

Neutral Citation Number: [2019] EWHC 3231 (Ch)

Case No: CR-2019-BHM-000759

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 28/11/2019

Before :

HHJ DAVID COOKE

Between :

Lee Causer (1)

Applicants

Neville Side (2)

- and -

All Star Leisure (Group) Ltd

Defendant

Ali Tabari (instructed by **Gowling WLG**) for the **Applicants**
The Respondent did not appear and was not represented

Hearing date: 8 November 2019

Approved Judgment

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

.....

HHJ DAVID COOKE

HHJ David Cooke:

1. This is another application seeking confirmation of the validity of an appointment of administrators as a result of uncertainties arising from the interaction of the regime for electronic filing of documents (CE File), the Insolvency Rules 2016 and the Practice Direction- Insolvency Proceedings (PDIP). Similar issues have been considered by Barling J in *Re HMV Commerce Ltd* ([2019] EWHC 903 (Ch)), by Marcus Smith J in *Re Skeggs Beef Ltd* ([2019] EWHC 2607 (Ch)) and by ICC Judge Burton in *Re SJ Henderson & Co Ltd* ([2019] EWHC 2742 (Ch)). I am very grateful to Mr Tabari for his skeleton and helpful examination of those cases, and for dealing with the various queries I put to him in the course of argument.
2. The very fact that such applications are having to be made, and that the answers are not straightforward, indicates in my view that there is an urgent need for a review of the drafting of these provisions to ensure they operate effectively in conjunction with each other and do not produce unnecessary traps for the unwary.

Background

3. The factual background to the appointment in issue is fairly straightforward. All Star Leisure (Group) Ltd ("the company") is the parent of five subsidiaries which own and operate bowling alleys. A winding up petition had been presented against the company (but not the subsidiaries). It was desired to put all the group companies into administration to implement a pre-pack sale of their combined business. That sale had been negotiated and was ready to proceed on 17 September 2019, subject to placing all the companies into administration.
4. The appointments in relation to the subsidiaries raised no issues and were effected by their directors pursuant to para 22 of Sch B1 Insolvency Act 1986. The notice of appointment required by para 29 was filed at the court in Birmingham using CE File, within normal court hours.
5. In relation to the parent company however, because of the pending winding up petition the directors were not entitled to make an appointment. They approached its bank to do so as the holder of a Qualifying Floating Charge, pursuant to para 14 of Sch B1. During the afternoon of 17 September the bank approved and signed the necessary notice of appointment and instructed the solicitors now acting for the applicants to file it.
6. The witness statement of Mr Miah, the solicitor who was dealing with the filing, sets out the timing that followed:
 - i) At 3.37 pm he logged on to CE File and attempted to upload the notice of appointment and associated documents. For reasons he is not able to explain, the CE File system would not accept the documents as uploaded and instead saved his attempt as a draft application.
 - ii) He made a second attempt at 3.50 pm and a third at 4.01pm, with the same result on both occasions..
 - iii) He printed and re-scanned the documents and made a fourth attempt at 4.18 pm which was successful. He received an electronic confirmation that the documents had been submitted and the fee paid at that time.

- iv) He then spoke to a clerk at the court who told him that he had wrongly entered the bank as the filing party in the CE File system, and should have given the company's name instead. He did not agree with that (and it appears to be wrong) but uploaded the same documents again as a precaution at 4.37 pm, this time naming the company as the filing party. He received an acknowledgment of receipt at 4.38 pm.
 - v) A minute later he received a CE File message, presumably from the clerk he had spoken to, stating that his 4.18 pm filing had been "rejected" because "you need to lodge the company details and not the administrator's". This was not consistent with what he had been told on the telephone.
 - vi) The uploaded documents were electronically sealed and became available online at 4.54 pm. Presumably this followed acceptance of his 4.37 upload, but the sealed documents were the same as those he had uploaded at 4.18 pm (and attempted to at 3.37pm).
7. The pre-pack sale was completed at or about 5.12 pm the same day.

The issue

8. The issue arises because the counter opening hours of the court at Birmingham, as published on the HMCTS website, are 10 am to 4 pm, and the drafting of the provisions I have referred to creates doubt, to say the least, whether it is open to a party to file such a notice of appointment outside those hours using the CE file system. If on the facts above filing was not effective, and unless the court can rectify the defect, the appointment of the administrators may be invalid, as may the sale and all the transactions consequent upon it, with serious consequences for the applicants, the purchaser and those affected by the operation of the business, including its employees and creditors.
9. How can this be the case? One of the main advantages of the CE File system is supposed to be that it enables court users to file documents with the court without having to deliver hard copies to the court, and to do so at any time of the day or night. It is an apparent absurdity that a party's ability to use a system designed to operate on a 24 hour basis should be authorised within court opening hours but forbidden outside such hours.
10. The electronic filing system is strictly still a pilot scheme, and is governed by CPR Practice Direction 51O. Paras 1 and 2 of that PD provide that:

“General

1.1

(1) This Practice Direction is made under rules 5.5, 7.12 and 51.2 of the Civil Procedure Rules (“CPR”). It provides for a pilot scheme (“Electronic Working”) to—

(a) operate from 16 November 2015 to 6 April 2020;

(b) operate in—

(i) the Chancery Division of the High Court, the Commercial Court, the Technology and Construction Court, the Circuit Commercial Court, and the Admiralty Court, at the Royal Courts of Justice, Rolls Building, London (together, “the Rolls Building Jurisdictions”); ...

(iii) the B&PCs District Registries (as defined in paragraph 1.2 of Practice Direction 57AA); ...

(c) apply ...

(iii) in the B&PCs District Registries, to proceedings started on or after 25 February 2019, and will not apply to existing proceedings unless ordered by the court;

(2) Electronic Working is a permitted means of electronic delivery of documents to the court for the purposes of rule 1.46 of the Insolvency (England & Wales) Rules 2016 (“IR 2016”)...

1.2

(1) Electronic Working works within and is subject to all statutory provisions and rules together with all procedural rules and practice directions applicable to the proceedings concerned, subject to any exclusion or revision within this Practice Direction.

Usage and operation of Electronic Working

2.1

Electronic Working enables parties to issue proceedings and file documents online 24 hours a day every day all year round, including during out of normal Court office opening hours and on weekends and bank holidays, except—

(a) [*planned or*] (b) [*unplanned down time of the system*]...; and

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

11. The exclusion in sub-para (c) is expanded upon by the terms of the PDIP, which (as amended in 2018) extends it to notice of appointment by any person (not just a qualifying floating charge holder). Para 8 provides:

“8. Administrations

8.1 Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O -The Electronic Working Pilot Scheme, ... where a notice of appointment is made using the electronic

filing system. For the avoidance of doubt, and notwithstanding the restriction in sub-paragraph (c) to notices of appointment made by qualifying floating charge holders, paragraph 2.1 of the Electronic Practice Direction 51O shall not apply to any filing of a notice of appointment of an administrator outside Court opening hours, and the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply.”

12. PD 51O constitutes the operative provision of the rules of court authorising filing under the electronic working scheme. There is no doubt therefore that such authorisation applies in principle to filing notices of appointment of administrators, but (assuming for present purposes that the PDIP is effective to extend its terms) not if such notice is given by a charge holder "when the court is closed" or by any other person "outside court working hours".
13. Why should this carve out have been made? Marcus Smith J in *Re Skeggs Beef* made the point that, as para 1 of PD 51O makes clear, the electronic working scheme is subject to any applicable rules or practice directions applicable to particular types of proceedings and so (for instance) could not "trump or override" provisions of the Insolvency Rules. He therefore considered that PD 51O authorised electronic filing only so long as that would not be inconsistent with other rules such as the Insolvency Rules; see his judgment at paras 12-14.
14. It seems that it may have been thought when drafting PD 51O that the Insolvency Rules provided a mandatory system for filing notices of appointment outside normal court hours (by fax or email to a specified address), and that accordingly a PD supplementing the CPR would not be competent to establish a different system such as CE File that could operate during such periods.
15. However, if that was the source of this exclusion, the concern seems to me to have been misplaced, for the reasons I set out briefly below.
16. The starting point is the relevant provisions of Insolvency Act 1986. Sch B1 provides:

“14 (1) The holder of a qualifying floating charge in respect of a company’s property may appoint an administrator of the company...

18 (1) A person who appoints an administrator of a company under paragraph 14 shall file with the court-

(a) a notice of appointment, and

(b) such other documents as may be prescribed...

19 The appointment of an administrator under paragraph 14 takes effect when the requirements of paragraph 18 are satisfied.”
17. The Act does not expand on what is meant by "file with the court". So far, then, any question as to what is an effective filing with the court must be a matter for the rules

Paras 22-31 contain provisions, which are similar for present purposes, for appointment by the members or directors of a company.

and procedure of the court itself, ie the CPR and associated Practice Directions. There is nothing in the Act to limit such filing to particular hours of the day, or create a presumption against the applicability of any procedure the court might provide for such filing.

18. There are however relevant provisions of the Insolvency Rules, which could in principle operate to expand on or restrict what is permitted by the CPR, in relation to insolvency proceedings. Those in point are:

“Defined terms

... (2) In these Rules—

"file with the court" and similar expressions in these Rules means deliver to the court for filing...

"Practice Direction" means a direction as to the practice and procedure of a court within the scope of the CPR...

Electronic delivery of documents to the court

1.46.—(1) A document may not be delivered to a court by electronic means unless this is expressly permitted by the CPR, a Practice Direction, or these Rules.

(2) A document delivered by electronic means is to be treated as delivered to the court at the time it is recorded by the court as having been received or otherwise as the CPR, a Practice Direction or these Rules provide...

Notice of appointment

3.17.—(1) Notice of an appointment under paragraph 14 of Schedule B1 must be headed “Notice of appointment of an administrator by holder of a qualifying floating charge” and must contain... [(a)-(1)]

Filing of notice with the court

3.18.—(1) Three copies of the notice of appointment must be filed with the court, accompanied by... [(a)-(b)]...

(4) This rule is subject to rules 3.20 and 3.21 (appointment made out of court business hours).

Appointment taking place out of court business hours: procedure

3.20.—(1) When (but only when) the court is closed, the holder of a qualifying floating charge may file a notice of appointment with the court by—

(a) faxing it to a designated telephone number; or

(b) emailing it, or attaching it to an email, to a designated email address...

(9) The appointer must take to the court on the next occasion that the court is open for business—

(a) three copies of the faxed or emailed notice of appointment;

(b) the fax transmission report or hard copy required by paragraph (5);

(c) all supporting documents referred to in the notice in accordance with rule 3.21(1) which are in the appointer's possession; and

(d) a statement providing reasons for the out-of-hours filing of the notice of appointment, including why it would have been damaging to the company or its creditors not to have so acted.

Appointment taking place out of court business hours: legal effect

3.22.—(1) The filing of a notice in accordance with rule 3.20 has the same effect for all purposes as the filing of a notice of appointment in accordance with rule 3.18.

(2) The appointment—

(a) takes effect from the date and time of the fax transmission or sending of the email; but

(b) ceases to have effect if the requirements of rule 3.20(9) are not completed on the next occasion the court is open for business..."

19. The definition of "file with the court" takes the position under the Act no further. What constitutes "delivery" to the court for filing is in principle a matter for the rules and procedure of the court. R1.46 is important however; it restricts the ability to deliver documents to the court by electronic means to such circumstances as may be "expressly permitted" by the CPR, a Practice Direction or the Insolvency Rules themselves. It does not however impose any limit on what provision for electronic delivery may be made by the CPR or a PD.
20. R 3.20 sets out the circumstances in which the Insolvency Rules permit electronic delivery of notices of appointment. It is to be noted that:
- i) It applies only to notices filed by a qualifying chargeholder (and so does not permit electronic filing by directors or members making an appointment)
 - ii) It applies only "when the court is closed".
 - iii) It is very prescriptive about the email address or fax number that may be used. Those are plainly intended to be central addresses or fax numbers designated by the Lord Chancellor, not specific to a particular court, and accordingly the

information required with the filing includes the name of the court having jurisdiction, no doubt so that the Lord Chancellor may distribute the filed information to the relevant courts on the next working day.

- iv) R3.20(9) imposes a subsequent requirement to file various documents and a statement of reasons for use of the out of hours procedure, and to do so "on the next occasion that the court is open for business". This is backed up by a Draconian sanction; if not complied with when the court is next open, the appointment ceases to have effect. This appears to be an absolute requirement, and inflexible as to timing.
21. These then are the only circumstances in which the Insolvency Rules themselves permit electronic filing of notice of appointment. But r 3.20 is couched in permissive and not exclusive terms; a chargeholder "may" use the procedure it provides, not "must". Thus it is still open to the CPR or a Practice Direction to provide for other circumstances or methods of electronic delivery, and there is nothing in r 3.20 either to prevent such provision being made, or, if it is, to prevent a party from using it.
22. Nor does r 3.20 regulate either the times when the court is open or what constitutes being "open" or "closed". The evident aim of the rule is to provide a mechanism, outside the structure of the court rules, for circumstances in which filing in accordance with the general rules of the court is not possible, so as to avoid a situation in which an urgent appointment is required but cannot be made. It is not necessary, for that purpose, to prevent parties from making use of existing or new court procedures for filing that would likewise avoid that situation. Since r 3.20 is not in mandatory terms, it does not, in my view, prevent parties from using an alternative procedure if one is provided by the CPR or a PD.
23. It follows that it was not necessary, in my view, for PD 51O to have a carve out for appointment notices filed by qualifying chargeholders. If it did not have that carve out, such a filing would be electronic delivery expressly authorised by the PD, and so falling within the methods permitted by Insolvency Rule 1.46. There would be no question of "trumping" or overriding the Insolvency Rules, since it would not be authorising something those Rules otherwise forbade but permitting something the Insolvency Act 1986 and the Insolvency Rules allow to be permitted.
24. In this respect, I respectfully differ from the conclusions of Marcus Smith J at paras 12-17 of his judgment in *Skeggs Beef*. In my view, the position is not that the CPR (and their PDs) are incompetent to provide alternative out of hours filing facilities for administration appointments, but that, for whatever reason, a choice has been made not to do so.
25. Why might it have been thought desirable to have such a carve out, even if not strictly necessary to do so? I speculate, in the absence of material showing what was or was not considered by the drafters. It is obviously desirable to ensure that all the required information reaches the court, whatever filing mechanism is used. That is no doubt why the r 3.20 procedure provides for follow up delivery of hard copy documentation to the court as soon as that can be done. Further, it is important that there be a publicly available record of the time at which an appointment takes effect, so whatever procedure is devised should be such as to create such a record. But neither of these reasons can be a reason for insisting that only the r 3.20 procedure is used at a particular time of day- if all the material required to be delivered to the court can be

satisfactorily delivered through CE File at 3.50 pm, the same material could not be insufficient if filed at 4.10 pm. CE File records the time of delivery, whatever it is.

26. The only additional document required if the r 3.20 procedure is followed is the statement of reasons for filing out of hours required by r 3.20(9). But it is questionable what purpose that statement serves- it is not a precondition of using the r 3.20 procedure that there be any such reasons, or that they be adequate, and there is no sanction imposed or potential invalidity if the reasons stated are not considered to be sufficient, or even are wholly specious. One may think that makes the sanction for non-delivery of the statement (or even slightly late delivery) somewhat excessive. It does not seem to me that preserving or extending the circumstances in which such a statement is required, or that such a sanction may operate, is a sufficient reason to withhold from one particular category of court users a facility that is being extended to others.
27. It is not in any event necessarily the case that a party would find it impossible to deliver physical documents to court for filing outside the published counter opening hours. Suppose for instance a helpful court clerk, seeing a queue at the counter, opens a few minutes early, or continues to serve those waiting until after the published closing time? It would not, I assume, be suggested that the effect of r 3.20 (or either of the Practice Directions) is to invalidate a notice stamped as received by such means at 4.05 pm. If that delivery would be valid without a statement of reasons for not waiting until the following day, why should it be necessary to require such a statement for documents filed electronically at the same time?
28. Another potential reason might be that r 3.20 applies only to notices by qualifying chargeholders, and there is no equivalent provision in the Insolvency Rules for email or fax filing by directors or members. It must be assumed that that is deliberate, so that the drafters of the Rules must have considered it unnecessary or undesirable to permit out of hours filing by such persons. Permitting delivery by CE File for all categories of appointer would thus provide an out of hours filing facility to some who do not presently have any option under the Insolvency Rules. That presumably is why the carve out in PD 51O was extended, by amending the PDIP, to all notices of appointment. But any such concern obviously cannot have been a consideration in the mind of the drafter of PD 51O, since it was not reflected there and has had to be grafted on, apparently as an afterthought, by amendment of the PDIP.
29. I can see that it might perhaps be thought that a change in that policy is a matter to be achieved by amendment of the Insolvency Rules rather than the rules of court. That was in effect the conclusion of ICCJ Burton in *Henderson*. However to my mind it does not seem obviously compelling- for the reasons above such a change would not cut across any provision of the Act and would be as much within the scope permitted to the rules of court as a change in court counter opening hours or establishment of some other method for, say, extended hours for receipt of physical documents. Nor was any good reason for preserving the previous restriction apparent to Barling J in *Wright*; see for example para 14 of his judgment.
30. It might be said that since an appointment by members or directors under para 22 cannot be made while a winding up petition is outstanding (Sch B1 para 25), giving the directors an opportunity to make an appointment out of hours would potentially allow them to "get in first" before a creditor files his petition. But why is this unfair? If all parties had to file during court hours, there would still be a potential race to be first. If creditors may now file a petition out of hours using CE File but directors may

not make an appointment until the next day, an uneven playing field is being created, not removed.

31. Even if that policy consideration were persuasive, it would be a reason for carving out electronic delivery (after hours) of notices by members or directors, but not a reason for not offering to qualifying chargeholders a more convenient way of effecting the electronic delivery they are already, as a matter of policy reflected in the Insolvency Rules, entitled to.

Resolution of the present case

32. For the present, however, it is the case that the carve out exists and prima facie therefore it was not open to the qualifying chargeholder in this case to use CE File to file notice "when the court is closed". I have considered whether it might be held that the court is not "closed", a term that evidently relates to its availability to receive documents for filing, at a time when it is able to do so by the electronic system it has specifically put in place for the purpose. Attractive as that would be as a way out of the present difficulty, I have concluded it would not be a permissible construction as it would mean that para (c) of the exclusions in PD51O added nothing at all to (a) and (b).
33. Nor can the court be considered not to be "closed" for the purpose of PD51O at a time when the relevant counter is not scheduled to be open for business, even if the court building is generally open to the public (as the court in Birmingham is likely to be between, say, 4pm and 5pm). If that were the case, the court would also not be "closed" for the purpose of r 3.20 and chargeholders would be unable to use the r 3.20 procedure during such periods, even though they would (probably) in practice not be able to lodge physical documents. True, they would now have the alternative of using CE File, but that was not always the case, and in principle might not so in future if, hypothetically, the pilot scheme were discontinued.
34. I pause to observe that the fact that all courts do not have the same published opening hours is another source of potential confusion and error in circumstances where the ability to use electronic filing is made time dependent. It is bizarre that the appointer in this case could apparently have filed using the CE File system at 4.18 pm if he had specified the court in London as the court of issue, but not when he specified Birmingham, and that the reason this is so is because the counter in London (which it did not wish to use) was open but that in Birmingham (which by that time it could not have used) was closed. It may be said that the same issue arises if the appointer seeks to use the r 3.20 procedure, but that is equally bizarre and no reason why the CE File system should adopt the same difficulty.
35. Barling J in *Wright* was dealing with an appointment made by directors outside court hours. He concluded that it was not permitted by PD51O, as extended by the PDIP, but that the resulting defect was not fundamental, and could be cured either by extending time for filing under PD51O, or by order under IR 12.64:

“Formal defects

12.64. No insolvency proceedings will be invalidated by any formal defect or any irregularity unless the court before which objection is made considers that substantial injustice has been

caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court.”

The use of electronic filing outside the permitted hours could be considered an "irregularity". It was clear in the circumstances that no injustice had been caused and an order curing the defect was appropriate in the circumstances (see para 14-19).

36. In *Skeggs Beef*, Marcus Smith J made an order under IR 12.64 validating an appointment by a chargeholder filed using CE File just over half an hour after the court had closed. He too considered the defect was not fundamental and no injustice had been caused.
37. In the present case, on the facts the appointment documents were received by the court at 4.18 pm through the CE File system. They were so received, notwithstanding the (erroneous) purported rejection of them by entry made on the CE File system by a court clerk. Here there is nothing to suggest that any possible injustice has been caused to any person by use of the CE File system at that time rather than the r 3.20 procedure. For the same reasons as were accepted by Marcus Smith J and Barling J, the defect is not fundamental. It is appropriate to make an order curing the defect under IR 12.64 and I will therefore make such an order, to the effect that the appointment be treated as taking effect at 4.18 pm on 17 September 2019.
38. I note that in *Henderson*, ICCJ Burton considered two cases, both involving purported appointments by directors. Differing from Barling J, he held that a purported appointment out of hours by directors was wholly invalid and not curable. That does not arise in this case, but I should say that if it had I should have preferred Barling J's reasoning and, for the reasons given above, would not have felt driven by the terms of the legislation to the conclusion that ICCJ Burton reached.
39. Finally, I repeat that it is in my view regrettable that these difficulties, with consequent uncertainty and cost, have arisen from the drafting of provisions for an electronic filing system intended to assist court users, and I urge consideration of ways of resolving them. As will be apparent, in my view this could be fairly simply achieved, without any conflict with the Insolvency Act 1986 or Insolvency Rules, by removing the "carve out" from the electronic working PD (and the PDIP).