Neutral Citation Number: [2020] EWHC 003171 (Ch)

Case No: CR-2020-003171

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF TOKENHOUSE VB LIMITED (formerly VAT BRIDGE 7 LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Business Skype Remote Hearing
Date: 14/10/2020

Before :
I.C.C. JUDGE JONES
- -

BETWEEN:

STRATEGIC ADVANTAGE SPC

For and on behalf of VAT 1 SP

Applicant

-and-

(1) MR LAURENCE RUTTER
(2) MR SIMON WILLIAM HOLDEN
(3) MR GRAHAM AVERY
(4) TOKENHOUSE VB LIMITED
(formerly VAT Bridge 7 Limited)
(5) MR JEREMY KARR
(as purported Joint Administrator of Tokenhouse VB Limited)
(6) MR JAMIE TAYLOR
(as purported Joint Administrator of Tokenhouse VB Limited)

Respondents

- -

Ms Madeleine Heal and Mr Matthew Maddison on 4 September and **Mr Hugo Groves and Mr Maddison on 15 October 2020** (instructed by **Walker Morris LLP**) for the **Applicant**
Mr Iain Pester for the 1st, 2nd and 3rd Respondents instructed by direct access
Ms Tina Kyriakides (instructed by **HCR Specher Grier**) for the **5th and 6th Respondents**
No-one else appeared or was represented

Hearing date: 4 September 2020
- -

Approved Judgment

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

.....CHJ 15/10/20.....

I.C.C. JUDGE JONES

I.C.C. Judge Jones:

A) The Issues and Task

1. On 4 September 2020 I decided for reasons given orally that the Applicant is a qualified floating charge holder and, therefore, should have been given at least 5 business days' notice of the directors' intention to appoint an administrator as required by ***paragraph 26(1)(b) of Schedule B1*** ("***Schedule B1***") to the Insolvency Act 1986 ("***the Act***") for all intended appointments under ***paragraph 22 of Schedule B1***.

2. I reserved judgment to decide the following issues: (i) whether the failure to give that notice means the appointment by the directors on 29 July 2020 in respect of the Fourth Respondent is void ("the First Issue"); if not, (ii) whether the breach should be remedied by the appointment of those whom the Applicants wish to appoint or otherwise ("the Second Issue").

3. To "hold the ring" during the vacation and the time needed to arrange a hearing to hand down judgment, I ordered that the purported administration should cease and a court appointed administration began. One of the purported administrators and an insolvency practitioner nominated by the Applicant were appointed subject to further order, including the right to apply for a retrospective appointment.

4. This is, therefore, another in the long line of cases grappling with the construction of the provisions introduced from 15 September 2003 by ***Schedule B1*** empowering qualifying floating charge holders and the company or the directors to appoint administrators out of court. The First Issue is one which has caused the editors of Sealey and Millman's "Annotated Guide to the Insolvency Legislation 23rd Ed. - 2020" (on-line) to opine:

> *"The question whether the failure to comply with the notice requirements of para.26 inevitably invalidates the appointment of the administrator has been much debated in recent cases at first instance, and remains the subject of controversy. Only a ruling of a higher court can resolve the current impasse."*

5. This area of law is littered with conflicting authorities at High Court Judge level. As His Honour Judge Purle Q.C. observed, no doubt with a wry smile: *"This conflict of judicial opinion is unfortunate, to say the least"*. My task is to identify and apply the decision(s) at High Court Judge level binding upon me.

B) The Facts and Submissions

6. ***Paragraphs 26(1)-(3) of Schedule B1*** provide that a notice of intention to appoint must be given in the prescribed form: (i) to any person who is or may be entitled to appoint an administrative receiver or an administrator or has appointed an administrative receiver of the company (for convenience to be called "a Chargeholder"); and (ii) to any prescribed person ("Prescribed Person").

7. Those currently prescribed by ***Rule 3.23(4) of the Insolvency Rules 2016*** (formerly ***Rule 2.20(2) of the Insolvency Rules 1986***) are (in summary): an enforcement officer charged with distress or other legal process; a person who has distrained; a supervisor of a voluntary arrangement and the company if it is not intending to appoint. A supervisor and the company, like the Chargeholder, have rights to apply for an administration order and all will be affected by the interim moratorium which exists pending an administration pursuant to ***paragraph 44 of Schedule B1***.

8. Only Chargeholders, not Prescribed Persons, must be given 5 business days' notice but in all cases the notice must be filed with the court as soon as is reasonably practical and an appointment may not be made after the period of 10 business days beginning with the date of that filing (***paragraphs 27-28 of Schedule B1***).

9. There is no dispute that notice of intention to appoint was not given to the Applicant, a Chargeholder. This breach of ***paragraph 26(1) of Schedule B1*** means the Applicant did not have the five business days' notice which would have enabled it to agree the appointment of the proposed administrators or to make its own appointment under ***paragraph 14 of Schedule B1*** or (if appropriate) to seek directions from the court including to challenge the right to appoint. The Applicant's unchallenged evidence is that it would have appointed its own administrators had notice been given.

10. Ms Heal on behalf of the Applicant submits that the clear wording of the relevant provisions of ***Schedule B1*** means the appointment could not have been made (***paragraph 28 of Schedule B1***) and/or that it cannot have had effect (***paragraph 31 of Schedule B1***). She submits that I am bound by higher authority to reach that conclusion, relying upon two principal reasons.

11. First, because case law, including ***Re Euromaster Ltd*** [2012] EWHC 2356 (Ch), [2012] B.C.C. 754, establishes that the purpose of the notice of intention is to give a Chargeholder the opportunity to appoint their own administrator or administrative receiver. A breach prevents that option arising and cannot be cured because of the 5 business days' time limit within ***paragraph 26(2) of Schedule B1***. Second, because it is established by cases such as ***Re Skeggs Beef Limited*** (above) that an appointment is a nullity if there is a fundamental defect. It must be the case that failure to give a notice under ***paragraph 26(1) of Schedule B1*** is fundamental applying the approach of cases such as ***Adjei v Law for All*** [2011] EWHC 2672 (Ch), [2011] B.C.C. 963 and contrasting the position when ***paragraph 26(2) of Schedule B1*** applies in respect of a Prescribed Person. Ms Heal relied in particular during her oral submissions on the case of ***Re Kaupthing Capital Partners II Master LP Inc*** [2010] EWHC 836 (Ch); [2011] B.C.C. 338 on this point.

12. The alternative case, submitted for the Second Issue, is that the loss of the opportunity to appoint administrators, if an irregularity, is a defect which should be cured by restoring that opportunity (see ***Re Assured Logistics Solutions Ltd*** [2011] EWHC 3029 (Ch)). That will require the current appointment to cease and allow the Applicant to make its appointment or for the court to do so. The court has power to remove an administrator under ***paragraph 88 of Schedule B1*** and to order the appointment of a new administrator under ***paragraph 95 of Schedule B1***. It is also submitted that this is the route to follow because the current appointment was made for improper motive to circumvent the statutory requirements.

13. Ms Kyriakides on behalf of the appointed administrators submits that case law establishes that the First Issue is to be addressed by taking the approach to statutory interpretation directed by the House of Lord in **R v Soneji *(Kamlesh Kumar)*** [2005] UKL 49, [2006] 1 A.C. 340 at [14] and [23], and to answer the question whether Parliament intended the outcome to be total invalidity by focusing on the consequences of non-compliance, That being so, the approach of Mr Justice Norris in ***Re Euromaster***, (above) should be applied and a distinction be drawn between those provisions which define the circumstances in which the power to appoint arises and those which prescribe procedural requirements that must be fulfilled for the appointment to be made. If there is no power to appoint, then the appointment will be a nullity, but if there is a breach of a procedural requirement, the appointment will more naturally be treated as irregular. She submits that Mr Justice Norris' statement that ***paragraphs 22 to 25 of Schedule B1*** relate to the power to appoint and that ***paragraphs 26 to 32 of Schedule B1*** relate to the procedural requirements for the exercise of the power mean the answer to the issue is that the appointment is valid but with a procedural irregularity.

14. As to the resulting Second Issue, the administrators adopt the required position of neutrality. It is observed, subject to that position, that the question is whether prejudice has resulted. Obviously there has been a loss of the opportunity to agree or appoint administrators but an issue raised by the court is whether that has caused substantive prejudice bearing in mind that all appointees are and should be independent, licensed insolvency practitioners.

C) The Statutory Background

C1) The Introduction of Out of Court Appointments

15. Until 15 September 2003 all administrations were court appointed. On that day ***Schedule B1*** was inserted by the ***Enterprise Act 2002*** ("***the EA***") pursuant to the ***Enterprise Act 2002 (Commencement No 4 and Transitional Provisions and Savings) Order 2003*** (SI 2003/2093). Two of the changes introduced by ***the EA*** within ***paragraphs 14 and 22 of Schedule B1*** empowered qualifying floating charge holders and the company or the directors to appoint administrators out of court in accordance with the procedures prescribed. The purpose of introducing out of court appointments was to *"streamline the process"* in the context of the requirement to petition the court being potentially *"cumbersome"* (see ***The Explanatory Notes to the EA*** at paragraph [643]).

16. Mr Justice Norris in ***Re Virtual Purple Professional Services Ltd*** [2011] EWHC 3487, [2012] B.C.C. 254 stressed the need to interpret the provisions concerning the appointment of administrators out of court within the context of the statutory scheme for administrations *"as a whole"*. He said this:

> "*Administration" was introduced in the 1986 Act to facilitate the rescue and restructure of businesses. It is of the nature of the commencement of an administration that the formalities will have to be observed under pressure of time and circumstance. Whilst under the 1986 Act the commencement and termination of that process took place in court proceedings, the Enterprise Act 2002 streamlined that process and enabled administrators to be appointed out of court. The*

true construction of Sch.B1 and of the relevant Insolvency Rules depends upon setting the particular paragraph or rule in the context of this scheme as a whole."

C2) The Scheme As A Whole

17. The scheme as a whole is for administrations to be a potential rescue route for companies who are unable or likely to become unable to pay their debts and to avoid, for the ultimate benefit of creditors and the company, the all too frequent consequence of a liquidation resulting in a "fire-sale" before dissolution. The purpose and aim of an administration is to act with speed to enable an independent insolvency practitioner as administrator to present proposals to be approved or rejected by creditors to achieve: (i) the rescue of a company which is or is likely to become unable to pay its debts as a going concern; or (ii) a better result for such a company's creditors as a whole than will be likely if the company is wound up; or (iii) to realise its property to make a distribution to one or more secured or preferential creditors (see ***paragraphs 3, 11, 49 and 53(1) of Schedule B1***).

C3) Out of Court Appointments and Qualifying Floating Charge Holders

18. The ***EA*** when introducing out of court appointments into ***the Act*** also applied significant changes to the rights of qualifying floating charge holders otherwise entitled to appoint administrative receivers under a floating charge. ***Section 72A of the Act*** prohibits such an appointment subject to the exceptions within ***sections 72B-72H of the Act***. Although qualifying floating charge holders were conferred the right to appoint administrators, there are differences less favourable for them:

    a) An administrative receiver would be appointed (normally as an agent of the company) with the function of achieving the realisation of the secured assets now the subject of a crystallised floating charge for the benefit of the floating charge holder. This process would start upon appointment rather than require a proposal and vote of creditors in accordance with the procedure for all administrations, albeit that a "pre-pack" sale may be an option.

    b) In contrast, all administrations have the purpose and aim summarised in paragraph 17 above, even if the qualifying floating chargeholder makes the appointment. An administrator must act in the interests of the creditors as a whole, subject to the administrator's function being to make a distribution to one or more secured or preferential creditors. That function will only arise if the administrator thinks it is not reasonably practical to achieve either of the other two objectives and if it will not unnecessarily harm the interests of the creditors as a whole (see ***paragraphs 3(2) and 3(4) of Schedule B1***).

    c) Whilst a receiver may still be appointed over less than a substantial part of the company's secured assets, that may well be unattractive commercially and the appointee would be required to vacate office if an administrator is appointed (see ***paragraph 41(2) of Schedule B1***).

19. It is no doubt in the context of those abrogated rights and consequences that chargeholders have been provided with the right to receive notice of intention to appoint. As Mr Justice Norris said in ***Re Euromaster Ltd*** (above at [19]):

> *"The notice of intention has to be given to those specified in paragraph 26(1) of Schedule B1... The purpose of giving the notice is clearly to afford the holder of the superior right the opportunity to establish whether its security is enforceable, to decide whether to make its own appointment under paragraph 14 of Schedule B1, and (if necessary) to give 2 business days' notice to the holder of any and every prior qualifying floating charge. The giving of the notice also affords the holder of the superior right the chance to conduct negotiations with the proposed appointors over the identity or terms of appointment of the proposed administrator or (in an extreme case) to prevent the company going into administration."*

20. However, the matters referred to in sub-paragraphs 18(a) and (b) above lead to the conclusion that the identity of the administrator has far less practical significance because of the obligations described for an adminisration. This is further enhanced by the fact that all administrators must be licensed insolvency practitioners, must be independent and are made officers of the court by ***section 5 of Schedule B1*** whether appointed by the court or not. None will have any form of allegiance to the appointee and they will be concerned to fulfil their statutory duties and functions objectively.

21. Those features together with the words of Mr Justice Norris above are also consistent with the fact that the court has overall supervisory control of all administrations. Directions can always be sought by an administrator in connection with the statutory functions under ***paragraph 63 of Schedule B1***. The overall scheme of ***the Act*** is ultimately to leave issues relevant to the functioning of an insolvency remedy to the court to ensure the best result is achieved for the interested parties. The role of administrators, the requirement that they are licensed insolvency practitioners and the role of the court are all part of the scheme "as a whole" and are relevant to consider when construing the provisions of ***Schedule B1***.

C4) The Scheme for Out of Court Appointments

22. The scheme for an out of court appointment by the company or its directors starts at ***paragraphs 23-25 of Schedule B1*** with restrictions on the power to appoint. It then, at ***paragraphs 26-34 of Schedule B1***, provides for the method of appointment and when that appointment takes effect. In summary, at this stage, the prohibitions concern time limits relevant to previous moratoriums and steps having been taken for a different insolvency remedy or administration route. The procedure requires: (i) the giving and filing of notices of intention to Chargeholders and Prescribed Persons when required (***paragraphs 26-28 of Schedule B1***); (ii) the resolution to appoint; and (iii) the filing of a notice of appointment (***paragraphs 29-31 of Schedule B1***). Mr Justice Nugee, as he then was, in ***Re Spaces London Bridge Ltd*** [2018] EWHC 3099 (Ch), [2019] B.C.C. 280 explained:

> *"the structure envisages that there will be two separate stages in the process: the appointment followed by the filing of the notice. The appointment may be made before notice of intention is sent and the subsequent step of filing the notice of appointment may be made under that authority without the need for a second resolution provided those entitled to notice raise no relevant objection. The appointment will take effect in accordance with* ***paragraph 31 of schedule B1****."*

C5) The Consequences of An Appointment

23. If the company or the directors file a notice of intention to appoint under ***paragraph 27 of Schedule B1***, an interim moratorium starts from that time and continues until the appointment takes effect or an administrator has not been appointed within the period of 10 business days from that date (***paragraph 27 of Schedule B1***).

24. The same moratorium applies when an application for an administration order is made and it lasts until the date an administration order made by the court takes effect or until the court dismisses the application. In the case of an out of court appointment by a floating charge holder, it starts when the notice of intention to appoint in the prescribed form is filed under ***paragraph 14 of Schedule B1*** and lasts until the appointment takes effect or if an administrator has not been appointed within the period of five-business days beginning with the date of filing.

25. An interim moratorium prevents the company resolving upon a voluntary liquidation or a winding up order being made (subject to exceptions). It prevents enforcement of security, repossession of hire-purchase agreement goods, forfeiture by peaceably re-entry or the institution or (subject to the exceptions in ***paragraph 44(7) of Schedule B1***) continuation of legal process (including proceedings, execution and distress) without permission of the court. An administrative receiver may not be appointed (see ***paragraphs 42-43 as applied by paragraph 44 of Schedule B1***). It is not difficult to conclude that these consequences mean it is relevant for each of the categories of Prescribed Person to be given notice of intention to appoint.

26. The interim moratorium will be superseded by a final moratorium under ***paragraphs 42-43 of Schedule B1*** if the administration commences. In short, it is in the same terms except that permission (consent) may be obtained from an administrator and there is no equivalent to ***paragraph 44(7) of Schedule B1***.

C6) Other Relevant Provisions

27. The following provisions are also potentially relevant to the First Issue and have been addressed in the case law:

    a) ***Sub-paragraphs 27(3) and 27(4) and 29(2) and 29(7) of Schedule B1*** respectively require a statutory declaration to be filed with the notices of intention and appointment and provide that a criminal offence will be committed if a statement is false and not reasonably believed to be true.

    b) ***Paragraph 34 of Schedule B1*** empowers the court to order a person who makes an invalid appointment to indemnify the appointee against any liability which arises solely by reason of that invalidity.

    c) ***Section 232 of the Act*** provides that the acts of an administrator are valid *"notwithstanding any defect in his appointment, nomination or qualification"*. ***Paragraph 104 of Schedule B1*** confers a presumption of validity in the

following terms: *"An act of the administrator … is valid in spite of a defect in his appointment or qualification"*.

d) ***Rule 12.64 of the Insolvency Rules 2016*** (formerly ***Rule 7.55 of the Insolvency Rules 1986***) provides:

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

e) The court has a general power to rectify errors of procedure conferred by ***CPR Rule 3.10***.

28. It is also to be borne in mind when interpreting provisions concerning out of court appointments by the company or the directors that:

a) In the case of court appointments, Chargeholders must be notified of the application as soon as is reasonably practical after it is made (see ***paragraph 12(2) of Schedule B1***). A qualified floating charge holder is entitled to apply for an administration order ***(***see ***paragraph 35 of schedule B1***). They may also intervene in an application if they would prefer a different appointee to the insolvency practitioner preferred ***(paragraph 35 of Schedule B1***).

b) A court appointment will be valid subject to review or appeal under ***Rule 12.59 of the Insolvency Rules 2016*** (formerly ***Rule 7.47 of the Insolvency Rules 1986***) even if the requirement of notice was not fulfilled. It is a court order.

c) Chargeholders wishing to make an out of court appointment under ***paragraph 14 of Schedule B1***, which can only be done if the floating charge is enforceable (***paragraph 14 of Schedule B1***), are required by ***paragraph 15 of Schedule B1*** to give notice of their intention to relevant floating charge holders whose charge has priority over their charge (see the early decision of Mr Justice Peter Smith in ***Fliptex Ltd v Hogg*** [2004] EWHC 1280 (Ch), [2004] B.C.C. 870).

29. Against that background, it is now appropriate to consider why there have been so many conflicting authorities and the task identified in paragraph 4 above exists.

D) The Problem

30. The key provisions of ***paragraphs 22-31 of Schedule B1***, which follow the restrictions on the power to appoint at ***paragraphs 23-25 of Schedule B1*** are:

a) ***Paragraph 26 of Schedule B1*** which requires a notice of intention as summarised at paragraphs 6-8 above.

b) ***Paragraph 27 of Schedule B1*** requiring the notice of intention to be filed with the court as soon as is reasonably practical together with any document

accompanying it and a statutory declaration in the prescribed form made not more than 5 business days before filing (***Rule 3.23(6)(b) of the Insolvency Rules 1986***, formerly ***Rule 2.20 of the Insolvency Rules 1986***). The declaration, which is subject to a criminal offence provision, requires (amongst other matters) statements to the effect that the insolvency requirements are met and the appointment is not prevented by ***paragraphs 23-25 of Schedule B1***.

c) ***Paragraph 28 of Schedule B1*** provides that an appointment may not be made after the period of 10 business days beginning with the date of that filing. It also prohibits an appointment if the requirements of ***paragraphs 26 and 27 of Schedule B1*** have been complied with.

d) ***Paragraph 29 of Schedule B1*** requires the notice of appointment to be filed. It is to include a statutory declaration made not more than 5 business days before filing (see (***Rule 3.25(4)(b) of the Insolvency Rules 1986***, formerly ***Rule 2.25 of the Insolvency Rules 1986***) which declares (amongst other matters and subject to a criminal offence provision) that the appointment is in accordance with ***Schedule B1*** and that the statutory declaration filed with the notice of intention to appoint remains accurate.

e) ***Paragraph 31 of Schedule B1*** provides that the appointment takes effect when the requirements of ***paragraph 29 of Schedule B1*** are satisfied.

31. Put simply, the underlying problem is the tension between: (i) the normal meaning of the words used within those provisions strongly suggesting that non-compliance with their out-of-court procedural requirements should prevent an appointment being effective; and (ii) the fact that this may have a disproportionate result when compared with the prejudice caused by breach and, even more importantly, may adversely affect a company's ability to achieve the purposes it would have been likely to achieve had the appointment been valid.

32. This tension exists because provisions which are framed in mandatory terms exist within the context of scenarios which will require the company to be quickly placed into administration, whilst it is or is likely to be (at least) cash flow insolvent, if it is to be rescued through the aims and purposes of an administration. Assuming, which it is right to do for these purposes, that aim is reasonably likely to succeed, it is not difficult to appreciate that it may be considered counter-intuitive for an appointment to be invalid if it is subsequently discovered that a notice of intention was not given when it should have been. The consequence of invalidity potentially does not appear to fit the breach and the purpose of the requirement for notice.

33. These potentially straightforward provisions have been considered in a variety of circumstances ranging from minor defects when complying with the form of notice or the requirements for filing documents to more serious breaches concerning the failure to give notices. In some of the cases the breach was not appreciated for a considerable time and significant steps had been taken to implement the purposes of an administration. Indeed, there has been a case before me when the breach was first identified by liquidators after the conclusion of the administration. In one of the many reported cases the outcome would determine whether the company was in administration or whether a creditors' voluntary liquidation had commenced by a resolution passed shortly after the purported appointment.

34. It is not difficult to see that potentially an automatic conclusion based upon the plain meaning rule that an appointment has no effect may cause significant damage to the company and its creditors. Automatic invalidity would do so even though the Chargeholder and/or the Prescribed Person concerned does not object to the appointment or "only" wants the appointee replaced by their own nominee. Nevertheless, if that is the wording of the statute and the intention of Parliament, that must be followed subject in exceptional circumstances to the court's extraordinary inherent jurisdiction which confers *"scope for the court to direct that things be done (or not done) in apparent conflict with express provisions of the legislation"*. (see the judgment of Lord Justice Lloyd in ***Donaldson v O'Sullivan*** [2008] EWCA Civ 879; [2009] 1 W.L.R. 924 at [38-41]). That has not been suggested within case law to date.

35. The tension has resulted in the above-mentioned *"conflict of judicial opinion"* in cases which have considered (in the context of the application of principles of statutory interpretation) whether there was power to make an appointment or if an appointment was made and, to the extent that there was an appointment: (i) whether the provisions requiring notice provide for the consequences of breach; or. if not, (ii) the plain meaning overrides any contrary purpose arguments; or (iii) insofar as purpose is relevant, whether non-compliance with the notification requirement(s) must be a fundamental breach because the absence of notice cannot be cured and, certainly in the case of a Chargeholder, the rights lost cannot be revived; or (iv) whether the breach is not fundamental taking into consideration it is procedural and/or the overriding purpose of achieving the aims of an administration.

36. The *"conflict"* and the potential for appointments to be void have also led the court to find an alternative approach.

E) An Alternative, Retrospective Solution

37. Recognising the difficulties of the *"current impasse"*, many cases at ICC Judge, Circuit Judge and High Court Judge levels have avoided the problem by adopting a practical approach. Namely: to order the current appointment, insofar as it is valid, to cease; to appoint administrators immediately; and to make the order retrospective by back dating the time of the appointment to the time of the original appointment.

38. It is an approach that has been adopted with some reluctance and has not always been exercised because of the concern in principle over making a retrospective order and particularly because of its potential consequences (see the observations of Mr Justice Snowden in ***Re Elgin Legal Limited*** [2016] EWHC 2523 (Ch), [2017] B.C.C. 43). There is also an unattractive element within the proposition that an appointment which might be ineffective because of the wording of statute, can be made effective by other means. However, it remains an available, pragmatic remedy on current authority (see ***Petit v Bradford Bulls (Northern) Ltd (in Administration)*** [2016] EWHC 3557 (Ch), [2017] B.C.C. 50).

39. Such pragmatism is not available in this case because the Applicant seeks a decision that the purported appointment by the directors was void.

F) Binding Authority

40. To reach that decision I need to decide which authority/authorities bind me or which I should follow, depending upon whether they are at or below High Court Judge level. My conclusion, the reasoning for which is for convenience set out in the Appendix to this judgment, is as follows:

a) This is not a case where the purported appointment is void because there was no power to appoint or the appointment was not made. Examples of those types of case include the failure to make an appointment (see ***Re Kaupthing Capital Partners II Master LP Inc; Pillar Securitisation Sarl v Spicer*** [2010] EWHC 836 (Ch), [2011] B.C.C. 338) and the failure to pass a valid resolution to appoint (see ***Minmar (929) Ltd v Khalastchi*** [2011] EWHC 1159 (Ch); [2011] B.C.C. 485).

b) For cases such as this, where there is an issue of compliance with the requirements of ***paragraphs 26-30 of Schedule B1***, there is now a consensus binding upon me that the court should follow the decision of Mr Justice Arnold, as he then was, in ***Re Ceart Risk Services Ltd*** [2012] EWHC 1178 (Ch), [2012] B.C.C. 592 to the extent that he held that the answer to the question whether non-compliance results in invalidity depends upon whether Parliament intended that outcome. That is to be decided by first identifying the purpose of the requirement breached and second by identifying the consequences of non-compliance. As Mr Justice Norris explained in ***Re Euromaster Ltd*** (above), the focus is on *"the consequences of non-compliance"*.

c) If the answer is that there is not automatic invalidity and breach is an irregularity, it follows that ***paragraph 31 of Schedule B1*** will be given effect accordingly. The presumptions of validity within ***section 232 of the Act*** and ***paragraph* 104 of Schedule B1** will apply (as expressly decided by the decision of Mr Justice Arnold in ***Re Ceart Risk Services Ltd***) together with ***Rule 12.64 of the Insolvency Rules 2016***, formerly ***Rule 7.55 of the Insolvency Rules 1986***) (see also the decision of Mr Justice Nugee, as he then was, in ***Re Spaces London Bridge Ltd*** [2018] EWHC (Ch), [2019] B.C.C. 280 and ***CPR Rule 3.10.***,to the extent necessary).

d) As a result, the decision in ***Re G-Tech Construction Ltd*** [2007] B.P.I.R. 1275 that in a case of breach, in that case of ***paragraph 29 of Schedule B1*** by failing to file the correct prescribed form but with reasoning equally applicable to any of the requirements of ***paragraphs 26-30 of Schedule B1***, there cannot be an effective appointment because of the terms of ***paragraph 31 of Schedule B1*** is not to be followed.

e) Mr Justice Marcus Smith in ***Re Skeggs Beef Ltd*** [2019] EWHC 2607 (Ch), [2020] B.C.C. 43 has identified three categories of case to be applied when deciding the consequences of a breach of the requirements for an out-of-court appointment. Namely, cases where (i) the breach is fundamental, (ii) not fundamental but have caused no injustice, and (iii) not fundamental but have caused substantial injustice.

f) When answering the question of Parliamentary intention and for the purpose of categorising the breach, the provisions concerning the appointment of administrators out of court are to be interpreted within the context of the statutory scheme for administrations *"as a whole"* (***Re Virtual Purple Professional Services Ltd*** (above)).

g) The judgment of Mr Justice Marcus Smith also leads me to conclude that when applying those categories and determining the First Issue, I must apply the reasoning of Mr Justice Norris in ***Re Euromaster Ltd*** (above) and proceed from the premise that ***paragraphs 26-32 of Schedule B1*** prescribe procedural requirements. The result being that a breach will "*naturally fall to be treated as irregular"* (Norris J. at [28]). The reasoning has been approved in the case of ***Re Melodious Corporation*** [2015] EWHC 621 (ch), [2016] B.C.C. 727 by Sir Terence Etherton when Chancellor.

h) Neither Mr Justice Marcus Smith nor Mr Justice Norris were specifically concerned with a breach of ***paragraph 26(1) of Schedule B1***. In ***Gregory v A.R.G. (Mansfield) Limited*** [2020] EWHC 1133 (Ch), [2020] B.C.C. 641 at [56-88] H.H. Judge Davis-White Q.C., sitting as a Judge of the High Court, disagreed with His Honour Judge Purle Q.C.'s decision in ***Re BXL Services*** [2012] EWHC 1877 (Ch), [2012] B.C.C. 657 that ***Re Ceart Risk Services Ltd*** (above) established as settled law that a failure to give notice to a Prescribed Person did not invalidate the appointment under ***paragraph 26(2) of Schedule B1***. That conclusion must equally apply to ***paragraph 26(1) of Schedule B1*** and bind me.

i) In any event Mr Justice Norris did not have to address within his reasoning each procedural provision or circumstance of breach. He did not decide the First Issue and this leaves the possibility, in particular in the light of previous authority, that a failure to give a notice of intention under ***paragraph 26(1) of Schedule B1*** may be an exception which does not *"naturally fall to be treated as irregular"*.

41. As a result, I conclude that the First Issue is to be decided by focusing on the consequences of non-compliance and deciding whether the intention of Parliament is that a failure to give notice of intention is a fundamental breach or an irregularity which has either caused substantial injustice or not. In doing so I should proceed from the premise that a breach of ***paragraphs 26-32 of Schedule B1*** will naturally but not necessarily fall to be treated as irregular. I will consider the statutory scheme as a whole.

G) The Decision – The First Issue

42. Failure to give a notice of intention to appoint to a Chargeholder before an appointment under ***paragraph 22 of Schedule B1*** and the filing of the notice of appointment under ***paragraph 29 of Schedule B1*** will mean the Chargeholder will never receive at least 5 business days' written notice of the intention to appoint under ***paragraph 26(1) of Schedule B1*** unless the appointment is declared invalid and incurable and the process has to start again, if it can.

43. It will mean the Chargeholder will have lost the ability to appoint its own administrator or to agree the appointee before the purported appointment under ***paragraph 22 of Schedule B1*** was made. If the process is to start again, it will mean the time between expiry of the requisite 5 days, the date of discovery of breach and the time taken to start again will have been lost. This could be of extreme detriment because it may mean the purposes of an administration are no longer reasonably likely to be achieved or, at any rate, that the Chargeholder's recovery on distribution will be significantly reduced. However, that potential scenario advocates a case for irregularity to be the intention of Parliament not automatic invalidity.

44. It might be argued that significant loss or damage will be unlikely because when the process starts again (whether by court or out of court appointment) the "new administrators" will adopt the work of the "old administrators" even though that work was carried out as agents for the company outside the scope of ***the Act***. However, that is a fact sensitive argument arising in circumstances of the company and the "old administrators" having misrepresented to those dealing with them that the company is in administration and having wrongly taken advantage of the interim and potentially final moratorium. This may give rise to a myriad of potential problems illustrated by the following possibility, namely that even in the case of a "pre-pack sale" it might result in the intending purchaser withdrawing or seeking more favourable terms. It may not be possible for the process to start again and the consequences of what has gone before may need to be unravelled.

45. Therefore, a conclusion that non-compliance with ***paragraph 26(1) of Schedule B1*** is a fundamental breach appears (potentially at least) to mis-rank the importance of a receiving notice above the importance of there being an administration. Of course, there may be cases where the administration could and should be opposed but the First Issue is not to be decided on that premise.

46. Nor should the loss of the right to appoint or agree the appointment during the 5 business days be considered a consequence of such significance in the light of the role of administrators, the requirement that they are licensed insolvency practitioners and the role of the court (see paragraphs 18-21 above). It is relevant to consider those matters when addressing the scheme as a whole for the purpose of construing the provisions of ***Schedule B1*** (see paragraph 16 above and the passage cited from the judgment of Mr Justice Norris in ***Re Virtual Purple Professional Services Ltd***). In particular, whoever appointed the administrators: they will be independent insolvency practitioners; they will be officers of the court; they will be required to act in the interests of the creditors as a whole if they can; they will need to prepare a proposal bearing in mind that the first two purposes of ***paragraph 3(1) of Schedule B1*** will have priority over the third.

47. In addition, the Chargeholder can seek the directions of the court to cure the breach immediately it is discovered. Further, if the appointment is not automatically void or ineffective, no such application to "cure" will need to be made if the Chargeholder is content.

48. The resulting, limited prejudice is to be contrasted with the potential danger that the main purposes of the administration may no longer be capable of being achieved at the time the breach is identified if the appointment is found to be automatically void. It cannot have been intended that breach of the requirement to give notice to enable

the Chargeholder to agree the appointee or to appoint their own administrator would mean the administration was invalid and incurable. It must have been intended that the breach should be treated as an irregularity allowing the Chargeholder to apply to the court for appropriate, discretionary relief. For example, to apply to terminate the administration and/or replace the administrators appointed under ***paragraph 22 of Schedule B1***. The consequence of automatic invalidity would not fit the purpose of the requirement to give notice. It would be at odds with the need for there to be an administration and the intention of the Chargeholder to appoint an administrator, whether by agreement or through their own appointment. The purpose of ***paragraph 26(1) of Schedule B1*** and the consequence of breach do not lead to the answer that Parliament intended automatic invalidity. They lead to the conclusion of irregularity, consistent with the existence and breach of a procedural requirement. The requirement to give notice is not linked to the issue of validity.

49. That conclusion is entirely consistent with the reasoning of Mr Justice Norris in ***Re Euromaster Ltd*** (above). Namely, that ***paragraphs 26-32 of Schedule B1*** are procedural and *"naturally fall to be treated as irregular"*. It is also consistent with the fact that the purpose of out of court appointments was to *"streamline the process"* (see paragraphs 15-16 above), not to add a new layer of formality which invalidates proceedings for want of compliance in a multiplicity of circumstances (adopting the words of Mr Justice Norris in ***Re Euromaster Ltd*** at paragraph (26) of the Appendix). It is also consistent with the speech of Lord Bingham in ***Seal v Chief Constable of South Wales*** [2007] UKHL 31, [2007] 1 W.L.R. 1910 at [7], referred to by HH Judge Davis-White Q.C. in ***Gregory v A.R.G. (Mansfield) Limited*** above (see paragraph (33) of the Appendix). Equally, it produces a result consistent with the consequences for a court appointment (see paragraph 28(b) above).

50. Reference can also be made to the fact that the general intention of Parliament is for defects in appointment not to affect the validity of actions taken. This intention can be found in ***section 232 of the Act***, paragraph **104 of Schedule B1, Rule *12.64 of the Insolvency Rules 2016*** (formerly ***Rule 7.55 of the Insolvency Rules 1986***) and the general power to rectify errors of procedure conferred by ***CPR Rule 3.10***. Whilst their specific application to the First Issue depends upon its outcome, on current authority, account should be taken of this general approach when determining that outcome.

51. The following matters also support the conclusion:

    a) The fact that the breach can be cured, if appropriate, by the replacement of administrators by court order (see Issue 2 below).

    b) There will be consistency with the outcome for a breach of ***paragraph 26(2) of Schedule B1)*** in accordance with ***Re Euromaster Ltd*** bearing in mind that Prescribed Persons include supervisors and the company who may also appoint administrators.

    c) Parliament has provided potential remedies to deter breaches by making it a criminal offence to file a false statutory declaration not reasonably believed to be true and to potentially have to indemnify the appointee (see paragraph 27(a) and (b) above).

d) There will no longer be a need to make retrospective appointments, ending the concerns that have arisen in respect of them (see paragraph 38 above).

52. However, in my judgment the most important feature establishing Parliament's intention is that a statutory construction which concludes that a breach means automatic invalidity may have a disproportionate result when compared with the prejudice caused by breach, would not reflect the purpose of the requirement for notice and, most importantly, may adversely affect a company's ability to achieve the purposes it would have been likely to achieve had the appointment been valid. This is particularly the case when administration is a remedy to be implemented quickly and the breach may not be appreciated even, albeit as the extreme end of the spectrum, until after the company is in liquidation (see paragraphs 32-33 above). The consequence of invalidity, as opposed to irregularity, would be at odds with the Chargeholder's protected right to agree the appointee or to make their own appointment.

53. The Chargeholder may not object to and may indeed prefer a valid appointment, yet this would not be relevant to automatic, incurable invalidity. The overriding purpose of the statutory scheme is to achieve the company's rescue (see paragraph 17 above). That purpose must have been intended by Parliament to be more important than the purpose behind ***paragraph 26(1) of Schedule B1*** when an irregularity can be cured to protect that purpose if appropriate.

54. My decision, therefore, is that this is a case falling within the second category of case identified by Mr Justice Marcus Smith in ***Re Skeggs Beef Ltd*** (above) and the answer to the First Issue is that the failure to give that notice of intention to appoint does not mean the appointment by the directors on 29 July 2020 was void.

H) The Decision - The Second Issue

55. Although I am satisfied the first appointment of administrators was valid, it remains the case that it should not have occurred. As previously explained, I have already ended the first administration on the application of the Applicant as a creditor pursuant to ***paragraph 81(1) and 81(3)(d) of Schedule B1*** and the Court's power to give directions and its inherent jurisdiction. I must now decide whether to remove the court appointed administrator who was an original administrator pursuant to the powers conferred by ***paragraph 88 of Schedule B1*** and appoint the second appointee proposed by the Applicant instead.

56. Before doing so I should refer to the application for an adjournment made by Mr Pester on behalf of the directors, in their personal capacities, and refused at the beginning of the hearing. The basis for the application was that they needed time to be advised on their personal positions having been joined as parties but were awaiting indemnity insurance funding. My decision was that their personal positions were irrelevant to the matters before me. There is no relief sought against them except for costs and, of course, people cannot be joined purely to recover costs except as non-parties when circumstances justify that course (see ***CPR Rule 46.2***). I observed that they might have exercised a residuary authority to cause the Fourth Respondent to participate and serve evidence. They have not done so and do not seek an

adjournment for that purpose. Mr Pester has made clear that he is not instructed by the Fourth Respondent. In all those circumstances there was no reason to adjourn and every reason to hear the expedited application, including the need to resolve whether a court appointment was required.

57. The court's powers for the purposes of the Second Issue are unfettered. However, the fact that there has been a breach of ***paragraph 26(1)(a) of Schedule B1*** must be an important factor with considerable weight. Nevertheless, the court should have regard to all relevant circumstances. In particular, whether replacement will be conducive to the proper operation of the administration and achieve justice between all those interested in that process. For example and there are a myriad of possible circumstances, there may be cases where the current administrators are in the process of bringing proceedings against the Chargeholder or have detailed involvement in a forthcoming transaction or the cost and inconvenience resulting from a replacement will be disproportionate. Those are circumstances which may outweigh the consequences of breach as a factor. The court should always address the commercial rationale for the relief sought and its potential outcome.

58. Those principles are to be applied even if the case is one for which a decision of improper motive to circumvent the statutory requirements, as alleged here, is made out. Although obviously, the court will take into consideration the fact of and any additional consequences flowing from improper motive. In this case I cannot make express findings as to motive at this hearing based purely upon the written evidence other than the obvious finding of non-compliance. Whether that is a matter for another day is for the Applicant to decide but it is not a matter for today. I merely note that various facts relevant to conduct were identified in the first, oral judgment.

59. In this case the application to cure the breach was made promptly and that is a material consideration. This is an early stage of the administration. In addition, the Applicant is the main creditor. The appointment of new administrators including one of the former administrators should have maintained continuity whilst also allowing the new appointee to become familiar with this administration. That should potentially mean removal of the former administrator and replacement by an insolvency practitioner in the same practice as the other administrator could flow seamlessly. Potentially, therefore, this is a case where the fact of breach will tip the scales but that must be subject to the administrators reporting upon the current circumstances for the administration.

60. Their report is dated 14 October 2020. Four points are of particular note. First, they are of the opinion that replacement will be seamless. Second, the financial position of the Fourth Respondent appears dire in the light of the information available concerning the ability of its debtors, those to whom it has lent money, to repay their debts. Third, the directors do not appear to be co-operating as they should do in accordance with ***section 235 of the Act*** (although I should make clear that I have not heard from them in response to this allegation and there was a meeting on 28 September 2020). Fourth, it is understandable that the Applicant may have serious concerns over the use and recovery of the money it lent to the Fourth Respondent. As to that, the report provides the following information (the sums due being derived from the Fourth Respondent's nominal ledger):

a) Corporate Commercial Collections Limited owes £7,338,636.16 but its statutory accounts filed for the period to 31 December 2019 report net liabilities of £1.6m.

b) Appleby Castle (Outbuildings) Limited owes £929,670.29 but its statutory accounts filed for the period to 28 February 2020 report net liabilities of £256,157.

c) One Charter Limited owes £1,078,758.07 but its statutory accounts filed for the period to 31 January 2020 report net liabilities of £294,715 before it (presumably used the original loan to purchase a property for £1,625,000 on 19 February 2019, There is a valuation report provided by the directors of £1,350,000.

d) Triple C Funding Limited owes £2,511,139.58 but its statutory accounts filed for the period to 30 November 2019 report net assets of £344,275.

e) EMC Power Limited owes £1,566,340.46 but its statutory accounts filed for the period to 31 December 2019 report net assets of £113,335.

f) VAT Bridge Limited owes £184,892.90 but its statutory accounts filed for the period to 31 December 2018 report net assets of $342,404. liabilities of £1.6m.

g) VAT Bridge 2 Limited owes £1,387,301.10 but its statutory accounts filed for the period to 31 January 2020 report assets and shareholder funds of £2.00. This being after it had purchased a property for £2,216,136 on 19 December 2019.

61. Obviously, that is a limited snap-shot and does not address the current financial position of the debtors or the existence and resulting potential benefit to the Fourth Respondent of any security it may hold. In addition, the report states that recoveries cannot be estimated because of a lack of further information and documentation and because of an absence of required assistance from the Fourth Respondent's directors. It also appears the Fourth Respondent has relatively limited other assets. All this leads to the conclusion relevant to the exercise of the Court's discretion but for the purposes of this judgment only, that this administration is most likely to be concerned with investigation and recovery not a rescue as a going concern.

62. Subject to one matter, taking into consideration all the circumstances above, I conclude that it is right to cure the breach of ***paragraph 26(1) of Schedule B1*** by having both the Applicant's nominees as the court appointed administrators.

63. The one matter is the reference in the report and in the evidence to assertions by the directors that the Fourth Respondent has a claim against the Applicant for lost profits resulting from its funding of a direct competitor in breach of an agreement with the Fourth Respondent. The report refers to a sum of approximately £12m. having been included by the directors in the Fourth Respondent's 31 July 2020 balance sheet. This raises the possibility of a question of conflict of interest, namely whether it is right for the Applicant's nominees to act. However, it also draws attention, again, to the fact that administrators are licensed insolvency practitioners, independent and officers of the court who owe a duty to act in the interests of the creditors as a whole (see

paragraphs 18-21 above). They can be relied upon to identify the need for a conflicts' administrator should that need arise. This accords with Parliament's intention to entrust the day to day running of administrations to licensed insolvency practitioners subject to the overriding control of the court.

64. There is no basis for suggesting that a conflicts' administrator is needed now and absolutely no cause for suggesting that the current/replacement administrators will not investigate such claims to the extent that they consider it right to do so in the exercise of their statutory functions and in the interests of the creditors as a whole. It is currently unnecessary to have three administrators and in my judgment it is right, for the reasons set out above, to reach a final decision that the administrators should now be Mr Woolrych and the other licensed insolvency practitioner proposed by the Applicant, subject to the provision of the necessary consent. I make clear for the avoidance of any doubt that the replacement of Mr Taylor is not attributable to any cause for doubt over his fitness to act, his abilities as an insolvency practitioner or his professional integrity. It is to cure the original breach.

I) Conclusion and The Future

65. For the reasons set out above in my judgment the original appointment was valid although in breach of ***paragraph 26(1) of Schedule B1***. I have already ended that administration and ordered a court appointed administration. Holding the ring pending this judgment, I appointed one of the original administrators, Mr Taylor, and one of the appointees proposed by the Applicant, Mr Woolrych, the administrators. For the reasons set out above under the Second Issue, I will replace Mr Taylor with a second nominee of the Applicant from the same firm as Mr Woolrych to cure the breach of ***paragraph 26(1) of Schedule B1*** subject to the fulfilment of the statutory requirements for appointment.

66. This judgment may be published and, therefore, it is appropriate to end by emphasising that it does not resolve the conflict of High Court Judge level authority, but decides which of those decisions is binding upon judges sitting below High Court Judge level. In those circumstances, any future case which needs resolution of the conflict should be listed at High Court Judge level. It is to be noted that this decision does not prevent an application for the retrospective solution referred to at paragraphs 37-38 above if that is appropriate. As explained in those paragraphs, that is a solution still approved at High Court Judge level.

Order Accordingly

APPENDIX

Analysis of Authorities

For the task of identifying the decision(s) at High Court Judge level binding upon me.

(See Paragraph 40 Above)

Introduction

(1) My task has been made considerably easier by a detailed review of authorities by H.H. Judge Davis-White Q.C., sitting as a Judge of the High Court, in the case of ***Gregory v A.R.G. (Mansfield) Limited*** (above at [56-88]). However, I trust he will forgive me for observing in the context of my task that his decision in part adds to the line of *"conflict of judicial opinion"* and does not relieve me from having to analyse where that line has led for the purposes of those sitting below High Court Judge level.

(2) The approach I will take is this: I will treat paragraphs 56-88 of his decision as being read into this judgment at this point. I will provide my analysis of the decisions most relevant to my task without repeating (unless necessary) his observations upon those cases I refer to. Whilst it is necessary for me to add my commentary to the extent necessary to explain my reasoning, his analysis sitting as a High Court Judge has obvious priority.

Re G-Tech Construction Ltd

(3) In my judgment until the decision of ***Re Ceart Risk Services Ltd*** (above) I would have been bound to follow the decision of Mr Justice Hart in ***Re G-Tech Construction Ltd*** (above). It is a decision based upon the plain meaning rule and decides that ***paragraph 31 of Schedule B1*** provides for the consequence of non-compliance, namely that an appointment cannot be effective. It is consistent with the decision of ***Fliptex Ltd v Hogg*** (above) in respect of ***paragraph 14 of Schedule B1***.

(4) In that case, the company had appointed an administrator but failed to comply with the requirements of ***paragraph 29 of Schedule B1*** by filing the correct prescribed form. The error was only identified after some 12 months when it was being proposed to place the company into voluntary liquidation. Mr Justice Hart decided there cannot have been an appointment because ***paragraph 31 of Schedule B1*** provides that an appointment *"under paragraph 22 [of Schedule B1] takes effect when the requirements of paragraph 29 are satisfied"*. As he said, *"a necessary prerequisite of an appointment taking effect under para 31 of Sch B1"* had not been met. As he explained at [12]: *"The relevant insolvency process here is administration, and one is simply faced with the difficulty which seems to me to be an insuperable one, of the provisions of para 31 of Sch B1 to para 35"*.

(5) He also decided that ***paragraph 104 of Schedule B1***, which provides that an act of an administrator of a company is valid despite any defect in his appointment, could not be relied upon if there was no appointment. Equally, there were no insolvency proceedings and, therefore, the ***Insolvency Rules*** would not apply. That prevented advantage being taken of what was then ***Rule 7.55 of the Insolvency Rules 1986*** (now ***Rule 12.65 of the Insolvency Rule 2016***), which provided that no insolvency proceeding should be invalidated by any formal defect or irregularity unless any injustice caused by it could not be remedied.

(6) Mr Justice Hart's solution was to make a retrospective appointment under ***paragraph 13(1) of Schedule B1***. Although initially reluctant, he was persuaded that this provision's unfettered discretionary power conferred that jurisdiction. The order had the effect of ratifying all that had been done as purported administrator and allowed fees and expenses to be recovered as though there had been a valid appointment throughout.

After *G-Tech Construction Ltd* and Before *Re Ceart Risk Services Ltd*

(7) ***Re G-Tech Construction Ltd*** (above) was followed by cases such as ***Re Kaupthing Capital Partners II Master LP Inc; Pillar Securitisation Sarl v Spicer*** (above), ***Re Frontsouth (Witham) Ltd (In Administration)*** [2011] EWHC 1668 (Ch), [2011] B.C.C. 635 and ***National Westminster Bank plc v Msaada Group (a firm)*** [2011] EWHC 3423 (Ch), [2012] EWHC 5 (Ch), [2012]

(8) Although Ms Heal relied heavily upon ***Re Kaupthing Capital Partners II Master LP Inc; Pillar Securitisation Sarl v Spicer*** (above), and no doubt there is much within the judgment to consider by a higher level of court, its facts present a different scenario. The effect of using the wrong form in that case was that it and the attached resolution referred to the appointment of a company not of a partnership. That being so, there was no appointment over the partnership and, therefore, the appointment could not be valid. This is similar to the facts which resulted in the decision of the then Chancellor, Sir Andrew Morritt, in ***Minmar (929) Ltd v Khalastchi*** (above). The appointment could not be valid because it was contrary to the company's articles. These are cases where the appointment was not made or there was no power to appoint.

(9) However, obiter remarks of the then Chancellor, Sir Andrew Morritt, in ***Minmar (929) Ltd v Khalastchi*** (above) also addressed the failure of the directors to give notice of intention to appoint to a Prescribed Person, the company. The decision included an investigation as to whether a White Paper, Explanatory Notes or Ministerial Statement admissible under the rule in ***Pepper (Inspector of Taxes) v Hart*** [1993] A.C. 593 might assist statutory construction. The Chancellor concluded that this failure would have meant in any event that the appointment was invalid because ***Schedule B1 paragraph 28*** provides that an appointment of administrators cannot be made under ***paragraph 22 of Schedule B1*** unless the requirement under ***paragraph 26(2) of Schedule B1*** for notice of intention to appoint was complied with

(10) However, there were also cases moving away from this approach including ***Hill v Stokes Plc*** [2010] EWHC 3726 (Ch), [2011] B.C.C. 473 to which the Chancellor was not referred. In that case His Honour Judge McCahill Q.C., sitting as a High Court Judge, decided that the court should adopt a flexible approach, categorising fundamental and non-fundamental requirements when analysing the consequences of non-compliance of the requirements for a notice of intention to be given to a Prescribed Person under ***paragraph 26(2) of Schedule B1***.

(11) His Honour Judge Purle Q.C. in the case of ***Re Assured Logistics Solutions Limited*** (above) found the decisions in ***Hill v Stokes Plc*** (above) and ***Minmar (929) Ltd v Khalastchi*** (above), albeit obiter, irreconcilable. However, this different approach only arose in the context of His Honour Judge McCahill Q.C. addressing notices given to Prescribed Persons and did not apply to notices to Chargeholders. Only in the former case did the absence of relevant prejudice mean he could not accept that Parliament had intended automatic invalidity. This meant the conclusion above, that I would be bound to follow ***Re G-Tech Construction Ltd***, (above) was not yet altered by the ***Hill v Stokes Plc*** (above) line of authority.

(12) His Honour Judge Purle Q.C. in ***Re Assured Logistics Solutions Limited*** (above), also in the circumstance of a failure to give notice of intention to a Prescribed Person, the company, indicated his preference for the ***Hill v Stokes Plc*** (above) approach. However, the irreconcilable authority of that case and the obiter remarks in ***Minmar (929) Ltd v Khalastchi*** (above) led him to view his case on the facts. He observed that the mere failure to give notice to the company when the directors acting as a board had chosen to appoint an administrator could not be a circumstance Parliament intended would result in invalidity of appointment when it caused no prejudice. That being so, he concluded there were insolvency proceedings to which ***Rule 7.55 of the Insolvency Rules 1986*** (now ***Rule 12.64 of the Insolvency Rules 2016***) applied with the result that the formal defect would not invalidate the proceedings subject to objection and to the court deciding substantial injustice had been caused which was irredeemable.

(13) Mr Justice Norris in ***Adjei v Law for All*** (above) also suggested a possible alternative route even if the law was correctly stated, obiter, in ***Minmar (929) Ltd v*** **Khalastchi** (above). He said this and I will underline the words particularly relied upon by Ms Kyriakides:

> ***14.*** *For the purposes of the application before me it has been taken that the law is correctly stated in that obiter passage in Minmar (929) Ltd (above): no contrary argument was addressed. On that basis, by parity of reasoning the appointment by the directors of Law For All of Mr Batty and Mr Evans as administrators was invalid because the qualifying charge holder was not given notice of intention to appoint an administrator in accordance with para.26(1) of Sch.B1. This in turn means (if the decision in G-Tech Construction is right) that para.104 cannot be used to validate the acts of Mr Batty and Mr Evans since July 28, 2011. There was no argument in the present case to the contrary: <u>but there does seem to me to be scope for argument on another occasion as to precisely what acts para.104 (and indeed s.232 of the Insolvency Act 1986) does validate when the scheme of the Act is considered as a whole</u>.*
>
> ***15.*** *On the state of the authorities and argument before me I must accept that the only solution is that afforded by the making of a retrospective administration order in exercise of the jurisdiction identified in G-Tech Construction. I do so with the same misgivings but with the same desire to provide a practical answer as Morgan J. in Re Derfshaw Ltd [2011] EWHC 1565 (Ch); [2011] B.C.C. 631 and Henderson J. in Re Frontsouth (Witham) Ltd [2011] EWHC 1668 (Ch); [2011] B.C.C. 635.*

(14) Nevertheless, none of the pre-***Ceart Risk Services Ltd*** (above) cases reviewed by H.H. Judge Davis-White Q.C. undermine ***Re G-Tech Construction Ltd*** (above) as the decision to be followed at that point in the line of conflicting authority. For example, although Mr Justice Norris in ***Re Virtual Purple Professional***

Services Ltd (above) followed ***Hill v Stokes Plc*** (above), he expressly contrasted ***paragraphs 26(1) and 26(2) of Schedule B1*** when reaching his decision.

(15) ***Re Virtual Purple Professional Services Ltd*** (above) is nevertheless an important decision for the First Issue because it led the way to the approach of Mr Justice Arnold in ***Re Ceart Risk Services Ltd*** (above). Mr Justice Norris in the circumstance of a breach of ***paragraph 26(2) of Schedule B1*** decided that ***Schedule B1*** does not provide for the consequences of non-compliance. As a result, he applied the approach to construction laid down by Lord Steyn in ***R v Soneji (Kamlesh Kumar)*** (above). He concluded that Parliament will not have intended an imperative requirement to lead to invalidity when the purpose of providing information to a Prescribed Person is not linked to the issue of validity.

(16) However, he expressly contrasted that with the failure to give notice under ***paragraph 26(1) of Schedule B1*** to the Chargeholders, who had superior rights enabling them to potentially appoint their own administrator or otherwise to agree the nominee. He did not address the point that two of the Prescribed Persons potentially had the same rights.

Re *Ceart Risk Services Ltd*

(17) In ***Re Ceart Risk Services Ltd*** (above) Mr Justice Arnold was concerned with a provision which prohibits appointment under ***paragraph 22 of Schedule B1*** over a company regulated under the ***Financial Services and Markets Act 2000*** ("***FSMA***") without the consent of the Financial Services Authority (or other body specified from time to time) ("the Authority") (see ***section 362A(2) FSMA***). The consent had to be in writing and filed with the notice to appoint under ***paragraph 27 of Schedule B1*** or, absent the requirement for such notice, with the notice of appointment under ***paragraph 29 of Schedule B1*** (see ***section 362A(3) and (4) FSMA***). This, therefore, is a decision for which the principles of statutory interpretation should apply to the requirement for a notice of intention to appoint under ***paragraph 26 of Schedule B1***, albeit that the purposes behind the provisions will obviously be different.

(18) Mr Justice Arnold was referred to many of the conflicting authorities including ***Re G-Tech Construction Ltd***, ***Hill v Stokes Plc, Minmar (929) Ltd v Khalastchi*** and ***Re Virtual Purple Professional Services Ltd*** (above). He followed the approach to statutory interpretation specified in ***R v Soneji*** (above) and identified the first step as being to identify the purpose of the requirement to obtain consent. The next step was to identify the consequences of non-compliance.

(19) As a matter of precedent, I am bound to apply that approach to statutory interpretation to the First Issue, subject to later authority. Accordingly, ***Re G-Tech Construction Ltd*** (above) is not binding upon me. Whilst it is correct that Mr Justice Arnold was not referred to all previous authorities, that will not affect the position in precedent at the level below High Court Judge. Some of those cases are identified by His Honour Judge Purle Q.C., sitting as a High Court Judge, in ***Re BXL Services*** [2012] EWHC 1877 (Ch), [2012] B.C.C. 657. He

decided he was bound to follow ***Re Ceart Risk Services Ltd*** (above), as I must be. He also decided it is now settled law that a failure to give notice to a Prescribed Person does not invalidate the appointment. His decision of settled law, therefore addresses ***paragraph 26(2) of Schedule B1*** but not ***paragraph 26(1) of Schedule B1*** unless or to the extent that consistency between the two sub-sections is required. In any event, as will be seen at paragraph (32 ii) below, that opinion has been superseded to that extent for the purposes of precedent by the decision of ***Gregory v A.R.G. (Mansfield) Limited*** (above).

(20) I am similarly bound by Mr Justice Arnold's decision that ***paragraph 104 of Schedule B1*** will apply. As he said at ***[28]***:

> *"Paragraph 104 says that, even though an administrator has been defectively appointed, his acts shall be valid. This seems to me to be apt to address situations where the defect in the appointment is curable, as opposed to situations where the appointment is incurably invalid. If para.104 does not apply where an appointment has been made subject to a curable defect, then it is difficult to see in what circumstances it would ever apply. I therefore respectfully disagree with Hart J. [in* ***Re G-Tech Construction Ltd*** *above to whom the case of* ***Morris v Kanssen*** *[1946] A.C. 459 was not cited]".*

(21) The outcome in ***Re Ceart Risk Services Ltd*** (above) depended upon the purpose of and consequences for service of notice upon the Authority. Whilst the outcome obviously does not bind me for the purposes of the First Issue, it provides important guidance, subject to the distinction that FSMA did not provide any express statutory time limit for notification. It is instructive that (amongst other matters) Mr Justice Arnold contrasted the fact that non-compliance would not have serious consequences if post-appointment consent could be obtained with the problems invalidity could cause to the detriment of creditors' interests. His decision was that Parliament intended that the defect resulting from breach could be cured if a notice of consent was subsequently obtained. Whether the equivalent option is available in the context of ***paragraph 26(1) of Schedule B1*** and to what extent that is relevant to the First Issue were not matters for his judgment.

Re Euromaster Ltd

(22) Cases such as ***Re BXL Services*** (above) and ***Re Eco Link Resources Ltd (In CVL)*** [2012] B.C.C. 731 followed the approach of Mr Justice Arnold towards statutory interpretation. However, as mentioned, his decision still left open the need to decide whether Parliament intended a breach of ***paragraph 26(1) of Schedule B1*** to result in invalidity. His Honour Judge David Cooke's decision in the Birmingham, District Registry in ***Re Eco Link Resources Ltd (In CVL)*** (above) indicates that it will. It was concerned with the need for a qualified floating charge holder to give notice of intention to appoint to a prior qualifying floating charge holder under ***paragraph 15 of Schedule B1*** rather than with ***paragraph 26(1)(a) of Schedule B1***. However, the similarities are obvious.

(23) He decided the requirement, a precondition, for *"at least two business days' written notice"* to be given was critical. He concluded Parliament must have intended a breach of this provision to mean an appointment will be invalid. Its

purpose was to enable the prior charge holder to agree an appointment or to make his own appointment and non-compliance would cause *"potential prejudice"*. Not only would the opportunity to appoint be lost but any application to remove existing administrators would face *"potential dispute"* even in those circumstances. Whilst not binding upon me, as a matter of judicial comity the approach should normally be followed subject to High Court level or higher authority.

(24) A month later, however, Mr Justice Norris in ***Re Euromaster Ltd*** (above) considered the position in the light of ***Re Ceart Risk Services Ltd*** (above) in the context of an appointment having been made eleven business days after the filing in court of the notice of intention to appoint when ***paragraph 28(2) of Schedule B1*** provides that an administrator *"may not"* be appointed under ***paragraph 22 of Schedule B1*** after the period of ten business days beginning with the date on which the notice of intention to appoint was filed under ***paragraph 27(1) of Schedule B1***. He decided the appointment was irregular not void. The Judge also identified the approach to statutory interpretation as follows at [17]:

> *"… to focus on the consequences of non-compliance and, taking into account those consequences, to consider whether Parliament intended the outcome of non-compliance to be total invalidity: in short, to ask whether it was a purpose of the legislation that an appointment made in breach of para.28 should be null."*

(25) Adopting that approach, he decided that the purpose of the notice of intention was:

> *"to afford the holder of the superior right the opportunity to establish whether its security is enforceable, to decide whether to make its own appointment under para.14 of Sch.B1, and (if necessary) to give two business days' notice to the holder of any and every prior qualifying floating charge. The giving of the notice also affords the holder of the superior right the chance to conduct negotiations with the proposed appointors over the identity or terms of appointment of the proposed administrator or (in an extreme case) to prevent the company going into administration".*

(26) Obviously, his approach must be followed. However, it cannot be concluded that this decision determines the First Issue. That is because the reasons for and purposes of the 10 days' maximum period and the minimum 5 business days' notice period for notices under ***paragraph 26(1) of Schedule B1*** will be different. The 10 days are required because the filing of a notice of intention starts the interim moratorium under ***paragraph 44 of Schedule B1.*** That period of statutory protection cannot be open-ended and 10 days is intended to be a reasonable window of opportunity for an appointment to be made. Mr Justice Norris decided, however, that an appointment one day after its expiry would not cause consequences justifying the conclusion that Parliament intended the appointment to be invalid and incurable. It would be a defect in procedure but not fundamental to the insolvency proceedings. Obviously, different reasoning will apply when considering the consequence of breach of ***paragraph 26(1) of Schedule B1's*** 5 days period.

(27) Nevertheless, the High Court Judge's reasoning at paragraphs [26-28] of his judgment is to be noted. In particular he observed that it "*is highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator is automatically invalidated"* when *"the object of introducing out-*

of-court appointments was to streamline the process of business rescue". In addition, he reasoned (my underlining for emphasis):

> *"Sch.B1 contains a mixture of provisions, some of which are naturally read as defining the circumstances in which the power to appoint arises and some of which are naturally read as prescribing procedural requirements that must be fulfilled before the appointment is properly made. If an appointment is made in circumstances where there is no power to appoint then the purported appointment would naturally fall to be treated as a nullity. I will give two examples. In* ***Minmar (929) Ltd v Khalastchi*** *[2011] EWHC 1159 (Ch); [2011] B.C.C. 485 the appointment was a nullity because there was no quorate meeting of the directors, the board had never properly resolved to do anything and those who attended the meeting had no power to appoint. In* ***Re Blights Builders Ltd*** *[2006] EWHC 3549 (Ch); [2007] B.C.C. 712 the appointment was a nullity because the company had no power to appoint administrators by reason of the existence of an undisposed of winding-up petition.*
>
> *If the appointment is made in breach of some other requirement more of a procedural nature then the purported appointment would naturally fall to be treated as irregular. That was the view taken by H.H. Judge Purle QC of the "minor deficiencies" in Re Assured Logistics Solutions Ltd (above) and by Arnold J. in* ***Re Ceart Risk Services*** *(above) of the requirement to obtain the consent of the FSA.*
>
> ***28.*** *I consider that this distinction is reflected in the terms of Sch.B1 itself as regards appointments by directors. Paragraphs 22–25 inclusive specify when it is that the directors or the company have the power to appoint administrators. Paragraphs 26–32 set out the procedural requirements for the exercise of the power. The structure of the Schedule suggests (albeit not strongly) that the court should treat non-compliance with the requirements set out in para.28 as leading to an irregularity rather than the nullity."*

(28) That reasoning should be applied at a lower judicial level subject to later authority. It supersedes the approach in ***Re Eco Link Resources Ltd (In CVL)*** (above). The First Issue should be determined on the basis that ***paragraphs 26-32 of Schedule B1*** prescribe procedural requirements with the result that a breach will *"naturally fall to be treated as irregular"*. It is also highly significant that Sir Terence Etherton when Chancellor approved Mr Justice Norris's above-mentioned reasoning in the case of ***Re Melodious Corporation*** (above), albeit in the context of ***Rule 7.55 of the Insolvency Rules 1986*** (now ***Rule 12.65 of the Insolvency Rules 2016***) (see paragraphs [73 and 75] of the judgment). The fact Mr Justice Norris did not have to address each circumstance of breach, including the First Issue, means, however, that this still leaves the possibility that failure to give a notice of intention under ***paragraph 26(1) of Schedule B1*** may be an exception to the natural fall but this reasoning is to be applied in context.

Subsequent Decisions leading to *Re Skeggs Beef Ltd*

(29) ***Re Euromaster Ltd*** (above) has also been followed in cases such as ***Re BXL Services*** (above) and ***Re Eiffel Steelworks Ltd*** [2015] EWHC 511 (Ch), [2015] 2 B.C.L.C. 57 before Mr Andrew Hochhauser Q.C., sitting as a High Court Judge. It would have been followed by Mr Justice Nugee, as he then was, in ***Re Spaces London Bridge Ltd*** (above) had the notice of appointment, which failed to specify the date and time of appointment, not been found to be valid. There being no substantial injustice caused by the breach, he explained he would have exercised his power under ***Rule 12.64 of the Insolvency Rules 2016*** (formerly

Rule 7.55 of the Insolvency Rules 1986) to remedy a formal defect or irregularity.

(30) Mr Justice Marcus Smith in ***Re Skeggs Beef Ltd*** (above) also followed ***Re Euromaster Ltd*** (above). In paragraph [21] of his judgment the High Court Judge identified three categories of case to be applied when deciding the consequence of a defective out-of-court appointment:

"(1) cases where the defect is fundamental: in such cases, the purported administration appointment is a nullity. There are no insolvency proceedings on foot, and so there is nothing that the court can cure;

(2) cases where the defect is not fundamental and causes no substantial injustice: r.12.64 of the Insolvency (England and Wales) Rules 2016 provides: [inserted into text]

Thus, provided the defect is not fundamental (i.e. not falling within [21(1)] above), so that there are indeed insolvency proceedings on foot, the court must first satisfy itself that the defect or irregularity has caused no "substantial injustice". If so satisfied, then the proceedings will not be invalidated by any formal defect or irregularity; and

(3) cases where the defect is not fundamental, but substantial injustice is caused: if the defect—again, not being a fundamental defect within [21(1)] above—is found to cause "substantial injustice", then the court must ask itself whether that substantial injustice can be remedied by an order of the court. Of course, the court will consider, in light of all the circumstances, whether it is appropriate to make a remedial order. If so, then the defect is cured on the court making the order. If the court cannot make a remedial order or does not consider that it is appropriate to do so, then the defect remains uncured.

(31) He then drew attention to the following distinctions the case law to which he had been referred has drawn in the case of notices of appointment of administrators:

"(1) the failure to file a notice of appointment in the prescribed form: this appears to amount to a fundamental flaw which renders a purported out-of-court appointment a nullity: ***Re G-Tech Construction Ltd*** *[2007] B.P.I.R. 1275;* ***Re Kaupthing Capital Partners II Master LP Inc*** *[2010] EWHC 836 (Ch); [2011] B.C.C. 338;* ***Re MTB Motors Ltd (in admin.)*** *[2010] EWHC 3751 (Ch); [2012] B.C.C. 601; and* ***Re Frontsouth (Witham) Ltd (in admin.)*** *[2011] EWHC 1668 (Ch); [2011] B.C.C. 635. In short, this is a case falling within that described at [21(1)] above;*

and

(2) the filing of a notice of appointment, in the prescribed form, in the wrong manner. This appears to amount to a "defect" or "irregularity" that is not fundamental, and that can be dealt with in one of the two ways set out at [21(1)] and [21(2)] above: Re Assured Logistics Solutions Ltd [2011] EWHC 3029 (Ch); [2012] B.C.C. 541; Re Euromaster Ltd [2012] EWHC 2356 (Ch); [2012] B.C.C. 754."

(32) Those distinctions do not directly address the First Issue which, subject to later authority, turns upon whether within the context of the reasoning of Mr Justice Norris in ***Re Euromaster Ltd*** (above) the failure to give notice under ***paragraph 26(1) of Schedule B1*** is a category (1), (2) or (3) case as identified by Mr Justice Marcus Smith in ***Re Skeggs Beef Ltd*** (above).

Gregory v A.R.G. (Mansfield) Limited

(33) In the latest case at High Court Judge level to which I have been referred, ***Gregory v A.R.G. (Mansfield) Limited*** (above), H.H. Judge Davis-White QC, sitting as a Judge of the High Court disagreed with Mr Justice Arnold's decision in ***Re Ceart Risk Services Ltd*** (above) when finding that the failure to obtain the authority's consent under ***section 362A FSMA*** was a fundamental flaw. In reaching that decision, however, the Judge adopted the same approach as Mr Justice Arnold by applying the test required by ***R v Soneji*** (above). The difference between those two decisions, therefore, lies in the application of the test to the specific statutory provision and their respective analyses of the purposes for the requirement of consent. That analysis, of course, falls outside the scope of the First Issue.

(34) However, I note, in particular, the following from the judgment of H.H. Judge Davis-White QC:

i. The reference to the speech of Lord Bingham (and other members of the House of Lords) in ***Seal v Chief Constable of South Wales*** (above) at [7] to welcoming:

"the … tendency to prefer substance to form must generally discourage the invalidation of proceedings for want of compliance with a procedural requirement".

ii. At paragraph [74], that he did not agree with His Honour Judge Purle Q.C. in ***Re BXL Services*** (above) that ***Re Ceart Risk Services Ltd*** (above) established as settled law that a failure to give notice to a Prescribed Person did not invalidate the appointment under ***paragraph 26(2) of Schedule B1***.

iii. His observation at paragraph [52] that the precise limits of ***paragraph 104 of Schedule B1*** have not *"really been explored"* and his reference to Mr Justice Norris in ***Re Care Matters Partnership Ltd (in admin.)*** [2011] EWHC 2543 (Ch); [2011] B.C.C. 957 suggesting it may apply to a defective appointment resulting from procedural irregularity in contrast to one where there has been no appointment or (perhaps) if there was no power to appoint.

iv. His reference to the general provision of ***Rule 12.64 of the Insolvency Rules 2016*** (formerly ***Rule 7.55 of the Insolvency Rules 1986***):

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

v. His reference to the court's general power to rectify errors of procedure conferred by ***CPR Rule 3.10***.

Conclusion

Those matters are to be borne in mind when applying to the First Issue the approach to statutory construction adopted by Mr Justice Arnold in ***Re Ceart Risk Services Ltd*** (above), the categories identified by Mr Justice Marcus Smith

in ***Re Skeggs Beef Ltd*** (above) and the reasoning of Mr Justice Norris in ***Re Euromaster Ltd*** (above) at paragraphs [26-28] of his judgment.

End