Neutral Citation Number: [2023] EWHC 2065 (Ch)

Case No: CR-2023-002923

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

IN THE MATTER OF THE SUSTAINABLE BATHROOM COMPANY LTD
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 11 August 2023

Before:

Deputy Insolvency and Companies Court Judge Baister

Between:

SOPHIE REBECCA PERHAR	**Applicant**
- and –	
(1) LOUISE FREESTONE	**Respondents**
(2) PAUL MALLATRATT	
(3) SYNERGY IN TRADE LTD	

The Applicant appeared in person
Mr Martin Ouwehand (instructed by **Mills & Reeves LLP**) for the **First and Second Respondents**
Mr James Morgan KC (instructed by **Howes Percival LLP**) for the **Third Respondent**

Hearing date: 4 August 2023

Approved Judgment

This judgment was handed down remotely at 10.30 am on 11 August 2023 by prior circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Deputy ICC Judge Baister:

1. The applicant, Sophie Perhar, incorporated The Sustainable Bathroom Company Ltd in January 2019. She is its sole shareholder, director and employee. It carried on business as a wholesaler of environmentally sustainable bathroom products developed by Mrs Perhar, initially a mosquito repellent called Mozzipatch and later an electric bamboo toothbrush. The Mozzipatch project was initially a success but ultimately came to grief as a result of the insolvency of the long established company entrusted with its distribution. By early 2022 the company had developed the toothbrush to the point of having in place a supply agreement with Aldi, the German supermarket chain.

2. Synergy in Trade Ltd is a provider of business finance. In March 2022 it agreed to provide the company with a line of credit on the terms (as varied) set out in a letter dated 11 April 2022 and accepted by the company on 12 April 2022. In essence, Synergy agreed to pay, or issue letters of credit on behalf of the company to, its suppliers for the cost of the goods in return for remuneration in the form of a share of profits, 70% in favour of the company, 30% in favour of Synergy. The facility was subject to a maximum aggregate principal of £350,000. The company agreed that a designated account would be set up, details of which would be quoted on invoices to its customers (in effect Aldi at this stage). This was because Synergy was funding the supply of goods to the company from China and wanted to ensure that it received the income generated by the sale of those goods so that, in the words of Mr Slinger, a director of Synergy, the company could not use the receipts as its own general working capital.

3. The facility was supported by a debenture dated 10 March 2022. Mrs Perhar and her husband also gave personal guarantees.

4. Agreeing the deal with Aldi and arranging the supply of goods from China was a laborious process, but business began in early 2023, and Aldi was invoiced. As a result of an error, the invoices did not contain full and accurate details of the designated account into which payments were to be made: they gave the wrong IBAN of the account. Instead of making payments into the designated account, in late February 2023, Aldi made payments to a Euro Revolut Business account held by the company which Mrs Perhar says had been set up in connection with establishing an EU branch in Ireland. As Mr Morgan KC says in paragraph 13 of his skeleton argument, the court is not in a position to make findings as to the circumstances which led to this, but for present purposes, and on the basis that it appears to have been Synergy which set up the account, I will assume, but without making any finding, that Mrs Perhar is correct in blaming Synergy for what she describes as a "critical mistake," although, as Mr Morgan says, the IBAN error does not explain how money that should have been received into the designated account found its way into the Revolut account.

5. This, and related matters, led to the breakdown of the relationship between the company and Synergy. On 5 June 2023 Synergy made demand under the terms of the facility and filed a notice of appointment of administrators, the first and second respondents.

6. Mrs Pehar challenged the validity of the appointment of the administrators with commendable speed. Her then solicitors, Francis Wilks & Jones, wrote a comprehensive letter of 15 June 2023 challenging the validity of the appointment. Having failed to

convince those instructed in the administration of that, she issued her application. It seeks an order (or more properly, I think, a declaration) that the administration order and subsequent appointment of the joint administrators are a nullity and relief under paragraph 81 of Schedule B1 Insolvency Act 1986, further relief, damages and costs. By order dated 10 July 2023 ICC Judge Greenwood, having allowed minor amendments to the application, ordered a hearing to decide:

> (a) whether the floating charge under which the administrators were appointed was enforceable at the date of their appointment;
>
> (b) whether the notice of their appointment was defective and incapable of cure.

7. The application is supported by two witness statements of the applicant herself. The third respondent relies on witness statements of David Slinger and Cassandra McAlpine, both directors of Synergy, and the administrators rely on a witness statement of the first respondent (now Louise Williams). The scope of the evidence is wide, but the matters relevant to the issues I have to decide are narrow and can be dealt with largely by reference to facts that are uncontroversial and a limited number of documents. For that reason I shall not deal with a number of allegations made regarding the conduct of the directors and others working for Synergy or evidence as to the course of negotiations and discussions between them and Mrs Perhar after things began to go wrong. I do, however, recognise Mrs Perhar's compelling account in her evidence of the hard work she put into, and her energy and commitment in developing, the business of the company. She embodies many of the best qualities associated with the word "entrepreneur," and it is a matter of considerable regret that she has been unable to enjoy the fruits of her very real endeavours.

8. No order was made for the cross-examination of witnesses in connection with the issues before me. That is another reason why I do not comment on much of what is set out in the witness statements.

9. As we have seen, Mrs Perhar's attack on the appointment of the administrators goes to the enforceability of Synergy's debenture and to defects in the notice of appointment of the administrators. I shall deal first with the enforceability issue.

10. Synergy, through Mr Morgan, accepts that its documentation suffers from defects but contends that those are not fatal to its ability to enforce its rights.

11. The facility agreement provides that:

> "Synergy may at any time withdraw all or any of the Facility and/or demand repayment of all sums owing whether under this Facility or otherwise ('Indebtedness') whereupon the Borrower will forthwith repay in full the Indebtedness plus any accrued interest, costs and fees."

12. It provides for the establishment of the account to which I have already referred as follows:

> "An account in the name of The Sustainable Bathroom Company Ltd ('Borrower's Account') will be established in Synergy's books. Payments to Suppliers will be debited to this account and receipts from the Customers will be credited. All invoices issued to the Borrower relating to Synergy's fees together with any expenses paid or incurred by Synergy on behalf of the Borrower […] will be debited to this account and a monthly statement will be provided and, in the absence of manifest error be conclusive and binding on the Borrower."

A later provision allowing the company to resell or use goods otherwise subject to retention of title in the ordinary course of its business provides that the company "holds any and all proceeds of sale to the goods on trust for Synergy until they are paid in full."

13. Events of default are set out in the form of a list of bullet points. These include failure on the part of the company to observe any of its obligations under the facility or any security document and the following free standing provision:

> "Synergy shall cease to be under any obligation to issue letters of credit and/or to pay deposits hereunder at any time after the occurrence of any event of default and all monies payable under this Facility and all interest and costs incurred pursuant to the Facility shall become immediately due and payable, and the Borrower shall immediately pay them to Synergy."

14. The debenture contains a term (clause 10.8.1) that the company will

> "as an agent for the Lender, collect in and realise all Book Debts, pay the proceeds into such account as the Lender may from time to time notify the Company (the 'Designated Account') immediately on receipt and, pending that payment, hold those proceeds [o]n trust for the Lender."

Further relevant terms are set out in paragraph 25 of Mr Morgan's skeleton argument. I shall come to some of those later.

15. Synergy relies on its general power to demand immediate payment and the designated account/trust provisions, which it says have been breached and constitute an event of default which also entitled it to enforce its rights.

16. The general power relied on requires little explanation. A letter was sent on 5 June 2023 demanding payment of £376,291.30. That sum, which is not disputed, was calculated by reference to statements which, in the absence of manifest error, are deemed conclusive (see paragraph 12 above). I understand that it has been suggested on behalf of Mrs Perhar that the letter is defective in that it makes demand under the terms of the debenture and not explicitly under the terms of the facility. It is a nice point but is not one that I accept. The facility and debenture are complementary documents, part of a single deal between Synergy and the company, and fall to be considered together; and in any event the letter

makes reference to what it describes as a "trade finance agreement" (i.e. the facility) secured by debenture as well as to the debenture itself.

17. The second matter relied on as a triggering event does require some explanation. Whatever may be in dispute about how money that should have gone into the designated account ended up in the Revolut account, it is plain that it did, and Mrs Perhar does not contest that. It is also plain that, in breach of trust, she used funds which should have gone into the designated account, but were in any event held on trust for Synergy, to pay others, herself, Hopkins & Jones and Capability Holdings (pawnbrokers she had used) and Alison Jaques Ltd, a gallery run by a friend from whom she had borrowed and who was threatening to take legal action.

18. Mrs Perhar explains that those payments were made because of the exceptional circumstances in which she found herself: they were "urgently needed" (paragraph 122 of her first witness statement). That is an understandable explanation with which I sympathise, but it does not detract from the fact that it was a breach of the terms on which the company had contracted with Synergy, entitling Synergy to enforce its rights.

19. Mrs Perhar endeavours to argue that Synergy in some way (by its conduct or by implication) waived reliance on its contractual entitlement. The problem with that is that the facility letter contains a non-waiver provision as does the debenture (see clauses 36-38). Mr Morgan points out that waiver must take the form of a "clear statement" (*Closegate Hotel Development (Durham) Ltd v McClean* [2013] EWHC 3237 (Ch)). I have seen nothing in the evidence that comes close to that, and Mrs Perhar conceded that she was not able to point to anything. The best she was able to do was to refer to discussions that had taken place and the informal way in which they were conducted, but even if conduct were relevant, clause 36 of the debenture provides that any waiver or variation of any right on the part of Synergy will only be effective if made in writing and signed, which was not the case.

20. We have reached a point where I can be satisfied that there was a breach by the company of the terms of its borrowing and a debt due to Synergy which the company was unable to pay. (Mrs Perhar's contention that the company was solvent at the material times is not sustainable: it was cash flow insolvent at the very least.) That would normally entitle a debenture holder to act without more, but, unusually, in this case the debenture failed expressly to provide for the circumstances in which it (or the floating charge) became enforceable, and paragraph 16 Schedule B1 Insolvency Act 1986 provides that an administrator may not be appointed under paragraph 14 while the floating charge on which the appointment relies is not enforceable.

21. Synergy accepts that its debenture is defective but relies on the following matters to circumvent the defect.

22. Mr Morgan began his oral submissions by making an obvious but cogent point in the form of a question (What is the purpose of a charge?) and answering it by saying that its purpose is to create the right to compel performance of the obligation it secures; in doing so it cuts across the normal property rights of the party giving it. He submitted that the

parties recognised this, pointing to, for example, clauses 7, 11.3, 11.4, 16.1, 17, all posited on just that, and clause 26 which expressly confers on the lender power without notice to appoint one or more persons to be administrators.

23. In his skeleton argument he makes the points that "The power to appoint administrators is…itself a means of enforcement" (*per* Briggs LJ, as he then was, in *SAW(SW) 2010 Ltd v Wilson* [2017] EWCA Civ 1001, [2018] Ch 213, at paragraph 35); and the word "enforceable" means "capable of being enforced" (*ibid* at paragraph 51).

24. He goes to deal with matters of interpretation. He begins by citing Andrew Sutcliffe QC, sitting as a High Court Judge, in *Re ARL O09 Ltd* [2020] EWHC 3125 (Ch), [2021] BCC 228 accepting (at paragraph 50) that the question before him, whether the floating charge was enforceable within the meaning of paragraph 16, was "to be assessed objectively and that such assessment involves consideration of all the circumstances including the terms of the debenture or other security document between the parties, any collateral contract or agreement, whether between the parties or between the floating chargeholder and a third party, any promissory estoppel, and any statutory provision." In other words, a debenture is subject to the usual rules of construction when it comes to ascertaining its meaning and effect.

25. I will pass over some other principles which he (Mr Morgan) next outlines, because he recognises that the correction of a mistake, which is what we are concerned with here, involves a different approach to interpretation to that involved in choosing between rival meanings in a case of ambiguity (see *Britvic plc v Britvic Pensions Ltd* [2021] EWCA Civ 867), which is not the case here. There is an overlap with the implication of terms, which is not a matter of construction but, rather, turns on the tests of business efficacy and/or obviousness (*Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742). In the present case we are concerned with whether to correct a mistake in the form of an omission; we are in what Snowden LJ, as he then was, in *Hayfin Opal Luxco 3 SARL v Windermere VII Cmbs plc* [2018] 1 BCLC 118, described as one of those cases

> "in which an analysis of the express terms of a contract leads to a clear conclusion that something is missing, and in such a case the court may be able to supply the missing words or terms."

Snowden LJ went on to say that the authorities cited to him and set out in the preceding paragraphs of his judgment (so not repeated here) established that,

> "The court will not supply additional words or terms simply because it is reasonable to do so in the circumstances which have arisen. The court will only add words to the express terms of an agreement if it is necessary to do so because the agreement is incomplete or commercially incoherent without them. Even then, the court must be certain both that the absence of the *missing words* was inadvertent, and that if the omission had been drawn to the attention of the parties at the time of contracting they would have agreed what additional provision should be made."

26. I am satisfied that that is the position we are in here. I say that on the basis of the matters mentioned in paragraphs 22-23 above and for the reasons set out in paragraph 36 of Mr Morgan's skeleton argument, in particular the following:

> (a) It is a general principle of interpretation that all parts of a contract should be given effect where possible, and no part of it should be treated as inoperative or surplus (*Lewison, The Interpretation of Contracts* (7th edn) at 7.24-7.36). Whilst Mr Morgan accepts that that principle has to be applied with some caution in a commercial contract, it is of weight in light of the points made on behalf of Synergy as to the effect of clauses 11.3, 11.4 and 26 of its debenture, which should not be held to be redundant.
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> (b) The debenture must have been intended to form part of a coherent contractual scheme together with the facility, a point which I have recognised earlier. The latter identified circumstances giving rise to "events of default", which would be expected to operate in conjunction with the circumstances in which the debenture would be expected to be capable of enforcement.
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> (c) It can properly be said that (i) the debenture is incomplete and/or commercially incoherent without the insertion of words providing for the circumstances in which it becomes enforceable, and (ii) this must have been the result of inadvertence.

27. I agree with Mr Morgan that, in the light of the foregoing, it is appropriate to imply an enforceability term so as to give the debenture the required business efficacy, which I shall do. There is no basis on which it might be said that the implication of such a term would be unreasonable or unfair to the company or any other party.

28. Mrs Perhar complains that the third respondent also deviated from or failed to comply with its own contractual terms from time to time. I do not propose to deal with those complaints: they are trivial and cannot have caused any damage to the company or otherwise have interfered with the performance by either party of its contractual obligations; if anything they would have operated against Synergy's interests.

29. The same cannot be said, however, of the premature making of demand on the company by the third respondent.

30. Howes Percival's letter of demand of 5 June 2023 was sent to the company by email timed at 9.00 am and by first class post. The notice of appointment was filed at 11.56 on the same day.

31. There is established, if harsh, authority as to the requirement of immediate performance in a case where money is repayable on demand. In *R A Cripps & Son Ltd v Wickenden* [1973] 1 WLR 944, where the debenture holder appointed a receiver precipitately, much

as the third respondent has appointed administrators in this case, the court held that money repayable on demand had to be ready to be paid when demand was made. Goff J held that there was no obligation to give the company time to make proposals to pay, only to make the payment due by getting the money from a desk or going across the street or to the bank to get it. (The modern equivalent would, I suppose, be instructing the bank to transfer the money to the creditor's account.) The fact that Synergy allowed only a very short time to elapse before acting on its demand does not assist Mrs Perhar.

32. But that is not the end of the matter. Clause 45 of the debenture provides for notice or any other communication in connection with it to be in writing and delivered personally or sent by prepaid first class post to the address of the recipient set out in the debenture. Clause 46.2 provides that, in the case of first class post, notice is deemed given on the second business day on which banks are open for business in London for normal banking business. Neither clause makes provision for notice by email. On the face of it, then, the third respondent jumped the gun, notwithstanding the effect of the decision in *R A Cripps*.

33. Mr Morgan suggests that that the notice provisions in the debenture should not be regarded as an exclusive service regime. Relying again on the way in which the facility and the debenture operate to complement one another, he points out that the former provides for notice by telephone or email (unless otherwise required) as well as by first class post or fax, to be "effective on receipt" (which would have been 9.00 am on 2023 in the case of the demand by email). He points out that the parties invariably communicated by email.

34. He also relies on authority in the form of the judgment of Simon Picken QC, sitting as a Deputy Judge of the High Court, in *United Trust Bank Ltd v Dohil* [2011] EWHC 3302 (QB). I note that the defendant did not appear in that case and that the clause with which the learned deputy judge was concerned was permissive as to the method of giving notice rather than mandatory, as it is here, so I should arguably approach the authority with some caution. Equally, however, the judgment contains a detailed analysis of the circumstances in which the courts have countenanced deviation from compliance with an apparently mandatory term. Mr Morgan referred me to paragraphs 52-66 of the judgment. Paragraph 59 deals with a case called *Spectra PTY Ltd v Pindari Pty Ltd* [1974] 2 NSWLR 617 concerning an option to renew a lease which stated that the lessee "shall give to the Lessor notice in writing to be sent by prepaid registered mail to the Lessor's last known place of residence," in spite of the terms of which Wootten J concluded that "in the absence of a very clear indication of a contrary intention, it would not be reasonable to construe a provision for service by registered mail as excluding the giving of notice by other equally expeditious means which do in fact result in the actual receipt of the notice by the offeror." So even where "shall" is used, the provision is not necessarily to be regarded as mandatory. In paragraph 60 the deputy judge considers *Yates Building Co v RJ Pulleyn & Co* [1976] 1 EGLR 157 which also involved an option to purchase land, the relevant provision stating that it should be exercised by notice in writing "to be sent by registered or recorded delivery post to the registered office of Pulleyns or the offices of their said solicitors." Acceptance was not sent by registered or recorded delivery post but arrived on time. Lord Denning MR held that, as a matter of construction, it was a valid exercise of the option, distinguishing between what he called a mandatory and a directory provision. Simon Picken QC himself went on to conclude that compliance with the clause he was concerned with was not the only means of giving

notice or making demand, which is broadly the approach I understand Mr Morgan to invite in this case too.

35. Not without misgivings, I shall do so. First, *United Trust Bank v Dohil* appears to provide a basis for doing so. Secondly, the notice in this case was received (a matter which rightly exercised the deputy judge in *United Trust*). And thirdly, there is no indication that the company would have been able to pay if the requisite notice had actually been given (a factor that appears to have been taken in to account in *R A Cripps*).

36. To the extent that the appointment was not properly made at the time it was made, Mr Morgan submits that that is an irregularity which can be validated by the court under the principles set out by HHJ Purle QC, sitting as a High Court Judge, in *Re Care People Ltd* [2013] EWHC 1734 (Ch), [2013] BCC 466. That too was a case of jumping the gun, but the premature appointment of administrators was held to be a defect that was procedural rather than fundamental so was capable of cure. Again, the inability of the company to have paid even if demand had been made properly was a feature of the case. Mr Morgan draws my attention to *Re ARG (Mansfield) Ltd* [2020] EWHC 1133, [2020] BCC 641, in which HHJ Davis-White QC, also sitting as a High Court Judge, expressed doubt about the judge's reasoning in *Re Care People*, but points out that the precise issue before HHJ Purle was not before HHJ Davis-White. Mr Morgan also draws my attention to *Re ARL O09 Ltd*, this time to point out that the deputy judge in that case also noted the doubts expressed by HHJ Davis-White in *Re ARG* but was ultimately able to decide the case before him by distinguishing it from *Re Care People* on the facts.

37. Whilst I too note, and to some extent share, the concerns expressed by the learned judge in *Re ARG*, the decision in *Re Care People Ltd* is now of some standing and is that of a judge with considerable experience of insolvency who was sitting as a judge of the High Court. I consider myself bound by the decision and that it is appropriate to take the same approach in this case.

38. Taking up the thread I left at paragraph 20, we have now reached the point where it is plain that the defect in the debenture can be remedied so as to make possible the appointment of administrators and that any problems that might have been caused by acting too quickly after making demand need not stand in the debenture holder's way. I end this part of my judgment, then, by holding that the floating charge under which the administrators were appointed was enforceable at the date of their appointment.

39. I turn next to the question whether defects complained of in the appointment documentation are fatal in that they are incapable of being cured. There are three, which are that:

> (a) the notice of appointment incorrectly states that the company is an article 1.2 undertaking as defined in rule 1.2 Insolvency (England and Wales) Rules 2016 (i.e. an insurance undertaking, a credit institution, an investment undertaking or a collective investment undertaking);
>
> (b) it does not include a statement under paragraph 100(2) of Schedule B1 to the Insolvency Act 1986; and

> (c) the statutory declaration required under paragraph 18 of Schedule B1 was made remotely.

The first and second respondents submit that those defects have given rise to no substantial injustice and are capable of cure. What follows is largely taken, but slightly shortened and adapted, from Mr Ouwehand's skeleton argument, with which I agree.

40. Rule 12.64 Insolvency (England and Wales) Rules 2016 provides that "[n]o 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 injustice cannot be remedied by any order of the court."

41. An appointment of administrators out of court under paragraph 14 of Schedule B1, as is the case here, constitutes "insolvency proceedings" (see rule 1.1(2) Insolvency (England and Wales) Rules 2016).

42. The current approach of the courts to failure to comply with the requirements for the appointment of an administrator and the applicability of rule 12.64 may be taken from the judgments of Stuart Isaacs QC, sitting as a Deputy Judge of the High Court, in *Re Zoom UK Distribution Limited (In Administration)* [2021] EWHC 800 (Ch), [2021] BCC 735, and Marcus Smith J in *Re Skeggs Beef Ltd* [2019] EWHC 2607 (Ch), [2020] BCC 43, which Mr Ouwehand helpfully summarises as follows:

> (a) Whether non-compliance with a requirement results in the invalidity of an appointment depends on whether Parliament intended that outcome.
>
> (b) The question whether it does is to be answered by identifying (i) the purpose of the requirement and (ii) the consequences of non-compliance (*Re Zoom UK Distribution Limited (In Administration)* at paragraph15).
>
> (c) Defective out of court appointments can be divided into the following categories: (i) fundamental defects, such that the purported appointment is a nullity, (ii) defects that are not fundamental but have caused no injustice such that pursuant to rule 12.64 the appointment will not be invalidated, and (iii) defects that are not fundamental but have caused substantial injustice (*Re Skeggs Beef Ltd* at paragraph 21).
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> (d) In the latter category, the court will consider whether, in light of the circumstances, it is appropriate to make a remedial order curing the defect. If a remedial order cannot be made, or it is not appropriate to make one, the defect remains uncured (*Re Skeggs Beef Ltd* at paragraph 21 again).

43. Rule 3.17(1)(j), which requires the notice of appointment to contain an article 1.2 undertaking statement, goes to whether the court has jurisdiction to open insolvency proceedings in particular circumstances. A breach which takes the form of the erroneous

inclusion of the statement does not of itself determine whether there is power to make an appointment or whether jurisdiction exists. As Mr Ouwehand observes, either there is jurisdiction or there is not. The defect here is therefore "not fundamental" but a defect or irregularity of a procedural nature.

44. There is no evidence of prejudice to the company or any other party likely to have been affected.

45. Rule 3.17(2) provides that where two or more administrators are appointed, the notice of appointment must specify the matters required by paragraph 100(2) of Schedule B1. Paragraph 100(2) provides that the appointment of a number of persons to act as administrator must specify (a) which functions (if any) are to be exercised by the persons appointed acting jointly, and (b) which functions (if any) are to be exercised by any or all of the persons appointed.

46. The wording of paragraph 100 itself does not indicate that compliance is a precondition to the appointment of administrators. It presumes there can or has been an appointment regardless: cf *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th edn) paragraph 7-019 on s 231 Insolvency Act 1986, which is the equivalent provision (albeit expressed differently) regarding the appointment of administrative receivers and liquidators. (Mr Ouwehand accepts that the way the authors express the requirement as regards paragraph 100(2) in paragraph 6-013 could be read as contradicting that assertion, but, he says, they do not appear to be directly addressing the issue.)

47. An administrator is a person appointed under Schedule B1 to manage the company's affairs, business and property (see paragraph 1(1) of the Schedule). In exercising his functions the administrator acts as the agent of a company (see paragraph 69 of the Schedule).

48. The purpose of paragraph 100(2) must be to identify which functions each administrator may exercise jointly or otherwise.

49. As a matter of general law, where more than one person is appointed an agent, it is presumed that their authority was given to them jointly unless a contrary intention appears from the nature or terms of the authority or the circumstances of the case **(**see *Bowstead & Reynolds on Agency* (22nd edn) paragraph 2-043). The presumption should be, then, that the joint administrators would have to act jointly until a paragraph 100(2) statement is filed. Importantly, the consequence of non-compliance is not that neither of them has any power to exercise any of their functions at all.

50. Again, then, the defect is not fundamental but a defect or irregularity of a procedural nature. There can be no substantial injustice here because any potential harm has now been mitigated by the filing of the statement at court on 16 June 2021, only 11 days late, as appears from Ms Williams's evidence. The joint administrators have not engaged extensively with third parties relating to the company, and certainly not during the aforementioned 11-day period; it is unlikely that a third party would have become aware of the paragraph 100(2) statement (or its absence) until the joint administrators' proposals were made on 27 July 2023. The paragraph 100(2) statement appears in those proposals.

51. The statutory declaration complied with sub-paras 10.1-10.3 of the Temporary Practice Direction Supporting the Insolvency Practice Direction made during the Covid pandemic. Any defect or irregularity arising solely from the declaration not being made in person before the person authorised to administer the oath cannot be regarded as causing substantial, or indeed any, injustice. In my view, there is nothing in the point.

52. As I have said, I agree with Mr Ouwehand's propositions, which disposes of the second issue I have to decide.

53. The result is that, as regards both the enforceability issue and the defects issue before me as a result of ICC Judge Greenwood's order, the application fails. I will hear the parties on the form of the order I should make when this judgment is handed down.

54. Whilst I appreciate that this will be a disappointment to Mrs Perhar, to the extent that the object of her application was, and may still be, to continue to run the company if the administration were set aside, I reiterate what I said to her towards the end of the hearing, namely that that hardly appears to be realistic in circumstances in which the company's relationship with its finance provider has broken down with little or no prospect of its obtaining alternative funding or an injection of capital sufficient to enable it to continue to trade.