Neutral Citation Number: [2020] EWHC 1133 (Ch)

Case No: **CR-2020-LDS-000028**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS IN LEEDS**
**INSOLVENCY AND COMPANIES LIST (CHD)**

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 3BY
Date: 7 May 2020

**Before** :

**HIS HONOUR JUDGE DAVIS-WHITE QC**
**(SITTING AS A JUDGE OF THE HIGH COURT)**

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**IN THE MATTER OF A.R.G. (MANSFIELD) LIMITED**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

**Between :**

**(1) JACQUELINE ROMA GREGORY**
**(2) ALLAN RUSSELL GREGORY AND**
**(3) PAUL ALAN UNWIN**

**Applicants**

**- and –**

**A.R.G. (MANSFIELD) LIMITED** **Respondent**

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**Ms Lisa Feng** (instructed by **Leonard Curtis Legal LLP**) for the **Applicants**

Hearing dates: 17 April 2020

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# Approved Judgment

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HIS HONOUR JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

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**His Honour Judge Davis-White QC :**

1. This is another in a long line of cases that has had to consider the effect of a defect in the appointment of administrators. The case came before me in the applications list in the Business and Property Courts in Leeds on 17 April 2020. I then made the order that I shall explain further below, in effect appointing the persons hitherto acting as administrators with retrospective effect (to the date of their original purported appointment) and, if and to the extent that their original purported appointment was only irregular and not a nullity, removing them as administrators under such appointment. Unless the context otherwise requires, references in this judgment to "appointment" are to appointment of (an) administrator(s).

2. The particular defect in this case is that the relevant company (the "Company"), being a company regulated by the Financial Conduct Authority ("FCA"), could only be put into administration with the consent of the FCA. The directors of the Company purportedly appointed administrators in January 2020, but the need for FCA consent was not appreciated at that time. As it happens, FCA consent (but subject to limitations) was obtained by letter from the FCA dated 5 March 2020.

3. The reasons that I decided to reserve judgment in this case were four-fold:

   (1) The guidance given by HH Judge Hodge QC in *Re M.T.B. Motors Limited* [2010] EWHC 3751 (Ch), [2012] B.C.C. 601 as regards the manner of searching, what is now, the FCA Register so as to determine whether or not there is a need for FCA consent prior to the appointment of administrators appears to be being overlooked;

   (2) The legal decision in the *M.T.B Motors* case appears to be have been overlooked such that in a case 18 months later, *Re Ceart Risk Services Limited* [2012] EWHC 1178 (Ch), Mr Justice Arnold (as he then was) was told that there was no authority on the point (see paragraph [12] of the Judgment). Mr Justice Arnold in the event reached a contrary conclusion to HH Judge Hodge QC. Decisions being reached on points of principle by one Judge in the High Court which are not referred to in a later case, and where the second judge reaches a different conclusion are, unfortunately, not a rare animal in this area of the law. Indeed, in a recent case, Re *Skeggs Beef Limited* [2019] EWHC 2607 (Ch), the *M.T.B. Motors* case was cited as if it were good law with no mention of *Re Ceart*;

   (3) The two cases of *M.T.B. Motors* and *Ceart* appear to be in conflict;

   (4) As remarked upon by Norris J, who has done so much to develop the jurisprudence in this area: "*This is a complex and technical area of the law containing conflicting decisions, all delivered under pressure of time and after hearing arguments on one side only" (Re Euromaster Limited* [2012] EWHC 2356 (Ch); [2012] BCC 754). Not only that, but from personal experience the "spate" of applications regarding the validity of administration appointments out of court and referred to by Norris J in Re *Care Matter Partnership Limited* [2011] EWHC 2543 (Ch); [2011] BCC 957 paragraph [3] continues, albeit with ebbs and flows.

4. Ms Feng appeared for the administrators of the Company and, in due course, for the directors also. I am grateful to her for her submissions, both written and oral.

5. Although I did not have the benefit of contrary argument, and would have welcomed it, I consider that it is appropriate, under the Practice Direction, to direct that this judgment may be cited even though the application was attended by one party only.

**The Facts**

6. The Company was incorporated in April 1994 and commenced trading shortly thereafter from premises at Mansfield Woodhouse, Nottinghamshire. Its main business was as general building contractors, dealing mainly with government and local authority-funded organisations. In particular, the Company carried out major and minor planned maintenance and refurbishment contracts of schools, colleges, universities and hospitals. Between about 1999 and 2012 it became an approved contractor for Belzona Polymerics Limited. However, by 2012 that company had formed its own installation operation and this had an adverse impact on the Company's turnover.

7. In common with other building companies, the Company's turnover and profitability was also adversely affected by other additional factors after 2008. These included the financial crash in 2008, increasing trade pressures thereafter, the issue as to the United Kingdom's departure from the European Union, and loss of customer confidence. The immediate causes of its financial crisis were the Company's involvement in a potential contract which was delayed and finally not granted to the Company and the weather in the late autumn/winter of 2019.

8. The directors consulted Leonard Curtis Recovery Limited ("Leonard Curtis"). The conclusion was reached that the Company was insolvent and that the appropriate course was to place it into administration.

9. A notice of intention to appoint administrators was filed on 7 January 2020. National Westminster Bank plc as qualifying charge holder consented to the appointment on 9 January 2020. On 10 January, a notice of appointment by the directors of Richard Pinder and Sean Williams of Leonard Curtis as administrators was lodged with the Court (the "Administrators": this definition is for convenience and does not prejudge the validity of the appointment). At that stage, it was assumed that the appointment was valid and that relevant statutory requirements had been met.

10. The Administrators issued a Report to Creditors dated 27 February 2020. It confirmed and set out (among other things) (a) the Company's insolvency and that in the administrators' opinion, the administration would be likely to achieve the purpose of achieving a better result for the Company's creditors as a whole than would be likely if the Company were to be wound up (without first being in administration); (b) the steps that the Administrators had taken to date in the administration and (c) the Administrators' proposals, including an invitation for the creditors to approve the same under the decision procedure by correspondence rather than at a meeting. Under that procedure the proposals were deemed to have been approved without modification on 19 March 2020. It remains the case that it is anticipated that there will be payment of a dividend to unsecured creditors, they being the only class of creditors believed to exist.

11. On 3 March 2020 it was brought to the Administrators' attention that following a periodic review of the administration by an employee of Leonard Curtis, the employee had carried out a search of the FCA's financial service register. This revealed that the

Company was previously an Appointed Representative, but that it had been registered on the relevant FCA register under the name "A R G (Mansfield) Limited" thus omitting the full-stops after each of the capital letters "A", "R" and "G".

12. Apparently, due diligence had been carried out both by or on behalf of Leonard Curtis and by solicitors for the Company prior to the purported appointment of the administrators. Although the precise facts are not clear in the evidence, it appears that the searches were under the Company's correct name (including the punctuation). What prompted the employee of Leonard Curtis to make a wider search in March than the previous search, which did not go so widely, is unclear.

13. One of the directors, who is also the company secretary, Ms Gregory, made a witness statement on behalf of all the directors. In it she explained that, when the issue of registration with the FCA was raised with her by staff from Leonard Curtis (apparently when the fact of registration was established), she could not recall why the Company would have had an appointed representative status with the FCA. After further investigation it became clear that the Company had been a member of the Federation of Master Builders which operated a trust mark guarantee scheme backed by an insurance policy. It was in relation to that scheme that an application for registration was made. As it happened, the scheme was not used by the Company and it did not sell any policies which explains Ms Gregory's lack of recollection. In addition, Ms Gregory was not familiar with the administration process and did not know that there was a requirement to obtain the consent of the FCA before the appointment of an administrator.

14. In the *M.T.B. Motors* case, the same legal issue that confronts me here arose on very similar facts. There the punctuation in the name of the Company, being full-stops after each of the three initial letters of the Company's name, had been omitted from the record of the Company's name on the Financial Services Authority (relevant predecessor regulator to the FCA) register. Administrators were purportedly appointed on 7 October 2010. The error in the record of the Company's name, and the failure to seek and obtain FCA consent prior to the appointment of administrators, came to light when the FSA wrote to the administrators informing them that the company was still registered and that it was in default in failing to file a return. The FSA eventually gave consent to the appointment of administrators by letter dated 3 November 2010 and filed on 25 November 2010. An application was issued on 23 November 2010 and came before HH Judge Hodge QC on 26 November 2010. In paragraph [13] of his judgment he said

> "*[13] …This present case may serve a useful purpose if it emphasises the need to obtain FSA consent before filing notice of intention to appoint an administrator in a case such as the present; and if it also draws attention to the fact that, where there are initial letters followed by full-stops in a company's name it may also be necessary to search, not only against the correct name of the company, but also against a variant of that name, without the full-stops after each capital letter*."

15. I echo the remarks of HH Judge Hodge QC. One would have hoped that, in this day where technology and electronic searches are so prevalent, that (a) the register search facility was sufficiently sophisticated so that a search with the punctuation that I have mentioned would nevertheless electronically produce a record of the incorrectly

recorded name without punctuation and/or (b) that the persons undertaking the search would try relevant variants of the name (e.g. trying variants such as leaving no spaces between the three initial letters in the search term as well as with and without punctuation (including variants to pick up the possible incorrect omission of parentheses in a name such as the one I am concerned with). It may be that the FCA has issued guidance for those carrying out searches as to the manner in which searches will produce results when the register is searched against certain criteria, but if it has not it might be useful were it to do so.

16. I should also note the helpful comment made in a letter from the FCA when the question of retrospective consent to the administration was made. The writer commented:

> *"I will also see if I can get into contact with the appropriate team at the FCA to feed back the difficulty you had in finding this firm on the FCA Register, and make the suggestion that searching by Company number would make it easier for instances like this to be avoided in the future."*

17. In the *Ceart Risk Services Limited* case, it is unclear from the judgment the circumstances in which consent from the FSA was not sought prior to the purported appointment of administrators.

**Consent of the FCA**

18. When the need for, but absence of, consent from the FCA to the administration came to light, correspondence was entered into with the FCA seeking retrospective consent. The request and need for "retrospective" consent was acknowledged by letter from the FCA :

> "*I can confirm that the correspondence you sent regarding the above firm and the need for retrospective consent has been received by the Resolution team at the FCA. In order to grant consent, I will need to receive an 'Administrator's Letter' in the typical format (I've attached the template for ease of reference). Whilst not essential, you may want to amend slightly to reflect the fact that this is a retrospective request*."

19. Such an "Administrator's Letter" was thereafter sent to the FCA. By letter dated 5 March 2020, headed "*To be used when consent is sought after appointment*" and having set out the factual position and various confirmations received from the administrators (for example) the Administrators' belief that administration would achieve the statutory purpose of achieving a better result for the company's creditors as a whole than would be likely if it were to be wound up, the FCA provided consent in the following terms:

> "*For the purposes of section 362A of the Act, and having considered your letter, the FCA gives its consent to the appointment but only from the date of this letter."*

20. The covering email made the following point:

> "*Please find enclosed with this letter the FCA's consent under section 362A of the Act. Please note that by providing the enclosed consent, the FCA is not in any*

*way ratifying, agreeing to/with and/or endorsing any of the actions taken in the period between the Joint Administrators' purported appointment. and the-date. of the consent letter (the "hiatus") or opining on the validity of their appointment or any actions taken during the hiatus.*

*We take the view that whilst the failure· to obtain the FCA's consent to your appointment is a 'curable' defect, the validity of your appointment and/or any significant actions taken prior to the FCA's consent being obtained could be subject to challenge. It is for the Joint Administrators to seek legal advice on the validity of their appointment and ensure they are validly appointed*."

## The relevant insolvency legislation

21. To understand some of the cases it is helpful if I set out more of the provisions of the insolvency legislation than those strictly relevant to this case.

22. Paragraph 22 of Schedule B1 to the Insolvency Act 1986 ("Sch B1") confers power on the directors of a company and on the relevant company itself to appoint administrators. That power is subject to various limitations.

23. Paragraph 26 of Sch B1 requires notice of intention to appoint pursuant to paragraph 22 to be given to various persons. It provides as follows:

"

***Notice of intention to appoint***

***26***
*(1) A person who proposes to make an appointment under paragraph 22 shall give at least five business days' written notice to—*
*(a) any person who is or may be entitled to appoint an administrative receiver of the company, and*
*(b) any person who is or may be entitled to appoint an administrator of the company under paragraph 14.*
*(2) A person who [gives notice of intention to appoint under sub-paragraph (1)] shall also give such notice as may be prescribed to such other persons as may be prescribed.*
*(3) A notice under this paragraph must—*
*(a) identify the proposed administrator, and*
*(b) be in the prescribed form."*

The words in square brackets in sub-section (2) were inserted, replacing earlier wording, by the Deregulation Act 2015, Schedule 6 paragraph 6 as from 1 October 2015. The effect was to make clear that there is not a (or remove the) requirement to give notice to the prescribed persons (including the company itself) where there is no qualifying floating charge holder or person entitled to appoint an administrative receiver (in either case) entitled to notice. A number of the cases deal with that issue, but also the separate issue of the effect of a failure to give notice under para 22(2) where there is a person entitled to notice under paragraph 22(1).

24. Paragraph 27 of Sch B1 deals with the procedural requirements of a notice to appoint under paragraph 26. It provides as follows:

> ***"27***
>
> *(1) A person who gives notice of intention to appoint under paragraph 26 shall file with the court as soon as is reasonably practicable a copy of—*
>
> *(a) the notice, and*
>
> *(b) any document accompanying it.*
>
> *(2) The copy filed under sub-paragraph (1) must be accompanied by a statutory declaration made by or on behalf of the person who proposes to make the appointment—*
>
> *(a) that the company is or is likely to become unable to pay its debts;*
>
> *(b) that the company is not in liquidation, and*
>
> *(c) that, so far as the person making the statement is able to ascertain, the appointment is not prevented by paragraphs 23 to 25, and*
>
> *(d) to such additional effect, and giving such information, as may be prescribed.*
>
> *(3) A statutory declaration under sub-paragraph (2) must—*
>
> *(a) be in the prescribed form, and*
>
> *(b) be made during the prescribed period.*
>
> *(4) 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."*

25. Paragraph 28 further limits the power to appoint under paragraph 22 where notice of intention to appoint is required under paragraph 26. It provides as follows:

> ***"28***
>
> *(1) An appointment may not be made under paragraph 22 unless the person who makes the appointment has complied with any requirement of paragraphs 26 and 27 and—*
>
> *(a) the period of notice specified in paragraph 26(1) has expired, or*
>
> *(b) each person to whom notice has been given under paragraph 26(1) has consented in writing to the making of the appointment.*
>
> *(2) An appointment may not be made under paragraph 22 after the period of ten business days beginning with the date on which the notice of intention to appoint is filed under paragraph 27(1)."*

26. The effect of the lodging, pursuant to paragraph 44 of a notice of intention to appoint an administrator by the directors or company is that an interim moratorium, lasting for a maximum period of 10 days, comes into effect under paragraph 44. Paragraph 44 provides, so far as relevant:

> " ***Interim Moratorium***
>
> ***44***
>
> *.....*
> *(4) This paragraph also applies from the time when a copy of notice of intention to appoint an administrator is filed with the court under paragraph 27(1) until—*
> *(a) the appointment of the administrator takes effect, or*
> *(b) the period specified in paragraph 28(2) expires without an administrator having been appointed.*
> *(5) The provisions of paragraphs 42 and 43 shall apply (ignoring any reference to the consent of the administrator).*
> *(6) If there is an administrative receiver of the company when the administration application is made, the provisions of paragraphs 42 and 43 shall not begin to apply by virtue of this paragraph until the person by or on behalf of whom the receiver was appointed consents to the making of the administration order.*
> *(7) This paragraph does not prevent or require the permission of the court for—*
> *(a) the presentation of a petition for the winding up of the company under a provision mentioned in paragraph 42(4),*
> *(b) the appointment of an administrator under paragraph 14,*
> *(c) the appointment of an administrative receiver of the company, or*
> *(d) the carrying out by an administrative receiver (whenever appointed) of his functions."*

Paragraphs 42 and 43 contain respectively the moratorium provisions on insolvency proceedings and other legal process that apply while a company is in administration.

27. Paragraphs 29-31 deal with the appointment of an administrator by the company/directors pursuant to paragraph 22. They provide as follows:

> **"** ***Notice of appointment***
> ***29***
> *(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.*

***30***

*In a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) (and paragraph 28 therefore does not apply)—*

*(a) the statutory declaration accompanying the notice of appointment must include the statements and information required under paragraph 27(2), and*

*(b) paragraph 29(2)(c) shall not apply.*

***Commencement of appointment***

***31***

*The appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied."*

28. Paragraph 104 of Schedule B1 provides as follows:

*"**Presumption of validity***

*104.*

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

This provision mirrors s232 IA 1986 which applies to the acts of individuals acting as administrative receiver, liquidator or provisional liquidator.

29. As one of the areas that I have to consider is the ability of the Court to make administration orders with retrospective effect, I should also set out paragraph 13(2) of Schedule B1 which provides:

> "*(2) An appointment of an administrator by administration order takes effect-*
>
> *(a) At a time appointed by the order, or*
>
> *(b) Where no time is appointed by the order, when the order is made."*

30. Finally, in the context of Sch B1 I should mention that the Schedule also confers powers on qualifying floating charge holders themselves to appoint administrators out of court (see paragraphs 14 to 21). Paragraph 15 requires prior notice to be given to a holder of a relevant qualifying floating charge which was created at an earlier time than the charge in question or which has priority by agreement or for consent of such prior charge holder before an appointment can proceed. Further there can be no appointment if the company is already in liquidation or administrative receivership.

31. Further relevant provisions are set out in the Insolvency (England and Wales) Rules 2016 ("IR 2016").

32. R3.23 IR 2016 sets out certain requirements regarding the content of the notice of intention to appoint by the directors/company under Sch B1 paragraph 26, what the notice must be accompanied by (a copy of the resolution to appoint or a record of the directors' decision), how notice is to be given (by service), certain persons to whom copy of the notice must be sent (which include the company if the company is not intending to make the appointment) and the timing of the making of the statutory declaration and the requirement that the capacity of the maker be set out if not the proposed appointor.

33. R3.24 IR 2016 sets out details regarding the content of the notice of appointment after a notice of intention to appoint has been given under paragraph 26. It also contains provisions regarding the functions of the administrators which are to be exercised jointly and which severally and the timing of the making of the statutory declaration and the requirement that the capacity of the maker be set out if not the proposed appointor.

34. R3.25 IR 2016 sets out similar details regarding content of the notice of appointment where no notice of intention to appoint is filed. It also contains provisions regarding the functions of the administrators which are to be exercised jointly and which severally and the timing of the making of the statutory declaration and the requirement that the capacity of the maker be set out if not the proposed appointor.

35. R3.26 IR 2016 provides for copies of the notice of appointment to be filed with the court. The notices must be accompanied by the administrator's consent to act and where notice of intention to appoint was given, written consent of the persons to whom

notice was given under paragraph 26(1), unless the period of notice under that sub-paragraph (five business days) has expired. Where notice of intention to appoint has not been given, the notice must also be accompanied by a copy of the resolution of the company to appoint or a record of the directors' decision.

36. R12.64 IR 2016 (formerly r7.55 of the Insolvency Rules 1986) provides as follows:

> *"**12.64. Formal defects***
> *No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."*

37. There are various other provisions of the CPR and Practice Directions (PDs) which, in any case about an appointment, may also be relevant.

## The Financial Markets and Services Act 2000

38. As amended, the Financial Services and Markets Act 2000 ("FSMA 2000") sets up the Financial Conduct Authority (the "FCA") and the Prudential Conduct Authority (the "PCA") (together the "Regulators") as regulators in relation to (in very broad terms) financial markets and providers of financial services.

39. Under FSMA 2000, the Regulators are given certain powers in relation to making administration applications in relation to certain regulated entities or matters and to intervene in certain administration applications to the court. In addition, certain breaches of FSMA 2000 must be reported by administrators to the relevant Regulator (see generally ss 359-362 FSMA 2000).

40. Section 362 FSMA 2000 provides:

> *362.— Powers of FCA and PRA to participate in proceedings.*
>
> *(1) This section applies if a person makes an administration application under Schedule B1 to the 1986 Act or Schedule B1 to the 1989 Order in relation to a company or partnership which–*
>
> > *(a) is, or has been, an authorised person or recognised investment exchange;*
> >
> > *(b) is, or has been, an appointed representative; or*
> >
> > *(c) is carrying on, or has carried on, a regulated activity in contravention of the general prohibition.*
>
> *(1A) This section also applies in relation to—*

*(a) the appointment under paragraph 14 or 22 of Schedule B1 to the 1986 Act or paragraph 15 or 23 of Schedule B1 to the 1989 Order of an administrator of a company of a kind described in subsection (1)(a) to (c), or*

*(b) the filing with the court of a copy of notice of intention to appoint an administrator under any of those paragraphs.*

*(1B) This section also applies in relation to—*

*(a) the appointment under paragraph 22 of Schedule B1 to the 1986 Act (as applied by order under section 420 of the 1986 Act), or under paragraph 23 of Schedule B1 to the 1989 Order (as applied by order under Article 364 of the 1989 Order), of an administrator of a partnership of a kind described in subsection (1)(a) to (c), or*

*(b) the filing with the court of a copy of notice of intention to appoint an administrator under either of those paragraphs (as so applied).*

*(2) The appropriate regulator is entitled to be heard–*

*(a) at the hearing of the administration application; and*
*(b) at any other hearing of the court in relation to the company or partnership under Part II of the 1986 Act (or Part III of the 1989 Order).*

*(3) Any notice or other document required to be sent to a creditor of the company or partnership must also be sent to the appropriate regulator.*

*(4) The appropriate regulator may apply to the court under paragraph 74 of Schedule B1 to the 1986 Act or paragraph 75 of Schedule B1 to the 1989 Order.*

*(4A) In respect of an application under subsection (4)—*
*(a) paragraph 74(1)(a) and (b) shall have effect as if for the words "harm the interests of the applicant (whether alone or in common with some or all other members or creditors)" there were substituted the words "harm the interests of some or all members or creditors", and*
*(b) paragraph 75(1)(a) and (b) of Schedule B1 to the 1989 Order shall have effect as if for the words "harm the interests of the applicant (whether alone or in common with some or all other members or creditors)" there were substituted the words "harm the interests of some or all members or creditors".*

*(5) A person appointed for the purpose by the appropriate regulator is entitled–*
*(a) to attend any meeting of creditors of the company or partnership summoned under any enactment;*
*(b) to attend any meeting of a committee established under paragraph 57 of Schedule B1 to the 1986 Act or paragraph 58 of Schedule B1 to the 1989 Order; and*
*(c) to make representations as to any matter for decision at such a meeting.*

*(5A) The appropriate regulator or a person appointed by the appropriate regulator is entitled to participate in (but not vote in) a qualifying decision procedure by which a decision about any matter is sought from the creditors of the company or partnership.*
*(6) If, during the course of the administration of a company, a compromise or arrangement is proposed between the company and its creditors, or any class of them, the appropriate regulator may apply to the court under section 896 or 899 of the Companies Act 2006.*

*(7) "The appropriate regulator" means—*

*(a) where the company or partnership is a PRA-regulated person, each of the FCA and the PRA, except that the references in subsections (5) and (5A) to a person appointed by the appropriate regulator are to be read as references to a person appointed by either the FCA or the PRA;*

*(b) in any other case, the FCA.*

*(8) But where the administration application was made by a regulator "the appropriate regulator" does not include that regulator.*

41. Section 362A FSMA 2000 deals with the position where there is an appointment of administrators by the company or the directors (or, by the relevant equivalent under the regime applicable to partnerships). In effect it requires written consent of the relevant regulator and the lodging of the relevant document containing such consent with the court. It provides as follows:

"***362A Administrator appointed by company or directors***

*(1) This section applies in relation to a company or partnership of a kind described in section 362(1)(a) to (c).*

*(2) An administrator of the company or partnership may not be appointed under a provision specified in subsection (2A) without the consent of the appropriate regulator.*

*(2A) Those provisions are—*
*(a) paragraph 22 of Schedule B1 to the 1986 Act (including that paragraph as applied in relation to partnerships by order under section 420 of that Act);*
*(b) paragraph 23 of Schedule B1 to the 1989 Order (including that paragraph as applied in relation to partnerships by order under article 364 of that Order).*

*(2B) "The appropriate regulator" means—*
*(a) where the company or partnership is a PRA-regulated person, the PRA, and*
*(b) in any other case, the FCA.*

*(3) Consent under subsection (2)—*
*(a) must be in writing, and*
*(b) must be filed with the court along with the notice of intention to appoint under paragraph 27 of Schedule B1 to the 1986 Act or paragraph 28 of Schedule B1 to the 1989 Order.*

*(4) In a case where no notice of intention to appoint is required—*
*(a) subsection (3)(b) shall not apply, but*
*(b) consent under subsection (2) must accompany the notice of appointment filed under paragraph 29 of Schedule B1 to the 1986 Act or paragraph 30 of Schedule B1 to the 1989 Order."*

The Company was an entity falling within section 362(1) FSMA 2000 and in this case the FCA was the "appropriate regulator".

**What is the effect of breach of statutory requirements?**

42. The general position regarding the consequence of breach of statutory requirements where that is not expressly set out in the provisions themselves is now, and for present purposes, most conveniently found in the trilogy of cases: *London & Clydeside Estates Ltd v Aberdeen District Counci*l [1980] 1 WLR 182; *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354 and *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340.

43. In short, the old distinction between "mandatory" and "directory" provisions has been abandoned. Instead, the focus as a matter of statutory interpretation is an inquiry as to the consequences Parliament intended to follow if the (mandatory) requirement was not followed. As Lord Steyn said in the *Soneji* case at paragraphs [14] and [15]:

"[14] *A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the earlier case law is to be found in Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286, 1294D—1295H.*

*[15]* [Having cited from Lord Hailsham LC's speech in the *Aberdeen District Council* case [1980] 1 WLR 182, he went on to say] *This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard*

*to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament.*"

To the same effect is paragraph [23] of his speech, cited by Arnold J in the *Ceart* case at paragraph [16].

More recently it has pithily been said in *McGrath v Camden LBC* [2020] EWHC 369 (Admin) at para 52:

"[52] *Where legislation requires a procedural step or action to be taken, it may not specify the legal consequences of a failure to comply with that requirement, for example, whether any other step or document must be treated as invalid or non-compliant with the legislation, In such circumstances, the court must firstly construe the instrument in order to determine whether the legislature intended 'total invalidity' to follow ... If the answer to that question is "yes" then no further issue arises. But if the answer is 'no', then the second question is whether the circumstances of the instant case indicate that invalidity should be the consequence. The answer to that question may be affected by whether there has been substantial compliance with the requirement, or whether any non-compliance has caused significant prejudice relevant to the purposes of the legislation".*

44. In short, and has been said, where a certain procedure or requirement is laid down by Parliament, then that requirement or procedure is mandatory and must be followed. If it is not followed, it will be a matter of statutory construction whether the result is automatic invalidity or whether there can be circumstances in which the irregularity will not result in a nullity. There is then a factual question as to whether, in the particular circumstances, the validity of the relevant steps should be upheld.

45. Although the mandatory/directory categorisation is now discarded, and best regarded as a conclusion as to effect of non-compliance with a statutory provision, certain general principles can be identified. As regards the question of permission of the court for the bringing of proceedings I considered a number of the authorities in *Wilton UK Limited v Shuttleworth* [2017] EWHC 2195 (Ch); [2018] Bus LR 258 in the context of the permission of the court required for the bringing of derivative actions against companies under Chapter 1 Part 11 of the Companies Act 2006 (sections 260-264). In the context of the need for court permission to commence or continue proceedings Lord Bingham (and other members of the House of Lords) in *Seal v Chief Constable of South Wales Police* [2007] 1 WLR 1910 referred to the following principle:

"*the welcome tendency to prefer substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement*". (at paragraph [7]). [2007]

In my assessment, this statement applies more generally and also covers insolvency proceedings, out of Court.

46. In this connection, relying also on the predecessor to what is now CPR r3.10, and also considering the insolvency background see also Norris J in *Re Euromaster Limited* at para [25].

47. In the insolvency context of out of court appointments of administrators, it is also a relevant factor that the procedures have been developed to streamline the process of administration as described by Norris J in *re Euromaster Limited* at paragraphs [15] and [16] (referring back also to *Re MF Global Overseas Limited* [2012] EWHC 1091 (Ch); [2012] BCC 490 and *Re Virtualpurple Professional Services Limited* [2011] EWHC 3487 (Ch); [2012] BCC 254 at [11] and [25g]). Although a myriad of circumstances in which a purported appointment might be found to be a nullity is undesirable and whilst "steamlining" provides the context within which Sch B1 must be construed, as Norris J said, it is not "*a warrant for a lax approach to the construction of a statute*." (or I would add statutory instrument)

48. On the other hand, a point comes at which it may be said that a defect has moved from being one of procedure to being one of a more fundamental nature, and, in my view, "capacity" or provisions laying down the circumstances in which a power to appoint arises are likely to be such an area. In that area it seems to me that it is more likely that a relevant "breach" will result in the relevant actions taken being a nullity rather than a mere irregularity (see Norris J in *Re Euromaster Limited* at para [27] and Barling J in *HMV Ecommerce Ltd* [2019] EWHC 903 (Ch); [2019] BCC 887).

49. In considering the consequences of a breach of statutory requirements, it is also necessary to have regard to the power available to the Court, at least in theory, to deal with particular situations. Thus, under what is now r12.65 IR 2016, a "formal defect" or "irregularity" will not invalidate insolvency proceedings unless the court otherwise orders. In such cases there is no need for a court order validating as such. The court will however make an order that the proceedings are invalidated in the event that it considers (a) that substantial injustice has been caused by the defect or irregularity and that (b) such injustice cannot be remedied by any order of the court. Similar in its effect is CPR 3.10 which provides:

> " **General power of the court to rectify matters where there has been an error of procedure**:
>
> 3.10 Where there has been an error of procedure such as a failure to comply with a rule or practice direction (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error."

50. Even where a defect or irregularity is such that the acts are not of themselves valid, this does not mean that the Court may not have other powers in its armoury to regularise the position. Two examples in different fields are the express power of the court to dispense with service of a claim form under CPR r6.9 (see e.g. the discussion in the *Wilton* case of *Golden Ocean Assurance Ltd v Martin (The Golden Mariner)* [1990] 2 Lloyd's Rep 215; *Vinos v Marks & Spencer plc* [2001] 2 All ER 784; *Phillips v Nussberger* [2008] 1 WLR 280, and *Integral Petroleum SA v SCU Finanz* AG [2014] EWHC 702 (Comm)) and the power of the Court to grant retrospective permission to bring/continue proceedings where permission was required and not obtained at an earlier stage (see the *Wilton* case and the earlier cases considered in that case regarding need for court permission).

51. In the context of defects in the appointment of administrators, the Court has three possible routes to validation or regularisation which it has adopted.

    (1) First, it may decide that there is simply an irregularity or defect which does not invalidate the process and which it will not itself invalidate under what is now r12.65 IR 2016. In such cases the Court is simply declaring what the position is under the law rather than itself regularising the position.

    (2) Secondly, where there is an irregularity that means the appointment is not valid, the Court may reach for paragraph 104 of Schedule B1, in the sense of confirming its application, to confirm the validity of the acts of the purported administrators, even if the appointment is not itself valid;

    (3) Thirdly, the Court may itself decide to appoint the administrators under its separate power to do so and purport to do so retrospectively.

52. Each of the second and third routes gives rise to questions.

    (1) As regards paragraph 104, Sch B1, its precise limits have not really been explored. In *Re Care Matters Partnership Ltd* [2011] EWHC 2543 (Ch), [2011] BCC 97, Norris J has suggested (referring back to what is now s161 CA 2006 and *Morris v Kannsen* (dealing with the Companies Act, 1929 (CA 1929) equivalent, but narrower, provision) that, by analogy with the CA 1929 provision, paragraph 104 Sch B1 may apply where there has been an appointment (but a defective one) but not in a case where there has been no appointment at all. However, he accepted that it may be that paragraph 104 is also of no assistance in cases where there has been a purported appointment but there was no power to make the appointment (for example, because there is no valid charge in respect of a purported appointment by a charge holder under paragraph 14 Sch B1 or the persons purporting to act as directors making an appointment under paragraph 22 are not themselves directors).

        "*But it may well be that para. 104 is of assistance where there is a power to make an appointment but that power has been defectively exercised through some irregularity in procedure.*"

    (2) As regards making orders appointing administrators with retrospective effect, on many occasions as well as stressing the exceptional circumstances when this may be a suitable course, the propriety of doing so or the jurisdiction to do so has also been questioned.

53. When considering the effect of a breach of statute or the rules with regard to out of court appointments, the Court has in recent years consistently approached the matter from the perspective of the cases that I have outlined above, and particularly *R v Soneji*, and focussed "*on the consequences of non-compliance and taking into account those consequences, to consider whether*, [as a matter of statutory construction] *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 the relevant provision should be null." (per Norris J in Re Euromaster Limited* and citing *Hill v Stokes*, *Re Assured Logistics Solutions Ltd*, *Re Bezier Acquisitions Limited, Re Virtualpurple Limited*, *Re Ceart Risk Services Limited*, and *re BXL Services Limited*. I would also refer to *Re Skeggs Beef Limited*). The references for these cases are given

elsewhere in this judgment. For convenience I shall refer to this approach as the "*Soneji Approach*".

**The Court's approach when faced with irregularities and defects in appointment**

54. It is possible to identify three different approaches that the Court has taken when faced with dealing with and attempting to regularise a defective appointment of administrators.

(1) One is to deal with the application on the merits and determine whether, and if so, what relief is available. The second and third avoid dealing with the question of what precise analysis and form of relief is appropriate.

(2) The second approach is for the court to restrict itself to dealing with the relief sought in the application before it, and not to consider whether some other form of relief is available and appropriate (see e.g. the approach of Norris J in *Adjei v Law for All* [2011] EWHC 2672 (Ch); [2011] BCC 963, Morgan J in *Re Derfshaw Limited* [2011] EWHC 1565 (Ch); [2011] BCC 631 and Norris J in *re Care Matters Partnership Limited* [2011] EWHC 2543(Ch); [2011] BCC 957, with regard to relief under para 104 Sch B1 which was not pursued).

(3) The third is to take the course of granting relief that is thought to be available on a "worst case scenario" of invalidity, and to avoid dealing with the question of whether another analysis (and other relief) may be available. In *Re Care Matters Partnership Limited*, Norris J was not addressed on the resolving the question of what the legislative requirements were and which of two authorities to follow on the point, the point was assumed to be as put forward by the applicant. In *HMV Ecommerce Ltd,* Barling J did not decide what the statutory requirements were on the facts before him. He considered that there was an argument that they had not been breached but proceeded to deal with the case by granting relief on the basis that if there had been a breach it was not such as to make the relevant steps taken a complete nullity. See also Mann J in the *Bradford Bulls* case considered below.

**The authorities regarding appointments of administrators**

55. The following is an attempt to cover the main reported authorities, though inevitably it will not be complete, and to illustrate the approaches that the court has adopted with regard to the procedures to appoint administrators.

56. An early case in a different area, but later relied upon in the administrator appointment context, is *re Awan (a Bankrupt)* [2004] BPIR 241. In that case, HH Judge Boggis QC was sitting in the High Court on an appeal from the county court on a question of costs. He determined that there had been a failure to prove service of a bankruptcy petition in accordance with the IR 1986 before the making of the relevant bankruptcy order, which order had thereafter been annulled. The relevant affidavit of service with prescribed particulars not having been before the court at the relevant time, it followed that the bankruptcy order was one which "*should never have been made*." Having referred to the fact that bankruptcy is "*one of the most serious forms of execution that can be brought against a debtor*" and that it was in his view "*absolutely clear that provisions as to service must be followed exactly*". He went on to say that he was "*not prepared*

*to apply*" r7.55 IR 1986 to waive a defect in proof of service. He does not in terms deal with whether he was saying that that rule did not apply or that it did apply but he considered that there was a substantial injustice that could not be remedied by court order. However, it appears likely that he was saying that the breach in question was of its nature one that r7.55 did not apply to in terms of validating the actions taken (unless and until the Court otherwise ordered).

57. In *Re G-Tech Construction Ltd* [2007] BPIR 1275, in a judgment that was unapproved before the sad death of the Judge, Hart J, the wrong form had been filed with the court: the form after having given notice of intention to appoint rather than the form where no intention to appoint had been given. The application came before the Court about 12 months after the original defective appointment. Reliance was placed upon r7.55 IR 1986.

(1) Hart J decided that r7.55 IR 1986 did not apply because insolvency proceedings were never commenced: by virtue of paragraph 31 of Sch B1, an appointment only taking effect once the relevant forms had been filed in accordance with paragraph 29 and that had not occurred.

(2) As regards paragraph 104 of Sch B1, he accepted that the paragraph might assist in assessing the validity of the acts done by a person purporting to be an administrator but did not cure the point that there was on the face of it no administration. As I see it, he was saying that it did not provide a solution to the ongoing need for a proper administration.

(3) He then made an order appointing the administrator with retrospective effect at a date some two weeks or so after the administrator's original invalid appointment. The reason for this was to prevent the administration lapsing prior to the date of the hearing before him. He had no difficulty making an administration order but was concerned about its retrospective effect and said that in any event it was a jurisdiction to be exercised with "extreme caution". He distinguished the case of *Darrell v Miller* [2003] EWHC 2811 (Ch). In that case Lewison J had held that there was no jurisdiction to make an order appointing liquidators on block transfer with retrospective effect because the legislation did not make clear that this was possible and therefore the provisions of CPR 40.7 applied by default which only allowed for prospective not retrospective making of orders. Hart J distinguished the case on the grounds that the provision he was considering was different. The provision regarding appointment of liquidators by the Court simply said that the Court could make such an order without any reference to the timing.

58. In *Re Blights Builders Ltd* [2006] EWHC 3549 (Ch), [2007] Bus L.R. 629 the Court was faced with the prohibition on appointment of administrators under para 22 Sch B1 when a petition for winding up has been presented. In that case the petition was presented before, but not issued by the court until after, notice of intention to appoint administrators and then notice of appointment had been give and filed. The *G-Tech* case was not cited to the Judge (see his comments in *Care Matters Partnership*, referred to below). HH Judge Norris QC (as he then was):

(1) rejected a submission that r7.55 would apply to regularise the position. First, he did not consider that the out of court appointment procedure amounted to an

"insolvency proceeding" (contrary to the view of Hart J in the *G-Tech* case). (This view was later rejected by Henderson J in r*e Frontsouth (Witham) Ltd* (referred to below). Norris J in *re Euromove* (referred to below) said that Henderson J was right to do so and that he, Norris J, had since applied the approach that "out of court" appointments do amount to "insolvency proceedings", as had others). Secondly, he accepted the submission that failure to satisfy the statutory criteria for the exercise of a power to appoint represents "a fundamental flaw" which cannot be remedied under a regularisation (relying on the *Awan* case). Thirdly, he did not see how an invalid appointment could occasion an "injustice" or that if invalidating it did cause such an injustice how that would be remedied by an order retrospectively validating the appointment. This third reason is difficult to follow. In *re Euromove*, Norris J revisited this reasoning and said that his view should be revisited in light of the "*emerging distinction between non-compliance which leads to a nullity and that which leads to an irregularity. Now that there is a focus upon the purpose of the relevant requirement and upon the consequences of non-compliance, it seems to me less troubling to say that someone who wishes to rely on the defect* [as invalidating the relevant process] *must show (a) that substantial injustice has been caused by the defect and, (b) that that injustice cannot be remedied by some other order of the court short of an order invalidating the entire insolvency proceedings"*

(2) granted the individuals an indemnity in respect of their acts as administrators under para 104 Sch B1;

(3) declared under para 104 Sch B1 that their acts as joint administrators were valid.

(4) on the application of the petitioner on the winding up petition, made a prospective administration order.

(5) was not referred to and was unaware of the *G-Tech* decision.

59. In *Re Kaupthing Capital Partners II Master LP Inc, Pillar Securitisation SARL v Spicer* [2010] EWHC 836 (ch), [2011] BCC 338 a purported appointment of administrators in relation to limited partnership had been effected by filing the prescribed form relating to companies rather than that relating to partnerships. Proudman J decided:

(1) the wrong form for the notice of appointment had been used (para [42]);

(2) certain errors in filling in the form used were not of themselves enough to invalidate the appointment, if otherwise valid (para [49]);

(3) the difference between the forms was not simply the headings used. "Substantively" the forms were different.

(4) *G-Tech* was applied and the appointment was invalid. She could not distinguish *G-Tech* from the differences between the two forms in the case before her and those before Hart J and in any event considered that it would be invidious to do so if it resulted in saying that some forms required for an appointment to take effect were "in effect more prescribed" than others (paras [54]-[55];

(5) The appointment was not saved by r7.55 IR 1986 as there was a "fundamental flaw" going to the validity of the appointment itself and there were no insolvency proceedings on foot. Further para 104 Sch B1 could not be applied. She relied upon the *G-Tech* case, pointed out that *Blights Builders Ltd* had reached a different decision regarding para 104 (but did not comment further and whether it was a factually different case or one where a different view of the law had been reached) and referred to *Morris v Kannsen* and *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 regarding the effect of a null appointment.

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(6) She left over for further decision the question of whether to make an appointment with retrospective effect and as at what date (given the date of the original purported appointment was now some time ago).

60. The next case in time is the *M.T.B Motors* case. As I have said, that case, like this, involved a failure to obtain and to file consent of the relevant regulator when the notice of appointment of the administrators was filed with the court. HH Judge Hodge QC:

(1) rejected the submission that a failure to lodge the consent of the relevant regulator (then the Financial Services Authority) was not something "prescribed" within the meaning of para 29 of Sch B1. He therefore considered that this ground for distinguishing the *G Tech* and *Kauphing* cases was not made out. Accordingly, the purported appointment was void and the defect not capable of being cured under either r 7.55 IR 1986 nor para 104 Sch B1.

(2) following *G-Tech* case and the practice of the then Vice-Chancellor (presumably of the County Palatine of Lancaster), made an administration order with retrospective effect holding that the language of para 13(2) was wide enough to confer jurisdiction on the court to do so and contrasting its language with that under CPR r40.7.

61. In *Hill v Stokes plc* [2010] EWHC 3726 (Ch); [2011] BCC 473, no notice of an intention to appoint having been given to prescribed persons who had distrained against the Company's property and who on the face of it fell within para 26(2) Sch B1. In that case there was a prior charge holder to whom notice under paragraph 26(1) had been given. His Honour Judge McCahill QC (sitting as a High Court Judge) determined that:

(1) the requirement in para 28 Sch B1 referring to an appointment not being possible unless the requirements of paragraph 26 and 27 had been met was to be read, as regards the reference to para 26, as a reference to para 26(1) only.

(2) (obiter) but in any event, and applying the *Soneji* Approach, the defect was not so fundamental as to result in the purported appointment being invalid.

62. In *Minmar (929) Ltd v Khalastchi* [2011] EWHC 1159 (Ch); [2011] BCC 485 the then Chancellor, Sir Andrew Morritt, was faced with an application to set aside the purported appointment of administrators on various grounds. He does not refer to *Hill v Stokes* which presumably was not cited to him. He decided (among other things) by judgment dated 8 April 2011:

(1) the appointment was invalid and should be set aside because the purported appointment by a majority of the board was of no effect because the decision was not made at a valid board meeting: no notice of the meeting had been given, there was no quorum and in fact no meeting as only one person was present;

(2) (obiter) under the then wording of paras 26, 28 and IR 1986, notice of an intention to appoint had to be given (to the Company) under para 26(2), even if there was no person falling within section 26(1). The failure to do so invalidated the appointment;

(3) the appointment of the administrators being invalid, the invalidity should be recognised by the Court even if "cured" by a later appointment as was done by Hart J in the *G-Tech* case (or as it was suggested might be effected by the directors in the instant case).

63. In Re *Derfshaw Ltd* [2011] EWHC 1565 (Ch) in a judgment given on 2 June 2011, Morgan J had to deal with a number of cases where notice of the intention to appoint administrators had not been given to the company. The applications he faced were for the retrospective appointment of administrators on the basis that the decision in *Minmar* was accepted as being correct and was not challenged by way of seeking relief that the purported appointments were in fact valid. It follows that the assumption was that *Minmar* was correct in its (obiter) conclusions as to (a) the relevant statutory requirements as to notice and (b) the effect of breaching them. He proceeded on that basis. He also considered the question of the ability to make the appointments with retrospective effect. He accepted that it was not necessarily obvious that all the steps taken by the purported administrators since their appointment would be invalid but that "there would certainly be a serious question as to their invalidity". As a matter of discretion, the correct course would undoubtedly to make appointments with retrospective effect, but was there jurisdiction to do so? He expressed concerns that the language of para 13, Sch B1 was not as clear on the point as ideally it would be but relied on *G-Tech* as authority which had been applied in other cases and which had not been called into question in later case or, so far as he was aware, in any relevant textbook. He made the orders with retrospective effect.

64. In *Re Frontsouth (Witham) Limited* [2011] EWHC 1668 (Ch); [2011] BCC 635, Henderson J (as he then was) had to deal with applications for extension of the term of officers of administrators. In the case of one company there had been an earlier purported extension of time but that extension was defective because written consent from one secured creditor, required under the IR 1986, had not been obtained. A further extension, in ignorance of the earlier defect, had then been ordered by the court. The problem facing Henderson J was that an extension cannot be granted by the court after expiry of the administrator's term of office. Unless the initial purported extension could somehow be waived, the later extension by the court thereafter would also be invalid and a nullity. Judgment was given on 30 June 2011. Having considered each of *G Tech, Blights Builders and Kaupthing Capital Partners II Master LP Inc,* Henderson J:

(1) considered that r7.55 IR 1986 did not apply for the reason given by Hart J (i.e. that there were no insolvency proceedings) and preferred it over the suggestion

of Norris J that there were no insolvency proceedings because the appointments involved an out of court process;

(2) agreed with Norris J, that r7.55 could not be used to remedy a fundamental flaw such as a failure to satisfy one of the statutory pre-requisites for appointment. Such a flaw is not "purely formal" nor a mere "irregularity". Rather, it "goes to the "very essence of the appointment";

(3) agreed with Norris J's comments regarding the wording of r 7.55 and suggested that that provided a reason why the rule was not intended to apply to the sort of situation in the case before Norris J or before him: it is hard to see how an invalid appointment would cause "injustice" or of how such injustice might be remedied by court order;

(4) considered that the defect in the case before him, a failure to obtain one of the required consents to an earlier extension, was "fundamental" with the result that the earlier purported extension did not take effect and the administrators' term of office had expired some years before and the court could not know extend such expired term;

(5) made an administration order backdated by 364 days on the application of the bank as creditor. In this context he referred to the *G-Tech* and *Derfshaw* cases. He stated that he shared some of the misgivings expressed by Morgan J but regarded the jurisdiction as a useful one and was prepared to follow the practice which he described as having become "fairly well established".

65. In *Care Matters Partnership Limited* [2011] EWHC 2543 (Ch); [2012] 2 BCLC 311, Norris J gave judgment on 7 October 2011. He had to consider the appointment of successive administrators to the same company. Although the facts are not clear, it appears from the discussion of *Minmar* that the defect which brought about the application was the failure to give notice to the company of the intention to appoint the original administrator. The successor administrator had been appointed by court order, on removal by court order of the first.

(1) The application proceeded on the basis that *Minmar* was correct in the relevant obiter comments made and the Judge was not invited to and did not consider the question of what the relevant provisions required and therefore the conflict between *Hill v Stokes* and *Minmar* on this issue.

(2) It seems to have been assumed by the applicant that any defect in the appointment of an administrator resulted in invalidity of the appointment and Norris J appears to have proceeded on that basis;

(3) An application for validation of relevant acts under para 104 Sch B1 was made in the application but not pursued. The applicants assumed that the invalidity was such that, not only was the original appointment void but, relevant acts could not be validated by para 104. Norris J expressed obiter comments about that, which I have referred to earlier.

(4) The only relief pursued was retrospective appointment. However, to make an administration order the court had to be satisfied that the conditions for the

making of an administration order were met at the time of making the order. It was not sufficient that they were met at the time of the purported invalid appointment to which the order might be backdated.

(5) On the facts the conditions for the making of an administration order at the hearing date were not met (the "administration" had in effect run its course and the only thing remaining was to end it, there was no statutory purpose remaining to be achieved). Accordingly, an administration order could not be, and was not, made.

(6) there were also practical and discretionary problems of appointing someone an administrator at the date of the hearing with retrospective effect when subsequent to the date at which the order was sought to take effect, that person had been removed as administrator by court order.

66. In *Adjei v Law for All* [2011] EWHC 2672 (Ch); [2011] BCC 963, Norris J gave judgment on 19 October 2011. There had been a failure to notify a qualifying floating charge holder of the intention to appoint. In addition, the notice of intention to appoint was defective as filled in by failing to indicate whether the company was an insurance undertaking or whether the EU regulation applied. The Judge decided:

(1) the failure to fill in the form correctly in the two respects identified were defects that were capable of remedy under r7.55 IR 1986;

(2) the failure to give notice to the charge holder was more fundamental. It had been assumed by the applicant following the obiter comments in *Minmar* that a failure to give notice was invalid (in the sense of being a nullity). It also followed that if *G-Tech* was correct that para 104 Sch B1 had no room to operate. There was again no argument to the contrary on the case before him, although he considered that there was scope for argument as to the precise limits and operation of para 104.

(3) Accordingly, the only remedy sought and made was the making of an administrative order with retrospective effect, which he made in this case with "*some misgivings*".

(4) In making the order with retrospective effect, he determined that not only was there no reason for the court to ratify or declare valid the acts of the administrators to date, there was a strong reason why the court should not do so which was that the court did not know what had taken place and there might be someone aggrieved by the administrators actions who had a proper ground for challenge or complaint. However, the effect of the retrospective appointment was that whatever acts of administration they had done as purported administrators would, as a result of the order, thereafter be treated as having been done as administrators appointed by the court.

67. In *re Bezier Acquisitions Limited* [2011] EWHC 3299 (Ch), [2012] Bus LR 636, Norris J, in a judgment handed down on 12 December 2011, dealt with a case where the service of notice of intention to appoint was found to have been validly effected under the relevant statutory provisions by service upon their solicitors. As a fallback, had there been a defect and applying the *Soneji* analysis, he would have held that any defect was not, on the facts, such as to result in invalidity of the appointment.

68. *In re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), [2012] BCC 254 judgment was given on 21 December 2011. The case had been heard on the same day as the *Bezier* case, and judgment reserved in both cases. The issue before the Court was whether notice of intention to appoint had to be given to the company in circumstances where there was no requirement to give notice to any qualifying floating charge holder. (This point has now been resolved by amendment to Sch B1 para 26 by the Deregulation Act 2015.) Norris J considered both *Minmar* and *Hill-v-Stokes.*

    (1) He preferred the reasoning (and decision) in *Hill v Stokes* over the obiter dicta of the Chancellor in *Minmar* on the question of whether the legislation required notice of intention to appoint to be given to the company.

    (2) In the event that, contrary to his decision, the statutory requirement was that notice of intention to appoint had to be given to the company, he would have held that the failure to give notice was capable of cure under r7.55 IR 1986.

    (3) He applied the *Soneji* Analysis of considering what Parliament's intention was in the event of breach of a particular provision. In broad import he therefore followed the approach in *Hill v Stokes*. He decided that if there had been a breach of the rules, the breach would not have invalidated the appointment. The fact that the obligation formed part of a group, some of which were not absolute because they depended on knowledge of the party otherwise obliged to give notice, suggested that the obligation would not be so strict that any non-compliance would lead to total invalidity of the process. Notice was apparently for information purposes and there was no minimum period of notice. It would be rare that a company would not know what its directors were doing. In the case of an administration application, a failure to serve would not normally result in automatic invalidation of the application. A multiplicity of circumstances in which defects led to automatic nullity was highly undesirable.

    (4) The defect not being such as to result in automatic invalidity, a number of factors weighed in aid of exercise of the discretion (which I take to amount to a decision that there was no substantial injustice within the meaning of r7.55 IR 1986).

69. On the same day that judgment was handed down in Re *Virtualpurple*, Warren J handed down judgment in *National Westminster Bank plc v Msaada Group* [2011] EWHC 3423 (Ch); [2012] BCC 226. The potential defect was a failure, in the context of the appointment of an administrator over a partnership, to serve one of the prescribed persons with notice of intention to appoint as required by para 26(2) Sch B1, in circumstances where there was no person required to be served under para 26(1). Resolution of the differing views in *Minmar* and *Hill v Stokes* was therefore raised.

    (1) The Judge preferred and applied the reasoning in *Minmar* and held that there had been non-compliance with the statutory regime in that notice had not been served as required;

    (2) As in *Minmar,* breach of the statutory procedure automatically resulted in invalidity of the appointment: the provisions in question were mandatory not directory based on the wording used*;*

(3) A prospective administration order was made in favour of the Bank's nominees, there being a context between the members of the partnership who had appointed their nominee originally and the nominee of the Bank.

70. In *Re MF Global Overseas Finance Limited* [2012] EWHC 1091 (Ch); [2012] BCC 490 (judgment on 23 March 2012), Mann J had to deal with the question of what form of prescribed notice should be served at the time of appointment, which seemed to turn on the question of whether a notice had to be served of the notice of intention to appoint on persons pursuant to para 26(2) Sch B1 even if there was no person on whom notice had to be served under para 26(1). Out of an abundance of caution the appointors had followed the dicta in *Minmar* and served a notice at that stage. They had then served a notice of appointment as if the preceding notice had been necessary and had been served (as it had been). However, if the notice of intention was not required to be served it was arguable that a different form of notice on appointment should have been served (one where there had been no notice of intention served previously). Mann J interpreted the rules as permitting what had happened on the facts of the case. He did not have to decide between the *Minmar* and *Hill v Stokes* approach to para 26(2) and para 28 but preferred the answer given in *Hill v Stokes*. He did not strictly have to decide the issue of what the effect on validity would have been had there been a relevant breach of the procedures by application of the *Soneji* Approach. The point was argued however, and he expressed doubts that it would succeed.

71. In *Re Ceart Risk Services Limited*, (judgment on 3 May 2012) Arnold J, as I have already described, dealt with the question of lack of regulator consent under FSMA 2000. I shall return to this case in more detail later in this judgment. For present purposes it suffices to note that:

(1) The question was, as in this case, consent of the regulator.

(2) As I read the judgment, it was assumed by the Judge that there had been a breach of the statutory requirements but applying the *Soneji* approach he considered that the flaw in appointment was not fundamental such as to invalidate the appointment but he seems to have held the appointment only took effect from the date the consent was filed.

(3) As regards the period between the date of the filing of the original purported appointment and the date of the filing of the consent from the regulator he treated the actions of the purported administrators as validated by para 104 Sch B1.

72. *In Re Eco Link Resources Ltd* [2012] B.C.C. 731 judgment was delivered on 2 July 2020 by HH Judge David Cooke. There was an undoubted defect in the appointment of an administrator by a qualifying floating charge holder. There had been a failure to give notice to a prior charge holder as required by article 15, Sch B1.

(1) The Judge applied the approach in *re Ceart* (i.e. the Soneji Approach).

(2) The decision in *Re Ceart*, and the fact that the wording of the two provisions in question (s362A(2) and para 15 Sch B1) was the same was pressed on the Judge. However, he considered that the wording was different. S352A simply spoke to a requirement to obtain consent it did not in terms say when consent

had to be obtained and Arnold J had read the section as not necessarily requiring consent prior to the appointment. The Judge seems to have read Arnold J as deciding that there was a relevant breach of s356(A) FSMA in *Ceart* but that it was curable: see para [29]). Para 15 Sch B1 on the other hand, although using similar language to s352A(2), went on to say that in terms (in effect) that the power could only be exercised if the relevant two days business notice prior to the appointment had been given to, or consent had been obtained from, the prior charge holder. Having taken into account the purposes of the prior notice required by para 15 Sch B1 he concluded that there had been a relevant breach of the statutory requirement which was a pre-condition, failure to comply with which did render the appointment by the second charge holder invalid from the beginning.

(3) He indicated that he would not have held inaccurate reference to the charge document in the relevant notice would have invalidated the appointment but preferred to express no view on what effect an inaccuracy in the statutory declaration would have had.

73. In *re Assured Logistics Solutions Limited* [2011] EWHC 3029 (Ch); [2012] BCC 541 judgment was handed down on 23 September 2011. HH Judge Purle QC had to deal with the question of validity of an appointment where there was no charge holder falling within paragraph 26(1) to whom notice had to be given but notice had not been given to the company as apparently required by paragraph 26(2) Sch B1.

(1) The Judge identified the conflict on the point between the dicta in *Minmar* and *Hill v Stokes* as to whether in the particular circumstances notice to the company was required and decided that it was not. He did so by construction of paragraph 26(2) Sch B1 rather than having to deal with the construction route adopted in *Hill v Stokes* involving, primarily, construction of para 28 of Sch B1. In effect, the question as to whether notice is required to be given to certain prescribed persons under art 26(2) may differ depending on whether there is a relevant charge holder to whom notice may be given under para 26(1) Sch B1.

(2) Even if notice was required to be given, he considered that the failure to do was not so fundamental as to require the purported appointment to be a nullity. The appointment was therefore regular and, if necessary, resort could be had to r7.55 IR 1986 which led to the same conclusion.

74. In *re BXL Services Limited* [2012] B.C.C. 1877 (Ch); [2012] B.C.C. 657 judgment was delivered on 10 July 2012. In this case HH Judge Purle QC (sitting as a High Court Judge) had to deal again with the question of the effect of a failure to give notice of an intention to appoint to prescribed persons under para 26(2) where there was no person to whom notice had to be given under para 26(1). As he pointed out, there were three possible answers to the alleged defect which had been variously given in different cases. One was that there was no defect at all. The statutory provision did not require notice to be given. The second was that, applying the *Soneji Approach*, the defect was not such as to invalidate the appointment. The third was that the defect did invalidate the appointment. He concluded that if there was a requirement to give notice, the failure to do so was not such as to result in the appointment being invalid. In reaching this

conclusion he seems to have decided that that was what Arnold J had decided and approved in *re Ceart*. However, all that Arnold J decided regarding any breach of statutory requirements under Schedule B1 was that it was then necessary to apply the *Soneji* approach in deciding between the second and third alternatives. I do not read Arnold J as deciding what the answer would be on an application of the *Soneji* Approach in any case other than the one he, Arnold J, was dealing with. I am not persuaded therefore that *Re Ceart* determined the issue of the effect of any breach in failing to give notice under para 26(2). It confirmed what technique was to be used to resolve the issue, namely the *Soneji* Approach. True it is that, in that scenario, the cases applying the *Soneji* approach had concluded that a breach did not involve automatic nullity of the later purported appointment. HHJ Purle QC seems to have assumed that if the *Soneji Approach* applied then there was only one answer but I am far from sure that that is necessarily correct.

75. In *re Euromaster Limited* [2012] EWHC 2356 (Ch); [2012] BCC 754 there was an admitted defect in procedure in that the administrators had purportedly been appointed 11 business days after the filing in court of the notice of intention to appoint. Para 28(2) Sch B1 provided that an appointment may not be made after 10 business days beginning with the date on which the notice of intention to appoint was filed. Norris J decided, in a judgment handed down on 10 August 2012, that:

(1) the notice of intention to appoint was one day after the 10 day period within which it had to be effected under the statutory provisions (para 28 of Sch B1);

(2) applying a *Soneji* Approach, it was necessary to identify the purpose of the 10 day window. The minimum 5 day period of notice to a qualifying charge holder was understandable as giving that person time to consider whether himself to appoint. A 10 day maximum period (after which notice would have to be given again and a new 5 day/10 day window commenced) seemed more difficult to explain. As regards notice to other persons there was little they could do on receipt of the notice which appeared to be more in the nature of notice for information purposes as regards such persons and there was no minimum period of notice set. Looking at the purposes of, and consequences of non-compliance with, para 28 in this respect Parliament's intention was not to make non-compliance result in automatic nullity. (I add that, application of the latter part of what is now r12.65 might still result in the court invalidating the appointment).

(3) Defects in procedure should not invalidate proceedings unless "fundamental" and account had to be taken of the policy lying behind the introduction of out of court appointments, such that it is undesirable for there to be a multiplicity of circumstances in which appointments will be invalid.

(4) A broad distinction can be drawn between provisions which are naturally read as defining the circumstances in which a power to appoint arises and others which are naturally read as prescribing procedural requirements that must be fulfilled before the appointment is properly made. Failure to meet the former will make the appointment a nullity (see e.g. *Minmar* (regarding the lack of proper board appointment) and *Blights Builders*). If the matter is

a more minor procedural matter the appointment would be treated as irregular but valid (eg. As in *Re Assured Logistics Solutions Ltd* and re *Ceart Risk Services*).

76. In *Re Care People Limited* [2013] EWHC 1734 (Ch); [2013] BCC 466, HH Judge Purle QC (sitting as a High Court Judge) faced the question of whether an appointment by a qualifying floating charge holder was valid or not in circumstances where it was said that insufficient time had been allowed for payment after the relevant demands for repayment were made. In effect, the question was whether the appointment was invalid because at the relevant time the charge was not enforceable under para 16 Sch B1, there having been insufficient time permitted to repay the sum secured under the loan and charging documents. HH Judge Purle QC decided that:

(1) there probably was an irregularity in that the charge had not been enforceable at the time of purported appointment because insufficient time had passed to permit payment after the demand (6 minutes);

(2) he would proceed on the basis there was a defect or irregularity and the charge was not enforceable at the relevant time;

(3) he would take into account the need to apply the *Soneji* Approach and relied heavily on what Norris J said in *Euromaster*. In his assessment, the premature appointment was properly characterised as a defective exercise of an undoubted power of appointment, procedural in nature but not fundamental to the exercise to the power to appoint and that the requirement of para [16] was not of such fundamental importance as to render the appointment a nullity.

(4) In considering whether, notwithstanding the starting point that the power to appoint was not a nullity, he should invalidate the appointment under r7.55 IR 1986 he decided that he should not as there was no substantial injustice: the company could not pay and so if exercised in accordance with the rules, the appointment would have taken place 2 days later in any event, at the latest (if the documents were to be read as requiring 2 days to meet a demand before the charge became enforceable). He therefore declined to set aside the appointment under r7.55 IR 1986.

77. As I set out below, I have doubts about the correctness of the reasoning in Re *Care People Limited*. In my assessment, this was not an example of the defective exercise of an undoubted power of appointment. The power of appointment had not arisen. If characterised as a defective exercise of an undoubted power of appointment in *Care People*, it is difficult to see why the same could not have been said of the position in *Minmar*. The directors undoubtedly had a power to appoint but, the argument would run, they exercised it defectively.

78. In *re Eiffel Steelworks Ltd* [2015] EWHC 511 (Ch), [2015] 2 BCLC 57 the Deputy High Court Judge, Mr Andrew Hochhauser QC, faced a situation where there had been a potential defect in that notice had not been given of the intention to appoint to the company itself in the case of a directors' appointment. He was asked to proceed, and did proceed, on the basis that while the point was reserved, there was a requirement under Sch B1 to serve notice on the company. On that basis, he held that the defect was an irregularity which was validated and not invalidated under r7.55 IR 1986. One

of the cases that he relied upon was *Re Ceart*. He did not need to consider retrospective appointment but noted the potential jurisdictional concerns of such a course.

79. In *Re Synergi Partners Limited* [2015] EWHC 964 (Ch); [2015] BCC 333, HH Judge Hodge QC (sitting as a Judge of the High Court) deal with an application for retrospective administration order in circumstances where a (valid) administration had expired some time before, the company had purportedly been placed into voluntary liquidation and the former administrators has been acting as liquidators. On the facts the various types of retrospective order that might be made were found to be of no assistance in the particular circumstances and the Judge made a winding up order, to enable wrongful trading proceedings to brought against the company's former directors.

(1) The Judge went through the authorities regarding the question of the existence of the jurisdiction to maker retrospective administration orders and acknowledged that the foundations were far from sure.

(2) On the facts he was not satisfied that the jurisdictional requirement for making an administration order were made out in any event nor that making any of the retrospective orders which might be possible would achieve anything worthwhile or resolve the particular issue that had arisen regarding the wrongful trading proceedings.

80. In *Re Melodious Corporation* [2015] EWHC 621 (Ch); [2016] BCC 727, Etherton C (as he then was) dealt with the question of the status of a BVI incorporated company which was registered in the England. The Judge referred to *Minmar*, *Frontsouth (Witham), Euromaster,* and *Assured Logistics Solutions*.

(1) A purported appointment by directors pursuant to para 22(2) Sch B1 was held to be invalid as the meeting was inquorate (following *Minmar*).

(2) R7.55 IR 1986 did not rescue the position because there were no relevant insolvency proceedings (following *Euromaster*). He cited with approval the distinction drawn by Norris J in *Euromaster* between matters in Sch B1 which are naturally read as defining the circumstances in which the power to appoint arises and those which are naturally read as prescribing procedural requirements that must be fulfilled.

81. In *Re Elgin Legal Limited* [2016] EWHC 2523 (Ch);[2017] BCC 43, Snowden J had to deal with a situation where by oversight an appointment had been allowed to expire without extension. Initially a new order was sought but with retrospective effect. Snowden J made a prospective order for administration but refused to make a retrospective order (to the date of the original expiry), the application or the same in any event having "rightly" been withdrawn.

(1) As regards applications for administration orders, the relevant applicant has to be within the category specified in Sch B1. The ex-administrator was able to be fitted within the list in his capacity as creditor (on the facts). The debts in question arose from his period when validly appointed an administrator (contrast *Kaupthing*).

(2) The test for the making of an administration order, as at the date of the court considering the making of an order, was satisfied.

(3) The application for a retrospective order was withdrawn and the Court did not need to consider whether or not there was jurisdiction to make one. However, it repeated the misgivings expressed in other cases and the fact that Hart J in the *G-Tech* decision did not seem to have been referred to cases such as *F Hoffmann-La Roche & Co. AG v Inter-Continental Pharmaceuticals Limited* [1965] Ch. 795.

(4) Even if there was jurisdiction to make an order and the application had not been withdrawn, the Court would have been unlikely to make such an order given the potential prejudice to creditors whose debts carried interest and who would lose a period of interest that they could otherwise prove for were the order to be made with retrospective effect and given the absence of evidence that that prejudice would be outweighed by benefits to the creditors as a whole from the making of such an order.

82. In *Petit v Bradford Bulls (Northern) Limited* [2016] EWHC 3557 (Ch); [2017] BCC 50, Mann J was faced with an application for a declaration as to the validity of a purported appointment, alternatively for the making of an administration order with retrospective effect. As the Judge pointed out, the case demonstrated "*yet again the almost infinite number of ways in which the appointment of administrators can go wrong and require proceedings in the court in order to try and fix the problem*". The case concerned appointment by charge holders. However, there were at least two potential defects with the charge: it had not apparently been executed as a deed by the company through the mechanism of two directors (or a director and the secretary) signing as the deed envisaged. Secondly, no "event of default" was identified in the debenture, though such an event might be a pre-condition to the appointment of administrators by the charge holder under the charge. There might be answers to the potential defects but that would take a lot of time and submission. The Judge considered that it might save time to deal with the question of retrospective appointment on the footing that there were defects in the appointment (and in any event recognised that he would not be hearing any contrary argument on the validity issue). The parties agreed with that proposal.

(1) The Judge was satisfied as to satisfaction of the criteria for the making of an administration order and that it was desirable to do so with retrospective effect.

(2) The Judge identified the doubts expressed in *Elgin Legal Limited*, and earlier cases, regarding the existence of the jurisdiction to make administration orders with retrospective effect but pointed out the many such orders that had been made and concluded that "*in the circumstances and subject to a decision of the Court of Appeal to the contrary, it would be right for me to follow my brethren and consider the jurisdiction exists*." The order backdated the appointment to the date and time of their original appointment.

(3) As he was not deciding that the original purported appointment by the charge holders was ineffective, he made an order insofar as necessary removing the purported administrators from office with retrospective effect. Jurisdiction to make

the order under para 79 Sch B1 with retrospective effect followed the same principle as the jurisdiction to make retrospective administration orders under para 13(2)(a) Sch B1.

83. In *Re Spaces London Bridge Limited* [2018] EWHC 3099 (Ch); [2019] BCC 280, Nugee J had to deal with the question of the requirement in r3.24 IR 2016 that a notice of appointment filed with the court must specify the date and time of the appointment of the administrator. The notice filed in that case did not give, as a separate time and date, the details appertaining to the step taken by the directors to appoint in contrast to the date and time when the notice took effect.

(1) As a matter of statutory construction, Nugee J decided that the requirement of the rules was to specify the time and date when the appointment became effective. The result was that there was no breach of the statutory provisions and the appointment was valid.

(2) As a matter of statutory construction, the choice as to what had to be entered on the form was essentially between the time and date when the prior act of the directors making the appointment took place and the date when the appointment took effect, on filing of the relevant documents. The former would require the insertion of a date and time which, as Counsel put it, "*could not serve any useful purpose at all, and indeed, could be positively misleading*…". The latter would be an otiose requirement because the court has to endorse such details on the notice of appointment in any event. Nugee J preferred adoption of the latter. In considering this issue of statutory construction, Nugee J, took into account that the court's endorsement of the time and date of filing, being when the appointment took effect, as serving a useful function: "*because it will identify, with precision, not only the date and time at which the administration takes effect.*" He also referred to the decision of Peter Smith J in *Fliptex Limited v Hogg* [2004] EWHC 1280 (ch); [2004] BCC 870 dealing with the provisions for appointment of administrators out of court by a qualified and floating charge holder under para 14 Sch B1 and the similar provision, in those circumstances, that the appointment takes effect once the notice is filed. At paragraph [32], in a passage with which Nugee J agreed, Peter Smith J said:

> "*Paragraph 19 plainly indicates that the appointment is only effective when paragraph 18 is satisfied. That makes sound sense. Where out of court appointments take place there will be no clear mechanism identifying the date and time when an appointment takes effect (contrast court appointments). It is therefore logical to dictate that the appointment is only effective when the conditions of paragraph 18 are satisfied. All documents executed before that date are executed subject to a condition that the appointment would become effective. Miss Kyriakides was constrained to concede that a person appointed as administrator before it became effective could do nothing, because the appointment was still not effective. Her submissions have odd results. Let us suppose for example, a debenture holder executes an appointment, which is intended to take effect when the documents are lodged. On her analysis that appointment is immediately effective, even if, for example the administrator has not yet consented to act. Equally on her analysis the appointment would be made*

*and a subsequent lodging of the documents in accordance with paragraph 18 not capable of challenge, even if in the intervening period the debt had been repaid. Such difficulties can be avoided by a straightforward construction. That construction gives sense to paragraph 19. The appointment only becomes effective for all purposes when the conditions in 19 are satisfied and it is then unconditional. That gives a clear date when everybody knows that all the conditions have been satisfied and the appointment then becomes effective. The idea that there is an appointment made, but not effective, but nevertheless is treated as having an effect is not a result that the draftsman of the schedule could have contemplated*."

(3) In case he was wrong, Nugee J went onto consider whether 12.64 would rescue the position. He drew the distinction between "matters which merely go to irregularity and matters that go to fundamental validity" and referred to *Re Euromaster*. Having failed to identify any purpose of a rule requiring the statement of the time and date of the directors having made the appointment, he found it difficult to envisage that Parliament intended non-compliance with such a provision to lead to total invalidity and he would have held that any failure to comply was nothing other than a formal defect or irregularity which he would have waived under r 12.64 (or perhaps more accurately, would not have held the appointment to have been invalid under r12.64).

84. In re *HMV Ecommerce Ltd* [2019] EWHC 903 (Ch); [2019] BCC 887 in a judgment handed down on 24 January 2020, the question was the validity of an out of court appointment by directors which was made outside court opening hours. The purported appointment had been made using the CE filing system purportedly pursuant to the electronic working pilot (CPR RD 51O). Barling J held that it was arguable that such filing was permitted (in the sense that the appointment was valid and took effect from the time and date, out of hours, when the notice was filed). In any event, however, to deal with any possible irregularity he determined that the if the filing was a breach of the provisions of the relevant Practice Direction the defect did not affect the validity of the appointment or that it took effect at the time and date of the filing out of court hours nor the validity of the acts of the administrators after that time, He further ordered that any defect was waived so far as necessary pursuant to r.12.64 IR 2016 and/or extended the time for filing to the time and date on which the relevant forms were filed out of court hours (for form of order see paragraphs [87] and [88] of the judgment in *Re SJ Henderson*, referred to below). This was on the basis that the defect was not fundamental and that the validity caused no injustice. In reaching this conclusion about the effect of possible invalidity he:

(1) considered the purpose of the relevant legal requirements;

(2) considered what the consequences of non-compliance were intended to be;

(3) identified that the rule was a procedural, timing rule, breach of which was likely to amount to a procedural irregularity rather than being a fundamental flaw resulting in a nullity. The provision went to the time from which an appointment took effect rather than going to the power to appoint. The provision was clearly procedural in nature rather than one which restricted

the power to appoint. Time periods would generally (though not necessarily in all cases) be of this procedural nature.

(4) decided that the breach was trivial and inadvertent, not deliberate.

(5) considered that validation, despite breach, would not result in any substantial injustice.

85. In *Re SJ Henderson & Co Ltd* [2019] EWHC 2742 (Ch); [2020] BCC 52 ICC Judge Burton dealt again with the question of an out of court appointment by directors being filed electronically through the CE filing system outside court hours. She concluded that such filing was not permitted by the relevant rules in the case of either director or company appointments. She further considered that filing in this manner was not simply a procedural defect which could be cured but was a fundamental breach such that the appointment at the relevant time and date of actual filing was a nullity but that it was to be treated as a filing at the time that the court formally opened for business.

86. In *Re Skeggs Beef Limited* [2019] EWHC 2607 (Ch), judgment handed down on 5 October 2019, Marcus Smith J had to consider the issue of whether an out of court notice of appointment by a qualified floating charge holder could validly be effected out of hours by filing the notice of appointment electronically using the CE Filing system out of hours or whether the relevant regime (involving the inter-action of the IR 2016 and the Electronic Working Pilot Scheme under CPR PD51O) required the following of the procedure in the IR 2016 for out of hours appointments by charge holders out of court, the electronic form there set out requiring filing by fax transmission or email. He determined that, on their proper construction, the relevant provisions required notice of appointment to be given in accordance with the IR 2016. If there was no provision in those rules for electronic filing then the absence could not be made good by resort to PD51O. The IR 2016 specifically laid down a procedure for out of hours appointments by qualifying charge holders which had not been followed. Obiter, he decided that directors could not appoint administrators outside court opening hours by way of electronic filing by means of CE File. He therefore disagreed with the earlier remarks of Barling J that it was arguable that such a filing was permitted as regards director appointments (as contrasted with charge holder appointments). He then went onto consider whether the defect could be cured.

(1) He identified a number of cases where the defect had been determined to be fundamental and not capable of cure, the flaw rendering the purported appointment a nullity. The cases included *Re M.T.B. Motors Ltd*. This category he identified as being cases where there was a failure to file a notice of appointment in the prescribed form. The other cases he identified were the *G-Tech, Kaupthing and Frontsouth (Witham) Ltd* cases.

(2) The second category of cases he identified was those where the prescribed form was used but "in the wrong manner" which amounts to a defect or irregularity that is not fundamental. If no substantial injustice is caused then it will be validated by r12.64 IR 2016. If substantial injustice is caused then the court considers under r12.64 whether it is appropriate to make a remedial order. If it is appropriate, the defect is then cured by the Court's order. If the court cannot or does not consider it

appropriate to make a remedial order then the defect remains uncured. Into this category he placed *Re Assured Logistics Ltd* and *Re Euromaster Limited.*

(3) The current case fell within the second category, r12.64 applied. The Judge considered that no injustice had been caused. Accordingly, all he needed to do was to make a declaration to that effect and that the appointment took effect form the time of the actual filing out of hours.

(4) the decision in *Re SJ Henderson & Co Ltd* was provided to him after the order had been made and judgment prepared and it was not appropriate for him to take it into account.

87. In *Keyworker Homes (North West) Limited*, HH Judge Hodge QC (sitting as a Judge of the High Court) delivered judgment on 11 November 2019. The issue before him as whether there had been a breach of the requirements relating to out of court appointments by directors based on requirements relating to clear days between certain steps. On his interpretation of the relevant provisions he held that there was no such breach. However, if he was wrong as to that there was a question whether a purported out of court appointment by directors outside court opening hours by way of use of the CE filing system was valid when the documents were filed out of hours or not. Obiter, he considered that that the filing was in accordance with the requirements and valid. There was no irregularity. He considered that Marcus Smith J had been wrong to consider (obiter) otherwise in the *Skeggs Beef* case and that he similarly he disagreed with ICC Judge Burton. However, he agreed with Marcus Smith J's analysis that the error regarding the charge holder in the *Skeggs Beef* case was one that was a procedural irregularity that would be validated under r12.64 IR 2016. He also disagreed with ICC Judge Burton's position that an out of hours appointment using CE Filing could never be a curable defect in relation to the relevant requirements (which on his analysis would only arise where the out of hours appointment was made via the CE filing system by charge holders). Given his conclusions there was no need for Judge Hodge to resort to r12,64 IR 2016. The appointments were valid because they were in accordance with the requirements of the rules and PDs in question.

88. In *Causer v All Star Leisure (Group) Limited* HHJ David Cooke had again to consider the question of validity or otherwise of the electronic filing of notices of appointment through the CE Filing system when the courts are closed. Judgement was handed down on 28 November 2019. The hearing was on 8 November, prior to judgment being delivered on 11 November 2019 in the *Keyworker Homes* case. The appointment in this case was, as in *Skeggs Beef*, an appointment by a qualifying charge holder and not one by the directors or the company itself. The Judge accepted that there had been an irregularity and followed *Skeggs Beef* in deciding that it was curable under r12.64 IR 2016 as decided in that case (and of the reasons there given and by Barling J in the *HMV Ecommerce* case). Although he was dealing with an appointment by charge holders rather than an appointment by directors, he preferred the reasoning of Barling J, over that of ICC Judge Burton, on the question of whether the irregularity (if there was one) was an irregularity that necessarily resulted in the appointment at the relevant time of actual filing being a nullity that was incapable of being cured under r.12.64 IR 2016.

**The Application in this case**

89. The application in this case was prepared on the basis that the *M.T.B. Motors* case was good law. A retrospective appointment was sought. As I understand it, the *Ceart* case was later found. It was drawn to my attention at the hearing as a possible solution but the application proceeded on the basis that it was a retrospective appointment that was sought, unless I considered that not to be available or to be unnecessary. In those circumstances I decided to follow the approach of Mann J in the *Bradford Bulls* case, on the basis that I was satisfied that it was at least arguable that there was no power to appoint administrators without the consent of the FCA and that the purported appointment was a nullity which could only be cured by a retrospective appointment, r12.64 IR 2016 not applying.

90. Having considered the matter with more time, I am of the view that this is in fact the position in law, although of course this view is strictly obiter given the basis upon which I made the order and of course I have heard no real argument to contrary effect.

91. The questions that therefore need to be considered are as follows:

    i) Question 1: What are the statutory requirements?

    ii) Question 2: If they have been breached, is the consequence, as a matter of construction of the provisions, that there is only a procedural defect or is the appointment a nullity?

    iii) Question 3: if the appointment is subject to a procedural defect, is substantial injustice caused by what would otherwise be the validation under r12.64?

    iv) Question 4: If there is such substantial injustice, can this be remedied by court order?

    v) Question 5: If the appointment is a nullity, can and should the defect be cured by a retrospective order?

92. As Questions 1 and 2 both turn on a construction of the relevant legislation, the same sort of considerations are likely to come into play. Nevertheless, it is important to consider the questions separately. A key consideration in considering both questions of construction is the purposes of the requirement in question and the practical consequences of breach.

**Question 1: the statutory requirements: at what stage is consent required from the FCA ?**

93. Before turning to the question of the effect of any breach of the provisions and irregularity, the first need is to identify the requirements regarding regulator consent laid down by FSMA 2000. It is all too easy to slip between the distinct issues of identifying what the legislative requirements are and identifying what are the consequences of breach of those requirements.

94. In my judgment, it is clear that the legislative scheme, being the Insolvency legislation and FSMA 2000, requires that the FCA grants consent before an appointment of administrators can become effective. In my judgment, this follows from the express terms of s362A FSMA, taken together with paragraph 29 of Schedule B1.

95. The point does not arise in this case as to whether the FCA consent must be received before the appointment by the directors/company or before the appointment otherwise becomes effective pursuant to paragraph 29. For what it is worth, in my judgment there is much to be said for the latter view. In this respect, assistance may be gained from the case of *Re Spaces London Bridge Limited.* That case explains the difference between such an appointment and the appointment becoming effective. It also deals with a question of construction of the IR 2016 where the date and time of the appointment, which had to be specified in the notice of filing, was read as referring to the date and time at which the appointment became effective. Doubtless, as a matter of prudence, advisors will act on the basis that the former view is the safer view.

96. I also consider that it is clear that statute does not envisage retrospective consent as satisfying the requirement.

97. The reasons for this are essentially the language used in s362(A) coupled with the requirements in that section as to filing of the consent.

98. There is also the question of how s362A(3) operates. Where no notice of intention to appoint is required and the matter proceeds straight to appointment it is, in my judgment, clear from s362A that the written consent must be filed at court with the notice of appointment. That follows from the word “accompany” in s362A(4) (and see the use of similar language in e.g. paragraphs 27(1),(2), 29(3), (5) Sch B1 and IR 2016). As a matter of policy it also makes sense in the overall scheme of how and when appointments become effective and the importance of this being known from the date and time of filing of the notice of appointment endorsed by the court. Again, this is an area discussed in the *Spaces London Bridge Ltd.* It seems to me that consent obtained some time later is not appropriate. This is not least because the position as it had been at the time of the original purported appointment might now be completely changed.

99. However, where the consent is required to be filed “along with” a notice of intention to appoint it may be, again I need not decide, that that requirement would be met if the consent was filed at a different time to the notice of intention to appoint, as long as it was at the very least filed by the time that the notice of appointment was filed (see paragraph 29 (1) Sch B1). The argument is that the written consent is for these purposes a document that is “prescribed” for the purposes of paragraph 29(2). The appointment can only become effective once all relevant prescribed documents are filed, but the words “along with” rather than utilisation of the “accompanying” *may* indicate that it is not required that the consent is filed at the same time as the notice of intention to appoint so long as it is lodged before or at the same time as filing notice of the appointment itself.

100. The conclusions that I reach in the immediately preceding paragraphs are supported by the consideration that copies of the notice of appointment as filed must be sealed by the court and endorsed by it with the date and time of filing: see IR r3.26(3) that must be on the basis that the effective date of the appointment (under paragraph 29 Sch B1) is the filing of such notices of appointment together with, by then, all other necessary documents. Again, under IR r.3.26(4) one of the sealed copies must be delivered to the administrator as soon as reasonably practical. This must be so the administrator knows that he can act. In my judgment it would be a breach of the relevant requirements were a written consent to be lodged after this time.

101. In *Re Ceart*, Arnold J (as he then was) focussed on the question of whether a purported appointment prior to relevant regulator consent being obtained was "*incurably invalid or ..merely defective*" (see paragraph [11]).

102. However, in paragraph [19] he appears, on one view, to go further and to discuss the content of the requirements rather than the consequences of breach of them. In terms he appears to discuss the statutory provisions not just from the perspective of whether it is essential that they are obeyed (in the sense that if they are not then a purported appointment is a nullity) or not essential (in the sense that if not obeyed, there is simply a defect and not a nullity) but in terms of what the statutory provisions require. Thus, in the paragraph in question he relies on the fact that s372B(2) does not say "without the *prior* consent of the authority" as supporting the conclusion that it is not <u>essential</u> to obtain such consent prior to appointment (emphasis supplied). If he was saying that it is not essential in the sense that non-compliance will not necessarily result in nullity that is one point. If he was saying that it is not a requirement of statute (subject to the question of whether consent obtained prior to lodging of the notice of appointment rather than prior to appointment would meet the requirement), I would respectfully disagree.

103. As regards the requirement to file the written consent he also said:

> "[*19] ... Although subsections (3)(b) and (4)(b) provide that the consent "must be filed ... along with the notice of intention to appoint" or "must accompany the notice of appointment", that wording does not compel the conclusion that the consent must be filed at the same time as the notice of intention to appoint or notice of appointment, as the case may be. A consent filed the following day could still be said to have been filed "along with" a notice to intention to appoint or to "accompany" the notice of appointment. <u>Even if</u> one interprets subsections (3)(b) and (4)(b) as requiring the consent to be filed simultaneously with the notice of intention to appoint or the notice of appointment, that does not compel the conclusion that the consent must be obtained prior to the appointment. The appointment could be made on day 1, consent obtained on day 2 and the notice of appointment and the consent filed simultaneously on day 3. Finally, nothing in section 362A explicitly states, or necessarily implies, that a failure to obtain the FSA's consent prior to the appointment means that the appointment is incurably invalid."* (emphasis supplied).

104. If and insofar as Arnold J was purporting to decide that there is no statutory requirement that the written consent had to be lodged (and therefore obtained) at the very least by the time of the lodging of the notice of appointment, I would respectfully disagree. (If he was simply deciding that a failure to file on time did not mean that the appointment was incurably invalid, that is a different point).

105. I also note that Arnold J decided that the appointment should take effect from the date of lodging the consent under para 29. If there was no requirement to obtain consent earlier and no requirement to file it earlier, it is difficult to see how any question of invalidity arose or why it was considered. If there was an irregularity, it is difficult to see why the regularity principle would not have resulted in the validation of the appointment from the date of the filing of the notice of appointment rather than from the (later) date of the filing of the consent.

106. HH Judge Hodge QC in the *M.T.B. Motors* case went further than I consider I need to decide in these proceedings. He recorded that before him:

> "*The administrators accept, as they must, that the language of s362A(3) of the 200 Act requires the FSA consent to be filed along with the notice of intention to appoint*."

In context it is fairly clear that he had in mind that "along with" meant "at the same time as." I see the strength of that argument but do not need to decide whether that view is correct or whether filing by or at the time of the filing of the notice of appointment would suffice and would meet the requirement of the statutory provisions.

107. To summarise on this aspect, and as I have already said, my conclusion is that the legislation requires that written consent from the relevant regulator must be obtained and lodged at the latest by (and with) filing of the notice of appointment. I do not need to decide whether, in certain circumstances, it may need to be filed earlier nor whether it need be obtained any earlier.

**Question 2: what is the effect of breach of the requirements?**

108. In this area, the first consideration is to see what the relevant provisions require and what the purpose of such requirements are. As I have said, to some extent the same reasoning or considerations may be relevant when considering what I have identified in this case as question 1 and question 2.

109. I agree with Arnold J that the purpose of consent of the relevant regulator (in this case the FCA) includes the three matters that he sets out in para [17] of his judgment in *Ceart*, namely to vet persons proposed as administrators by the company/directors, to check that the statutory purposes of administration are likely to be fulfilled and to draw the attention of the proposed administrators to the obligations imposed on insolvency practitioners with regard to companies regulated under FSMA 2000. However, with great respect I consider that this understates the regulator's role and its importance. I also consider that his conclusion that a consent obtained later is as good as a consent obtained earlier also does not fully give weight to the realities of the position.

110. First, it should be recognised that the effect of the sections of FSMA that I have referred to is that the regulator is not simply a person whose consent is required for an administration out of court to take place. The regulator itself has standing to apply to the court for the making of an administration order. It also has locus to appear before the court on an administration application, which might be made by, for example, the directors, were regulator consent to an out of court appointment to be refused. The ability of the regulator to be involved in the administration process both before and after any appointment is very important. True it is that the regulator cannot itself appoint an administrator out of court or control what the creditors vote upon, but the regulator has wide powers to bring the proposed or actual administration before the court and even to prevent an appointment out of court by refusing consent, thus either preventing a proposed administration going ahead or, or in practical terms, having the effect that an application for an administration order has to be made to the court, on which the regulator would have the right to be heard.

111. The second point is one relating to the realities. There are a number of matters which may be for the judgment of the administrator or matters where alternative courses may equally be open as a matter of discretion to the administrator. Further, the administrator may early on take crucial decisions which affect the whole administration (such as a pre-pack sale). To have a veto on the appointment of the directors'/company's nominee, at least so as to require the matter to be brought before the court, is a very real and important regulatory power. That may well assist the regulator in (properly) persuading the proposed administrators that acting in a certain way, rather than another is desirable. It is clear from the number of reported cases where parties argue over the identity of administrators on first appointment that the identity of the administrator(s) is perceived as being, and can be, of real importance.

112. In addition, although it is true that consent of the regulator may be obtained later, after an appointment, that is in a situation where the die is cast and the regulator is faced with a fait accompli without very much real choice in the matter. In connection with the appointment by a charge holder who had failed to give notice to a prior charge holder as required, HH Judge David Cooke in *Eco Link Resources Limited* said (at para [27] and [28]:

> "[27*] It seems to me that the first floating charge holder is potentially prejudiced if the provision is construed as being one that permits a second charge holder to act first and seek consent later, or seek to give notice later, because he is thereby faced with what is almost, if not quite, a fait accompli. Administrators will have been purportedly appointed, will have assumed office and may have taken actions reliant on their office, and he is, at the very least, likely to face a potential dispute if he seeks to displace them by making his own appointment.*
>
> *[28] If one asks the question whether Parliament can fairly be intended 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*."

113. In my assessment, the public interest is potentially prejudiced in the same way as a prior charge holder's interest is where no notice is given, if the regulator's consent (and indeed notice to the regulator) is only sought after the fact of purported appointment.

114. HH Judge Cook was able to distinguish the *Ceart* case on the basis that Arnold J was able to construe the relevant FSMA 2000 requirements as not involving a requirement of consent at any set time (contrast the notice period for floating charge holders to give notice to prior charge holders). There are two possibilities, the first is that Judge Cook was saying that Arnold J determined that there was no breach, the other is that he was saying Arnold J determined that the breach did not have the consequence of invalidity. If the point is one of construction of what the requirements are, then, for the reasons that I have already given, I respectfully consider that Arnold J was incorrect. On this footing, the basis for distinguishing the situation facing HH Judge Cook and that facing me (and which faced Arnold J) really evaporates.

115. Indeed, standing back from the detail, it seems to me that it might be said to be odd that a failure to give notice to a charge holder will result in a purported appointment being a nullity (because the charge holder might have taken steps) (per Judge Cook) but a failure to notify and obtain consent of the regulator will not (per Arnold J). The same analysis applies in respect of the *Adjei* case.

116. In my assessment, this result is entirely consistent with the approach of the courts in distinguishing procedural matters, where the likelihood is that breach will not result in nullity, and matters going to the power to make the appointment or restricting the power to appoint as described by Barling J in the *HMV Ecommerce* case. Using the language of Norris J in *Euromove,* I consider that the requirement for regulator consent defines the circumstances in which the power to appoint arises rather than that simply being a prescribed procedural requirement that must be fulfilled.

117. I should also add that I consider that the decision in *Care People* is questionable. It is difficult to see why the charge not being enforceable (if that was the case) was not as much a substantive fundamental failing leading to nullity as the board not having authorised the appointment in *Minmar*. True in both cases there was a failure of procedure, but the result was that a substantive condition for the making of an appointment (action by the board/company in *Minmar* and the charge being enforceable in the case of *Care People*) was not met.

118. Of the cases that have applied *M.T.B. Motors* or *Ceart*, I regard those dealing with *Ceart* as approving the approach in *Ceart* (being effectively what I have described as the *Soneji* approach) but not necessarily the specific answer given in that case. Similarly, cases referring to *M.T.B. Motors* do not, in my view, do more than cite it for illustrative purposes without actually considering and approving the result.

119. In conclusion on this point, for the purposes of the approach that I have taken I only have to be satisfied that it is at least arguable (or possibly that there is a real prospect) that the appointment is a nullity. I am so satisfied. My view, having examined the cases in more detail, is that the appointment is in fact a nullity but that conclusion is obiter.

**Questions 3 and 4**

120. In light of my earlier conclusions, these questions do not arise. However, I gratefully adopt the analysis of Marcus Smith J in the *Skeggs Beef* case as to how r12.64 IR 2016 operates (see para [21]). In short, procedural defects are validated by the rule, unless the court otherwise orders. The court will otherwise order if the effect of validation is to cause substantial injustice which the court cannot (or will not) otherwise remedy. In my judgment, considerations as to (for example) whether a breach is deliberate go to the question of “substantial injustice”, which is not a factor measured solely by prejudice to other parties involved in the particular company’s affairs but may also extend to the general justice of preventing advantage being taken of cynical disregard of the rules and in deterring such conduct. Alternatively, it may enter into the general discretion that the court must have in deciding whether to make an order under r12.64 IR 2016.

**Questions 5: Can and should the defect be cured by a retrospective appointment?**

121. As regards an appointment:

(1) By the time of the hearing before me, all the directors were joined into the application, which was originally made by one only of them, and they have locus to apply for the making of an administration order;

(2) The statutory conditions for the making of an administration order are made out as at the date of the hearing before me;

(3) As a matter of discretion, an (at the least, prospective) administration order is clearly appropriate on the evidence.

122. As regards the question of the appointment being retrospective: the jurisdiction to make a retrospective appointment, though it has been questioned has now been relied upon (and exercised) consistently for many years. I agree with Mann J in the *Bradford Bulls* case that that if there is to be a challenge to the existence of that jurisdiction, such challenge should now be raised in the Court of Appeal.

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123. The wording of the consent by the regulator is more guarded than that before HH Judge Hodge QC in the *M.T.B. Motors* case. On analysis I consider that it is not objecting to a retrospective appointment, rather it is not agreeing that the actions of the (purported) administrators to date are validated for all purposes. It is the same sort of point that Norris J made in *Adjei v Law for All* when refusing to make an order validating or affirming the decisions/actions of the purported administrators. There is a difference between making the acts and decisions ones quae administrators, and in that sense validating them, and going beyond that and saying that the acts and decisions have been correctly made.

124. There is no specific prejudice to anyone flowing from validation that is identified. On the face of things, administration is and has been beneficial to the creditors as a whole. The breach was inadvertent. In all the circumstances the order that I made was retrospective.

125. It was also appropriate to deal with the possibility that the appointment was, notwithstanding my views, valid notwithstanding what I have identified as a non-curable breach. Accordingly, the purported administrators agreeing to the same, I made an order that if they had been validly appointed they were removed from office, following the approach of Mann J in the *Bradford Bulls* case.