators were appointed at 2pm that day. The NoA was not, however, filed with the court until the following day, and according to the views I have expressed in this judgment, could not take effect until 10am on 1 November 2018. I shall therefore invite counsel to address me at the handing down not only on any order that the SJH Administrators seek consequent upon this judgment, but also on the effect of paragraph 28(2) on the NoA in this matter.

Triumph Furniture Limited

98. Having set out the order in which the notice of intention to appoint and NoA administrators of TF were given and filed with the court and my interpretation of the meaning and effect of paragraph 8.1 of the IPD, I simply state in relation to TF that subject to any further defect or issue regarding the validity of the appointment of the TF Administrators, in my judgment, the appointment of the TF Administrators took effect at 10am on 8 October 2019. It is not clear from the evidence filed in support of

the application whether the TF Administrators purported to take any action in relation to the company in the 31 minutes between the time when they originally thought that they had been appointed and the time at which I have held their appointment to have taken effect. I shall therefore invite counsel to address me on this point and the terms of any order which they TF Administrators may seek, consequent upon this judgment, when I hand it down.

Notices of intention to appoint administrators

99. I am aware that the terms of paragraph 8.1 of the IPD, when read in the light of PDEW, have caused some additional concerns amongst practitioners in relation to the ability, or otherwise, of parties to file notices of intention to appoint administrators ("NoIA") outside of court hours. The IPD is silent about such notices.

100. The filing with the court of a NoIA gives rise to an interim moratorium (pursuant to paragraph 44 of Schedule B1). Whilst the protection afforded by such an interim moratorium is of considerable value and importance to many financially distressed companies, it is nevertheless, temporary in nature. It expires after ten business days beginning with the date on which the NoIA is filed with the court. Its consequences, at least as far as the subject company are concerned, are immeasurably less onerous than the appointment of an administrator.

101. The legislature demonstrated no desire to discriminate between NoIAs filed on behalf of QFCHs and those filed by a company or its directors. In these circumstances, and consistent with my reasoning above, I consider there is nothing to prevent a NoIA being e-filed by any party, out of court hours. Provided the filing does not fail Acceptance pursuant to paragraph 5.4(6) of the PDEW, the NoIA will take effect at time and date it was filed, as set out in paragraph 5.4(2) of the PDEW.

ICC Judge Burton

18 October 2019