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TRANSCRIPT OF PROCEEDINGS

Ref. CR-2018-011102
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[2019] EWHC 903 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (CHD)

IN THE MATTER OF HMV ECOMMERCE LIMITED (CO. NO. 09321397)

AND IN THE MATTER OF HMV RETAIL LIMITED (CO. NO. 08380689)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BEFORE THE HONOURABLE MR JUSTICE BARLING

24 JANUARY 2019
(11.30-12.15)

IN THE MATTER OF WILLIAM WRIGHT, DAVID JOHN PIKE & NEIL DAVID GOSTELOW

(Applicants)

-v-

HMV ECOMMERCE LIMITED
AND
HMV RETAIL LIMITED

(Respondents)

MS KYRIAKIDES (instructed by Addleshaw Goddard LLP) appeared on behalf of the Applicants

The Respondent companies were not represented

JUDGMENT

(Approved)

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MR JUSTICE BARLING:

1. On 28 December 2018 the directors of the two companies in question filed notices of appointment of administrators. The notices were filed with the court electronically at 5.54pm. Later in the evening of the same day, there was a telephone hearing in which I heard submissions from Ms Kyriakides of counsel, who also appears for the applicants today. I made an order in respect of each company declaring that the administrators were validly appointed as joint administrators of the companies and that their appointment took effect as at 17.54 that day, namely at the time at which the notices were electronically filed.

2. At that time, of course, the court office is not open, and the filing was purportedly made pursuant to Practice Direction 51(o) of the Electronic Working Pilot Scheme, which effectively began sometime in 2015 and has been in operation ever since. Paragraph 2.1 of the Practice Direction states that electronic working enables parties to issue proceedings and file documents on line 24 hours a day, every day, all year round, including during out of normal court office opening hours and on weekends and bank holidays. Certain exceptions are referred to, which do not apply to the present case, in which the appointment of administrators is made by the directors of the company on question. Subparagraph c provides for an exception

> "where the filing is of a notice of appointment by a qualifying floating charge holder under Chapter 3 of Part 3 of the Insolvency Rules 2016, and the court is closed, in which case the filing must be in accordance with Rule 3.20 of the Insolvency Rules 2016".

3. No issue arises in this matter as to the power of the company or its directors to make the appointment which they did. The question which arises is whether the electronic filing on 28 December 2018 was a breach of the Insolvency Practice Direction which came into force in July 2018, and which neither the court nor the legal teams acting for

the directors, nor presumably the administrators, had in mind when the orders to which I have referred were made.

4. Paragraph 8.1 of that Practice Direction states as follows:

> "Attention is drawn to paragraph 2.1 of the Electronic Practice Direction 51O - The Electronic Working Pilot Scheme, or to any subsequent Electronic Practice Direction made after the date of this IPD, where a notice of appointment is made using the electronic filing system. For the avoidance of doubt, and notwithstanding the restriction in 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."

5. The administrators are concerned that the somewhat byzantine terminology of that provision means that the notice of appointment of the administrators in the present case was made in breach of that rule, because it was made under the Electronic Working Pilot Scheme outside court opening hours. These are generally presumed to cease at 4.30pm on a working day, whereas this notice was given approximately one hour and 24 minutes after that time.

6. The curious aspect of paragraph 8.1 is that it states that the provisions of Insolvency Rules 3.20 to 3.22 shall in those circumstances continue to apply. However, those paragraphs of the Rules are only dealing with a notice of appointment filed by the holder of a qualifying floating charge and do not have any relevance to a notice of appointment filed by the company or its directors. So, the concept of those rules "continuing" to apply can only be a reference to a notice of appointment filed by a qualified floating charge holder.

7. Nevertheless, because there is an ambiguity in the rule, the administrators have quite properly considered that they should remedy any problem in view of the urgency and importance of this administration, and the fact that, as one knows from the press, matters have reached a delicate stage.

8. The importance of the time of filing of a notice of appointment is not controversial. The administration takes effect when the requirements of paragraph 29 of Schedule B1 to the Insolvency Act 1986 have been complied with. One of the requirements of

paragraph 29 of the Schedule is that the person who appointed the administrator of the company under paragraph 22 shall file (amongst other things) a notice of appointment with the court. Paragraph 31 states that the appointment of an administrator under paragraph 22 takes effect when the requirements of paragraph 29 are satisfied. It was for that reason that the time of filing electronically was carefully noted, and was confirmed by the court in a computer-generated email from Thompson Reuters timed at 17.56 on 28 December 2018. The email states that "This is a notice to inform you that the filings in question have been submitted on 28 December 2018, 5.54pm." That was further confirmed by another computer-generated email from the court stating that those filings had been accepted by the clerk at 8.23am on 31 December 2018, that being the Monday morning following the Friday filings. A further document endorsed and sealed by the court confirmed the date and time of filing.

9. As I have said, when the matter came before me late on Friday night, 28 December, the terms of paragraph 8.1 were not uppermost in anyone's mind. Had paragraph 8.1 been recognised as possibly relevant, the court would undoubtedly have been asked to take appropriate steps to resolve/remedy any potential irregularity. A number of such steps have been suggested. For example, the court could have been asked to waive any defect pursuant to Rule 12.64 of the Insolvency Rules 2016, which was a course that Nugee J considered to be open to the court in similar circumstances: see *In the matter of Spaces London Bridge Ltd* [2018] EWHC 3099 (Ch), at paragraph 28. Rule 12.64 is a re-enactment of the earlier Rule 7.55 of the 1986 Rules. Rule 12.64 provides:

> "No insolvency proceedings shall be invalidated by any formal defect or by 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".

10. Alternatively, or in addition, the court could have been asked simply to extend time for the filing from 16.30 to 17.54. It is clear that the provisions of the CPR which provide for extension of time limits, and in particular Rule 3.10, apply to out of court appointments of an administrator, unless they are excluded by some other provision. I was referred by Ms Kyriakides to an authority to that effect. Thus, in the absence of any provision expressly excluding the power to extend time for filing beyond 4.30pm, the court could, in a proper case, simply extend time for filing.

11. In the present case, I am invited to find that, despite a possible breach of paragraph 8.1 of the Practice Direction, the appointment of the administrators was nevertheless effective as from 5.54pm on 28 December 2018. Even if there is a defect in the appointments, I am asked to grant a declaration under paragraph 104 of Schedule B1 that no act of the administrators is invalid despite such defect. Further or alternatively, if there is a defect which it is necessary to remedy, I am asked retrospectively to extend time for filing the notice of appointment, and/or to waive the defect pursuant to Rule 12.64 of the Insolvency Rules.

12. Ms Kyriakides submits that the court must decide whether the breach (if it is a breach) of paragraph 8.1 by the directors has any effect upon the time and date as to which the appointments of the administrators took effect. She has not been able to show me any authority relating to the effect on such an appointment of a breach of a provision of a practice direction. However, she has very properly referred me to a number of cases in which a range of different potential defects or irregularities in relation to compliance with the rules for the appointment of administrators have been considered by the courts. These cases include: *Euromaster* [2013] BUSLR 466, a decision of Mr Justice Norris; *In the matter of Spaces London Bridge Ltd* (above), a decision of Mr Justice Nugee; *We Care People Ltd* (in administration) [2013] EWHC 1734 (Ch), a decision of His Honour Judge Pearl QC, sitting as a judge of the High Court; and *In the matter of Eiffel Steelworks Limited* [2015] EWHC 511 (Ch), a decision of Mr Andrew Hochhauser QC, sitting as a judge of the High Court.

13. A number of principles emerge from these and other similar cases in which there has been a failure to comply with the provisions of the Insolvency Act itself or the Insolvency Rules, in relation to out of court appointment of an administrator.

14. First, the authorities indicate that the starting point is to identify the purpose of the relevant provision. That is something of a problem here because, for reasons which one does not perhaps need to go into in any great detail, the purpose of paragraph 8.1 is not immediately apparent. The Electronic Working Pilot Scheme itself very clearly indicates that the intention is that documents should be able to be filed electronically at

any time, save in specific cases. If the applicants' concerns as to the possible meaning of paragraph 8.1 are correct, the provision may detract from that objective. Ms Kyriakides has not been able really to identify any obvious purpose of paragraph 8.1, save that in removing what would otherwise be the power of directors and the company to file a notice of appointment out of court hours, it would bring their options into line with filings by a qualifying floating charge holder (see paragraph 2.1 of the Practice Direction) and thereby remove any apparent difference of treatment. However, there is no evidence that this was what was intended, and the two situations are not in all respects comparable.

15. Second, the court should consider whether the consequences of non-compliance with the provision in question are such that it must have been intended that the result of non-compliance would be total invalidity or nullity of the appointment. In other words, one should ask whether the particular requirement goes to the very root of the appointment. In my view, that is simply a non-starter in the present case. This provision does not go to the power to appoint; it is a provision which concerns the time from which an appointment will take effect; it is difficult to envisage any circumstances in which failure to comply would give rise to nullity or invalidity so far as the appointment itself is concerned. Of course, this is not to say that the timing of the appointment is not of considerable importance in relation to acts of the administrators taken after that time.

16. Next, the court should consider whether the failure to comply with the relevant provision was inadvertent or whether there has been a deliberate breach. If inadvertent, it should again be asked whether it can have been intended that it would result in total invalidity. There was clearly no question of a deliberate breach here. Further, as I have said, the matter could have been very easily remedied at the time had the parties been aware of the provision during the first hearing. It cannot possibly have been intended that an inadvertent breach of paragraph 8.1 in relation to out of court filing could have been intended to result in total invalidity in such circumstances as these.

17. In addition, consideration should be given to the distinction between a provision which restricts the power to appoint and a requirement of this kind, which is obviously procedural in nature. Breach of the latter would, at worst, have the effect of rendering

an appointment irregular rather than a nullity. The courts have held that the mere fact that the non-compliance relates to a time limit does not of itself compel the conclusion that the defect is fundamental, and the purported act a nullity. It is obviously not inconceivable that failure to observe a time limit could have that effect, but in a case where the consequences of such a failure are, as in this case, wholly trivial, it is inconceivable that the effect could be such as to render any act subsequently taken on the strength of the filing as a nullity. In fact, here no consequences whatsoever are discernible.

18. Those are some of the factors to which reference is made in the case law mentioned earlier. None of those authorities is on all fours with the present case, but the considerations discussed in them are helpful indications of the approach that the court should take when faced with non-compliance of the kind which may have occurred here. Having regard to this guidance, I am led to the firm conclusion that there is no question here of the administration appointment or any act of the administrators being nullified or being automatically rendered a nullity or invalid.

19. There remains the question whether there could be some substantial injustice as a result of the non-compliance (if such it was). For the same reasons, it is clear that there is no conceivable injustice, let alone any injustice which would be substantial or incapable of being remedied by an order of the court. In those circumstances, the provisions of Insolvency Rule 12.64 indicate that nothing in the insolvency proceedings should be invalidated.

20. I believe that these reasons are sufficient for present purposes. As I have said, paragraph 8.1 is open to more than one interpretation; it may be that it only has application to filings by qualified charge holders, in which case there is no issue here. But, in case it does also apply to filings of the kind with which we are concerned, it would have been appropriate, when the matter was originally before me, to invite the court to grant a precautionary remedy at that stage. Had I been asked at the hearing on 28 December 2018, I would certainly have provided comfort in relation to any doubts that might have existed, and I would have done so either by extending time or by

making an appropriate declaration or by indicating that the court was prepared to waive any non-compliance with the rule, or by granting all of these alternative remedies.

21. In those circumstances, it is right that the court should grant an appropriate remedy now. Therefore, without hesitation I will grant the declarations discussed with counsel in relation to the date on which the administration took effect and the validity of such steps as the administrators have taken since that time. For the avoidance of doubt, I will also cumulatively extend time pursuant to CPR, Part 3, and waive any non-compliance, pursuant to Rule 12.64.

22. If there is any other aspect of the appropriate remedy which has been contemplated in the course of submissions, I request Ms Kyriakides to include it in the draft order, as a further alternative remedy for my approval.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.